Scrutiny for the Serpent: The Court Refines Entrapment Law in Jacobson v. United States

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NOTES

SCRUTINY FOR THE SERPENT: THE COURT REFINES ENTRAPMENT LAW IN JACOBSON v. UNITED STATES*

Since the United States Supreme Court first recognized and applied the doctrine of entrapment as a defense in a criminal prosecution in 1932,¹ it has struggled to define the precise parameters of the defense. Initially, the entrapment debate focused on whether applicability of the defense should include scrutiny of the defendant's state of mind, or "predisposition" to commit the crime,² or whether a court should look solely at the conduct of


1. Sorrells v. United States, 287 U.S. 435 (1932). In Sorrells, the Supreme Court made the entrapment defense available in appropriate cases because of the unconscionability of punishing a person for a crime that would not have been committed were it not for the government’s involvement. Id. at 444-45.

   Governmental involvement in crime usually entails police undercover operations, which have long been ethically problematic because of the government's participation in the criminal activity and the fear such participation instills in the populace. See Jonathan C. Carlson, The Act Requirement and the Foundations of the Entrapment Defense, 73 VA. L. REV. 1011, 1012 (1987) (noting that the use of informants to obtain evidence "is a feared tool of government oppression, used historically by repressive regimes seeking to suppress their political opponents"). Yet police undercover activity remains an integral part of the overall law enforcement scheme because of the difficulty inherent in detecting and prosecuting consensual crimes, such as drug trafficking, prostitution, gambling, and bribery. See Fred W. Bennett, From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court, 27 WAKE FOREST L. REV. 829, 831 (1992); Roger Park, The Entrapment Controversy, 60 MINN. L. REV. 163, 164 (1976); Paul W. Williams, The Defense of Entrapment and Related Problems in Criminal Prosecution, 28 FORDHAM L. REV. 399, 403-04 (1959). The entrapment defense, properly applied, would therefore serve to "balance individual rights and liberties with legitimate law enforcement objectives." Maura F.J. Whelan, Comment, Lead Us Not into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement, 133 U. PA. L. REV. 1193, 1197 (1985).

2. E.g., Sherman v. United States, 356 U.S. 369, 373 (1958); Sorrells, 287 U.S. at 451-52. Commentators and jurists have termed this view the "subjective" approach. See infra notes 53-54 and accompanying text (discussing the subjective approach to the entrapment defense, which calls for scrutiny of the defendant's predisposition in weighing the entrapment question).
the particular law enforcement agency and inquire whether such conduct represented an improper use of governmental power. More recently, the Court has stated that the entrapment question focuses on both the predisposition and inducement elements, with predisposition being "the principal element in the defense of entrapment." Since the Court has firmly established predisposition as the primary focus of a defendant's entrapment claim, the entrapment debate has shifted in an attempt to formulate a satisfactory definition of predisposition.

The United States Supreme Court, in *Jacobson v. United States,* inched closer to a precise formulation of predisposition by holding that a prosecutor must demonstrate beyond a reasonable doubt that a defendant was predisposed to commit the charged crime before being approached by law enforcement officers. The case involved Keith Jacobson, a Nebraska farmer who was the target of a variety of government sting operations designed to ensnare him. Jacobson was approached by a number of government-created organizations over the course of the federal government's thirty month effort to ensnare him. Petition for Writ of Certiorari at 5-12, *Jacobson v. United States,* 112 S. Ct. 1535 (1992) (No. 90-1124). The AHS was a sting operation run by an association of postal inspectors for the central region of the United States based in Madison, Wisconsin. Petition for Writ of Certiorari at 6, *Jacobson* (No. 90-1124). Jacobson was later contacted by two additional fictitious organizations, the Heartland Institute for a New Tomorrow (HINT) and Midlands Data Research (MDR). *Id.* at 7. HINT purported to be a lobbying organization seeking to liberalize legislation regulating sexual conduct. *Id.* MDR held itself out as a research firm that conducted consumer surveys on a variety of subjects. Both organizations were designed to identify a target's sexual preferences. *Id.*

Jacobson was also a target of Project Looking Glass, an undercover sting operation run by the postal service and designed to identify and prosecute pedophiles and others who use the mails to receive child pornography. *Id.* at 8-9 (citing United States v. Mitchell, 915 F.2d 521 (9th Cir. 1990), cert. denied, 111 S. Ct. 1686 (1991)). As part of this operation, the government contacted Jacobson in March, 1987, under the guise of the Far Eastern Trading Co. *Id.*
pose violators of the Child Protection Act of 1984.\textsuperscript{11} The Act criminalized the knowing receipt of child pornography through the mails.\textsuperscript{12} Jacobson became a target after he had ordered two \textit{Bare Boys} magazines containing sexually explicit photographs of minors, prior to the enactment of the Child Protection Act.\textsuperscript{13} After the Act's passage and over the course of two and one half years, Jacobson was approached by both postal inspectors and customs officials, disguised as a variety of hedonist organizations\textsuperscript{14} and a fictitious organization purported to deliver child pornography materials to its customers via the Virgin Islands, so as to circumvent the reach of United States customs officials. Brief for the United States at 8-9, \textit{Jacobson} (No. 90-1124).

The Customs Service was also running Operation Borderline, a sting operation, designed to target individuals suspected of importing child pornography. Petition for Writ of Certiorari at 12, \textit{Jacobson} (No. 90-1124). In March, 1987, a sham Canadian organization called “Produit Outaouais,” created by the customs service, sent a brochure to Jacobson that advertised photographs of boys engaged in sexual activity. Brief for the United States at 7-8, \textit{Jacobson} (No. 90-1124).


\begin{quote}
(a) Any person who—

\begin{enumerate}
\item knowing receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—
\begin{enumerate}
\item the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
\item such visual depiction is of such conduct;
\end{enumerate}
\end{enumerate}
\end{quote}

shall be punished as provided in subsection (b) of this section. \textit{Id.}

\textsuperscript{13} \textit{Jacobson}, 112 S. Ct. at 1537-38. In February of 1984, three months prior to the passage of the Child Protection Act, Jacobson ordered magazines entitled \textit{Bare Boys I} and \textit{Bare Boys II} from Dennis Odom, a California pornographer. Petition for Writ of Certiorari at 5, \textit{Jacobson} (No. 90-1124). In May of 1984, law enforcement officials executed a search warrant of Odom's place of business in San Diego and seized a mailing list containing Jacobson's name. \textit{Id}. Law enforcement officials then forwarded Jacobson's name and address to postal inspectors, who later initiated contact with Jacobson. \textit{Id.} at 6.

\textsuperscript{14} \textit{See supra} note 10. Significantly, these organizations couched their overtures in libertarian terms, appealing not merely to the target's purient instincts, but to more noble First Amendment values. \textit{Jacobson}, 112 S. Ct. at 1542. One such fictitious organization, for example, implied that more than mere sexual freedom was at stake, claiming that “‘freedom of the press is under attack. We must be ever vigilant to counter attack right wing fundamentalists who are determined to curtail our freedoms.’” \textit{Id.} at 1538 (quoting Record, Government Exhibit 9). Further, the bogus organization claimed to channel the proceeds of its catalogue sales toward lobbying efforts in support of legislation favoring sexual freedom. \textit{Id.} at 1542.
tious, like-thinking pen pal, all of whom explored Jacobson's willingness to violate the law.

Jacobson's communications with the various government-created organizations revealed his affinity for material depicting young men engaged in homosexual activity. In the spring of 1987, an organization created by the Customs Service sent Jacobson a brochure from which Jacobson ordered an outlawed magazine. For reasons that are not clear in the record, however, the order went unfilled. Subsequently, in May of 1987, Jacobson placed an order with an organization created by the Postal Service for Boys Who Love Boys, a publication containing child pornography. Jacobson was arrested upon delivery of the publication. A search of Jacobson's home incident to the arrest uncovered the Bare Boys magazines purchased legally by Jacobson in 1984, and evidence of his correspondence with the government-created organizations, but no other evidence of an interest in child pornography.

Jacobson was convicted in the United States District Court for the District of Nebraska for receiving child pornography through the mails in violation of the Child Protection Act. The United States Court of Appeals for the Eighth Circuit reversed, holding that Jacobson had been entrapped as a matter of law. The Eighth Circuit further instructed that before the government can lawfully target an individual in a sting operation, it must have a "reasonable suspicion" based on articulable facts" that the target was

15. Brief for the United States at 6-7, Jacobson (No. 90-1124). A postal inspector, using the pseudonym of Carl Long, wrote to Jacobson in an effort to engage him in a dialogue and thus acquire information as to his tastes. Id. at 6. The postal inspector employed a technique known as "mirroring," in which the government agent expresses interests similar to those of the target in the hope that the target will more readily divulge information. Id. at 6 n.5.


17. Id. at 1538-39. Early on in the process, Jacobson rated his enjoyment of pre-teen sex as a "two" on a scale of four. Id. at 1538. Later, he admitted his interest in "teen-age sexuality," id., and in materials depicting "good looking young guys" engaged in homosexual activity. Id. at 1539.

18. Id.

19. Id.

20. Id. at 1539-40.

21. Id. at 1540.

22. Id.

23. Id. With regard to the entrapment issue, the jury was instructed that "[i]f the defendant before contact with law enforcement officers" was not predisposed to commit the crime and "was induced or persuaded" by the government to commit the crime, then he was entrapped. Id. at 1540 n.1 (emphasis added).


25. Id. at 1002.

26. The reasonable suspicion requirement imposed upon the government by the Eighth Circuit panel was based on regulations promulgated by the Attorney General, which provided that "information concerning an individual shall be collected and maintained only if it is rea-
predisposed to commit the crime.27 A petition for rehearing with a suggestion for rehearing en banc was granted,28 and on rehearing, the en banc court of appeals reinstated Jacobson's conviction. The Eighth Circuit held that the Government had carried its burden of showing predisposition and rejected the reasonable suspicion requirement.29 The court stated that questionable governmental conduct would negate a conviction only if the conduct violated the target's due process rights.30

The United States Supreme Court granted certiorari31 and reversed the decision of the Eighth Circuit.32 The Court held that the Government failed to establish that Jacobson was predisposed to commit the charged crime prior to his contact with law enforcement officials.33 The majority conceded that Jacobson "had become predisposed to break the law by May 1987."34 In addition, the Government conceded that it induced Jacobson.35 Accordingly, the only issue before the Court was whether Jacobson's predisposition, existing before the solicitation to commit the crime, would operate to sustain the conviction, or whether the government was required to prove the existence of a predisposition at the time of the government's first contact with the target.36 The majority concluded that in cases where inducement is estab-
lished, the government must show that its target was predisposed to commit
the crime at a time prior to its initial contact with the target.\textsuperscript{37}

In her dissenting opinion, Justice O'Connor argued that requiring that the
government prove predisposition at the time of its first encounter with the
target was tantamount to imposing upon the government the same reason-
able suspicion test rejected by the Eighth Circuit.\textsuperscript{38} In addition, the dissent
contended that the jury's finding that Jacobson was predisposed was reason-
able and should not have been disturbed.\textsuperscript{39} Finally, Justice O'Connor arg-
ued that the Court had effectively imposed upon the government the
requirement that it demonstrate the defendant's predisposition to commit
the crime knowingly in order to overcome an entrapment claim.\textsuperscript{40}

This Note examines the United States Supreme Court's refinement of the
parameters of the entrapment defense. It first explores the two conflicting
approaches that have defined entrapment law since its initial recognition by
the Supreme Court, focusing on the intellectual source, the bases for criti-
cism, and the judicial philosophy reflected by each theory. This Note then
surveys recent entrapment decisions authored by the federal courts of ap-
peals and identifies a split between the courts with respect to the time at
which the prosecution must prove the existence of predisposition. Next, this
Note analyzes the majority and dissenting opinions in Jacobson. It argues
that Jacobson's clarification of the definition of predisposition necessitates
careful, though not overly burdensome, scrutiny of the government's con-
duct in cases where the government induces its target. This Note concludes
that the majority's approach will result in the enactment of a more reliable
mechanism by which society's interest in effective law enforcement can more
agreeably coexist with an individual's interest in freedom from oppressive
governmental conduct.

I. TOWARD A VIEW OF GOVERNMENTAL CONDUCT FREE FROM
SCRUTINY

The United States Supreme Court first applied the entrapment defense in
the landmark case of Sorrells v. United States,\textsuperscript{41} a decision in which the dif-

\textsuperscript{37} Id. at 1540.
\textsuperscript{38} Id. at 1545 (O'Connor, J., dissenting).
\textsuperscript{39} Id. at 1546.
\textsuperscript{40} Id.
\textsuperscript{41} 287 U.S. 435 (1932). The entrapment doctrine was first applied by a federal appellate
court seventeen years previously. See Woo Wai v. United States, 223 F. 412 (9th Cir. 1915)
(reversing the conviction of a defendant whose resistance to commit the crime charged was
overcome by the repeated solicitations of an undercover agent). The entrapment issue reached
the Supreme Court in 1928, when Justice Brandeis, in a dissenting opinion, called for its adop-
tion, arguing that "[t]his prosecution should be stopped, not because some right of [the defend-
ant] has been denied, but in order to protect the Government. To protect it from illegal
ferent formulations advanced by the majority and concurring justices reflected the schism between the subjective and objective definitions of the entrapment defense. In Sorrells, a government agent, whose admitted purpose was to prosecute bootleggers, attempted to purchase liquor from the defendant during the prohibition era. The agent solicited the defendant three times before the defendant acquiesced. Further, there was no evidence that the defendant was involved in bootlegging activity prior to his contact with the agent.

A majority of the Court, per Chief Justice Hughes, formulated a theory of entrapment under which a court would consider the predisposition and unlawful intent of the defendant in deciding the dispositive question of whether the government is seeking to prosecute an "otherwise innocent" defendant for a crime fabricated by the government. Justice Roberts, however, would have focused exclusively on the government's conduct in deciding the entrapment issue, noting that courts could not countenance outrageous governmental conduct simply because a defendant is predisposed. For the next fifty-five years, the two competing formulations enunciated in Sorrells remained at the center of the debate over the proper inquiry regarding the entrapment defense.

A. The Subjective Approach

The focus on predisposition, which commanded a majority of the Supreme Court in Sorrells, was again applied in Sherman v. United States. Sherman involved a government agent who happened upon his target while both men

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42. See infra notes 46-47 and accompanying text.
44. Id. at 439.
45. Id. at 441.
46. Id. at 451. The Sorrells Court noted that "[t]he predisposition and criminal design of the defendant are relevant . . . to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." Id. The key phrase in this formulation is "otherwise innocent," which makes relevant the inquiry into the defendant's disposition. See Linda L. Dukes, Comment, The Entrapment Defense, 10 AM. J. TRIAL ADVOC. 591, 594 (1986) (noting that the predisposition inquiry serves to determine whether the defendant is otherwise innocent, and thus entrapped).
47. Sorrells, 287 U.S. at 459 (Roberts, J., concurring). "The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents." Id. When the government acts so as to instigate a crime, such activity is not to be "condoned and rendered innocuous" by the existence of predisposition. Id.
were undergoing treatment for narcotics addiction. The agent requested that the target supply him with narcotics on a number of occasions, appealing to the target's empathy as a fellow sufferer. Eventually, the target acquiesced. In throwing out the subsequent conviction and holding that the defendant had been entrapped as a matter of law, the Court focused on the conduct of the law enforcement agent and asked whether such conduct served to "implant in the mind of an innocent person the disposition to commit the alleged offense." The majority's approach necessitated a thorough inquiry into the defendant's predisposition in order to resolve the entrapment issue.

1. Elements

The predisposition inquiry is made necessary by principles of statutory construction. For adherents to the subjective approach, therefore, the very basis for the entrapment doctrine results from the conclusion that legislatures, in enacting criminal enforcement statutes, could not have intended to punish innocent citizens lured into the commission of crimes manufactured by the government. A literal interpretation of a statute that fails to recog-

49. Id. at 371.
50. Id. The government agent and his target met by chance on a number of occasions. Conversations between the two men centered on "discussion[s] of mutual experiences and problems, including their attempts to overcome addiction to narcotics." Id. The agent proposed a number of solicitations, each "predicated on [the agent's] presumed suffering." Id.
51. Id.
52. Id. at 373.
53. Id. at 372 (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)). In the oft-quoted language that captures the essence of the predisposition approach, the Court later noted that, in weighing the entrapment issue, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." Id.
54. Id. at 373 (citing Sorrells, 287 U.S. at 451).
55. See Michael A. DeFeo, Entrapment As A Defense to Criminal Responsibility: Its History, Theory and Application, 1 U.S.F. L. REV. 243, 251 (1967) (noting that "[t]he rationale of [the Sorrells Court] was that of statutory construction"); Park, supra note 1, at 246 (stating that the subjective approach to the entrapment defense is rooted in the intent of the legislature as it enacts criminal statutes); Dukes, supra note 46, at 594 (noting that "[c]ourts have recognized an implied exception in criminal statutes regarding entrapped persons").
56. Sorrells, 287 U.S. at 448. The Court stated it was: unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. Id. Subsequent decisions have affirmed this rationale. See, e.g., Hampton v. United States, 425 U.S. 484, 488 (1976) (noting that entrapment was a "statutory defense"); United States v. Russell, 411 U.S. 423, 435 (1973) (noting that the defense "is rooted . . . in the notion that Congress could not have intended criminal punishment" for offenders induced by the government); Sherman, 356 U.S. at 372 (1958) (stating that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations").
nize the perceived intent of the legislature would thus result in injustice in cases where an entrapped defendant violated a particular criminal statute.\textsuperscript{57}

The fundamental entrapment inquiry, therefore, framed in terms of the legislative intent rationale, is whether the evidence supporting the invocation of the defense suggests that the particular defendant is outside the class of criminals that the legislature seeks to punish.\textsuperscript{58} Since the statute purportedly applies only where governmental conduct does not amount to inducement of an innocent person, entrapment situations fall beyond the scope of the statute and nullify any literal violation of the law.\textsuperscript{59} Under this formulation, the question of whether there was entrapment in a given case, like any question that asks whether a defendant’s conduct fits within the ambit of a particular criminal statute, is one of fact that is properly left with the jury.\textsuperscript{60}

The subjective approach, with its basis in statutory interpretation, reflects a more conservative, non-activist judicial philosophy. Under the subjective approach, a court’s function is merely to construe the particular statute so as

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\textsuperscript{57} Sorrells, 287 U.S. at 446; see Ralph A. Rossum, The Entrapment Defense and The Teaching of Political Responsibility: The Supreme Court as Republican Schoolmaster, 6 A.M. J. CRIM. L. 287, 290-91 (1978) (noting that the entrapment defense provides relief for those innocents “who have been lured by law enforcement officials to the commission of the offense”).

\textsuperscript{58} Sorrells, 287 U.S. at 452 (reasoning that “the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose”).

\textsuperscript{59} Id.; see also Bennett, supra note 1, at 834 (noting that “a defendant with no criminal predisposition, who government agents urge to commit a criminal act, would fall outside the scope of the applicable statute”).

\textsuperscript{60} See Sorrells, 287 U.S. at 452; Richard C. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 YALE L.J. 1091, 1101-02 (1951) (noting that since “the defense is available not on the ground that the accused though guilty may go free but for the reason that he is not guilty [that is, his conduct falls outside the scope of the criminal statute]. Whether or not there was entrapment is for the jury as an element of its findings of guilty or not guilty.”); see also Sherman, 356 U.S. at 377 (holding that the entrapment question is one for the jury “unless it can be decided as a matter of law”); Bennett, supra note 1, at 834 (stating that the entrapment question must be answered by the jury “[b]ecause entrapment bears on the guilt or innocence of the accused”); Park, supra note 1, at 268 (noting that entrapment is a jury issue because “the primary purpose of the subjective approach is acquittal of ‘innocent’ (nondisposed) persons, since questions of the guilt or innocence of a particular defendant have traditionally been issues for the jury”).
to avoid an unjust result. The Sorrells Court applied this philosophy in rejecting the argument that a finding of entrapment results in a grant of immunity to the defendant. A finding that a defendant has violated a given statute, yet nonetheless should be granted immunity based on entrapment, amounts to an unwarranted judicial intrusion on the executive branch.

Forty-one years later, the Court echoed this non-interventionist philosophy in stating that the entrapment doctrine was not intended to give the courts a "'chancellor's foot' veto over law enforcement practices of which [they] did not approve." In United States v. Russell, the Court went on to note that the judiciary's role is merely to create rules to ensure that constitutional and statutory safeguards are honored; the execution of laws is the function of the executive branch. The entrapment doctrine, derived from a perceived legislative intent and reflective of a conservative judicial philosophy, is thus a limited defense.

Critics have raised three basic objections to the subjective approach. Most fundamentally, the notion that legislative intent serves as the basis for the defense has been attacked by judges and commentators as "sheer fiction." Additionally, critics have contended that the application of the sub-

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61. Sorrells, 287 U.S. at 450; see Rossum, supra note 57, at 292 (noting the limited grounds for judicial intervention).
63. Id. at 449 (noting succinctly that "[c]lemency is the function of the Executive"); see Rossum, supra note 57, at 293 (stating that the entrapment defense should not be construed to give the judiciary the power to pardon a criminal offender, since "[i]t is, after all, to the executive branch, not the judiciary, that the execution of federal laws is committed").
66. Id. at 435. The Court offered its view of the separation of powers issue in stating that "[t]he execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." Id. As a result, the entrapment doctrine does not give the judicial branch the authority "to dismiss prosecutions for what it feels to have been 'overzealous law enforcement.' " Id.
67. Id. "Courts following the federal defense will intervene only in those situations 'in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.' " Rossum, supra note 57, at 292 (quoting Russell, 411 U.S. at 431-32); see also Park, supra note 1, at 178 (noting that while the entrapment "defense is easy to raise," it is "supremely difficult to establish as a matter of law").
68. For a general discussion of these criticisms, see WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 5.2(c), at 251-52 (1985 & Supp. 1992) [hereinafter LAFAVE & ISRAEL].
69. Sherman v. United States, 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring). Critics have argued that divining a legislative intent not to prosecute an entrapped defendant
jective approach permits the prosecution to engage in an evidentiary free-for-all aimed at proving a defendant's predisposition. Finally, subjective approach opponents argue that reliance on predisposition allows the line between permissible and impermissible police activity to vary depending upon results from a strained and unwarranted interpretation of the statute. Thus, "the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged." *Id.; see also* Carlson, *supra* note 1, at 1037 (noting that the legislative intent rationale is "obviously fictional" and arguing that "[t]here is no reason to believe that the legislature intended that, in those cases where the government encouraged the criminal act, the prosecutor should have to produce evidence of 'predisposition' as an additional element of the crime charged"); Louis M. Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 *Sup. Ct. Rev.* 111, 129-30 (arguing that "it is painfully obvious that the statutory basis for the defense is wholly fictional" and glibly stating that "[o]ne looks in vain through the United States Code for any indication that Congress meant to condition culpability on the defendant's predisposition").

Since a defendant has violated the terms of the statute regardless of whether he has been entrapped, the factor that requires a court to dismiss a case on entrapment grounds must be the nature of the governmental inducement. *See* Russell, 411 U.S. at 442 (Stewart, J., dissenting). Justice Stewart argued that since a defendant who violated a criminal statute is not innocent, regardless of the nature of the inducement, the entrapment inquiry's "significant focus must be on the conduct of the government agents." *Id.*

70. *See* Russell, 411 U.S. at 443 (Stewart, J., dissenting) (finding that the subjective test permits the introduction of hearsay, suspicion, rumor and reputation evidence). The majority opinion in Sorrells v. United States, 287 U.S. 435 (1932), noted that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Id.* at 451. In response, Justice Stewart argued that the subjective test would permit "the introduction into evidence of all kinds of hearsay, suspicion, and rumor . . . in order to prove the defendant's predisposition. It allows the prosecution . . . to rely on the defendant's bad reputation or past criminal activities, . . . evidence [which] is not only unreliable . . . but . . . also highly prejudicial." *Russell*, 411 U.S. at 443 (Stewart, J., dissenting); *see also* Carlson, *supra* note 1, at 1039 (arguing that the subjective inquiry "authorizes an 'open season' on any person who could be shown in a court of law—through proof of prior crimes, prior bad acts, bad reputation, or other evidence of bad character—to have a propensity to engage in crime"); Rossum, *supra* note 57, at 294 (noting that the subjective view "allows for the introduction of often unreliable and highly prejudicial testimony before an untrained and emotional jury"); Whelan, *supra* note 1, at 1206-07 (noting that the subjective test relies on "normally inadmissible evidence such as reputation, rumor, and criminal history," and arguing that this flaw in the doctrine "can chill the use of the entrapment defense by those who think that the risk of putting such information before the jury outweighs their chances of prevailing on the entrapment issue").

Commentators on the other side of the debate have responded to this criticism. Professor Bennett has stated simply that the solution lies in the enforcement of "evidentiary rules—especially Rule 403 of the Federal Rules of Evidence [which provides that relevant evidence may be excluded if it is unfairly prejudicial to the defendant]—and to prohibit the government from using hearsay evidence, reputation evidence or dissimilar bad act evidence to prove predisposition." Bennett, *supra* note 1, at 865; *see also* Park, *supra* note 1, at 248 (arguing that "[t]here is nothing special about predisposition that requires the use of otherwise inadmissible hearsay").
a target’s reputation and criminal record.\textsuperscript{71} Despite these criticisms, the subjective test has consistently been recognized and applied in a majority of jurisdictions.

2. Development: Tipping the Scales Toward a Predisposition Inquiry

The United States Supreme Court did not revisit the entrapment issue for twenty-six years after \textit{Sorrells}. In 1958, the Warren Court handed down decisions in \textit{Sherman v. United States},\textsuperscript{72} and its companion case, \textit{Masciale v. United States}.\textsuperscript{73} \textit{Sherman} involved a government agent who targeted a narcotics addict undergoing treatment.\textsuperscript{74} The Court applied the subjective approach, which looked both to the conduct of the law enforcement official and

\begin{itemize}
\item \textsuperscript{71} See \textit{Russell}, 411 U.S. at 443 (Stewart, J., dissenting) (arguing that the focus “on the defendant’s innocence or predisposition has the direct effect of making what is permissible or impermissible police conduct depend upon the past record and propensities of the particular defendant involved”). Justice Stewart contended that the majority’s test would allow the police to target 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.” \textit{Id.} at 443-44; \textit{see also Sherman}, 356 U.S. at 383 (Frankfurter, J., dissenting) (arguing that permissible law enforcement conduct should not vary depending upon the nature of the defendant); \textit{Carlson, supra} note 1, at 1039 (noting “the uncontrolled license that the predisposition test gives to the government to use even the most extreme inducements against persons” predisposed); \textit{Rossum, supra} note 57, at 295 (noting that the subjective test “makes what is permissible or impermissible police conduct dependent upon the prior record and propensities of the particular defendant involved”).

This criticism has been answered by the defenders of the doctrinal status quo. See \textit{Bennett, supra} note 1, at 865 (noting that the jury weighs the evidence of predisposition along with the evidence of the government’s inducement); \textit{Park, supra} note 1, at 260 (arguing that the pursuit of past offenders is a wise use of law enforcement resources because “past offenders are exactly the persons against whom agents should be allowed to use persuasive inducements [sic]”).

\item \textsuperscript{72} 356 U.S. 369 (1958).

\item \textsuperscript{73} 356 U.S. 386 (1958). The Warren Court would later have occasion to review two additional cases in which entrapment claims were raised. \textit{Lopez v. United States}, 373 U.S. 427 (1963), involved a tavern owner who attempted to bribe an officer of the Internal Revenue Service after being informed that he might be liable for a cabaret tax. The Court held that the defendant was not entitled to the entrapment defense because he failed to make a threshold showing of inducement. \textit{Id.} at 435. The Court declined to adopt a specific theory of entrapment, noting that “under any theory, entrapment has not been shown as a matter of law.” \textit{Id.} at 436.

The Warren Court rejected another entrapment claim three years later in \textit{Osborn v. United States}, 385 U.S. 323 (1966), a case in which Jimmy Hoffa’s attorney was accused of jury tampering. Upon learning that one of the potential jurors was a cousin of the undercover government agent, the defendant attorney took steps to buy the juror’s vote. \textit{Id.} at 326. The Court quickly disposed of the entrapment claim, noting that the events were “a far cry from entrapment.” \textit{Id.} at 332. These two cases did little to clarify the ongoing struggle to define entrapment law.

\item \textsuperscript{74} \textit{Sherman}, 356 U.S. at 371; \textit{see supra} notes 49-51 and accompanying text (discussing the facts in \textit{Sherman}).
\end{itemize}
to the state of mind of the defendant. In overturning the petitioner's conviction, the Court examined the Government's evidence of predisposition. Although there was no evidence that the defendant was a player in the drug trade and no contraband was discovered as a result of a search of his home, the defendant had been previously convicted for the sale and possession of narcotics.

If, as Chief Justice Hughes wrote in Sorrells, "an appropriate and searching inquiry" into a defendant's past is necessary to determine whether the defendant is "otherwise innocent," then surely two previous convictions on charges related to the alleged offense constitute evidence of predisposition sufficient to submit the case to the jury. Yet in deciding that the arguably predisposed defendant in Sherman had been entrapped as a matter of law, the Court was clearly troubled by the conduct of the government officials. The Sherman analysis was tilted heavily toward scrutiny of governmental behavior and methodology. So, while the Court stopped short of adopting the approach espoused by Justice Roberts in Sorrells, it demonstrated a clear sensitivity to protecting citizens, even those twice convicted for like offenses, from unwarranted law enforcement activity.

75. Id. at 373; see also supra notes 55-60 and accompanying text (discussing the elements of the subjective approach to the entrapment defense).
76. Sherman, 369 U.S. 373. The Court "conclude[d] from the evidence that entrapment was established as a matter of law." Id.
77. Id. at 375.
78. Id.
79. Id.
81. Cf. id. at 441 (although "[t]here was no evidence that the defendant had ever possessed or sold any [contraband] prior to the transaction in question," the Sorrells Court remanded the case so that the entrapment issue could be submitted to the jury). While there is a procedural distinction between keeping an issue from the jury, as the concurring Justices in Sorrells would have had it, id. at 459 (Roberts, J., concurring), and reversing a jury's decision, as the majority in Sherman did, Sherman, 356 U.S. at 378, the comparison between the two cases illustrates the Warren Court's willingness to more carefully scrutinize law enforcement activity in weighing the entrapment question.
82. Sherman, 356 U.S. at 376. The Sherman Court had little tolerance for the government agent's behavior, noting that "[t]he case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use." Id.
83. Id. The Court chastised the government for "play[ing] on the weaknesses of an innocent party and beguil[ing] him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this." Id.
84. Id.; see Bennett, supra note 1, at 838-39. Professor Bennett observed the Sherman Court's willingness to scrutinize the government's conduct: "Although the Sherman Court employed the subjective approach . . . . [T]he Court did consider the government's conduct in the case, describing it as 'evil' in that it had enticed a recovering drug addict not only to sell drugs, but also to use them." Id. (quoting Sherman, 356 U.S. at 376). Indeed, Professor Park
In *Masciale v. United States*, the Court was again faced with a defendant convicted over an entrapment claim, but here the Court affirmed the conviction. The *Masciale* Court was not faced with the same type of reprehensible governmental conduct as it faced in *Sherman*. The government agent in *Masciale* merely approached the target and engaged him in a discussion concerning the narcotics trade. The target mentioned that he would be able to acquire eighty-eight percent pure heroin. The defendant arranged a buy, and an arrest and conviction followed. While there was no evidence of predisposition apart from the defendant’s demonstrated willingness to engage in the criminal activity, the defendant admitted that the jury could reasonably have found that he was predisposed to commit the charged crime. Coupled with the absence of offensive governmental conduct, this admission made the Court’s decision a fairly easy one.

The Burger Court did not share the Warren Court’s concern with protecting the citizenry from abuses of governmental power. In its first entrapment case, the Burger Court heightened the importance of predisposition in the entrapment equation and relaxed the scrutiny given to governmental action. In *United States v. Russell*, an undercover police officer offered to supply phenyl-2-propanone, a rare but legally available chemical used to manufacture methamphetamine, to the defendant in exchange for access to

opined that the particular inducement “would not have caused an average person to commit the offense.” *Park*, supra note 1, at 174. This suggests that it was clearly the circumstances surrounding the inducement, and not the defendant’s disposition, that fueled the reversal of the conviction.

86. Id. at 387.
87. Id. at 388.
88. Compare id. at 387 (discussing the target’s quick willingness to engage in the outlawed conduct at the government agent’s suggestion) with *Sherman*, 356 U.S. at 373 (discussing the target’s eventual capitulation following repeated overtures and attempts to exploit the target’s sympathy).
90. Id.
91. Id. at 388.
92. Id.
93. The four dissenting justices conceded that the evidence supporting a claim of entrapment seemed “rather thin,” but would have remanded the case so that the trial judge, and not the jury, could weigh the entrapment question. *Id.* at 389 (Frankfurter, J., dissenting).
94. *United States v. Russell*, 411 U.S. 423, 436 (1973) (holding that the nature of the government’s inducement was irrelevant to the defendant’s entrapment claim once the government had established predisposition).
the manufacturing laboratory and one-half of the resulting product. This transaction eventually resulted in the defendant's arrest and conviction.

The defendant conceded that the jury finding with respect to his predisposition was supported by the evidence, but argued that the Constitution could not countenance such a level of governmental participation. This constitutional version of the defense was crafted by making an analogy to decisions like *Mapp v. Ohio* and *Miranda v. Arizona*. The *Russell* Court, per Justice Rehnquist, rejected this approach in this case, noting that unlike the situations in *Mapp* and *Miranda*, the Government's conduct did not violate the defendant's constitutional right. The Court did not reject the outrageous governmental conduct defense outright, but noted in dictum that if the conduct of governmental officials was particularly reprehensible, it might recognize such a defense, analytically distinct from the entrapment doctrine and rooted in the Due Process Clause of the Fifth Amendment.

The Court also rejected the defendant's entrapment claim under the traditional statutory variety of entrapment law, holding that the defendant's concession as to predisposition eliminated the need to scrutinize the government's conduct. *Russell*, therefore, represented a departure from the earlier Warren Court decisions in that governmental conduct became irrelevant once predisposition had been established. The only exception

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96. Id. at 425.
97. Id. at 424. On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court because the government agent had supplied the defendant with an essential ingredient for the manufacture of the methamphetamine and thereby had “participat[ed] in the criminal enterprise” to “an intolerable degree.” United States v. Russell, 459 F.2d 671, 673 (9th Cir. 1972), rev'd, 411 U.S. 423 (1973).
99. Id. at 430.
100. 367 U.S. 643 (1961) (excluding the admissibility of evidence resulting from a search violative of the Fourth Amendment).
103. Id. at 431. The Court recognized that it "may some day 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 invoking judicial processes to obtain a conviction ...." Id. This language created the due process defense, which is related to but separate from the entrapment defense. For discussions of the due process defense, see Roy M. Cohn, *The Need for an Objective Approach to Prosecutorial Misconduct*, 46 BROOK. L. REV. 249 (1980); Richard D. Cleary, Comment, *Due Process Defense When Government Agents Instigate and Abet Crime*, 67 GEO. L.J. 1455 (1979). In the years following *Russell*, criminal defendants have raised the defense repeatedly. For a discussion of the reluctance of the federal courts to entertain the due process defense, see infra note 244 and accompanying text.
105. See supra notes 83-84 and accompanying text (discussing the scrutiny given the government's conduct by the Sherman Court).
to this rule appeared in dictum which suggested that a conviction could be thrown out if the government’s tactics were so outrageous as to violate the Due Process Clause.\(^{107}\)

In *Hampton v. United States*,\(^{108}\) a three-justice plurality of the Court elevated the *Russell* holding to a *per se* rule by announcing that the remedy for outrageous police conduct lay not in overturning the conviction, as the dictum in *Russell* suggested, but in bringing charges against the offending law enforcement officials.\(^{109}\) The defendant in this case was charged with selling narcotics that were supplied to him by a government agent.\(^{110}\) Though the plurality recognized that the government agent was more deeply involved in the criminal scheme than was the agent in *Russell*,\(^{111}\) this heightened governmental role was irrelevant since predisposition had been established.\(^{112}\) Not surprisingly, the unprecedented weight given to predisposition drew objections from Justices Powell and Blackmun,\(^{113}\) both of whom voted with the majority in *United States v. Russell*.\(^{114}\) For these Justices, principles of

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107. *Id.* at 432. The Court intimated that it would allow convictions of predisposed defendants to stand unless the conduct of the law enforcement officials violated “that ‘fundamental fairness, shocking to the universal sense of justice,’ mandated by the Due Process Clause of the Fifth Amendment.” *Id.* (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960)).


109. *Id.* at 490. The plurality noted that “[i]f the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.” *Id.* (citing Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976) and O’Shea v. Littleton, 414 U.S. 488, 503 (1974)).

110. *Id.* at 486.

111. *Id.* at 489.

112. *Id.* at 488-89. The plurality clearly enunciated its break from *Sherman*, stating that:

> [T]he entrapment defense “focus[es] on the intent or predisposition of the defendant to commit the crime,” . . . rather than upon the conduct of the Government’s agents. We ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.

*Id.* (alteration in original) (citation omitted) (quoting United States v. Russell, 411 U.S. 423, 429 (1973)).

Professor Carlson has similarly recognized the shift in emphasis between entrapment law as promulgated in *Sorrells-Sherman* versus the more recent *Russell-Hampton* decisions. Whereas a finding of predisposition necessarily doomed an entrapment defense for the *Russell* Court, see *Russell*, 411 U.S. at 436, the nine Justices comprising the *Sherman* Court “shared the view that the entrapment defense exists to curb an abusive government practice.” Carlson, *supra* note 1, at 1032. More to the point, Carlson noted that “[a]lthough the Supreme Court now insists that the defendant’s predisposition is unrelated to the nature of the police conduct involved, defendants’ predispositions have often been weighed with close attention to the nature of the inducements offered.” *Id.* at 1040 (footnotes omitted).


due process would preclude a conviction under circumstances where the law enforcement conduct was particularly outrageous.115

The *Hampton* plurality opinion was the high water mark for the subjective approach. In forty-four years, the Court went from *Sorrells v. United States,*116 where predisposition was merely “relevant . . . . [T]o the controlling question [of] whether the defendant is a person otherwise innocent” who was induced by the very government that was now prosecuting him,117 to *Hampton,* where governmental conduct, no matter how outrageous or oppressive, did not figure strictly into the entrapment defense of a predisposed defendant.118

**B. The Objective Approach**

Proponents of the objective approach would eliminate entirely the inquiry into predisposition and focus exclusively on the conduct of government officials in deciding the entrapment issue.119 Any conviction resulting from circumstances where the conduct of the police constituted an improper use of governmental power would, under this approach, be thrown out, regardless of the defendant’s mindset.120

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117. *Id.* at 451.
118. *Hampton,* 425 U.S. at 488-89. For the three-justice plurality, even the most egregious conduct by law enforcement agents would not bar the conviction of a predisposed defendant. *Id.* For concurring Justices Powell and Blackmun, a conviction resulting from egregious governmental conduct could be overturned not on the basis of entrapment, but on principles of due process. *Id.* at 492-93 (Powell, J., concurring). The dissenters sided with Justice Powell on this issue, resulting in the survival of the due process defense. *Id.* at 497 (Brennan, J., dissenting).
119. See *id.* at 496 (Brennan, J., dissenting) (arguing that an entrapped defendant must be acquitted because of the unconscionability of the government’s conduct); United States v. Russell, 411 U.S. 423, 441 (1973) (Stewart, J., dissenting) (contending that the defendant should be acquitted if the government’s action was apt to cause an average person to commit the crime, “regardless of the predisposition to crime of the particular defendant involved”); Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring) (stating that courts should intervene in cases where “the methods employed on behalf of the Government to bring about a conviction cannot be countenanced”); Sorrells v. United States, 287 U.S. 435, 459 (1932) (Roberts, J., concurring) (noting that the only necessary entrapment inquiry is the question of the government’s conduct).
120. *Sherman,* 356 U.S. at 382; see also Carlson, *supra* note 1, at 1017 (noting that “[t]he defendant’s subjective characteristics, his character and predisposition, are regarded as irrelevant”); Cohn, *supra* note 103, at 265 (recognizing that, under the objective approach, “[t]he defendant’s predisposition to commit the offense is immaterial”); Park, *supra* note 1, at 171 (noting that the dispositive issue is “whether an agent used an improper inducement”).
1. Elements: Whether Governmental Conduct Crosses the Line

The objective approach grew out of a concern for the prevention of oppressive governmental conduct and an intellectual dissatisfaction with the statutory basis for the subjective approach to the entrapment defense.\(^1\) The notion that the legislature intended to bar convictions based on circumstances involving questionable governmental conduct was, for proponents of the objective approach, disingenuous.\(^2\) Irrespective of the nature of the government's means of detection and enforcement, one who has committed the criminal act with the requisite intent falls within the ambit of the statute.\(^3\)

What separates the entrapped defendant from the defendant not entrapped cannot therefore be predisposition, but is instead the conduct of the government.\(^4\) The entrapment doctrine rests, therefore, not on some unspoken legislative intent, but on public policy grounds: to protect and preserve the integrity of the courts and the law enforcement system.\(^5\) The predisposition inquiry, which shifts the focus away from governmental behavior, fails to consider this basis for the entrapment doctrine and results in a less honorable system of justice.\(^6\)

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121. See Sorrells, 287 U.S. at 455 (asserting that "the true foundation of the doctrine [lies] in the public policy which protects the purity of government and its processes"); Bennett, supra note 1, at 836 n.46 (stating that the basis for the objective approach arose from a need to protect "the courts from becoming unwilling parties in the prosecution of individuals whose crimes were induced by government officials"); DeFeo, supra note 55, at 252 (noting that the basis for the defense was "a strong public policy against what were considered unnecessary and therefore unjust prosecutions").

122. Sherman, 356 U.S. at 379 (Frankfurter, J., concurring) ("It is surely sheer fiction to suggest" that an entrapped defendant cannot be convicted "because 'Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.'") (quoting id. at 372 (majority opinion)); see supra note 69 (summarizing the remarks of critics of the legislative intent rationale).

123. Sorrells, 287 U.S. at 456.

124. Sherman, 356 U.S. at 380 (Frankfurter, J., concurring) ("The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced.").

125. Sorrells, 287 U.S. at 457; see United States v. Russell, 411 U.S. 423, 442-43 (1973) (Stewart, J., dissenting) (stating that a court's function is "to prohibit unlawful governmental activity in instigating crime. . . . To protect [the government] from illegal conduct of its officers. To preserve the purity of its courts."); (quoting Casey v. United States, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting), overruled by Turner v. United States, 396 U.S. 398 (1970)); Whelan, supra note 1, at 1196 (noting that "[t]he objective approach is animated exclusively by a concern with whether or not the conduct of the police was acceptable").

126. Sherman, 356 U.S. at 382-83 (Frankfurter, J., concurring) (arguing that "a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. . . . [That] certain police conduct . . . is not to be tolerated by an advanced society").
From the premise that the entrapment doctrine is based on the court's supervisory role comes the conclusion that the question whether a defendant has been entrapped is better answered by the court and not the jury. The court is to be aggressive in its role, stopping the proceedings at any stage and dismissing the defendant should there be a showing of entrapment.

This approach reflects a more activist judicial philosophy than does the subjective approach. Whereas the subjective approach instructed that courts should not exercise a "'chancellor's foot' veto" over unpalatable law enforcement practices, the objective approach gave judges an affirmative role in quashing prosecutions born of reprehensible governmental conduct. This activist philosophy is reflected in the entrapment test proposed by Justice Frankfurter's concurring opinion in Sherman, which would preclude prosecution if the inducement was such as to ensnare one "who would normally avoid crime and through self-struggle resist ordinary temptations." This test provided a mechanism by which the courts could actively evaluate law enforcement technique and mandated the dismissal of cases where police conduct failed to pass the test.

Proponents of the subjective approach have identified four general criticisms of the objective test. If the government were not permitted to rebut the claim of inducement by offering evidence of predisposition, some argue, law enforcement operations, particularly those targeted at consensual criminal acts, would be severely undermined. Further, opponents of the objec-

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127. Id. at 385 (asserting that the entrapment inquiry, "aimed at blocking off areas of impermissible police conduct, is appropriate for the court and not the jury"); see also Donnelly, supra note 60, at 1102 (noting that the objective test is for the court to determine, because "the question of entrapment has no connection with guilt or innocence"); Dukes, supra note 46, at 601-02 (noting that the entrapment question "should be decided by the judge because the preservation of the judicial system belongs to the court").

128. Sorrells, 287 U.S. at 457 (Roberts, J., concurring). Professor Donnelly has stated that the defense "may be raised at any point in the proceeding and, if proved, requires the court to quash the indictment and set the defendant at liberty." Donnelly, supra note 60, at 1102.


130. Sorrells, 287 U.S. at 457.

131. Sherman, 356 U.S. at 384 (Frankfurter, J., concurring). The objective test, adopted by the American Law Institute, is phrased more clearly in the Model Penal Code. Thus, entrapment will lie if the government agent "employ[s] methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." MODEL PENAL CODE § 2.13(1)(b) (1985).


133. For a general discussion of these criticisms, see LAFAVE & ISRAEL, supra note 68, § 5.2(d) at 252-53.

134. Two problems emerge when the objective test is analyzed in the context of undercover police work. First, undercover operations would cease to be a profitable policing tool, dealing a significant blow to the overall law enforcement scheme. See United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952) (Hand, J.) (noting that "it would be impossible ever to secure convictions of any offenses which consist of transactions that are carried on in secret") (quoted
tive approach point to the inherent injustice in granting total immunity to a defendant who knowingly committed a crime.\footnote{135} A third criticism suggests that the objective test encumbers the police with too rigid a standard to govern its behavior.\footnote{136} Finally, subjectivists argue that the objective test does not effectively preserve society's confidence in the criminal justice system.\footnote{137} 

in United States v. Russell, 411 U.S. 423, 434 (1973) and Sherman, 356 U.S. at 377 n.7); see also Donnelly, supra note 60, at 1093 (noting that informants "are used widely by police forces the world over"); Williams, supra note 1, at 403-04 (noting, in 1959, that law enforcement agencies rely heavily upon undercover operators: "It is safe to say that ninety-five per cent of all federal narcotics cases are obtained as the result of the work of informers").

Second, the objective test would lead to inaccuracy in the factfinding process. The nature of the inducement, the dispositive issue under the objective test, is "the factual issue least susceptible to reliable proof." Park supra note 1, at 222 (noting further that "[s]ince inducements are offered in private, the finder of fact will often have to choose between the testimony of an informer who has a criminal record and that of a defendant who has admittedly committed a criminal act"); see Bennett, supra note 1, at 866 (noting that jurors will have to believe either the testimony of the agent or that of the defendant).

135. Russell, 411 U.S. at 434 ("Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it . . ."). The argument assumes that a shrewd career criminal will not acquiesce unless the nature of the inducement crosses the objective test's line of demarcation. Thus, the objective test "creates a risk of acquitting dangerous chronic offenders." Park, supra note 1, at 216. If not acquitted, the savvy chronic offender will avoid prosecution entirely "because he can only be legally offered those inducements which might tempt a hypothetical, law-abiding person." Bennett, supra note 1, at 866.

A corollary to this argument is that it creates the danger that nondisposed defendants will be convicted. Even if the inducement would not have enticed the hypothetical person, it may ensnare a particularly weak-willed person "who might never have committed the type of crime charged but for the agent's overtures." Park, supra note 1, at 217.

136. The essence of this point, which is related to the previous criticism, is that the police should be permitted to tailor their overtures to each particular target. The nature of the inducement is inevitably linked to the target's predisposition. The propriety of the police conduct must therefore be analyzed in light of "whether the defendant was a proper target of police action; whether, if the defendant initially demurred, the police should have persisted in their efforts to engage him in criminal activity; and, finally, whether the particular inducement to which the defendant was subjected was excessive." Carlson, supra note 1, at 1045 (footnotes omitted); see Park, supra note 1, at 220 (arguing that an entrapment test "must necessarily allow agents substantial leeway" because "an inducement which is fair in the abstract may be unfair in a particular case"); see also Bennett, supra note 1, at 866 (objecting to the futility of "[a]ttempts to judge police conduct in a vacuum"); DeFeo, supra note 55, at 275-76 (arguing that "[e]rrant mankind does not neatly divide into two classes, situational or chronic violators").

137. Since courts are reluctant to promulgate per se rules to govern law enforcement activity, "it is doubtful that significant restrictions upon the type of inducements available to police would result if the Supreme Court adopted the objective approach." Bennett, supra note 1, at 866; see Park, supra note 1, at 225 (arguing that "the judiciary will lose respect by embracing an entrapment defense that ignores culpability and seeks to control police conduct by acquittal of professional criminals").
2. Application: Policing the Police

The objective approach to the entrapment doctrine has never been recognized and applied by a majority of the United States Supreme Court.\textsuperscript{138} Indeed, after objecting to the application of the subjective approach on three occasions following the decision in \textit{Sorrells v. United States},\textsuperscript{139} Justice Brennan conceded the issue in \textit{Mathews v. United States}.\textsuperscript{140}

Though the Supreme Court has declined to do so, a number of state courts have adopted the objective approach.\textsuperscript{141} The California Supreme Court's decision in \textit{People v. Barraza},\textsuperscript{142} which flatly rejected the subjective approach enunciated by the United States Supreme Court.\textsuperscript{143} The defendant Barraza was a recovering drug addict who, after persistent badgering by an undercover officer, put the officer in touch with a narcotics dealer.\textsuperscript{144} The

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\textsuperscript{138} Bennett, \textit{supra} note 1, at 837.

\textsuperscript{139} 287 U.S. 435 (1932).


\textsuperscript{141} The first state supreme court to adopt the objective approach was in Alaska. See Grossman v. State, 457 P.2d 226, 229 (Alaska 1969). Other state courts have followed suit. See, e.g., People v. Barraza, 591 P.2d 947, 955 (Cal. 1979); State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974); People v. Julliet, 475 N.W.2d 786, 792-93 (Mich. 1991); Baca v. State, 742 P.2d 1043, 1045 (N.M. 1987); State v. Zaccaro, 574 A.2d 1256, 1263 (Vt. 1990).

\textsuperscript{142} Other jurisdictions have adopted the objective approach legislatively. See ARK. CODE ANN. § 5-2-209(b) (Michie 1987); COLO. REV. STAT. § 18-1-709 (1986); HAW. REV. STAT. § 702-237(1)(b) (1985); KAN. STAT. ANN. § 21-3210 (1988); N.H. REV. STAT. ANN. § 626:5 (1986); N.Y. PENAL LAW § 40.05 (McKinney 1987); N.D. CENT. CODE § 12.1-05-11 (1976); 18 PA. CONS. STAT. ANN. § 313(a)(2) (1983); TEX. PENAL CODE ANN. § 8.06(a) (West 1974); UTAH CODE ANN. § 76-2-303(1) (1990).

Alaska has since adopted an entrapment law that combines the subjective and objective tests. See ALASKA STAT. § 11.81.450 (1989). Other jurisdictions follow a similar combined approach. See, e.g., DEL. CODE ANN. tit. 11, § 432 (1987); GA. CODE ANN. § 16-3-25 (Michie 1992); ILL. ANN. STAT. ch. 38, para. 7-12 (Smith-Hurd 1989); KY. REV. STAT. ANN. § 505.010 (Michie/Bobbs-Merrill 1990); State v. Hunter, 586 So. 2d 319, 321-22 (Fla. 1991); State v. Johnson, 606 A.2d 315, 323 (N.J. 1992). Briefly, the combined approach calls for scrutiny of the government's conduct in light of the characteristics of the specific target involved. Thus, "[e]ntrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." Cruz v. State, 465 So. 2d 516, 522 (Fla.), cert. denied, 473 U.S. 905 (1985), quoted in Hunter, 586 So. 2d at 322.

\textsuperscript{143} \textit{Id.} at 954. For the California court's rationale for rejecting the Supreme Court's formulation, see \textit{infra} note 147.

\textsuperscript{144} \textit{Barraza}, 591 P.2d at 949-50. The defendant and the undercover officer offered different accounts of what transpired at their meeting. The officer acknowledged that the defendant was at first "hesitant" to deal because he feared returning to prison, but that he quickly pro-
trial judge refused to instruct the jury on the entrapment issue, and Barraza thereafter appealed his conviction.

The California Supreme Court, concerned first and foremost with assuring the propriety of law enforcement activity, adopted an objective standard, which questioned whether "the conduct of the law enforcement agent [was] likely to induce a normally law-abiding person to commit the offense." The California court stated that the entrapment test would focus on whether the law enforcement activity would create in a law-abiding citizen a motive for the crime beyond the immediate ill-gotten gain. Alternatively, if the government agents were to promise an unusually beneficial reward resulting from the commission of the crime, such conduct would also constitute entrapment. The California court concluded by noting that under its test, inquiries into the defendant's character or predisposition were irrelevant.

The Michigan Supreme Court has similarly adopted the objective approach to the entrapment defense applying it in People v. Turner. Turner involved a government agent who attempted to purchase heroin from the defendant. Turner declined to obtain heroin for the informant on a number of occasions, but eventually acquiesced after the agent told Turner, untruthfully, that the heroin was for the agent's girlfriend who would stop dating him if he failed to produce the drug. The agent provided Turner

vided the officer with the dealer's name once the officer had assured the defendant that she "wasn't a cop." Id. at 949 (quoting officer's testimony). The defendant, on the other hand, testified that the officer pestered him for about an hour before he finally acquiesced. He did so, he testified, only to "get her off . . . [his] back." Id. at 949-50 (omission in original).

To justify its departure from the test articulated by the United States Supreme Court, the California court noted that "commentators . . . have overwhelmingly favored . . . application of a test which looks only to the nature and extent of police activity in the criminal enterprise." Id. at 954. In addition, the California court looked to other states that had adopted a similar approach, either judicially or legislatively. Id. at 955.

Here, the court noted that if the overture to the target attempted to induce based on sympathy or friendship, rather than pure personal gain, then such conduct would be impermissible. Id. Here, the court offered inducements which "guarantee that the act is not illegal" or which include "an offer of exorbitant consideration" as examples of this type of impermissible governmental conduct. Id.

The approach promulgated by the California Supreme Court in Barraza differed from the model created by Justice Roberts in that, because of its "substantial effect on the issue of guilt," the entrapment issue was for the jury. Id. at 956 n.6.

144. Id. at 956. 210 N.W.2d 336 (Mich. 1973).
145. Id. at 337-38. The agent's request for heroin was preceded by a two year period in which the agent unsuccessfully attempted to induce Turner to sell him pills containing narcotics. Id. at 337.
146. Id. at 338.
with twenty dollars so that Turner could make the purchase. Turner declined future offers to purchase heroin for the agent, but he did agree to put the informant in touch with his source. Turner was arrested and subsequently convicted.

The Michigan court, noting that it was not bound by the United States Supreme Court's holdings regarding entrapment law, adopted the objective test, held that Turner had been entrapped as a matter of law, and reversed Turner's conviction. The court quoted extensively and approvingly from Justice Stewart's dissenting opinion in United States v. Russell, and concluded that the objective test was preferable because it inquired as to the central issue in entrapment cases: whether the police conduct was so reprehensible that a conviction resulting from such conduct could not stand.

The Michigan court clearly believed that the police's conduct could not be tolerated. The court cited the police's persistence even after the first investigation failed to produce evidence, the creation of the addicted girlfriend as a means to play on Turner's sympathy, and the dearth of pre-investigation evidence linking Turner to the narcotics trade as evidence of the sort of impermissible police activity that the courts are charged with prohibiting.

II. TOWARD A WORKABLE PREDISPOSITION DEFINITION

The United States Supreme Court's opinion in Mathews v. United States, its final pre-Jacobson entrapment decision, effectively settled the Supreme Court's debate over the subjective and objective approaches. Meanwhile, in the aftermath of the Supreme Court's reaffirmance of the subjective approach in United States v. Russell and Hampton v. United States, federal courts have attempted to formulate a more refined definition of predisposition. Specifically, and critical to the resolution of Jacobson, the courts have grappled with an heretofore unresolved question

154. Id.
155. Id.
156. Id.
157. Id. at 341.
158. Id. at 343.
159. Id. at 341-42.
160. Id. at 342.
161. Id. at 343 (noting that the case was an example of "the type of overreaching by the police . . . . [that] cannot be permitted to go unchallenged by our Court").
163. See supra note 140 and accompanying text.
166. 112 S. Ct. 1535 (1992).
regarding time: at what point in the relationship between inducer and target must the government demonstrate the target’s predisposition in order to overcome an entrapment claim?

The United States Court of Appeals for the Second Circuit confronted the time issue in United States v. Williams,167 a case arising out of the Federal Bureau of Investigation’s Abscam undercover operation.168 The case involved Harrison A. Williams, a former United States Senator from New Jersey who promised to use his office improperly in exchange for a large sum of money.169 The court, in affirming Williams’s conviction, evaluated the merits of three different rules to apply to the time issue.170

First, the Second Circuit rejected the rule propounded by the defendant Williams—that the government must show predisposition at the time of the agent’s first contact with the defendant.171 The court argued that such a rule would unnecessarily require the courts to scrutinize contact apart from the actual inducement to commit the charged offense.172 The court similarly rejected the notion that the government must show the existence of predisposition at the time the crime is committed.173 Instead, the Williams court

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168. Abscam was an operation whereby undercover FBI agents spread word that wealthy Arabs were prepared to pay bribes to members of the United States Congress in exchange for favorable immigration legislation. See United States v. Jenrette, 744 F.2d 817, 819 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985). The operation eventually netted an assortment of corrupt government officials, including seven members of the United States Congress. As Maura Whelan noted savagely in her commentary, “[s]ome were zealous and some were hesitant, but all were on videotape.” Whelan, supra note 1, at 1200. The government won convictions in every Abscam case, and each conviction was affirmed on appeal. See id. at 1203.


169. Williams, 705 F.2d at 606.

170. Id. at 617-19.

171. Id. at 617 (rejecting the assertion made by Williams’s attorney at trial, that the Government must show the existence of predisposition “‘from day one’”).

172. Id. at 618 n.9. The court declined to consider the “preliminary contact,” that is, contact apart from the alleged offense. The court reasoned that “[s]ince the entrapment defense exonerates a defendant who has been induced to commit a crime he would not otherwise have committed, the inducement must consist of efforts to persuade him to commit the crime.” Id. Thus, preliminary contacts had no bearing on the issue.

173. Id. at 618. This rule was incorporated into the charge given to the jury by the trial judge and was a basis for the appeal. Although the court on appeal conceded that the trial judge erred in so instructing the jury, the court held that the “erroneous statement . . . [did] not warrant reversal.” Id.
held that the predisposition of the defendant must exist at the time the criminal conduct is proposed.\textsuperscript{174}

The Fourth Circuit followed a similar approach in \textit{United States v. Osborne}.\textsuperscript{175} Osborne, like Jacobson, involved a defendant whose arrest and conviction resulted from a postal service sting operation designed to prosecute those who use the mails to receive child pornography.\textsuperscript{176} In affirming Osborne's conviction, the Fourth Circuit held that predisposition must be evaluated at the time the government agent suggests the crime.\textsuperscript{177}

The Seventh Circuit, on the other hand, adopted a different approach in \textit{United States v. Kaminski}.\textsuperscript{178} In this case, the defendant Kaminski approached a government informant and offered his services as an arsonist.\textsuperscript{179} The informant put the defendant in touch with another agent, who posed as a man interested in such a service.\textsuperscript{180} The defendant agreed to destroy a building in exchange for $1,000 and was subsequently arrested and convicted.\textsuperscript{181}

The Seventh Circuit held that the Government had the burden of demonstrating the defendant's predisposition before his contact with the government officials.\textsuperscript{182} Applying this more demanding rule to the case, the court noted that the defendant had approached the agent and expressed his willingness to engage in arson and concluded that the jury's determination as to

\textsuperscript{174} \textit{Id.} The Second Circuit held that if a defendant were "of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference," then the entrapment defense would be unavailing. \textit{Id.}

\textsuperscript{175} 935 F.2d 32 (4th Cir. 1991), \textit{amended on other grounds}, No. 90-5691 (4th Cir. Aug. 12, 1991); \textit{see also} \textit{United States v. Hunt}, 749 F.2d 1078, 1085 (4th Cir. 1984) (holding that predisposition is to be judged at the time the government agent suggests the crime), \textit{cert. denied}, 472 U.S. 1018 (1985).

\textsuperscript{176} \textit{Osborne}, 935 F.2d at 34. The defendant Osborne became a target when he answered an advertisement placed in a periodical, thereby indicating his interest in purchasing child pornography. \textit{Id.}

\textsuperscript{177} \textit{Id.} at 37. Even if the Fourth Circuit had applied the rule offered by the Seventh Circuit, see \textit{infra} note 182 and accompanying text, the court almost certainly would have affirmed Osborne's conviction because Osborne initiated the contact with the government agent and revealed his predisposition simultaneously. \textit{Osborne}, 935 F.2d at 34.

\textsuperscript{178} 703 F.2d 1004 (7th Cir. 1983).

\textsuperscript{179} \textit{Id.} at 1005.

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} \textit{Id.} at 1006.

\textsuperscript{182} \textit{Id.} at 1008. In so holding, the court recognized that the Government must rely on indirect evidence obtained by examining the defendant's post-contact conduct in order to make a determination as to predisposition. The court noted that an initial refusal of the agent's overture was probative of a lack of predisposition. But if the defendant should "initiate contact with the agents in order to commit a crime this is strong proof of predisposition." \textit{Id.}

predisposition was not unreasonable. Thus, these varied interpretations of the predisposition definition, characterized by the split among the circuit courts regarding the time issue, would ultimately be resolved by the Supreme Court in *Jacobson v. United States*.

**III. JACOBSON V. UNITED STATES**

The United States Supreme Court, in *Jacobson v. United States*, resolved the issue as to time by holding that the prosecution, in order to overcome a defendant’s entrapment claim, must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to encountering the government agents. The Court’s task, therefore, involved the resolution of the question of whether the Government had proved that Jacobson was predisposed to receive child pornography through the mails prior to the government’s intervention.

**A. The Majority Opinion**

The Supreme Court reversed the decision of the United States Court of Appeals for the Eighth Circuit. Recognizing the evils associated with the proliferation of child pornography and the need for government agents to engage in undercover operations to enforce the law effectively, the majority nonetheless stated that the government's conduct was impermissible when it implanted the disposition to commit a crime in the mind of a person otherwise innocent. Since the Court conceded that Jacobson had become disposed to commit the crime by the time he placed his order, the dispositive question became whether Jacobson was so disposed at the time of the government’s first overture. The majority maintained that the government’s onus to show pre-contact predisposition was a requirement implicit in

183. *Kaminski*, 703 F.2d at 1008-09 (noting that “the evidence in this case was more than adequate to prove defendant’s predisposition”).
185. *Id.* at 1535.
186. *Id.* at 1540.
187. *Id.* at 1541 n.2.
188. Justices Blackmun, Stevens, Souter, and Thomas joined Justice White’s majority opinion.
190. *Id.* (citing Sorrells v. United States, 287 U.S. 435, 442 (1932) and Sherman v. United States, 356 U.S. 369, 372 (1958)).
191. *Id.* at 1541.
192. *Id.* at 1540. The Court cited United States v. Whoie, 925 F.2d 1481, 1483-84 (1991), for the proposition that in cases such as *Jacobson*, where there is no dispute as to inducement, the government “must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.” *Jacobson*, 112 S. Ct. at 1540.
the language of *Sorrells v. United States*,\textsuperscript{193} which held that the government could not prosecute a person for a crime generated by law enforcement officials.\textsuperscript{194}

To determine whether Jacobson was predisposed prior to contact with the bogus organizations or had become disposed as a result of such contact, the majority undertook a thorough examination of the Government's evidence of predisposition.\textsuperscript{195} The Court noted that this evidence consisted both of that developed prior to contact with Jacobson and that developed as a result of the government communications.\textsuperscript{196} As for evidence of a pre-contact predisposition, the Government could point only to the *Bare Boys* magazines that Jacobson had legally ordered and received in 1984.\textsuperscript{197} But, as the majority noted, a willingness to engage in conduct later criminalized is not probative of a willingness to commit an unlawful act, as citizens ordinarily choose to obey the law out of respect for it.\textsuperscript{198} The Court therefore concluded that Jacobson's demonstrated predisposition to view the sexually explicit photographs in accordance with the law, carried little weight in establishing Jacobson's predisposition.\textsuperscript{199}

The Court similarly concluded that the evidence garnered over the course of the government's extended courtship period failed to demonstrate a pre-contact predisposition.\textsuperscript{200} While the Court conceded that Jacobson had demonstrated a disposition to view sexually explicit photographs depicting minors,\textsuperscript{201} the Government failed to show that Jacobson possessed a disposi-

\textsuperscript{193} 287 U.S. 435 (1932).

\textsuperscript{194} *Jacobson*, 112 S. Ct. at 1541 n.2 (citing *Sorrells*, 287 U.S. at 451). The majority later maintained that the enunciated standard would not hamper law enforcement operations and was in fact consistent with the attorney general's guideline for the conduct of undercover operations. *Id.* The pre-contact predisposition standard, furthermore, would still fail to yield a meritorious entrapment defense in situations where, for example, the target immediately complied with the undercover officer's overture, because "the ready commission of the criminal act amply demonstrates the defendant's predisposition." *Id.* at 1541.

\textsuperscript{195} *Id.*

\textsuperscript{196} *Id.* The Court stated that "[t]he prosecution's evidence of predisposition falls into two categories: evidence developed prior to the Postal Service's mail campaign, and that developed during the course of the investigation." *Id.*

\textsuperscript{197} *Id.*

\textsuperscript{198} *Id.* at 1542. The Court reasoned that "[e]vidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it." *Id.* But see United States v. Williams, 705 F.2d 603, 623 (2d Cir.) (holding that "[c]onduct "morally indistinguishable" from the offenses charged is probative on the issue of predisposition") (quoting United States v. Viviano, 437 F.2d 295, 299 (2d Cir. 1971) (quoting United States v. Becker, 62 F.2d 1007 (2d Cir. 1933)), *cert. denied*, 464 U.S. 1007 (1983).

\textsuperscript{199} *Jacobson*, 112 S. Ct. at 1541.

\textsuperscript{200} *Id.* at 1542.

\textsuperscript{201} *Id.*; see also supra note 17 and accompanying text (discussing evidence of Jacobson's affinity for photographs of boys engaged in sexual activity).
tion to break the law in order to satisfy this desire.\(^{202}\) As to the evidential value ascribed to Jacobson's eventual decision to order the unlawful material, the Court concluded that such a willingness suggested only that a predisposition to break the law existed at the time Jacobson ordered the material, some two and a half years after the government had initiated contact, and could not have reasonably suggested a pre-existing predisposition.\(^{203}\)

The majority was clearly troubled by the conduct of the government officials and suggested that the very nature and method of the sting operation implanted the disposition in Jacobson's mind.\(^{204}\) By couching their overtures in terms extolling the most noble First Amendment values,\(^{205}\) the government-created organizations pressured Jacobson to purchase the outlawed material and thus become a soldier in the battle against censorship and a protector of individual rights.\(^{206}\) Given the nature of the government's inducement, acts designed to implant the criminal disposition,\(^{207}\) the Court concluded that Jacobson's willingness to break the law was not born of Jacobson's predisposition, but instead resulted from the nature of the government's overtures.\(^{208}\)

Since the only evidence of predisposition was the order eventually placed by Jacobson, which followed two and a half years of attempts to convince Jacobson that he had a right to engage in the outlawed conduct, the Government had failed to demonstrate that Jacobson was predisposed independent of the government's activity.\(^{209}\) The Court concluded that Jacobson had been entrapped as a matter of law and therefore reversed the decision of the Eighth Circuit Court of Appeals.\(^{210}\)

\(^{202}\) \textit{Jacobson}, 112 S. Ct. at 1542.

\(^{203}\) \textit{Id.} at 1541.

\(^{204}\) \textit{Id.} at 1542. The majority argued:

\[\text{The strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material.}\]

\(^{205}\) \textit{Id.} at 1542. The Court quoted Sorrells v. United States, 287 U.S. 435 (1932), to hammer home the point that the government had implanted in Jacobson the unlawful disposition: "Law enforcement officials go too far when they 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'" \textit{Id.} (quoting \textit{Sorrells}, 287 U.S. at 442) (emphasis added by \textit{Jacobson} Court).

\(^{206}\) \textit{Jacobson}, 112 S. Ct. at 1542.

\(^{207}\) \textit{Id.} at 1543.

\(^{208}\) \textit{Id.} The Court quoted Sorrells v. United States, 287 U.S. 435 (1932), to hammer home the point that the government had implanted in Jacobson the unlawful disposition: "Law enforcement officials go too far when they 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'" \textit{Id.} (quoting \textit{Sorrells}, 287 U.S. at 442) (emphasis added by \textit{Jacobson} Court).

\(^{209}\) \textit{Jacobson}, 112 S. Ct. at 1543. The Court concluded that "'[r]ational jurors could not say beyond a reasonable doubt that [Jacobson] possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to [Jacobson].'" \textit{Id.}

\(^{210}\) \textit{Id.}
B. Justice O'Connor's Dissent

In dissent, Justice O'Connor began by noting that the government had offered the illegal material on two occasions, and that Jacobson had accepted on both occasions. From this ready response, a jury could reasonably have concluded that Jacobson harbored the requisite predisposition to make the entrapment defense unavailable. Justice O'Connor therefore stated that the majority's holding was flawed in that it failed to recognize the reasonableness of the jury's finding. In addition, Justice O'Connor attacked the majority's position on the grounds that it imposed, in effect, a reasonable suspicion requirement on the government and redefined predisposition to include a requirement that the government demonstrate a defendant's predisposition to break the law knowingly in order to establish predisposition.

1. The Reasonable Suspicion Requirement

The dissent argued that the very heart of the Court's holding, that the government must demonstrate a pre-contact predisposition, contradicted precedent and stated that scrutiny of the government's conduct has traditionally been used to establish entrapment in the context of the target's repeated refusals to accept the government's unlawful proposal, and not to establish the government's affirmative implantation of the criminal disposition.

Justice O'Connor next suggested that the Court's holding represented a break from previous entrapment decisions holding that the government must show that the target was predisposed at the time the government offered the

211. Justice O'Connor's dissent was joined by Chief Justice Rehnquist and Justice Kennedy. Justice Scalia joined the dissent in part. Id. at 1535.
212. Id. at 1543 (O'Connor, J., dissenting).
213. Id. Justice O'Connor also defended the government's methodology on the ground that the questionnaires and similar literature designed to explore the target's willingness to break the law would not, as the catalogues might, "risk rebuff and suspicion, . . . shock and offend the uninitiated, or expose minors to suggestive materials." Id. at 1544.
214. Id.
215. Id.
216. Id. The dissent cited Sherman v. United States, 356 U.S. 369, 372-76 (1958), for the proposition that "a defendant's predisposition is to be assessed as of the time the Government agent first suggested the crime, not when the Government agent first became involved." Jacobson, 112 S. Ct. at 1544. Furthermore, the dissent contended that the government could not have implanted the disposition to commit the crime "[u]ntil the Government actually makes a suggestion of criminal conduct." Id. (citing Sorrells v. United States, 287 U.S. 435, 442 (1932)).
217. Jacobson, 112 S. Ct. at 1544 (citing Sherman v. United States, 356 U.S. 369 (1958) (holding that the defendant's lack of predisposition was evidenced, among other things, by his repeated refusals to supply the government agent with narcotics)).
opportunity to commit the crime. The dissent contended that the newly
enunciated pre-contact predisposition requirement was tantamount to im-
posing upon government the requirement that it "have a reasonable suspi-
cion of criminal activity before it begins an investigation." The dissent
feared that such a requirement would have a crippling effect on the prosecu-
tion of targets apprehended as a result of government sting operations.

The dissent further objected to the Court's failure to recognize a funda-
mental difference between Jacobson's situation and the circumstances which
the defendants in Sorrells v. United States and Sherman v. United States encountered. In those earlier cases, the dissent argued, the govern-
ment agents employed coercive measures or otherwise encouraged the de-
fendants to break the law for some worthy ulterior purpose. In contrast,
the factor cited by the majority which unduly enticed Jacobson to acquiesce
to the government's overtures merely called attention to the fruits inher-
ently attached to the crime. In any event, Justice O'Connor concluded,
the jury had an opportunity to weigh the evidence as to the pressure the
government exerted on Jacobson, and its determination as to Jacobson's in-
dependent willingness to order the unlawful materials was not unreason-
able.

218. Id. at 1545. Justice O'Connor maintained that "the inquiry is whether a suspect is predisposed before the Government induces the commission of the crime, not before the Gov-
ernment makes initial contact with him." Id.

219. Id.

220. Id. Justice O'Connor predicted dire repercussions:

[A]fter this case, every defendant will claim that something the Government agent
did before soliciting the crime 'created' a predisposition that was not there before. . . .
[A] bribe taker will claim that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe. . . . A drug buyer will
claim that the description of the drug's purity and effects was so tempting that it
created the urge to try it. . . .

Id.

221. 287 U.S. 435 (1932).


223. Jacobson, 112 S. Ct. at 1545. Justice O'Connor noted, for example, that the defendant in Sorrells encountered a government agent who "repeatedly asked for illegal liquor, coaxing
the defendant to accede on the ground that 'one former war buddy would get liquor for an-
other.' " Id. (quoting Sorrells, 287 U.S. at 440). The dissent further noted that "[i]n Sherman,
the Government agent played on the defendant's sympathies, pretending to be going through
drug withdrawal and begging the defendant to relieve his distress by helping him buy drugs." Id. (citing Sherman, 356 U.S. at 371).

224. See supra notes 204-08 and accompanying text.

225. Jacobson, 112 S. Ct. at 1545. The dissent suggested that the majority's contention
that the government exerted pressure on Jacobson was not supported by the record. Id. at
1545-46.

226. Id. at 1546.
2. The Specific Intent Requirement

Justice O'Connor also objected to what she perceived as a redefinition of predisposition to require a showing that the defendant was predisposed to violate the law "knowingly" in order to prove predisposition.227 This reasoning resulted from the Court's acknowledgement that Jacobson was predisposed to view sexually explicit photographs depicting minors228 and its seemingly anomalous conclusion that such a predisposition did not support the inference that Jacobson would commit the charged crime to effectuate his desire.229 Justice O'Connor argued that the newly conceived specific intent requirement was unwarranted since the predisposition requirement was designed to make the entrapment defense unavailable to those who would have committed the crime even if there had been no governmental inducement, regardless of whether the defendant was aware that the conduct was unlawful.230 Finally, the dissent scolded the Court for taking the issue away from the jury, even after the jury, as representatives of the community, had been apprised accurately as to the nuances of entrapment law.231

IV. SCRUTINY FOR THE SERPENT: EVALUATING GOVERNMENTAL CONDUCT

The majority opinion in Jacobson refined the entrapment doctrine in that it clarified the definition of predisposition to require the government to show that the target was disposed to commit the crime prior to his initial contact with government agents.232 Such a formulation flows logically from the

227. Id. Justice Scalia elected not to join this portion of the dissenting opinion. Id. at 1543.
228. Id. at 1546.
229. Id. The dissent noted that the statute in question did "not require proof of specific intent to break the law" and therefore charged the majority with "ignor[ing] the judgment of Congress that specific intent is not an element of the crime of receiving sexually explicit photographs of minors." Id.
230. Id.
231. Id. at 1547. Justice O'Connor concluded by noting that there was "no dispute that the jury in this case was fully and accurately instructed on the law of entrapment, and nonetheless found Mr. Jacobson guilty. . . . I believe there was sufficient evidence to uphold the jury's verdict." Id. Indeed, the jury was given instructions which incorporated the majority's predisposition formulation: "If the defendant before contact with law-enforcement officers or their agents did not have any intent or disposition to commit the crime charged and was induced or persuaded by law-enforcement officers or their agents to commit that crime, then he was entrapped." Id. at 1540 n.1 (emphasis added) (citation omitted).
232. Jacobson, 112 S. Ct. at 1540. The Court cited United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C. Cir. 1991) (opinion of then-Judge Thomas), to support its holding. The cited passage, however, does not contemplate the time issue, but instead focuses on the issue of the burden of proof. The passage notes the split between the "unitary" and "bifurcated" approaches to burdens of production and persuasion in an entrapment case, but ultimately notes that under either approach, it is the government that must demonstrate predisposition. Id.
prior cases, which held that the government cannot implant the criminal disposition into the mind of the target, and better protects against the evil that the entrapment defense seeks to overcome. Unless the government can prove that its target was predisposed to commit a crime at the time it initially contacted him, there is a significant danger that the government itself implanted the disposition, and thereby manufactured the crime.

Justice O'Connor, in dissent, argued that the Court's holding contradicted precedent and cited Sherman v. United States for the proposition that predisposition need only be established as of the time the crime is suggested. The issue of time, however, was not specifically addressed in Sherman. In fact, the Sherman Court took note of the agent's discussions with the target concerning their mutual struggle to overcome drug addiction, prior to the request for narcotics, and found that Sherman had been entrapped as a matter of law.

Justice O'Connor further voiced her dissatisfaction with the Court's holding in stating that the government could not implant an unlawful disposition in an innocent mind without first suggesting the commission of a crime. Justice O'Connor noted the difference in circumstances surrounding the Jacobson and Sherman cases: that Jacobson, unlike Sherman, immediately acceded to the criminal conduct once it had been offered. There is, however, no logical reason why the unlawful disposition cannot be implanted by a law enforcement official who initially refrains from extending a direct request to engage in criminal conduct. If, for example, the government agent in Sherman had played on the target's sympathy to the point where the target was convinced of the agent's dire need for narcotics, and then offered the crime, it would be difficult to see how Sherman's quick accession, motivated by empathy, and not the normal fruits associated with the crime, would have

There is, however, other authority which does support the Jacobson holding as to the time issue. See supra notes 182-83 and accompanying text.

234. See Sorrells, 287 U.S. at 444-45 (quoting Butts v. United States, 273 F. 35 (8th Cir. 1921)). The Sorrells Court adopted Judge Sanborn's argument: "[I]t 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. (quoting Butts, 273 F. at 38).
238. Id. at 373.
240. Id. at 1545.
yielded a different legal result. On the other hand, it is clear that an agent, in such a situation, could implant the disposition while refraining from suggesting the criminal activity. Justice O'Connor's formulation, however, would render all of the government's pre-proposition conduct irrelevant.241 Indeed, there would be no scrutiny of the government's conduct if a target's immediate acceptance of the unlawful offer were established, no matter how coercive the pre-proposition suggestions had been.

The approach taken by the majority appears to address a major flaw in the results of Hampton v. United States242 and United States v. Russell,243 namely that any sort of governmental conduct, no matter how outrageous, would be permissible as long as the government establishes predisposition.244 By focusing on when and how the defendant became predisposed, the Court calls for scrutiny of the government's conduct, even where, as in Jacobson, the defendant's predisposition to commit the crime existed before the crime was solicited.245 Except in cases where there is an immediate acceptance of the government's overture, therefore, some examination of the government's conduct is required to determine whether such conduct "'implant[ed] in the mind of an innocent person the disposition to commit the alleged offense."'246 If the evidence were to show that the government's pre-solicitation conduct was such as to generate the crime and instill within the target the disposition to commit the crime, then the target would have a valid entrapment defense.247 The renewed scrutiny given the government in this re-

241. The dissent's contention that "a defendant's predisposition is to be assessed as of the time the Government agent first suggested the crime, not when the Government agent first became involved," id. at 1544, suggests that a court need only scrutinize the government's post-proposition conduct.
244. See Hampton, 425 U.S. at 488-89 (stating that the entrapment defense is unavailable where predisposition is established); see also Russell, 411 U.S. at 436 (holding that the establishment of predisposition is "fatal" to the defendant's entrapment defense).

The exception, of course, is the due process defense. See supra notes 103, 115 and accompanying text (discussing the fruitless assertion of the due process defense by the defendants in Russell and Hampton). Defendants often assert this defense but rarely prevail. See, e.g., United States v. Osborne, 935 F.2d 32, 36 (4th Cir. 1991) (noting that the "courts have over time continued to demonstrate a high shock threshold in the presence of extremely unsavory government conduct"), amended on other grounds, No. 90-5691 (4th Cir. Aug. 12, 1991); United States v. Simpson, 813 F.2d 1462, 1466 (9th Cir.) (holding that the due process defense was unavailing where government officials manipulated a woman into providing sexual favors to its target as part of its effort to entice him into selling narcotics to undercover agents), cert. denied, 484 U.S. 898 (1987).
245. Jacobson, 112 S. Ct. at 1541 (conceding that Jacobson "had become predisposed to break the law by [the time the crime was offered]").
246. Id. at 1543 (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)) (emphasis added by Jacobson Court).
247. Id.
fined version of predisposition, therefore, ameliorates the harshness of the per se rule enunciated in *Hampton v. United States*,\(^2_{48}\) and restores, to some degree, the balance between the predisposition and inducement prongs of the entrapment test.\(^2_{49}\)

Justice O'Connor was further concerned that the Court's holding could be read to impose upon the government the requirement that it have a reasonable suspicion that a target was engaged in wrongdoing before launching an investigation.\(^2_{50}\) The reasonable suspicion requirement, however, simply does not flow logically from the Government's burden to demonstrate a target's pre-contact predisposition to break the law. Certainly, there could be many instances where the Government could demonstrate that the target was predisposed to break the law prior to contact without a reasonable suspicion showing.\(^2_{51}\)

*United States v. Myers*,\(^2_{52}\) a case arising from the Abscam\(^2_{53}\) investigation, provides a useful example. In that case, the undercover agents, without any specific suspicion that the defendant Lederer was engaged in wrongdoing, made it known they would pay cash in exchange for favorable immigration legislation.\(^2_{54}\) Yet the United States Court of Appeals for the Second Circuit rejected Lederer's entrapment claim because predisposition was established by his ready response to the inducement.\(^2_{55}\) Situations such as that in *Myers*, where a jury could infer a pre-contact predisposition based on the target's quick willingness to commit the crime, demonstrate that a reasonable suspicion requirement does not necessarily emerge from the *Jacobson* Court's holding.\(^2_{56}\) Thus, since the Court did not impose a reasonable suspi-

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\(^2_{49}\) Compare *supra* notes 82-84 and accompanying text (noting that the Sherman Court, ostensibly applying the same subjective test utilized in *Hampton* and *Jacobson*, was troubled by and gave considerable scrutiny to the conduct of the government agent).

\(^2_{50}\) *Jacobson*, 112 S. Ct. at 1545.

\(^2_{51}\) See *infra* note 256 and accompanying text (noting that federal appeals courts have declined to read a reasonable suspicion requirement into the *Jacobson* holding).


\(^2_{53}\) See *supra* note 168 and accompanying text (discussing the Abscam investigation).

\(^2_{54}\) *Myers*, 692 F.2d at 830. Indeed, the *Myers* court conceded that the government had no reasonable suspicion prior to its contact with the defendant, then entertained and ultimately rejected the defendant's defense on this basis. *Id.* at 835.

\(^2_{55}\) *Id.* at 836.

\(^2_{56}\) Indeed, the circuit courts have declined to impose a reasonable suspicion requirement upon the government as a result of *Jacobson*. See *e.g.*, United States v. Hurwitz, No. 91-5504, 1992 U.S. App. LEXIS 16322 (4th Cir. July 16, 1992), *cert. denied*, 113 S. Ct. 1011 (1993). The Fourth Circuit held that the defendant was not entitled to an entrapment instruction where the government's agent had no reasonable suspicion, but merely presented the opportunity for the target to engage in narcotics trafficking as a means to overcome his financial difficulty. *Id.* at *2.
cion requirement, Justice O'Connor's concern as to the attendant debilitating effect on law enforcement operations appears unfounded.257

Justice O'Connor's contention that the Jacobson holding requires the prosecution to prove that the defendant knowingly violated the law258 is equally without merit. The majority responded to this contention by simply noting that the evidence offered by the Government, the lawful purchase of the Bare Boys magazines and the inclination for the illegal material, was insufficient to establish a pre-contact predisposition.259 The Court therefore did not hold, as Justice O'Connor feared, that the government must demonstrate that a defendant knowingly violated the law to establish predisposition.

The result in this case is a more clear picture of the entrapment doctrine, one that restores some level of scrutiny of the government's conduct in cases where there is inducement. The effect on law enforcement will not be overly burdensome. To be sure, the government's task in establishing a pre-existing predisposition is more onerous than it would have been under Justice O'Connor's model,260 but the Court's holding should work to deter a relentless law enforcement officer from seeking doggedly to induce a reluctant target.261 Further, the result should encourage law enforcement agencies to

257. The majority noted, in response to the argument that the holding would cripple undercover investigation operations, that the Attorney General's guidelines regarding undercover operations include a reasonable suspicion requirement. Jacobson v. United States, 112 S. Ct. 1535, 1541 n.2 (1992).
258. Id. at 1546.
259. Id. at 1542 n.3.
260. See supra notes 216-18 and accompanying text (discussing Justice O'Connor's contention that the government need only show predisposition at the time the crime is solicited).
261. The wisdom of the Jacobson holding becomes evident when one examines the Ninth Circuit's recent opinion in United States v. Skarie, 971 F.2d 317 (9th Cir. 1992). The defendant in Skarie lived on a ranch with her abusive husband. After she forced her husband out of the house, a distant relative of the husband who was a police informant moved into the house. Id. at 318-19. The informant used methamphetamines in the house and repeatedly threatened the defendant by impaling a live chicken on a stake and vowing to kidnap her son. Id. Throughout this time, the informant asked the defendant to put him in touch with narcotics vendors. After putting the informant off on a number of occasions, she finally agreed to put him in touch with a methamphetamine dealer. After a sale, both buyer and seller were arrested. Id.

In overturning the defendant's conviction, the court noted that the only evidence of a pre-contact predisposition was that the defendant had used methamphetamines three years previously. Id. at 320. The remainder of the government's evidence of predisposition, including evidence of the defendant's "active and allegedly willing participation, and [her] supposed profit motive," was developed after the defendant's initial contact with the informant, and therefore should not have been considered in weighing the entrapment question. Id. at 321. Indeed, the Ninth Circuit noted that "the government eventually prevailed at trial by relying on a theory that Skarie was initially entrapped, but later became 'unentrapped.' " Id. at 321 n.5. The court was therefore able to rely on Jacobson's pre-contact predisposition standard in reversing Skarie's conviction. Id. at 322.
allocate their resources more efficiently,\textsuperscript{262} turning to a new task if the target fails to acquiesce quickly.

V. CONCLUSION

Since the entrapment doctrine was first recognized by the United States Supreme Court, its focus has steadily drifted away from scrutiny of the conduct of law enforcement agents toward a near-exclusive examination of whether the defendant was predisposed to commit the crime charged. This shift is best illustrated by comparing the Court's holding in \textit{Sherman v. United States}, where the Court was clearly focused on and troubled by the conduct of the law enforcement officials, with its later holdings in \textit{United States v. Russell} and \textit{Hampton v. United States}, where the nature of the government's activity became irrelevant once predisposition had been established.

The \textit{Jacobson} Court's holding that the government must show that the target was predisposed to commit the alleged crime prior to contact with government officials ameliorates the harshness of the holdings in \textit{Russell} and \textit{Hampton}, and provides that in all cases except those in which contact, solicitation, and ready acceptance occur simultaneously, some scrutiny of the government's conduct is mandated. In the future, courts, adhering to the \textit{Jacobson} Court's approach, will reassume their role as defenders of the populace against governmental excess and will indirectly provide a brand of law enforcement less prone to overzealousness and measurably more efficient.

\textit{Brian Thomas Feeney}

\textsuperscript{262} See \textit{United States v. Kaminski}, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring). Judge Posner argued that entrapment is "merely the name we give to a particularly unproductive use of law enforcement resources" and suggests that the predisposition inquiry should focus not on "psychological conjecture" but on "a common-sense assessment of whether it is likely that the defendant would have committed the crime" without the inducement. \textit{Id.} If not, society has squandered its law enforcement resources and entrapment has occurred. \textit{Id.}