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The Entrapment Defense: A Cry for Decisiveness, Consistency, and Resolution - Jacobson v. United States

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THE ENTRAPMENT DEFENSE: A CRY FOR DECISIVENESS, CONSISTENCY, AND RESOLUTION

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

Aubry Matt Pesnell

"The serpent beguiled me and I did eat."[1]

I. INTRODUCTION

Since the advent of the entrapment defense,[2] judges and legal scholars have waged a vehement theoretical battle within the criminal law jurisprudence.[3] This discord was borne out of confusion over the theoretical basis of the entrapment

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1. Board of Comm'rs v. Backus, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864) (quoting *Genesis* 3:13).

2. The entrapment defense may be available when officers of the law employ deceptive techniques in an attempt to induce a person into the commission of a crime to increase the chances of a successful prosecution. According to the prevailing view, the entrapment defense is available when the intent to commit the crime originates in the mind of the government official, and that government official implants the intent into the mind of an innocent person who would not have otherwise committed such an offense. *See, e.g.*, Sorrells v. United States, 237 U.S. 435, 441-43 (1932). If the innocent person thereafter goes on to commit the crime, the person is completely exonerated from all criminal culpability. *See, e.g.*, *Id.* at 452. The rationale given by the Supreme Court for such a defense is that the legislature in enacting criminal statutes did not intend to punish innocent people enticed by police into the commission of a crime; rather, the legislature only intended to punish those who commit crimes independent of substantial governmental influence. Sorrells v. United States, 287 U.S. 435 (1932).

Under the generally accepted view, once the defense of entrapment is pleaded and a prima facie case is made out, the burden of proof shifts to the government to prove that the defendant was predisposed to commit the crime before governmental involvement. *See, e.g.*, Jacobson v. United States, 112 S. Ct. 1535, 1540 (1992) (citing United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C. Cir. 1991)) (holding that the government had failed to prove that the defendant was predisposed to purchase child pornography through the mail before the government enticed him to do so). The Court has held proof of a defendant's predisposition will in all cases preclude any allowance of the entrapment defense. Hampton v. United States, 425 U.S. 484, 489-90 (1976).

There is, however, a diverging view that the entrapment defense should not consider whether the person is innocent but should focus on the overreaching methods employed to tempt the person to commit the crime. This view sees the entrapment defense as a method of punishing law enforcement officials for their reprehensible conduct; and when their methods of law enforcement go too far, the defendant is set free to deter their continued use of such methods. Sorrells v. United States, 287 U.S. 435, 453-59 (1932) (Roberts, J., dissenting).

For an excellent review of the development of the entrapment defense from its earliest beginnings in English common law through its implementation in the American criminal justice system, see Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5 (1986).

3. This theoretical battle is evidenced by the majority, concurring, and dissenting opinions written by the Supreme Court concerning entrapment. *See* Hampton v. United States, 425 U.S. 484 (1976) (plurality again upholds the subjective test of entrapment as Justices Brennan, Stewart, and Marshall dissented, advocating the objective theory of the defense); United States v. Russell, 411 U.S. 423 (1973) (majority holds true to the subjective test while Justices Brennan, Stewart, Marshall, and Douglas dissented); Sherman v. United States, 356 U.S. 369 (1958) (majority supporting subjective standard with a four man concurrence that stood strong for the objective theory); Sorrells v. United States, 287 U.S. 435 (1932) (majority advocating the subjective approach while the minority concurred supporting the objective standard).

For articles which chronicle the earliest beginnings of the entrapment controversy, see also J. Darwin Bond, Note, *Entrapment in Narcotic Law Violations*, 20 KY. L.J. 98 (1931-32); *Entrapment As Defense In Prosecution For Prohibition Violation*, 41 YALE L.J. 1249 (1932); *Entrapment by Government Officials*, 28 COLUM. L. REV. 1067 (1928); Robert W. Hansen, Note, *Entrapment In Criminal Cases*, 17 MARQ. L. REV. 218 (1932-33); Robert M. Vandergrift, Note, *Criminal Law – Entrapment – Element of Persuasion*, 8 S. CAL. L. REV. 245 (1935).

defense which today has still not been fully resolved.[4] Many believe the defense is a weapon for deterring the government from using overzealous investigation techniques and that the availability of the defense should depend solely on the law enforcement techniques employed in the investigation.[5] This view is the objective approach of the entrapment defense.[6] Others contend that the purpose of entrapment is to protect innocent individuals who would not have committed a crime without government inducement. They believe that allowing the defense depends solely on whether the particular defendant would have committed the crime absent police encouragement.[7] This view is the subjective theory of entrapment.[8]

Although the Supreme Court has addressed the issue of entrapment on six occasions[9] and has each time re-affirmed the subjective theory of the defense, the Court has failed to put a decisive end to this philosophical conflict by refusing to discuss the underlying purpose of the defense and being unwilling to offer any rationale for their preference for the subjective approach over the objective theory.

Jacobson v. United States[10] represents the Court's latest attempt to resolve the entrapment debate. This decision may have put an end to the dispute over which theory of entrapment the Court will support, but the Court again failed to explain its

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4. The Court in *Jacobson v. United States* used subjective theory analysis in both its majority and dissenting opinions, which makes it doubtful that the objective approach of entrapment will ever emerge as an alternative to the subjective theory of entrapment. However, the Court has still not unequivocally advocated the subjective approach in an unanimous opinion. *See* Jacobson v. United States, 112 S. Ct. 1535 (1992). *See also* Mathews v. United States, 485 U.S. 58 (1988); Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

A representative sample of states that have embraced the subjective theory of entrapment include: Colorado: COLO. REV. STAT. ANN. § 18-1-709 (West 1990); *see also* People v. Sanchez, 580 P.2d 1270 (Colo. 1978); Georgia: GA. CODE ANN. § 16-3-25 (Michie 1992); *see also* Keaton v. State, 316 S.E.2d 452 (Ga. 1984); Illinois: ILL. ANN. STAT. ch. 720, para. 5/7-12 (Smith-Hurd 1993); *see also* People v. Barnes, 595 N.E.2d 40 (Ill. 1992); Missouri: MO. ANN. STAT. § 562.066 (Vernon 1979); *see also* State v. Adams, 839 S.W.2d 740 (Mo. 1992); Montana: MONT. CODE ANN. § 45-2-213 (1991); *see also* State v. Farnsworth, 783 P.2d 1365 (Mont. 1989); Tennessee: TENN. CODE ANN. § 39-11-505 (1991); Washington: WASH. REV. CODE ANN. § 9A.16.070 (West 1988); *see also* State v. Pleasant, 684 P.2d 761 (Wash. 1984).

5. This is the contention of those courts and legal scholars that advocate the objective theory of the entrapment defense. For views supporting the objective approach see MODEL PENAL CODE § 2.13 (1985).

A representative sample of states that support the objective approach include: Alaska: ALASKA STAT. § 11.81.450 (1992); *see also* McLaughlin v. State, 737 P.2d. 1361 (Alaska Ct. App. 1987); Arkansas: ARK. CODE ANN. § 5-2-209 (Michie 1987); *see also* Ridling v. State, 719 S.W.2d 1 (Ark. 1986); Florida: FLA. STAT. ANN. § 777.201 (West 1992); *see also* Ricardo v. State, 591 So. 2d 1002 (Fla. 1991); Hawaii: HAW. REV. STAT. § 702-237 (1985); *see also* State v. Nakamura, 648 P.2d 183 (Haw. 1982); North Dakota: N.D. CENT. CODE § 12.1-05-11 (Supp. 1993); *see also* State v. Pfister, 264 N.W.2d 694 (N.D. 1978); Pennsylvania: 18 PA. CONS. STAT. ANN. § 313 (1983); *see also* Commonwealth v. Ritter, 615 A.2d 442 (Pa. 1992); Texas: TEX. PENAL CODE ANN. § 8.06 (West 1974); *see also* Perez v. State, 816 S.W.2d 490 (Tex. 1991); Utah: UTAH CODE ANN. § 76-2-303 (1990); *see also* State v. Belt, 780 P.2d 1271 (Utah Ct. App. 1989).

For a discussion of the objective approach to entrapment see United States v. Russell, 411 U.S. 423, 440-41 (1973) (Stewart, J., dissenting).

6. United States v. Russell, 411 U.S. 423, 440-41 (1973) (Stewart, J., dissenting).

7. An explanation of this approach can be found in Justice Rehnquist's majority opinion in United States v. Russell,,411 U.S. 423 (1973).

8. *Id.*

9. *See* Jacobson v. United States, 112 S. Ct. 1535 (1992); Mathews v. United States, 485 U.S. 58 (1988); Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

10. 112 S. Ct. 1535 (1992).

preference of the subjective approach over the opposing objective theory.[11] This note contains a historical sketch which details the evolution of the entrapment defense and the two conflicting theories that the Supreme Court has developed. The note will consider the underlying policies supporting the use of the subjective and objective theories and will also suggest an alternate approach that reflects the practical application of the entrapment defense and utilizes both subjective as well as objective considerations.

II. Facts and Procedural History

In February, 1984, Keith Jacobson, an elderly[12] Nebraska farmer, ordered two magazines from a California adult bookstore.[13] These magazines were entitled *Bare Boys I* and *Bare Boys II* and depicted nude teen and pre-teenage boys.[14] Shortly after the purchase, Congress passed the Child Protection Act of 1984 which contained a provision making it illegal to knowingly receive through the mail any depiction of a minor child engaging in sexually explicit conduct.[15] After the passage of this legislation, law enforcement officials searched the California bookstore where they found a mailing list which included the petitioner's name along with a record of his purchase.[16] Government agents then began an investigation of Mr. Jacobson which lasted more than two and one-half years.[17]

A government postal inspector first contacted Mr. Jacobson.[18] Through a fictitious organization, the American Hedonist Society,[19] the inspector mailed Jacobson some information and enclosed an application for membership to the society.[20] Jacobson joined the "organization" and filled out and returned its "sexual attitude questionnaire."[21]

Investigations halted until May, 1986, when Mr. Jacobson received a solicitation from a fictitious research company which sought "response[s] from those who 'believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite [sic] age.' "[22] To this solicitation Jacobson

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11. *Id.*

12. Mr. Jacobson was 56 years old at the time of the purchase, and the record shows that he was in charge of caring for his elderly father. *Id.* at 1537.

13. *Id.*

14. *Id.* These magazines did not depict the boys involved in any form of sexual activity, and at the time of the purchase, were prohibited by neither Nebraska nor federal law.

15. 18 U.S.C. § 2252 (1988).

16. Jacobson v. United States, 112 S. Ct. 1535, 1538 (1992).

17. *Id.*

18. This first contact came in January of 1985. *Id.*

19. The purported doctrine of the organization was "that members had the 'right to read what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have a right to seek pleasure without restriction being placed on us by outdated puritan morality.' " *Id.*

20. *Id.*

21. *Id.* The questionnaire requested that he rank his enjoyment of various sexual materials. *Id.* Jacobson indicated that he "enjoyed" (which was a 2 on a scale of 1 to 4) pre-teen sex, but further stated that he was opposed to pedophilia (an abnormal sexual attraction of an adult to children). *Id.*

22. *Id.*

responded: " 'Please feel free to send me more information, I am interested in teenage sexuality. Please keep my name confidential.' "[23]

Shortly thereafter, Jacobson was contacted by another government agent.[24] The agent posed as a lobbying organization, the "Heartland Institute for a New Tomorrow [hereinafter HINT]."[25] Jacobson cooperated by responding to the enclosed questionnaire; to one of the questions he stated: " 'Not only sexual expression but 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.' "[26] HINT again contacted Jacobson and sent him a list of others who were active in the organization.[27] Although he was urged to contact those on the list, Jacobson never attempted any such communication.[28] Despite this, a government officer began writing to Mr. Jacobson under an assumed name.[29] Mr. Jacobson responded to the letters and expressed an interest in young homosexual intercourse,[30] but after two letters, he ceased any further communication.[31]

It was not until March, 1987, that the United States Customs Service became involved in the investigation.[32] Through another "entity,"[33] the Customs Service sent Jacobson materials advertising photographs depicting young boys performing sexual acts.[34] Jacobson placed an order for these materials, but his order was never filled.[35]

At the same time, the United States Postal Service was continuing its efforts and contacted Jacobson again, this time under the guise of the " 'Far Eastern Trading Company Ltd.' "[36] The communication suggested that Jacobson request further information if he was interested in pornography, which he did.[37] Later he received a catalog from which he ordered a pornographic magazine containing photographs

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23. *Id.*

24. *Id.*

25. *Id.*

The purpose of this group was " 'an organization founded to protect and promote sexual freedom and freedom of choice. We believe that arbitrarily imposed legislative sanctions restricting *your* sexual freedom should be rescinded through the legislative process.' " *Id.*

26. *Id.*

27. *Id.* at 1539.

28. *Id.*

29. *Id.*

30. Mr. Jacobson defined "young" in his communications as " 'in their late teens and early 20's . . . .' " *Id.*

31. *Id.*

32. *Id.*

33. The organization was purportedly a Canadian company known as Produit Outaouais. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

featuring young boys engaging in sexual activities.[38] After a controlled delivery[39] of the magazine, Jacobson was arrested.[40]

The police searched his home and found no pornographic materials other than those Jacobson had purchased before the federal statute was enacted and those materials that the government agents had sent him during the course of the investigation.[41] Jacobson was, thereafter, charged and indicted for violating 18 U.S.C § 2252(a)(2)(A).[42]

The jury[43] found that Jacobson was not entrapped and convicted him of knowing receipt through the mails of sexually explicit material depicting a minor.[44] Jacobson appealed and obtained a reversal by a three judge panel of the Eighth Circuit Court of Appeals;[45] however, upon petition of rehearing, the Eighth

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38. *Id.* at 1539-40.

39. Commentator Cynthia Perez observed that "[d]uring a controlled delivery, after the suspect picks up the 'contraband' from his post office box, postal inspectors follow him and search his home pursuant to a previously issued warrant." Cynthia Perez, Note, United States v. Jacobson: *Are Child Pornography Stings Creative Law Enforcement or Entrapment?*, 46 U. MIAMI L. REV. 235, 238 n.33 (1991) (citing United States v. Mitchell, 915 F.2d 521, 523-24 (9th Cir. 1990)).

40. Jacobson v. United States, 112 S. Ct. 1535, 1540 (1992).

41. *Id.*

42. *Id.* When Jacobson was indicted, the statute read:

(a) Any person who–

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if–

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly 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–

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

18 U.S.C. § 2252 (Supp. V 1987).

43. The jury was instructed:

As mentioned, one of the issues in this case is whether the defendant was entrapped. If the defendant was entrapped he must be found not guilty. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.

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 o[r] their agents to commit that crime, then he was entrapped. On the other hand, if the defendant before contact with law-enforcement officers or their agents did have an intent or disposition to commit the crime charged, then he was not entrapped even though law-enforcement officers or their agents provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.

Jacobson, 112 S. Ct., at 1540 n.1.

44. *Id.* at 1537. Jacobson was sentenced to 250 hours of community service work and was given two years probation. United States v. Jacobson, 893 F.2d 999, 1000 (8th Cir.), *rev'd*, 916 F.2d 467 (8th Cir. 1990), *rev'd*, 112 S. Ct. 1535 (1992).

45. United States v. Jacobson, 893 F.2d 999, 1000 (8th Cir.), *rev'd*, 916 F.2d 467 (8th Cir. 1990), *rev'd*, 112 S. Ct. 1535 (1992).

Circuit sitting en banc affirmed his conviction and concluded that he was not entrapped as a matter of law.[46]

The Supreme Court granted certiorari, but the sole issue for consideration was whether the government carried its burden of proving that Jacobson was predisposed to violate 18 U.S.C. § 2252 *prior to* the intervention of the postal inspectors and other government officers.[47] Justice White writing for the majority concluded that "the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails . . . ."[48] The circuit court's decision was, thus, reversed, and Keith Jacobson's conviction was overturned.[49]

III. History and Background

The defense of entrapment was not explicitly recognized until the early part of the Twentieth Century.[50] Before this time, however, the courts were sensitive to reprehensible conduct by law enforcement officers, and this sensitivity was patently reflected in many opinions.[51] Despite their overt disapproval of misguided law enforcement techniques,[52] some courts refused to allow the person who had committed the crime to go free.[53] In an often quoted case, *Board of Commissioners v. Backus*,[54] the New York Supreme Court exemplified this view:

> Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: "[t]he serpent beguiled me and I did eat." That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will.[55]

The federal courts first recognized[56] entrapment as a criminal defense in *Woo Wai v. United States*.[57] The Ninth Circuit Court of Appeals justified the entrapment

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46. United States v. Jacobson, 916 F.2d 467, 470 (8th Cir. 1990), *rev'd*, 112 S. Ct. 1535 (1992).

47. *Jacobson*, 112 S. Ct. at 1540-41 n.2.

48. *Id.* at 1543.

49. *Id.*

50. *See infra* notes 56-80 and accompanying text.

51. *See, e.g.*, Love v. People, 43 N.E. 710 (Ill. 1896); Saunders v. People, 38 Mich. 218 (1878) (Graves, J., concurring).

52. People v. Mills, 70 N.E. 786 (N.Y. 1904). There the Court of Appeals of New York stated: "[w]hile the courts neither adopt nor approve the action of the officers, which they hold was unauthorized, still they should not hesitate to punish the crime actually committed by the defendant." *Id.* at 791.

53. *See, e.g., id.*

54. 29 How. Pr. 33, 42 (1864).

55. *Id.*

56. The earliest case that appeared in federal court was United States v. Wittier, 28 F. Cas. 591 (C.C.E.D. Mo. 1878) (No. 16,688). Although the court did not recognize that the entrapment defense was available and disposed of the case by acquittal on other grounds, a concurring opinion by Judge Treat condemned entrapment practices employed by the police. *Wittier*, 28 F. Cas. at 594 (Treat, J., concurring).

57. 223 F. 412 (9th Cir. 1915).

defense because "a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes."[58]

The Supreme Court did not render a decision on entrapment until 1932. In *Sorrells v. United States*,[59] the Court attempted to establish uniformity in an area that since *Woo Wai*[60] had been surrounded with confusion.[61]

In *Sorrells*,[62] a prohibition agent posing as a tourist visited the home of the defendant.[63] While there, the government agent asked the defendant on two occasions if he could obtain some liquor, and each time the defendant responded negatively.[64] After sharing common experiences about the World War, the agent asked a third time for some liquor, to which the defendant finally acquiesced.[65] The defendant was convicted of possessing and selling whiskey in violation of the National Prohibition Act.[66] He appealed, relying on the defense of entrapment.[67]

The majority made it clear that the defense was not one grounded merely in public policy;[68] rather, the Court established entrapment as a matter of legislative intent:

> We are 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.[69]

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58. *Id.* at 415. The court believed that Woo Wai's conviction of conspiracy to commit a criminal act could also be reversed on alternate grounds. "[The law enforcement officers] intended to prevent the consummation of the offense which they lured the defendants to undertake. Woo Wai and his associates, therefore, . . . were engaged in an act which was not to result in an accomplished offense against the laws of the United States." *Id.* at 415.

59. 287 U.S. 435 (1932). Although in deciding *Sorrells* the Court clearly recognized the existence of the entrapment defense, their attempt to settle the disputes and inconsistencies in the lower federal and state courts only served to perpetuate the controversy as to the theoretical basis for the entrapment defense and the test by which entrapment may be determined.

60. *Woo Wai*, 223 F. at 412.

61. Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5, 13 n.42 (1986).

> Most of the confusion surrounding the entrapment defense after *Woo Wai* centered on the proper theoretical grounding of the defense and the appropriateness of the defense under particular circumstances. Some courts continued to reject the defense altogether, and the defense received occasional judicial criticism. *See, e.g.*, United States v. Washington, 20 F.2d 160 (D. Neb. 1927).

Id.

62. Sorrells v. United States, 287 U.S. 435 (1932).

63. *Id.* at 439.

64. *Id.*

65. *Id.*

66. 27 U.S.C. § 1 (1927) (repealed 1935).

67. Sorrells v. United States, 57 F.2d 973 (4th Cir. 1932). The Circuit Court of Appeals for the Fourth Circuit affirmed the decision, and the Supreme Court granted certiorari but limited its review to the issue of whether the evidence was sufficient to have the entrapment issue decided by a jury. *Sorrells*, 287 U.S. at 438.

68. *Sorrells*, 287 U.S. at 448.

69. *Id.*

The Court admitted that to deter criminal activity law enforcement could use some deceptive and covert investigative methods.[70] The Court noted, however, that such methods cannot be tolerated when the criminal design originates in the mind of the government official who implants that design in the mind of a person and incites criminal activity in order to prosecute.[71] In overturning Sorrells' conviction, the Court held that the trial judge was in error for refusing to submit the entrapment issue to the jury.[72] This *predisposition* test used by the majority in *Sorrells*[73] focused on the conduct of the defendant and has come to be known as the "subjective" test of entrapment.[74]

In a concurring opinion, Justice Roberts[75] differed sharply with the majority's theoretical basis for the defense.[76] In his view, the defense was not based on legislative intent and should not inquire into the predisposition of the defendant.[77] He reasoned that in determining the availability of the defense, the focus should be on the conduct of the government officials, not misdirected toward the predisposition of the defendant.[78] This concentration on the methods employed by the government to incite criminal activity[79] is referred to as the "objective" test of entrapment.[80]

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70. *Id.* at 441. The Court stated: "[i]t is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." *Id.* (citing Bates v. United States, 10 F. 92, 94 (1881); Grimm v. United States, 156 U.S. 604, 610 (1895); Goode v. United States, 159 U.S. 663, 669 (1895); Rosen v. United States, 161 U.S. 29, 42 (1896); Andrews v. United States, 162 U.S. 420, 423 (1896); Price v. United States, 165 U.S. 311, 315 (1897); United States v. Reisenweber, 288 F. 520, 526 (1923); Aultman v. United States, 289 F. 251 (1923)).

71. *Id.* at 442.

72. *Id.* at 451. The Court stated: "the controlling question [is] whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Id.*

73. *Id.*

74. *See* Russell v. United States, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting).

75. Justice Brandeis and Justice Stone joined in the concurrence. *Sorrells*, 287 U.S. at 453-59 (Roberts, J., concurring).

76. *Id.*

77. He stated: "the true foundation of the doctrine [rests] in the public policy which protects the purity of government and its processes." *Id.* at 455.

78. *Id.* at 458-59.

> He has committed the crime in question, but, by supposition, only because of instigation and inducement by a government officer. To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. . . . The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment.

Id. Justice Roberts also differed with the majority saying that the judge, not the jury, should decide the question of entrapment. *Id.* at 458.

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

80. *Id.* Under the objective test, the availability of the entrapment defense is essentially determined by asking whether the conduct of the law enforcement officials fell below an acceptable standard. *Id.*

In *Sherman v. United States*,[81] the Court implicitly reaffirmed *Sorrells*[82] and the subjective test of entrapment. In *Sherman* the defendant met a government informant while they were both undergoing treatment for drug abuse.[83] Several subsequent meetings followed in which the two shared mutual experiences and difficulties in overcoming their addiction to drugs.[84] Under the guise of experiencing withdrawal and not responding to his drug treatment, the informant asked the defendant if he knew of a drug supplier.[85] Initially the defendant attempted to avoid the issue, but after repeated requests, he obtained a source and supplied the drugs.[86]

The Court found that Sherman had been entrapped as a matter of law.[87] As it had done in *Sorrells*,[88] the Court theorized that the entrapment defense was a creature of legislative intent.[89] In determining whether the entrapment defense had been established, the Court stated that a distinction must be made between law enforcement practices focusing on the "unwary innocent"[90] and those practices focusing on the "unwary criminal."[91] The Court stated it would use the principles established in *Sorrells* in making this determination.[92] In *Sorrells* the Court stated that the controlling question is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of . . . its own officials."[93] *Sherman* reaffirmed this principle.[94]

Although the conviction of Sherman was overturned by unanimous decision, the rationale for determining the entrapment defense was still divided, as evidenced by a concurring opinion[95] which supported the objective test of

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

82. United States v. Sorrells, 287 U.S. 435 (1932).

83. *Sherman*, 356 U.S. at 371.

84. *Id.*

85. *Id.*

86. *Id.* The record showed that the defendant on several occasions purchased the drugs for the informer and used part of each purchase for his own consumption. On each occasion defendant bore the cost of that portion of the drugs that he (defendant) used. *Id.*

87. *Id.* at 373.

88. Sorrells v. United States, 287 U.S. 435 (1932).

89. "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." *Sherman*, 356 U.S. at 372.

90. *Id.*

91. *Id.*

92. *Id.* at 373.

93. Sorrells v. United States, 287 U.S. 435, 451 (1932).

94. *Sherman*, 356 U.S. at 369.

95. Justices Douglas, Harlan, and Brennan joined Justice Frankfurter's concurring opinion. *Sherman*, 356 U.S. at 378-85 (Frankfurter, J., concurring).

entrapment.[96] Much of the concurrence focused on the vices of the majority opinion in *Sorrells*;[97] however, Justice Frankfurter did direct the Court's attention to the objective test and what he considered the crucial question: "whether the police conduct revealed . . . falls below standards, to which common feelings respond, for the proper use of governmental power."[98] He went further to say this inquiry is to be determined on a case by case basis.[99]

In *United States v. Russell*,[100] the Court was faced with the issue of entrapment when a government agent provided an essential ingredient in the manufacture of illegal drugs.[101] The accused was charged with unlawfully manufacturing, processing, and delivering the drug methamphetamine.[102] In *Russell*, an undercover federal narcotics agent told the accused he was interested in controlling the manufacture and distribution of methamphetamines throughout the Northeast.[103] The officer offered to supply the accused with phenyl-2-propanone, a chemical which is essential in the making of methamphetamine,[104] and in exchange the officer was

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96. *Id.* at 385.

> This [objective] test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits, and will give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised. It draws directly on the fundamental intuition that led in the first instance to the outlawing of "entrapment" as a prosecutorial instrument. The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime.
>
> What police conduct is to be condemned, because likely to induce those not otherwise ready and willing to commit crime, must be picked out from case to case as new situations arise involving different crimes and new methods of detection.

Id. at 385.

97. *Sorrells*, 287 U.S. at 435.

In Justice Frankfurter's view it is irrelevant to consider whether the intention of the accused arose in the mind of the government official or the defendant. He asserts that there is no distinction between cases involving decoys where the police simply provide the opportunity to commit a crime and cases whereby the police induce its commission. In both instances the intention is created in the mind of the government agent, yet in the decoy cases the action has been undisputedly permissible despite the source of the intent. *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring).

Further, he reasoned that to utilize a predisposition test undermines what he considered to be the purpose of the entrapment defense – to curtail the overreaching activities of law enforcement officials.

> No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. . . . Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he . . . is said to have a criminal disposition.

Id. at 382-83.

98. *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring).

99. *See supra* note 96.

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

101. *Id.*

102. *Id.* at 424. Methamphetamine is commonly referred to as "speed." *Id.*

103. *Id.* at 425. All of the discussions as well as all of the manufacture of the methamphetamine took place in Washington where the accused lived. *Id.*

104. Testimony at the trial indicated that although the chemical was difficult to obtain, it was not impossible. Though the chemical is not illegal, the difficulty in obtaining it stems from a refusal of chemical suppliers to sell the chemical at the request of the Bureau of Narcotics and Dangerous Drugs. *Id.* at 426-27.

to receive half of all the drugs produced.[105] The accused conceded that he may have been predisposed[106] to commit the crime, but he contended that in view of the officer's integral involvement in the crime, entrapment was established as a matter of law.[107] He based this contention on a due process argument,[108] which is essentially the objective theory argument.

Although the Court did acknowledge that a situation may arise in which government action is so egregious that a due process argument would be persuasive to the Court,[109] it noted that the conduct of the government in this case was not of such character.[110] Justice Rehnquist discussed the development of the subjective entrapment theory established in *Sorrells* and *Sherman*[111] and implicitly reaffirmed them stating that an individual's predisposition should be evaluated subjectively.[112] Applying the subjective test, the Court found the accused predisposed to commit the crime.[113] Justice Rehnquist labeled the accused in terms coined by the *Sherman* Court as an "unwary criminal."[114]

Although disputes surrounding the test to be used to establish the entrapment defense had been apparent since the Court first addressed the issue in *Sorrells*, this theoretical conflict had been waged through concurring opinions.[115] In *Russell*,

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105. *Id.* at 425.

106. The defendant revealed to the officer that he had been making the drug for almost four years and during that time had made approximately three pounds of the drug. *Id.*

107. *Id.* at 427.

108. *Id.* at 430.

The due process argument suggests that the involvement of the police officials is so great that prosecution for any resulting crime would violate the due process guarantee of the Constitution.

The Due Process Clause of the Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

109. *Russell*, 411 U.S. at 431-32 (citing Kinsella v. Singleton, 361 U.S. 234, 246 (1960)).

> While we 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, the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.

Id. (citation omitted).

110. *Id.*

111. *Id.* at 428-30.

112. *Id.*

113. *Id.* at 436.

Since the accused here conceded that the jury in the lower court could reasonably have found that he was predisposed to manufacture, process, and deliver methamphetamine and since the Court refused to recognize this situation as one which demands acquittal on due process principles, the Court had little trouble in establishing that he was indeed predisposed. Once predisposition is established and the defendant has committed the crime, the defense of entrapment is no longer available to the accused. *Id.*

114. *Id.*

115. *See supra* notes 75-80 and 95-99.

however, the dispute widened as Justices Stewart and Douglas advocated the objective approach in full blown dissents.[116]

Dissenting in *Russell*, Justice Stewart strongly rejected the predisposition test and the legislative intent upon which the *Sorrells* Court had based its decision:

> Indeed, the very basis of the entrapment defense itself demands adherence to an approach that focuses on the conduct of the governmental agents, rather than on whether the defendant was "predisposed" or "otherwise innocent." I find it impossible to believe that the purpose of the defense is to effectuate some unexpressed congressional intent to exclude from its criminal statutes persons who committed a prohibited act, but would not have done so except for the Government's inducements.[117]

In Justice Stewart's view, the entrapment defense cannot serve to protect the " 'otherwise innocent,' "[118] but its purpose must be to deter unlawful government investigation activities.[119] In reaching this conclusion, he pointed out that the term "predisposition" is misleading.[120] He reasoned that by virtue of having violated the statute, the accused is clearly not innocent of the crime, and though the precise plan or scheme may not have been his own, he was "predisposed" in that he did in fact commit it.[121] Further, Justice Stewart reasoned that merely because government officials tempted the accused to commit the crime does not make the accused "more innocent or less predisposed" than if he had been tempted by a private person[122]—"which, of course, would not entitle him to cry 'entrapment.' "[123] Since the only difference between these two situations is the source of the temptation, Justice Stewart concluded it was logical that "the significant focus must be on the conduct of the government agents, and not on the predisposition of the defendant."[124]

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116. United States v. Russell, 411 U.S. 423 (1973) (Douglas, J., dissenting); *Russell*, 411 U.S. at 439 (Stewart, J., dissenting).

Justice Brennan concurred with Justice Douglas' dissent, and Justices Marshall and Brennan joined in Justice Stewart's dissent. *Id.*

Justice Douglas' dissent focused on the fact that the government officer had furnished the chemical to the accused which in his words "made the United States an active participant in the unlawful activity." *Russell*, 411 U.S. at 437 (Douglas, J., dissenting).

117. *Russell*, 411 U.S. at 441-42 (Stewart, J., dissenting).

118. *Id.* at 442.

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* Henderson v. United States, 237 F.2d 169 (5th Cir. 1956).

123. *Russell*, 411 U.S. at 442 (Stewart, J., dissenting).

124. *Id.*

Justice Stewart conceded as the concurring opinions in *Sorrells* and *Sherman* that some covert and deceptive police conduct is necessary to deter crime. He articulated what constitutes entrapment:

> When the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred.

Id. at 445.

In *Hampton v. United States*,[125] a government informant not only supplied the accused with heroin, but also arranged for the accused to sell the drugs to undercover drug enforcement officers.[126] The accused did not contend that he was not predisposed to sell drugs,[127] but he sought to utilize the language in *Russell*[128] where the Court had left the door open to a possible due process argument.[129]

In a plurality opinion,[130] the Court denied that the government involvement constituted a complete bar to any conviction as the accused had contended.[131] Justice Rehnquist reaffirmed the predisposition test but went on to limit the application of the due process argument that he, only three years earlier, had recognized.[132] In interpreting *Russell*, Justice Rehnquist said the Court ruled out the possibility of establishing the entrapment defense if the government proved the accused to be predisposed to commit the crime.[133] Since the accused here had admitted his predisposition, he could not avail himself of the entrapment defense.[134]

The concurring opinion written by Justice Powell denied that a situation could never arise that would bar a conviction in the face of defendant's predisposition.[135] Justice Powell emphasized that proof of predisposition would only in rare cases not be dispositive, but he admitted that police overinvolvement in the crime would "have to reach a demonstrable level of outrageousness before it could bar conviction."[136]

The dissent again focused on the conduct exhibited by the government officials and concluded that under the objective view the accused was entrapped as a matter

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125. Hampton v. United States, 425 U.S. 484 (1976).

126. *Id.* at 485-86.

127. The testimony of the accused conflicted with that of the informant. Although the accused admitted to offering to sell and carrying out the sales in question, he denied knowing the substance that he sold was heroin. To the extent that the jury found him guilty of the offense charged, the jury did not fully believe that he did not knowingly commit the crime. *Id.* at 487.

128. *See supra* notes 100-10 and accompanying text.

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

The jury instruction that the accused requested stated:

> The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.
>
> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offense charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

Id. at 487-88 (citation omitted).

130. Justice Rehnquist wrote the opinion with which Justice White and Chief Justice Burger joined. *Id.* at 485. Justice Stevens (who on all prior occasions had joined the majority advocating the predisposition test) took no part in the decision. Justice Powell concurred, with Justice Blackmun joining. *Hampton*, 425 U.S. at 491 (Powell, J., concurring). Brennan dissented with whom Justice Stewart and Justice Marshall joined. *Hampton*, 425 U.S. at 495 (Brennan, J., dissenting).

131. *Hampton*, 425 U.S. at 489-91.

132. *Id.* at 488-91.

133. *Id.* at 488-89.

134. *Id.* at 490.

135. *Id.* at 495 (Powell, J., concurring).

136. *Id.* at 495 n.7.

of law.[137] The dissent distinguished this case from *Russell*, viewing the police conduct here as much more reprehensible:[138] "The Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary."[139]

The first distinguishing fact pointed out by the dissent was that in *Russell* only *legal* chemicals were supplied to the accused—no contraband was involved.[140] In this case, however, the officials provided the accused with the same illegal substance he was convicted of selling.[141] Second, the defendant in *Russell* was involved in the manufacture of drugs before the governmental intervention, and his illegal activity continued after the exit of the enforcement agent.[142] The dissent observed that in this case the "beginning and end of this crime . . . coincided exactly with the Government's entry into and withdrawal from the criminal activity . . . ."[143]

The dissent agreed with Justice Powell's concurring opinion in that predisposition does not preclude a bar to conviction on due process grounds.[144] Moreover, Justice Brennan reasoned that the facts compelled a reversal even under the subjective predisposition test.[145]

In *Mathews v. United States*,[146] the Court determined whether a defendant in a criminal prosecution who denied the essential elements of the crime was entitled to have the jury instructed on the affirmative defense of entrapment.[147]

Fredrick Mathews was an official at the Small Business Administration [hereinafter SBA] and was accused of using his influence there to secure personal loans from a businessman in exchange for help from the SBA.[148] After his arrest, he denied that he had accepted a bribe and at the same time filed a motion in limine requesting that he be allowed to plead entrapment.[149] The district court denied his

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137. *Id.* at 496-97 (Brennan, J., dissenting).

138. "Where the Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser, the Government's role has passed the point of toleration." *Id.* at 499 (citing United States v. West, 511 F.2d 1083 (3d Cir. 1975)).

139. *Id.* at 498 (Brennan, J., dissenting) (citing United States v. Bueno, 447 F.2d 903, 905 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973)).

In *United States v. Bueno*, the Fifth Circuit held that where the government has provided the defendant with the contraband he is accused of selling, the entrapment defense is established as a matter of law. United States v. Bueno, 447 F.2d 903, 905 (5th Cir. 1971).

140. *Hampton*, 425 U.S. at 497-98 (Brennan, J., dissenting).

141. *Id.*

142. *Id.* at 498.

143. *Id.*

144. *Id.* at 497.

145. *Id.*

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

147. *Id.* at 59.

148. *Id.* at 60-61.

The businessman, DeShazer, believed that he had been denied assistance from the SBA because of his refusal to extend Mathews a loan. DeShazer contacted the FBI with his suspicions, and he joined in a sting operation against Mathews. Thereafter, DeShazer offered to meet Mathews in a restaurant to make the loan of the money. Mathews was then arrested. *Id.*

149. *Id.* at 61.

motion, and the United States Court of Appeals for the Seventh Circuit affirmed the decision.[150]

The Supreme Court reversed, holding that, despite his denial of having committed the crime, the defendant was entitled to an entrapment instruction so long as a reasonable jury could find that entrapment existed.[151] Although it did so in dicta, the majority affirmed the accepted subjective test set forth in *Sorrells*[152] and stated that under this test the question of predisposition was one to be decided by the jury.[153]

In *Mathews*, the objective theory lost a great champion when Justice Brennan, finally surrendered to the majority in a concurring opinion:

> Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the Government's conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to *stare decisis*, and today join the judgment and reasoning of the Court.[154]

Although Justice White filed a dissenting opinion, with whom Justice Blackmun joined, he did not speak to the conflict between the objective and subjective theory of entrapment, but confined himself to the issue of inconsistent defenses before the Court.[155]

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150. *Id.* at 61-62.

The trial court denied the motion, saying that as a matter of law the defendant was not entitled to an entrapment jury instruction because he would not admit to the commission of the essential elements of the crime.

> The Seventh Circuit affirmed the trial court's decision: When a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was "the Government's deception [that implanted] the criminal design in the mind of the defendant." We find this to be inconsistent per se with the defense that the defendant never had the requisite criminal intent. We see no reason to allow [petitioner] or any other defendant to plead these defenses simultaneously.

United States v. Mathews, 803 F.2d 325, 327 (7th Cir. 1986), *rev'd*, Mathews v. United States, 485 U.S. 58 (1988) (quoting United States v. Russell, 411 U.S. 423, 436 (1973)) (citation omitted) (second alteration added).

151. *Mathews*, 485 U.S. at 61-62. The Court restated a basic rule: "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Id.* at 63.

152. United States v. Sorrells, 287 U.S. 435 (1932).

153. *Mathews*, 485 U.S. at 63 (citing Sherman v. United States, 356 U.S. 369, 377 (1958)).

154. *Mathews*, 486 U.S. at 67 (Brennan, J., concurring).

155. Justice White stated: "[T]he entrapment defense . . . 'is a relatively limited defense'; it is only available to 'a defendant who has committed all the elements of a proscribed offense.'" *Mathews*, 485 U.S. at 71 (White, J., dissenting) (quoting United States v. Russell, 411 U.S. 423, 435 (1973)).

IV. INSTANT CASE

A. The Majority Opinion

The Court used *Jacobson v. United States*[156] as its most recent forum to reaffirm the subjective theory of the entrapment defense. Not only did the Court use predisposition terminology to resolve the issues presented in *Jacobson*, but it also implicitly reaffirmed the notion that had emerged in *Sorrells* that entrapment was indeed a creature of legislative intent:

> Like the *Sorrells* court, we are "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."[157]

Although the majority,[158] under the pen of Justice White, chose to include a brief discussion of the basis of the entrapment defense, the underlying theory of entrapment was not at issue in *Jacobson*.[159] The sole issue presented was whether the government carried its burden of proving that Mr. Jacobson was predisposed to commit the crime *before* governmental intervention.[160]

Justice White stated: "Where the Government has induced an individual to break the law and the defense of entrapment is at issue . . . the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act *prior to* first being approached by government agents."[161]

The majority pointed out that the sole piece of pre-investigation evidence that the government presented was that Mr. Jacobson had ordered the *Bare Boys* magazines in 1984.[162] From the majority's perspective, this offered little evidence of predisposition to break the law, because at the time of the purchase, Mr. Jacobson was acting within his rights under the law.[163] Justice White conceded that Jacobson's prior purchase might be probative of the defendant's sexual inclinations to view pornographic materials or to otherwise "act within a broad range, not all of which is criminal," but he was quick to establish that this alone is not enough to

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

157. *Id.* at 1543 (quoting Sorrells v. United States, 287 U.S. 435, 448 (1932)).

158. Joining Justice White in the majority opinion were Justices Blackmun, Stevens, Souter, and Thomas. *Id.* at 1537.

159. *Id.*

160. *Id.*

161. *Id.* at 1540 (emphasis added) (citing United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C. Cir. 1991)). Justice White pointed out in a footnote that it is well settled that predisposition of the defendant must be shown to have existed prior to contact with government officers. Furthermore he stated that this idea is so firmly rooted in the case law that "the Government conceded the point at oral argument." *Id.* at 1540-41 n.2.

162. *Id.* at 1541.

163. *Id.*

Although Jacobson purchased the magazines in February of 1984, the federal statute 18 U.S.C. § 2252 did not become law until May of 1984, and Nebraska did not make receipt of child pornography illegal until the enactment of NEB. REV. STAT. § 28-813.01 in 1989. *Jacobson*, 112 S. Ct. at 1541-42.

show predisposition to do what had now become illegal: "[T]here is a common understanding that most people obey the law even when they disapprove of it."[164]

The majority went further to say that even evidence gathered during the investigation but prior to the criminal act was not sufficient to establish the defendant's predisposition.[165] His willingness to respond to the investigator's solicitations and surveys was merely indicative of his personal sexual preferences and inclinations to support private lobbying efforts.[166] The Court again explained its decision pointing out that any willingness to receive sexually explicit materials involving minors came only *after* "the Government had devoted 2 1/2 years to convincing him that he had or should have the right to engage in the very behavior proscribed by law."[167] Finally, in reversing the lower court's decision, Justice White wrote: "Rational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to [the defendant]."[168]

B. The Dissenting Opinion

The dissent[169] in *Jacobson* did not differ from the majority on which theory of entrapment should be used in disposing of the case;[170] it was content to analyze the facts surrounding *Jacobson* using the subjective approach of entrapment.[171] The dissent's dispute with the majority was concentrated in two central areas.[172] First, it believed that the government had met its burden of proving that Mr. Jacobson was predisposed to commit the crime and that a reasonable jury could have found that he was predisposed to receive child pornography.[173] Second, the minority

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164. *Id.*

165. *Id.* at 1542.

166. *Id.*

167. *Id.* at 1543.

Much of the Court's discussion consisted of examples of the governmental conduct in which the fictitious organizations that contacted Mr. Jacobson purported to be lobbying entities which derived their financial resources from catalogue sales. Other examples of the conduct included a reference to contacts from the Customs Service where they claimed to be an international organization opposing all censorship. This organization promised the defendant that any mailings from the organization to him could not be opened by police officers for inspection without a judicial order and implied that the defendant should be allowed to order and enjoy such publications free of censorship. *Id.* at 1542-43.

168. *Id.* at 1543.

169. The dissenters included Justice O'Connor, who wrote the opinion; Chief Justice Rehnquist, and Justices Kennedy and Scalia. Justice Scalia, however, did not join in Part II of the dissent which concerned the minority's opinion that the majority had redefined the meaning of predisposition. Jacobson v. United States, 112 S. Ct. 1535 (1992) (O'Connor, J., dissenting).

170. *Id.*

171. *Id.*

172. *Id.*

173. Justice O'Connor supported the jury's conclusion saying:

> It was . . . the jury's task, as the conscience of the community, to decide whether or not Mr. Jacobson was a willing participant in the criminal activity here or an innocent dupe. The jury is the traditional "defense against arbitrary law enforcement." . . . There is no dispute that the jury in this case was fully and accurately instructed on the law of entrapment, and nonetheless found Mr. Jacobson guilty. Because I believe there was sufficient evidence to uphold the jury's verdict, I respectfully dissent.

Id. at 1547 (citations omitted).

believed that in its analysis the majority had improperly redefined "predisposition."[174]

The dissenters believed that Mr. Jacobson was predisposed to receive child pornography through the mail.[175] Central to this argument was evidence of the defendant's ready compliance with the solicitations of the government.[176] Justice O'Connor, author of the dissent, contended that the determination of predisposition should be made when the defendant was offered an opportunity to commit the crime, not at the time government officials first came on the scene.[177] The dissent, thus, considered Jacobson's ready compliance as convincing evidence of his predisposition to perform the criminal act.[178] Further the dissent failed to see the "substantial pressure" exerted on Jacobson to which the majority had shown so much sympathy.[179] The dissent pointed out that no agent ever approached Jacobson face-to-face,[180] and the letters and solicitations could have been "ignored or thrown away."[181]

The dissenters saw the rule set out by the majority—that preliminary governmental conduct can create predisposition—as too vague a standard and expressed concern that this standard might be misapplied by lower courts.[182] The dissent pointed out that the Court's opinion might be read to prohibit the police from baiting criminals as part of a sting operation "for fear of creating a predisposition in its suspects."[183] Justice O'Connor found it even more disturbing that the majority failed to "distinguish between Government conduct that merely highlights the temptation of the crime itself, and Government conduct that threatens, coerces, or leads a suspect to commit a crime in order to fulfill some other obligation."[184]

Further, the dissent believed that the majority's method of analysis had redefined predisposition.[185] Since the majority had conceded that the defendant had a predisposition to view child pornography, the inquiry should have ended. The majority, however, held that this evidence did not support the inference that he would

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174. *Id.* at 1546-47.

175. *Id.* at 1543.

176. Justice O'Connor points out that Mr. Jacobson was only offered two opportunities to purchase child pornography from government agents, and on both occasions he ordered. *Id.* at 1543.

177. The minority bases this contention on the finding in *Sherman* where the Court decided that a defendant was not predisposed based on "the Government's numerous unsuccessful attempts to induce the crime . . . ." *Id.* at 1544 (citing Sherman v. United States, 356 U.S. 369, 372-76 (1958)).

The majority contended that the issue of predisposition had to be established prior to the first contact with government agents; consequently, it determined that when the first opportunity to buy the illegal materials was afforded to Mr. Jacobson, the prior government contacts had created the disposition to buy those materials so his compliance was not indicative of his predisposition before the government intervention. *Id.* at 1541.

178. Jacobson v. United States, 112 S. Ct. 1535, 1544 (1992) (O'Connor, J., dissenting).

179. *Id.* at 1545.

180. *Id.* at 1543.

181. *Id.* at 1545.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1546.

commit a crime.[186] The dissenters saw this as a new requirement for establishing predisposition:

> Not only must the Government show that a defendant was predisposed to engage in the illegal conduct, here, receiving photographs of minors engaged in sex, but also that the defendant was predisposed to break the law knowingly in order to do so. The statute violated here, however, does not require proof of specific intent to break the law; it requires only knowing receipt of visual depictions produced by using minors engaged in sexually explicit conduct . . . . Under the Court's analysis, however, the Government must prove *more* to show predisposition than it need prove in order to convict.[187]

V. ANALYSIS

In view of the support proponents have given the two divergent theories of the entrapment defense, it is curious to note that the subjective and objective theories of entrapment have drawn their existence from sources which are not as incompatible as the dissenters in *Russell* would contend.[188] The subjective approach was born as a matter of legislative intent, while the objective approach was distinguished as being founded on public policy. It is not difficult to find congruence between these two bases. Normally the intent of the legislative enactment *is* fundamentally grounded in the policies which our society deems important. It follows that showing deference to the subjective approach to entrapment over the objective approach, or vice versa, cannot be justified without a thoughtful contemplation of the policies promoted by each respective theory. In light of this, it is appropriate to analyze the two theories that have given the Court and legal commentators such a grand forum for dispute. Such analysis should not be based merely on conjecture, political ideology, or stare decisis, but instead on the policies that underlie each theory.

A. Purposes

The purpose of the entrapment defense, when considered from the subjective approach, seeks to protect those individuals who are "otherwise innocent" and would not have committed the crime but for the inducement of intervening government officials.[189] If this is the purpose of entrapment, then it is appropriate to have the availability of the defense focus on the accused and whether he or she is in fact "otherwise innocent." Only through a subjective assessment of the accused's innocence can such an inquiry be made.

Justice Roberts, concurring in *Sorrells*, believed the purpose of the entrapment doctrine was to protect "the purity of government and its processes."[190]

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186. *Id.*

187. *Id.* (citations omitted).

188. *See generally* United States v. Russell, 411 U.S. 324 (1973).

189. Sorrells v. United States, 287 U.S. 435, 448 (1932).

190. *Sorrells*, 287 U.S. at 455 (Roberts, J., concurring).

Accordingly, the purpose of the objective approach is grounded in the need for the Court to sustain the sanctity of the criminal justice system by punishing the overreaching conduct of law enforcement and thereby deterring their use of overzealous methods. In achieving such a purpose, it is irrelevant to inquire into the accused's predisposition; therefore, the focus of the defense should rest strictly on "whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power."[191]

B. Supporting the Focus of the Subjective Approach

Perhaps the most fundamental policy underlying the subjective approach is grounded in the substantive criminal law. Generally the purpose of criminal law is to insist that individuals conform their behavior to that which society considers to be desirable and to punish those that run afoul of those societal standards.[192] Regarding crimes that require intent as an essential element, the criminal justice system seeks only to punish those who act with a guilty mind.[193] The courts, therefore, must consider the mental state of the accused, using a subjective standard, to determine whether a particular defendant had the necessary criminal intent to commit the crime for which he is accused.[194]

It logically follows that any defense that would seem to negate or lessen the requisite mens rea[195] would also be evaluated by a subjective standard. This seems to be a reasonable basis on which to rest the subjective approach to entrapment. In *Russell*, the Supreme Court held that "[i]t is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."[196] From this it can be inferred that the Court treats entrapment as a mens rea defense whereby the origin of the intent serves as an excusing factor which reduces the degree of the criminal intent to a level of nonculpability.

According to the Court, the origin of the intent is the factor that may allow the defendant to escape prosecution.[197] If the intent originates in the mind of the accused and he thereafter proceeds to commit the crime, the Court focusing on his subjective intent will not allow the entrapment defense. Since he had subjective evil intent, the wrongdoer will be punished. By denying the defense and punishing the accused for his mens rea, the Court remains true to the tenets of criminal law.

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191. Sherman v. United States, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring).

192. United States v. Granda, 565 F.2d 922, 926 (5th Cir. 1978).

193. The law has chosen only to punish offenders when commission of the proscribed act is accompanied by the concurrent mens rea. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.4 (2d ed. 1986).

194. Those crimes that require intent as an element are called malum in se crimes (those which are wrong in and of themselves or are inherently evil, as opposed to malum in prohibitum crimes which are wrong because they are prohibited by legislation and require no criminal intent). *See* State v. Horton, 51 S.E. 945, 946 (N.C. 1905) (defining and distinguishing between malum in se and malum in prohibitum crimes).

195. Mens rea literally translated means guilty mind. United States v. Greenbaum, 138 F.2d 437, 438 (3d Cir. 1943).

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

197. *Id.*

Alternatively, if the criminal intent originates with the police and they implant the criminal intent in the defendant's mind, the subjective approach to the entrapment defense views the criminal's mens rea as less detestable than that of an accused who commits a crime without government inducement. Professor Roscoe Pound has stated that " '[o]ur traditional criminal law thinks of the offender as a free moral agent who, having before him the choice whether to do right or wrong, intentionally chose to do wrong.' "[198] When using the subjective approach, the belief must be that since the government implanted the criminal intent in the defendant's mind, the accused ceases to be a "free moral agent" and can no longer freely choose to commit or not commit the crime. This lack of freedom, in the eyes of the criminal tradition, reduces the defendant's criminal culpability.

An analogous theory in criminal law is the rule of provocation.[199] Under this theory, the criminal law views a defendant who has killed another human being, with the specific intent to do so, as less guilty if he can show that he killed with adequate provocation.[200] The rule of provocation also requires that the killing be done "in the heat of passion."[201] If a defendant is overtaken with such violent emotion and has no time to cool before acting, he is no longer able to act as a free moral agent.[202] Instead, the "heat of passion" that the defendant experienced, when he had no time to contemplate his actions, deprived him of his will to act as society desires.[203] In the eyes of the law, such a defendant's mens rea is not that of murder.[204] In light of the mitigating circumstances—the provocation—he will be charged with the lesser offense of voluntary manslaughter.[205]

When considering whether the rule of provocation is available, a court must first determine whether a reasonable person in the same situation would have

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198. Harry G. Anderson, Comment, *Some Aspects of the Law of Entrapment*, 11 BROOK. L. REV. 187 (1941) (quoting ROSCOE POUND, CRIMINAL JUSTICE IN CLEVELAND 583-89 (1922)).

Professor Pound is regarded as one of the preeminent scholars of jurisprudence. He served as Dean of the Harvard School of Law and was an accomplished trial lawyer, judge, and teacher. Professor Pound held honorary degrees from over seventeen institutions. For a detailed account of his life and accomplishments, see Mary Fisk Docksai, *Roscoe Pound*, TRIAL, July, 1980, at 44.

199. For an extensive overview of the rule of provocation doctrine and policies concerning the defense see Adrian Briggs, *In Defence of Manslaughter*, 1983 CRIM. L. REV. 764 (1983); William H. Coldiron, *Historical Development of Manslaughter*, 38 KY. L.J. 527 (1949-50); Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981); Joshua Dressler, *Rethinking Heat Of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982); *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021 (1958); John R. Snowden, *The Case for a Doctrine of Provocation in Nebraska*, 61 NEB. L. REV. 565 (1982); Jack K. Weber, *Some Provoking Aspects of Voluntary Manslaughter Law*, 10 ANGLO-AM. L. REV. 159 (1981); Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-Of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679 (1986).

200. *See supra* note 198.

201. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW § 1, at 98 (3d ed. 1982).

Passion has been defined as "violent, intense, high-wrought, or enthusiastic emotion." People v. Borchers, 325 P.2d 97, 102 (Cal. 1958) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, 2d ed. 1934).

202. *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1022 (1958).

203. *Id.*

204. *Id. See generally* ROLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW § 1, at 84-104 (3d ed. 1982).

205. *Id.*

acted out of passion rather than in the way that society would have him act.[206] Second, the focus is placed directly on the defendant to determine if he was under such extreme heat of passion that he could no longer freely choose not to commit the crime.[207] The mens rea defense of the rule of provocation seeks to discern whether there was evil intent and whether the freedom to resist acting on that intent was hindered.[208] If a restriction of free will is found, then the defendant's anti-social behavior is seen as less offensive, and his lessened ability to act freely serves as a mitigating factor which reduces his degree of responsibility for the crime.[209]

Similarly, it can be said that the entrapment defense should focus on the freedom of will of the defendant, just as *Sorrells* and its progeny have held.[210] In substantiating the subjective approach of entrapment, the Supreme Court has never made such an analogy to the rule of provocation nor has it ever expressly classified entrapment as a mens rea defense.[211] When the question of entrapment arises, however, such a comparison provides us with a reasonable justification for focusing on the mental state of the defendant and the origin of any evil intent rather than the actions of governmental officials. When the justification for the entrapment defense is considered along with the general purpose of criminal law, the subjective theory is consistent if the availability of the defense depends on whether the accused had evil intent and from where that intent originated.

When determining the availability of the entrapment defense, the subjective approach provides a method of accurately assessing a person's criminal intent; however, allowing the defense reveals a flaw in its consistency. In order to be wholly consistent with the principles of criminal law and other mens rea defenses, the entrapment defense should act to lessen or mitigate the defendant's criminal culpability but should not totally excuse him from his wrong.

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206. *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1022 (1958).

207. *Id.*

208. *See* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 442 (1982).

209. *Id.*

210. Jacobson v. United States, 112 S. Ct. 1535 (1992); Mathews v. United States, 485 U.S. 58 (1988); Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932); *see supra* part III.

211. Although the Court has never classified entrapment as a malum in se defense, Chief Justice Hughes in *Sorrells* opined: "The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct." *Sorrells*, 287 U.S. at 452.

Justice Roberts concurring in *Sorrells* alluded that under the subjective approach entrapment may be a mens rea defense. In advocating the objective theory he stated:

> This view calls for no distinction between crimes *malum in se* and statutory offenses of lesser gravity; requires no statutory construction, and attributes no merit to a guilty defendant; but frankly recognizes the true foundation of the doctrine in the public policy which protects the purity of government and its processes.

Sorrells, 287 U.S. at 455 (Roberts, J., concurring).

A total defense, such as insanity, excuses the actor from *all* criminal responsibility because the courts reason that the defendant has *no* criminal intent.[212] With entrapment, however, it cannot be said that the defendant was totally void of the required mens rea. Justice Stewart, dissenting in *Russell*, observed that the defendant's having committed the crime shows conclusively that the defendant is not totally innocent.[213] Although the criminal intent may have been implanted in his mind and his ability to act as a free moral agent may have been impaired, the defendant has not been deprived of *all* ability to choose. In view of this, it would be a mistake to allow the guilty defendant to go free.

If entrapment is to be treated as a mens rea defense and is to be consistent with the underlying principles of criminal law, the law must see the origin of the intent as a mitigating circumstance that merely reduces the defendant's mens rea to a lower level of criminal culpability rather than an excusing factor that relieves him of all responsibility for the crime.

C. Supporting the Focus of the Objective Approach

Advocates of the objective theory of entrapment have been more forthcoming with policy to validate the use of the objective theory. The proponents of the objective approach contend that the purpose of the entrapment defense is not to protect the unwary innocent, but rather it is to protect the "purity of government and its processes."[214]

> Because the purpose of the defense is to control impermissible police conduct, "it is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of 'the creative activity' of law-enforcement officials."
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> . . . .
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> . . . If the purpose of the defense of entrapment is to be achieved, the test must be objective and focus only on the methods used.[215]

If the primary purpose of the entrapment defense is to deter the overreaching methods used by governmental agents, then the objective approach is undoubtedly preferable to the subjective approach. By focusing solely on the actions of law enforcement officials, those methods considered to be reprehensible by society and detrimental to the courts and the criminal justice system can be effectively assessed without regard to the propensity of a certain defendant to commit a crime.

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212. Under the *Model Penal Code* when the insanity defense is granted, the defendant is not guilty of the crime because he does not have the capacity to prevent himself from committing it and is thereby unable to conform his conduct to what the law requires. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 36, at 269 (1972).

213. United States v. Russell, 411 U.S. 423, 442 (1973) (Stewart, J., dissenting); *see also supra* notes 117-24 and accompanying text.

214. *Sorrells*, 287 U.S. at 455 (Roberts, J., concurring).

215. People v. Moran, 463 P.2d 763, 768-69 (Cal. 1970) (citations omitted) (quoting Sherman v. United States, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring)).

An underlying policy furthered by the objective approach is that all people are considered equal under the law. Following the objective theory of entrapment, "[p]ermissible police activity does not vary according to the particular defendant concerned."[216] To accomplish the "goal" of the entrapment defense – deterring overzealous police methods – equal treatment under the law is essential. If the entrapment defense were only available to those persons who were considered innocent, then the full deterrent effect of allowing such a defense would be thwarted.[217] Government officials would feel free to employ any method regardless of how reprehensible to tempt, apprehend, and convict those persons such as habitual offenders who would be seen as predisposed. The application of an objective standard, one that focuses only on the actions of the government officials, would effectively prevent such inequity and would ensure that all are treated equally before the law.

Proponents of the objective approach have offered a compelling argument by analyzing the innocent person exception to the entrapment defense.[218] Justice Stewart first made this argument in *United States v. Russell*.[219] This exception provides that if the inducement to commit the crime comes from a private individual who has no connection with law enforcement, the defendant cannot claim entrapment.[220] In supporting the focus of the objective approach, Justice Stewart and other objective view proponents have pointed out that if a law enforcement agent engages in the same techniques as those used by a private person, then the entrapment defense *is* available to the defendant.[221] The only difference between the two situations is the source of the inducement. Where the entrapment defense is allowed, the source of the inducement emanates from the government official.[222] Therefore, it must follow that the focus in determining the availability of the entrapment defense must fall on the activities of the law enforcement officials and not on the subjective propensities of the defendant.[223]

It can also be said that the objective view of the entrapment defense is consistent with the underlying policies of the criminal law jurisprudence. By focusing on the methods used by law enforcement officers and punishing them for overzealous police tactics, the objective approach deters the police from conduct that is seen as intolerable by society, and thereby furthers the aim of the criminal law.[224] It must be recognized, however, that the exoneration of the defendant in order to punish law enforcement is a high price to pay for its misconduct. Not only must this cost

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216. *Sherman*, 356 U.S. at 383 (Frankfurter, J., concurring).

Justice Frankfurter continued: "[S]urely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition." *Id.*

217. MODEL PENAL CODE § 2.13 (1985).

218. *Russell*, 411 U.S. at 442 (Stewart, J., dissenting).

219. *Id. See supra* notes 117-24 and accompanying text.

220. Henderson v. United States, 237 F.2d 169 (5th Cir. 1956).

221. *Id. See also* MODEL PENAL CODE § 2.13 (1985).

222. *Id.*

223. *Russell*, 411 U.S. at 442 (Stewart, J., dissenting).

224. MODEL PENAL CODE § 2.13 (1985).

be borne by law enforcement officials, but society bears the cost of having a guilty individual become immune to prosecution for his wrongdoing.[225]

D. Is Subjective Preference Really Preferred?

Although both the subjective and the objective approaches to the entrapment defense are effective in promoting their respective goals, the Court has chosen to prefer one to the total exclusion of the other. Since the Court has consistently favored the subjective theory of entrapment, it must believe that the purpose of the entrapment defense is to protect those who are innocent and in whom the police have implanted criminal intent.

After *Jacobson*,[226] the support for the subjective approach seems unquestionable.[227] Although the explanation needed in this area is still absent from the Court's opinions, the subjective focus of the defense can achieve the purpose not only of the entrapment defense but also the goals of the criminal law.[228]

This consistency with the underlying tenets of the criminal law jurisprudence is the single distinguishing factor that makes the subjective theory of entrapment preferable to the objective approach. Although flawed in that it totally excuses the defendant's crime instead of merely mitigating it, the Court's treatment of entrapment as if it were a mens rea defense parallels the goals of criminal law by seeking to punish only those who act as free moral agents with the requisite evil intent.

In following the subjective theory of entrapment, there will be a substantial deterrent effect to police in their utilization of detestable methods of law enforcement. Government officials will no doubt be conscious that the subject of their investigation may be set free if they employ unconscionable law enforcement techniques. This by-product of the subjective approach serves as little consolation to advocates of the objective theory who believe that any benefit achieved serves as a mockery to the full deterrent effect that the objective theory could provide.

Despite differences in judicial ideology on the issue of entrapment and the preference for the subjective approach, it cannot be disputed that the Court is moved by audacious activities of government officials when employed to ensnare "helpless" defendants. It is impossible to imagine a court having such a strict view of the subjective entrapment theory that it would render an opinion without being motivated by the overzealous conduct of law enforcement officials. From a practical

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225. Some states believe that if the crime is especially heinous, the cost of allowing the defendant to go free is too great to be borne by society. These jurisdictions will not allow the entrapment defense to intervene and exonerate the defendant who has committed an extraordinarily heinous crime. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.2(a), at 421-22 (2d ed. 1986) (citing MODEL PENAL CODE § 2.13 (1985)).

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

227. *See infra* section V.E.

228. *See supra* text accompanying note 193.

standpoint, the Court considers both the predisposition of the defendant as well as the investigation techniques employed by the police.[229]

If the Court is motivated by subjective and objective theory considerations, then it is important to reflect that in the test used when availing the entrapment defense. It is essential that the Court adopts a test that accurately reflects all factors – subjective and objective – that prompt the defense's availability. Without this, the Court will never end the subjective-objective conflict, nor will the Court ever be successful in effectively leading the lower courts in resolving entrapment issues.

E. Entrapment After Jacobson

In the wake of the *Jacobson* decision there can be little dispute as to which view of the entrapment defense the Supreme Court now supports.[230] Both the five Justice majority as well as the dissent analyzed the factual circumstances using the subjective approach of entrapment by determining the defendant's predisposition to commit the crime.[231] The dispute between the majority and the dissenters did not concern whether to follow the objective or subjective approach, rather it centered almost exclusively around whether Mr. Jacobson was predisposed to commit the crime and when the predisposition of the defendant should have been assessed.[232]

Justice Brennan's concurring opinion in *Mathews v. United States*[233] dealt a blow to those who saw the objective approach as the modern trend of the entrapment defense.[234] There he deviated from his staunch position in the objective theory camp and bowed to stare decisis to align himself with the champions of the subjective theory. If there was any hope that the objective approach to the entrapment defense would emerge again as a viable alternative theory, it seems that *Jacobson* has left no doubt as to its defeat. The lone allusion to the objective theory in *Jacobson* came in Justice O'Connor's dissent to which she immediately tied subjective terminology:

> The crux of the Court's concern in this case is that the Government went too far and "abused" the "processes of detection and enforcement" by luring an *innocent person* to violate the law. Consequently, the Court holds that the Government failed to prove beyond a reasonable doubt that Mr. Jacobson was *predisposed* to commit the crime.[235]

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229. Just one patent example was chronicled in *Sherman* when the Court was motivated by the number of requests made by the government agent and the manner in which he was able to obtain capitulation; the Court also seemed to be moved by the fact that the government induced a reforming drug addict to return to his drug habit. The Court stated: "[The government agent] not only procured a source of narcotics but apparently also induced petitioner to return to the [drug] habit." Sherman v. United States, 356 U.S. 369, 373 (1958).

230. *See generally Jacobson*, 112 S. Ct. at 1535.

231. *Id. See also supra* parts II., IV.

232. *Jacobson*, 112 S. Ct. at 1543-47 (O'Connor, J., dissenting).

233. 485 U.S. 58, 66 (1988) (Brennan, J., concurring).

234. Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 18 (1986).

235. *Jacobson*, 112 S. Ct. at 1547 (O'Connor, J., dissenting) (citation omitted) (emphasis added).

F. Proposal: A Two-Step Analysis

A cursory inspection of the five-to-four majority in *Jacobson* may seem to suggest a narrow defeat of the proponents of the objective test and continued struggles on the Court concerning the entrapment theory; however, a closer examination reveals a decisive victory for the predisposition test and the subjective theorists.[236] The controversy over which test of entrapment should be used may at this point be moot, but there are still underlying theoretical questions that the *Jacobson* decision did not resolve. Although it can be deduced from the majority opinions[237] that the purpose of the entrapment defense is to protect the individual who is not predisposed to commit a crime, the Court's majority opinions have patently avoided any discussion of why the subjective approach of entrapment is so preferable to the objective test that it should preclude *any* integration of the two approaches.

Regardless of which theory of entrapment the Court or legal commentators choose to support, both the subjective and the objective theories further valid goals.[238] It is essential to realize that the practical utilization of one approach is not mutually exclusive of the other – a pawn that neither objective nor subjective theorists have been willing to concede.

Such concessions in this doctrinal conflict call for a novel approach to entrapment, one which accurately reflects all factors that should be assessed when determining the availability of the defense. A two-step analysis requiring both objective and subjective inquiries[239] could accomplish the aims of both the objective and subjective camps.[240] This analysis would allow the Supreme Court to guide lower courts' decisions by using a test that resembles a practical evaluation of an entrapment issue.

First, the Court should objectively assess the police conduct and the methods which the police employed. Such an investigation should center around whether the police conduct is, in the words of the Court, of the type that "falls below standards, to which common feelings respond, for the proper use of government power"[241] or of the type that would tend to compromise the integrity of any government condoning such methodology. The defendant should have the burden of

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236. *See supra* section V.E.

237. *See Jacobson*, 112 S. Ct. at 1535-43; Mathews v. United States, 485 U.S. 58, 58-66 (1988); Hampton v. United States, 425 U.S. 484, 484-91 (1976); United States v. Russell, 411 U.S. 423, 423-36 (1973); Sherman v. United States, 356 U.S. 369, 369-78 (1958); Sorrells v. United States, 287 U.S. 435, 435-42 (1932).

238. *See supra* section V.A.

239. Such a test has been recognized by Dean Paul Marcus as what he calls the hybrid test. In his article, he recognized that several states have either by statute or by judicial interpretation adopted a test that utilizes both objective and subjective standards in order to determine the availability of the entrapment defense to the accused. Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5, 34 (1986).

240. *See supra* part V.A.

241. *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring).

showing[242] that the questionable police conduct would have caused a reasonable person to commit the same crime.[243]

Second, a subjective investigation should be made into whether the defendant was predisposed to commit the crime. A court must inquire into the defendant's past and present specific acts in order to assess the accused's propensity to commit the crime.[244] In order to benefit from the entrapment defense the accused must prove that he was not predisposed to commit the crime and that the government conduct caused *him* to commit the crime for which he is charged.[245] Further, the defendant must prove that not only did the police conduct induce him to commit the crime, but that such police methods would have induced any reasonable person to act similarly.

Once the defense has established both the objective and the subjective parts of the two-step analysis, the entrapment defense should be available to the defendant. By requiring a two-part standard for the defense, the sanctity of the government and its processes is protected, and police are deterred from using overzealous methods. At the same time, the individual who is not predisposed to commit a crime, absent egregious police activity, is protected from criminal prosecution. Recognizing the reality of how the Court resolves entrapment controversies – the Court's being moved by both objective and subjective considerations – this type of analysis would provide the criminal law with a practical standard by which all entrapment decisions could be governed. Such a standard would also provide the jurisprudence with a decisive resolution to a doctrinal conflict that has raged for over three-quarters of a century.[246]

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242. This allocation of the burden of persuasion is wholly constitutional. *See, e.g.*, Patterson v. New York, 432 U.S. 197 (1977) (holding that placing the burden of persuasion on the defendant to establish an affirmative defense does not violate the Due Process Clause).

Although it may be argued that placing the burden of persuasion on the defendant implicates the violation of due process rights guaranteed by the Fifth and Fourteenth Amendments, the United States Supreme Court has held that states can regulate the administration of their laws including allocating the burden of pursuasion so long as the state law does not " '[offend] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Medina v. California, 112 S. Ct. 2572, 2577 (1992) (quoting *Patterson*, 432 U.S. at 201-02).

243. New Jersey has a statute that utilizes both the subjective and the objective approaches of the entrapment defense. N.J. STAT. ANN § 2C:2-12 (West 1982). *See also* New Jersey v. Rockholt, 476 A.2d 1236, 1241 (N.J. 1984) (interpreting statute to require dual standards).

244. This propensity is nothing more than the predisposition of the defendant to commit the crime.

The Seventh Circuit laid down some factors relevant to the inquiry of predisposition. Those factors are:

> (1) assessing the character or reputation of the defendant, including any prior criminal record; (2) whether the suggestion of criminal activity was made by the government; (3) whether the defendant was engaged in criminal activity for profit; (4) whether the defendant expressed reluctance to commit the offense which was overcome only by repeated government inducement or persuasion; and (5) the nature of the inducement or persuasion applied by the government.

United States v. Perez-Leon, 757 F.2d 866, 871 (7th Cir. 1985) (citing United States v. Kaminski, 703 F.2d 1004, 1008 (7th Cir. 1983)).

245. *Id.*

246. It has been over seventy-five years since the Ninth Circuit Court of Appeals handed down its opinion in *Woo Wai v. United States*, the first decision which recognized the entrapment defense. Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).

The adoption of such a two-part standard would allow the Court to re-assess entrapment as a total defense. This two-part analysis mirrors the analysis used in homicide cases when the rule of provocation defense is offered. In those cases the Court reasons that if the assailant was acting under such extreme heat of passion that he could no longer act as a free moral agent and if a reasonable person would have acted out of passion rather than reason, then the defendant will not be convicted of murder but will be guilty of manslaughter.[247] If the Court is to treat the entrapment defense like mens rea defenses, such as the rule of provocation, then the Court must consider the defendant's criminal intent and allow him to be punished accordingly.

If government officials implant criminal intent into the defendant's mind and entice him into committing a crime, the defendant cannot claim that he had no mens rea or that he was totally without freedom of choice. His having committed the crime is evidence that he had some evil intent, and although police persuasion may have been extreme, he could have chosen to abstain from the criminal activity.[248] By considering entrapment to be a complete defense, the courts do not punish the defendant for acting on his intent. In doing so, the Court ignores this criminal intent and the defendant's freedom of choice.

This choice is what distinguishes the entrapment defense from other complete defenses such as necessity or coercion. A starving man without any other means must steal to survive. When faced with the choice between stealing food and death, such a man is faced with *no* choice. The necessity defense completely absolves this man of culpability.[249] Similarly, a woman forced at gun point to drive a fleeing felon to safety has *no* choice but to comply, nonetheless she is an accomplice. Since her compliance was coerced, however, she has no criminal responsibility.[250]

In order to bring the entrapment defense in line with other mens rea defenses—defenses that seek to punish only those with the requisite criminal intent—entrapment should not serve to excuse the defendant from all criminal responsibility. A finding of entrapment should, however, serve to mitigate the amount of criminal culpability the defendant should bear. If investigation techniques were employed that would have persuaded a reasonable person to commit the crime and those techniques caused the otherwise innocent defendant to commit the crime, then the crime for which the defendant is charged should be mitigated proportionally to reflect his reduced mens rea. A total excuse for his crime cannot be justified.

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247. *See* William H. Coldiron, *Historical Development of Manslaughter*, 38 KY. L.J. 527 (1949-50).

248. *See, e.g.*, Jacobson v. United States, 112 S. Ct. 1535, 1543 (1992) (O'Connor, J., dissenting). Justice O'Connor pointed out that Jacobson was never approached or solicited by a government agent face to face and suggests that the letters and brochures could easily have been ignored or thrown away. *Id.*

249. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.4(a) (2d ed. 1986).

250. *Id.* § 5.3(a).

IV. CONCLUSION

The failure of the Court in *Sorrells*[251] to state decisively the purpose of the entrapment defense fueled the fire which had been raging in the lower courts over which theory of entrapment should be adopted. Since *Sorrells*,[252] the Court has rendered five opinions[253] on the issue of entrapment and each time has affirmed the use of the subjective entrapment theory. Each time, however, the Court has failed to put an end to the controversy by unequivocally stating the purpose of the entrapment defense. If the Court had said that its purpose is to punish the overzealous activities of law enforcement, the lower courts and legal commentators would have no choice but to follow the objective approach which most effectively reaches that end. Alternatively, if the Court had held that the purpose of entrapment is to protect the innocent who would otherwise not have committed a crime, then lower courts and legal theorists would undoubtedly support the subjective approach to the defense. It is this failure to identify the purpose for the entrapment defense that has created such polarity within the legal community which only the Court can bring to an end.

The Supreme Court was given an opportunity in *Jacobson v. United States*[254] to put the controversy surrounding the entrapment defense to rest. Although the Court in *Jacobson* took great strides in solidifying the use of the subjective approach to the entrapment defense in our criminal jurisprudence, the Court again failed to offer any validity for their decision to support the subjective approach to the absolute exclusion of any objective considerations.

An approach to the entrapment defense that appears to be preferable to either the subjective or objective theory is one that more accurately reflects the varied considerations contemplated when determining the availability of the entrapment defense. Such an approach would involve a two-step analysis[255] combining both objective as well as subjective considerations. Further in order to maintain consistency with the criminal law, entrapment should not constitute a complete defense but should serve only to mitigate the defendant's responsibility for the crime. This approach does more than accomplish the objectives proffered by one camp of entrapment theorists at the expense of the other; it simultaneously fosters the goals of each while remaining in accord with basic criminal law principles.

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251. Sorrells v. United States, 287 U.S. 435 (1932).

252. *Id.*

253. *See* Jacobson v. United States, 112 S. Ct. 1535 (1992); Mathews v. United States, 485 U.S. 58 (1988); Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958).

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

255. *See supra* part V.F.