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Out of the Quagmire After *Jacobson v. United States*: Towards a More Balanced Entrapment Standard

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I. INTRODUCTION

The entrapment defense is a seldom used, but often touted, retort to criminal prosecutions, particularly where law enforcement officers have employed persuasive techniques to secure participation in proscribed activity. Aside from examinations of notorious cases,[1] little attention has been given to this means of avoiding criminal responsibility.[2] However, as the focus on drug-related offenses intensifies and enforcement methods increase in sophistication, the doctrine of entrapment may become a more critical factor in criminal procedure. As the "war on drugs" has escalated, government

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[1] Two of the more notorious sting operations were Abscam and the case of John DeLorean. The former involved a standard FBI undercover scheme to recover stolen art work and securities that developed into a bribery investigation resulting in the conviction of seven congressmen and a host of other various officials. *See particularly* United States v. Kelley, 707 F.2d 1460, 1461 (D.C. Cir. 1983), and Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1565 (1982). The latter involved an FBI operation, in which an automobile entrepreneur became involved in a major drug transaction ostensibly to save his ailing manufacturing business. The jury in DeLorean's trial found that the government had entrapped the defendant and acquitted him. *See* Maura F.J. Whelan, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1193 (1985).

[2] A notable exception is the work of Paul Marcus. *See particularly* PAUL MARCUS, THE ENTRAPMENT DEFENSE (1989).

agents have turned to more cogent techniques to apprehend dealers; ensnared defendants have then resorted to the use of the entrapment defense to combat these more sophisticated efforts. As it is currently structured, however, the entrapment defense is incapable of dealing with these new methods.

This impotence is particularly acute in the area of the "reverse sting" or "reverse buy." Unlike the traditional "sting," where undercover officers pose as buyers of illicit goods or services, in the "reverse sting," law enforcement personnel act as sellers. Agents use various techniques to promote the sale of illegal services or goods such as felony-sized quantities of narcotics. Upon consummation of the sale, perpetrators are arrested for such offenses as possession with intent to distribute, or in the case of federal offenses, attempting to possess controlled substances.[3]

With the traditional sting, where government agents offer to purchase contraband from a defendant, the entrapment defense provides a workable mechanism to determine whether criminal liability will attach in the federal courts. In these cases, entrapment hinges on predisposition, which is the defendant's inclination to commit an offense prior to engaging in the criminal conduct. Proclivity to engage in criminal conduct is difficult to deny when a defendant actually provides contraband to an enforcement agent. Because predisposition is evident, or at least arguably present, the techniques of inducement used by enforcement personnel to secure a transaction become largely insignificant.[4] In the context of reverse stings and other variations of the traditional sting, however, the issue is far less clear-cut. The notion of predisposition becomes a significant issue, and the role of enforcement officers in securing cooperation becomes critical.

This article will demonstrate that traditional approaches to the entrapment defense are either unworkable in practice or unjust in result. The United States Supreme Court's recent attempt to resolve the confusion via *Jacobson v. United States*[5] only added to the

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[3] Because of Drug Enforcement Administration (DEA) guidelines, which prohibit illegal narcotics from being placed into the hands of a suspect under investigation, federal agents cannot arrest suspects for possession of controlled substances. Instead, would-be drug buyers are prosecuted for attempting or conspiring (21 U.S.C. § 846) to possess controlled substances (21 U.S.C. § 841(a)(1)).

[4] There are some notable exceptions to this general rule, not the least of which are the two most significant historical cases in this area: Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958). While these decisions represent the core of the philosophy behind the current federal approach, neither typify the common "sting" operation. *See infra* notes 36-62 and accompanying text.

[5] Jacobson v. United States, 112 S. Ct. 1535 (1992).

quagmire. This discussion will begin by describing the concept of the "sting" operation and its variations throughout law enforcement. The entrapment defense will be examined, specifically the two major approaches currently used (subjective and objective) to determine entrapment, and the unique problems the reverse sting poses for the entrapment issue. This analysis will conclude that current methods of determining entrapment are simply unworkable, and a new strategy is needed. Finally, this article will offer a new proposal, which combines both the traditional objective and subjective approaches. The concept involves a balancing of governmental impropriety (most often associated with the objective approach) against offender predisposition (usually found central to the subjective view). Under this proposal, the defendant can raise the entrapment defense only when some type of governmental impropriety is present. Once so found by the court, evidence of the improper action would be submitted to the jury, along with facts relating to the defendant's predisposition to commit the offense. The jury would then be charged with finding entrapment if the government's improper behavior outweighed the defendants' proclivity to engage in the misconduct.

I. THE WORLD OF "STINGS"

Sting operations have been popular among enforcement personnel for almost two decades. Initially, stings were used primarily to snare burglars and other thieves. In the early 1970s, undercover officers began setting up false business operations which were purportedly establishments where stolen merchandise could be "fenced."[6] Often utilizing funds provided by the federal government through the Law Enforcement Assistance Administration (LEAA), officers would "engage in the business of buying stolen goods. After a short period, the officers [would] obtain indictments against the criminals who [had] sold them the stolen goods, and a large number of criminals [would] then be rounded up[7] at about the

[6] The practice of government officers establishing crime-related fronts in order to lure offenders into engaging in illegal enterprises has been in the law enforcement arsenal for some time. In the traditional "sting" operation, law enforcement officers often establish a front, such as a business for the illegal "fencing" of stolen property. Then, often relying solely on word-of-mouth, they begin to purchase merchandise, usually from local burglars and other larceny offenders. Videos are normally made of the operation, and a grand jury issues indictments based on the evidence presented.

[7] Sometimes these "round-ups" would net unintended bystanders. Such was the case when on February 5, 1985, after a joint operation between the FBI, DEA, and the Georgia Bureau of Investigation, enforcement officials threw a private "party" at an exclusive Buckhead Club in Atlanta, Georgia, for individuals who had been secretly in-

same time."[8] In 1976, LEAA reported that twelve sting operations had netted over 1300 arrests and recovered almost $26 million in stolen property. With many of the transactions on video tape, it was estimated that the conviction rate reached almost 95 percent.[9]

The use of the "reverse sting" as a law enforcement tool seems to be a relatively new strategy. The concept, which involves the encouragement of would-be offenders to participate in a criminal event staged by officials, surfaced in the early 1980s under the nomenclature of the "reverse buy" or the "buy/bust" in drug cases.[10] Like its counterpart, the traditional sting, the reverse sting involves the enticement of offenders into a criminal enterprise. In the reverse sting, however, the would-be offender buys illicit goods or services that are offered by the government; thus the purchaser violates the law by accepting the offer.[11] Abscam and the pursuit of John DeLorean are perhaps the most notorious federal reverse sting operations.

Abscam, so named for the FBI front organization, Abdul Enterprises, initially involved a typical "sting" operation that targeted stolen art and securities. However, shortly after the operation began, two individuals approached undercover FBI agents, who were posing as representatives of wealthy Arab investors, about financing equipment purchases, which would include bribing local officials. This led to a "reversal" of the operation and the uncovering of corruption in the Immigration and Naturalization Service and eventually resulted in the conviction of seven congressmen.[12]

The case of John DeLorean involved a reverse sting operation, which was adjusted after it began in order to maintain DeLorean as a principal target. DeLorean, whose ailing motor company needed an infusion of cash, was approached by a "former neighbor and oc-

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dicted. Among those inadvertently arrested was then Assistant Chief Eldrin Bell of the Atlanta Police Department. David Craig, *Deputy Chief Eldrin Bell Demoted*, ATLANTA CONSTITUTION, Feb. 6, 1985, at A14.

[8] JOSEPH DELADURANTEY & DANIEL SULLIVAN, CRIMINAL INVESTIGATION STANDARDS (1980).

[9] David Pike, *12 Sting Operations Recover More Than $26 Million*, 6 LEAA Newsl. 9, Apr. 1977, at 8.

[10] *See, e.g.*, United States v. Pennell, 737 F.2d 521, 523 (6th Cir. 1984) (defendant paid some $43,000 in cash to DEA agents for two pounds of what he believed to be cocaine).

[11] The Eleventh Circuit defines it this way: "In this type of undercover narcotics operation, known as a 'reverse sting,' undercover law enforcement officers pose as sellers of previously confiscated drugs, set up deals with would-be buyers under carefully controlled conditions, and arrest the purchasers following the sale." United States v. Walther, 867 F.2d 1334, 1335 (11th Cir. 1989).

[12] *See* United States v. Kelley, 707 F.2d 1460, 1461 (D.C. Cir. 1983).

casional narcotics dealer."[13] He was allegedly invited to participate in the financing of a major cocaine deal, which involved an investment of some $2 million on DeLorean's part and could net him as much as $60 million. When DeLorean could not raise the capital, the plan changed so that he only had to put up collateral. A jury acquitted DeLorean based on his entrapment defense and the government's failure to prove its case.[14] DeLorean's case gained notoriety as an example of intolerance of overbroad governmental activity, particularly as it related to reverse sting operations.[15]

The DeLorean case closely resembles a variation of the reverse sting, which has been characterized as a "take back" or "circular sting." In this situation, government agents act as both seller and buyer with the target individual acting as an intermediary. An early case was *United States v. Bueno*,[16] where the defendant, a narcotics addict, was approached by another addict who was actually an informer working for the federal government. The informant purchased heroin in Mexico, smuggled it into the United States, and then made arrangements for the defendant to sell the heroin to a government agent posing as a buyer.[17] The agent purchased heroin twice from the defendant, who was arrested and convicted for selling narcotics.[18]

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13 Whelan, *supra* note 1, at 1198.

14 *Id.* at 1199.

15 Although there is some dispute over DeLorean's role as the originator of the initial contact, thereby casting doubt on his predisposition, the jury seemed to be more concerned with the government's behavior than DeLorean's proclivity. According to juror accounts, the jury appeared to have ignored the court's standard "subjective approach" entrapment instructions, which the defense requested and chief defense attorney Howard L. Weitzman "eloquently pleaded" in the closing arguments. Katherine Macdonald, *NOT GUILTY: Verdict's Effect On "Stings" Eyed*, WASH. POST, Aug. 17, 1984, at A1. The jury appeared to have acquitted DeLorean because of the impropriety of the government's action, and not DeLorean's predisposition to commit the offense. According to one account, "Weitzman said that jurors 'didn't like the case, they didn't like what happened.' The jurors intended, he said, 'to send a message to the public and to the system at large that this is the beginning of a new era in law enforcement. . . . Our citizens will not tolerate this type of conduct, setting up people." *Id.* As another report stated, "the defense, in effect, put the Government's undercover investigative methods on trial." Judith Cummings, *DeLorean is Freed of Cocaine Charge by Federal Jury*, N.Y. TIMES, Aug. 17, 1984, at A1. *See also* Whelan, *supra* note 1, at 1199-1200.

16 United States v. Bueno, 447 F.2d 903, 904 (5th Cir. 1971).

17 The informer told the defendant that he needed assistance because he had already "burned" the buyer by selling him a substantially diluted product. *Id.*

18 The court reversed the conviction on the basis of entrapment, holding that unless the government could rebut the defendant's version of the facts, the conviction was barred as a matter of law. The court seemed to be most troubled by the defendant's version of the facts:

> If this testimony is true, it is quite apparent that the heroin was purchased in Mexico with the government informer's money and credit. It is further apparent that the

Since *Bueno*, a number of cases involving reverse and circular stings have been reported. Many have involved the sale of narcotics but others, like *Jacobson v. United States*,[19] entailed other activities, such as the purchase of child pornography. The central theme in all of these cases echoes the concerns expressed by the *Bueno* court: the facts involve the government buying contraband from itself through an intermediary, the defendant, and then charging that person with the crime.[20] As the Fifth Circuit discovered in *Bueno*, the entrapment defense and the willingness of a defendant to participate in the sale, "which is common to the usual entrapment defense, is no answer."[21] Entrapment as it is currently structured in the federal courts simply does not address the issue properly.

II. ENTRAPMENT AS A DEFENSE TO CONDUCT

A. THE ENTRAPMENT DEFENSE IN GENERAL

Entrapment is considered a member of the family of affirmative defenses.[22] Broadly speaking, this family includes a variety of mechanisms whereby criminal liability is waived because of some compelling reason asserted by the defendant. Generally, this family includes two categories: the justification branch and the excuse branch.[23] The former incorporates grounds such as self-defense and the defense of persons and property. A defendant who raises such a defense does not deny committing a criminal act but, in an

heroin was smuggled into the United States by the Informer. The story takes on the element of the government buying heroin from itself, through an intermediary, the defendant, and then charging him with the crime. This greatly exceeds the bounds of reason stated by this court in Williamson v. United States, 311 F.2d 441 (5th Cir. 1962).

Bueno, 447 F.2d at 905.

19 112 S. Ct. 1535, 1537 (1992).

20 *Bueno*, 447 F.2d at 905.

21 The court went on to say:

In such cases where the issue is willingness or unwillingness of the defendant, the defense becomes a jury question because the sale itself constitutes evidence of willingness contrary to the defense of unwillingness. The issue there [in traditional entrapment cases] is not what he did but why he did it, i.e., because of coercion. The issue here is what he did, i.e., taking heroin from one government agent and selling it to another. The government's case cannot rest on the mere fact that he entered into the Informer's plan willingly.

Id. at 906.

22 *See* MARCUS, *supra* note 2, § 1.03; WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 5.2 (1986).

23 While few commentators directly address this concept, most tend to either lump defenses to criminal conduct into one broad category of "Justification and Excuse" like LAFAVE & SCOTT, *id.* § 5, or they separate certain "Special Defenses" from acts that limit a defendant's criminal responsibility, as does ROLLIN PERKINS, PERKINS ON CRIMINAL LAW §§ 9, 10 (1957). Others abandon any attempt to classify defenses. *See* SUE REID, CRIMINAL LAW 67-69 (2d ed. 1992).

attempt to obviate responsibility, claims that the conduct was justified by certain circumstances outside the defendant's control. In other words, the defendant stipulates to the intent to commit the act but defends the act based on circumstances that would cause a reasonably prudent person to do likewise. Thus, the conduct is considered justified in the eyes of the law.

The justification asserted most often is self-defense. Under this defense, if the accused reasonably believes that danger of death or serious injury is imminent, then the force necessary to repel an attack is justified.[24] The rationale for this justification is that it is only "just" to allow someone who is placed in danger to take necessary protective measures,[25] even those which otherwise constitute criminal acts. Self-defense is also based on the notion that the defensive act will promote social good, in that protecting one's self from attack is the proper course of conduct.[26] The same policy could apply to prevention of a crime and the defense of property, although there are limitations to the options available in these areas.[27]

The other side of the defense family consists of "excuses," in which the defendant either lacks the requisite intent (*mens rea*), or intent is excused due to mitigating circumstances.[28] The defenses of age and "insanity" fit the first strand, while the doctrines of necessity and duress fit the second. Under the defenses of age and, to an extent, insanity, the defendant claims to lack the means to form a critical portion of the *corpus delicti, mens rea*.[29] While there is evidence of guilty conduct (the defendant generally admits to the criminal act), there is uncertainty as to whether the accused possessed a

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24 State v. Goodseal, 183 N.W.2d 258, 263 (Neb. 1971).

25 LAFAVE & SCOTT, *supra* note 22, § 5.7.

26 *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 199 (1987).

27 In the area of crime prevention, or "law enforcement" as it is sometimes called, the Supreme Court in Tennessee v. Garner, 471 U.S. 1, 8 (1985), held that the use of deadly force to stop a fleeing felon was excessive unless it is considered "reasonable" under the Fourth Amendment. Generally, reasonableness includes knowledge that the felon committed a violent crime or reason to believe that the suspect will commit a violent crime. As to the defense of property, case law has evolved in this area to the point where preventive techniques generally must be non-life threatening unless serious violent felonies are involved. *See* People v. Ceballos, 526 P.2d 241, 245 (Cal. 1974).

28 DRESSLER, *supra* note 26, at 199.

29 *Mens rea*, or criminal intent as it is more commonly known, is one of the three basic requirements for criminal responsibility. Known also as the *corpus delicti*, the "body of the crime" consists of three parts. First, the defendant must have engaged in an *actus reus* ("guilty act") that is prohibited by the criminal law. Second, the defendant must have a guilty mind (*mens rea*), meaning that the defendant intended the untoward consequences. Finally, there must be some causal connection between the two. Put another way, the guilty mind put the guilty act into motion. For a detailed seven-point system, see JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 47 (2d ed. 1947).

"guilty mind" at the time of the crime. Society excuses such conduct because to do otherwise would hold an incompetent person responsible for a crime.[30]

Under the defenses of necessity and duress, a defendant is released from responsibility for an otherwise criminal act because a greater evil would have resulted had the accused not acted. Here, the defendant has the requisite intent to be held accountable, but the conduct is excused because it represents the lesser of the two evils. However, unlike self-defense, excuses such as duress or compulsion lack the element of social good that would allow for the justification of the proscribed conduct.[31] To illustrate, society is willing to justify the act of a person who, while under attack, kills someone else in self-defense. The social good derives from the survival of the righteous individual over the wanton. With duress, on the other hand, it is more difficult to "justify" the perpetration of a fraud by a bank president because a member of his family is held hostage by a malefactor. In this latter example, society is willing to excuse (not justify) the conduct because the alternative would perpetrate a greater harm (not provide for a greater good).

The defense of entrapment, unfortunately, does not fit comfortably into either family, although it has characteristics of both. Like self-defense, entrapment assumes that the accused fully intended to commit the proscribed acts. Likewise, the accused is thrust into circumstances brought about by another party, which at least encourages criminal behavior. It is at this point that the two defenses part company because, unlike self-defense, where protecting one's self is the better course of conduct, there is no such justification for entrapment.

Entrapment also can be aligned partially with the excuse defenses. If a defendant was duped into participating in a criminal act and thus lacked predisposition, then it could be argued that there was no criminal intent. However, if predisposition is not required, then entrapment loses its appeal as an "excuse" for criminal conduct.[32]

The fact that entrapment is neither fish (justification) nor fowl (excuse) may explain why it generates such controversy and consternation when it is applied. It is difficult to use entrapment to "justify" a criminal act because it would be neither "just," nor would it

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30 LAFAVE & SCOTT, *supra* note 22, at 308.

31 *See* PERKINS, *supra* note 23, at 840.

32 This latter argument is frequently cited as the foundation for the objective approach to entrapment, whereas the former is most often associated with the subjective approach. Both are discussed in detail, *see infra* notes 36-92 and accompanying text.

promote some social good. It is also difficult to "excuse" crime through the entrapment defense. While it would be possible to argue that a defendant who was not predisposed to commit the crime lacked the requisite intent to be held accountable, it is difficult to contend that the defendant is excused because of some greater evil, like improper government conduct.[33]

Some independent policy explanation therefore must support entrapment. Such a public policy rationale emerges from two interrelated questions, both of which are tied closely to the basic concept that the activities of government officials caused the defendant to engage in criminal behavior.[34] The first policy question is whether the government should be allowed to engage in clearly improper and often illegal behavior to carry out its law enforcement mission. The second issue concerns allowing the government to manufacture crime that might not otherwise occur. These policy issues are intertwined with the two major legal approaches to entrapment.[35]

B. APPROACHES TO ENTRAPMENT

There are two generally recognized approaches which various jurisdictions take toward the defense of entrapment: the subjective, or predisposition, avenue taken by the federal government and a majority of states, and the objective, or government instigation, approach that has been adopted by other jurisdictions. Under the sub-

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[33] This "homelessness" may be linked to the bifurcated view of the defense. Entrapment, according to the "objective" view, might be justified because this approach treats the defendant's predisposition as irrelevant and instead concentrates on government conduct. The opposite effects result when the "subjective" approach is taken in cases where the entrapment defense is available only to defendants who are not predisposed. Crime could never be "justified" according to the subjective view because the defendant lacks the requisite intent to engage in the conduct. The defense is only partly welcome in the excuse side of the family as well. Here, the results are just the opposite, depending on which view of entrapment is used. According to the objective view, entrapment would never be excused because to do so would require ignoring intent. On the other hand, if the subjective view of entrapment is taken, conduct could be excused if the defendant was not predisposed to commit the act.

[34] These explanations for entrapment are extrapolated from the general justifications, which are normally associated with the two primary approaches to this defense: the subjective approach and the objective approach. Both views of entrapment will be examined more closely later along with the justifications which support each approach.

[35] The first question is obviously tied to the objective approach but is closely related to the subjective strategy as well. The defendant's predisposition not to commit the crime, by definition, should be unaffected by "normal"/non-intrusive government behavior. Otherwise, the defendant would not be predisposed. As such, this question can equally apply to either approach. The second question is somewhat related to the traditional explanation for the subjective approach: government-instigated crimes are not thought to be the objects of proscription in penal codes, but it is also tied to the objective approach. *See* Sorrells v. United States, 287 U.S. 435 (1932).

jective approach, the salient factor is the defendant's predisposition to commit the crime in question. According to the objective view, predisposition is irrelevant. Rather, the objective approach focuses on the conduct of government officials. This article will next discuss each of these approaches in turn.

1. Subjective Approach

The subjective approach, also known as the *Sorrells-Sherman* doctrine,[36] entails a two-step test where the threshold requirement is government instigation of a criminal offense. Once this level of involvement has been found,[37] the focus shifts to whether an "otherwise innocent" party has been lured into the commission of a crime.[38] The primary focus of attention under the subjective view is whether the particular defendant in question was "predisposed" to committing the crime prior to government instigation.[39]

There are two primary justifications for the subjective approach. The first involves the public policy argument expressed by Chief Justice Hughes in *Sorrells v. United States*. In this Prohibition Era case, the Court held that the jury should have been allowed to consider an entrapment defense after a revenue agent, posing as a furniture salesman and war veteran, repeatedly asked the defendant to secure liquor for him as a personal favor.[40] The Court based its ruling in part on its belief that the evidence supported the defendant's claim that he was not predisposed to commit the offense[41] and that it was against public policy to convict such non-disposed parties. This position was buttressed by the conclusion that "it was [not] the intention of the Congress in enacting [the National Prohibition Act] 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 com-

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36 So named for Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958).

37 It should be noted that the Court in both *Sherman* and *Sorrells* stated that when the government merely provided the opportunity, this threshold was not met.

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

39 *Id.* at 451; *Sherman*, 356 U.S. at 372.

40 *Sorrells*, 287 U.S. at 452.

41 As to predisposition, the majority said:

> It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.

Id. at 441.

mission and to punish them."[42] In other words, convictions secured via entrapment should not be sustained by the courts because they involve activities not targeted by the legislation.

In *Sherman v. United States*, the Court affirmed the *Sorrells* rationale and reiterated that "[t]he function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime."[43] The Court ruled that entrapment was established as a matter of law where a recovering narcotics addict reluctantly supplied drugs to a government informer. Basing this decision on the injustice of the government activities, Chief Justice Warren pointed out:

> The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.[44]

Therefore, under the subjective view, entrapment is to be avoided for two reasons. First, non-predisposed parties are not targets of criminal statutes. Second, justice demands that enforcement officers not manufacture crime by involving otherwise innocent people in criminal activities.

The Court upheld the subjective standard in *United States v. Russell*.[45] In this case, Justice Rehnquist, representing a divided Court, reaffirmed *Sorrells* and *Sherman* and the principle consideration of the "defendant's predisposition to commit the crime."[46] In *Russell*, the government supplied the defendant with an ingredient necessary to the manufacturing of the controlled substance, methamphetamine or "speed," and subsequently arrested him. The Court was unwilling to hold that this government involvement amounted to entrapment based on improper actions, stating 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."[47]

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42 *Id.* at 448.

43 *Sherman*, 356 U.S. at 372.

44 *Id.* at 376.

45 411 U.S. 423 (1973).

46 *Id.* at 433.

47 *Id.* at 436. The Court did recognize that, notwithstanding the defendant's predis-

The Court confronted a potential due process claim in *Hampton v. United States*,[48] upholding the conviction of an admittedly predisposed suspect who bought heroin from a government informer and then sold it to an agent. There was no majority opinion in *Hampton*, but the plurality and concurring opinions apparently agreed that any due process claim should be considered separately from a review of entrapment.[49] In *Mathews v. United States*,[50] the Court once again upheld *Sorrells* through *Hampton*, and endorsed the notion that "predisposition [is the] 'principal element in the defense of entrapment,' [in that it] focuses upon whether the defendant was an 'unwary innocent' or instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime."[51]

Appellate examinations of predisposition in reverse-sting operations have been limited. This is probably due in part to the fact that predisposition is a question of fact to be determined by the jury.[52] Successful entrapment defenses are never appealed (and thus never reported) and thwarted entrapment defenses are often affirmed as jury findings not subject to review.[53] In addition, defendants who have a legitimate entrapment claim may be reluctant to raise the defense because of the specter of past conduct. In proving that a defendant was predisposed, federal prosecutors are given wide latitude to present damaging character evidence.[54] Predisposition is therefore either relatively easy to establish or, once con-

position, the government could "go too far," thereby violating standards of due process, but held that it had not done so in the present case.

48 425 U.S. 484 (1976).

49 The Third Circuit applied a due process test in United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), ruling that the government had gone too far when it enticed two defendants into a "speed" manufacturing scheme similar to that found in *Russell*, but where neither defendant was essential to the plan.

50 485 U.S. 58 (1988).

51 *Id.* at 61 (quoting *Russell*, 411 U.S. at 433, 436, and *Sherman*, 356 U.S. at 372).

52 *See* Paul Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53 (1987).

53 *See, e.g.*, United States v. Sayers, 698 F.2d 1128 (11th Cir. 1983), which summarily approved of the jury's rejection of an entrapment defense based on the evidence presented on predisposition. *See also* United States v. Wylie, 625 F.2d 1371, 1377 (9th Cir. 1980), in which the court characterized a jury nullification of the entrapment defense this way: "By convicting the defendants, the jury obviously rejected the entrapment defense and thereby found that the defendants had been predisposed to commit the crimes." *Id.* at 1377.

54 In United States v. Roper, 874 F.2d 782 (11th Cir. 1989), the Eleventh Circuit allowed the prosecution to bring up the defendant's past activities as evidence of predisposition in a reverse sting, which started in New Mexico and ended in Alabama with the defendant's arrests on conspiracy charges. The court gave the prosecutor a great deal of latitude in bringing up past conduct because the entrapment defense had been raised. The jury apparently rejected the defendant's claim that he was not predisposed and found him guilty. The court repudiated the defendant's protestation of the prejudicial

firmed, devastating to the defendant.[55]

In an attempt to avoid some of the problems posed by predisposition, some defendants have contended that they were entrapped as a matter of law. According to this argument, the defendant states that without prima facie evidence of predisposition, the case cannot go to the jury. When the courts have addressed this predisposition approach in the context of a reverse sting, little clarity has emerged.[56] Two federal circuits have addressed the issue directly. The Ninth Circuit has established a five-factor test to determine predisposition,[57] which focuses on the defendant's reluctance to engage in the crime.[58] The Fifth Circuit takes a different approach to

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information that was paraded before the jury, stating that it was permissible if needed to prove predisposition.

[55] The D.C. Circuit offers a more elaborate explanation in United States v. Whoie, 925 F.2d 1481 (D.C. Cir. 1991), in which the court described two different approaches to predisposition.

> In unitary-approach jurisdictions, a defendant who claims he was entrapped must produce evidence to the judge both of government persuasion and of his own "non-predisposition." [Citation omitted.] If the defendant carries his burden of production before the judge, the government bears the burden of persuading the jury "that it did not entrap the defendant." In jurisdictions following the "bifurcated approach," in contrast, the jury, not the judge, decides whether the defendant has carried his burden of proving inducement, not just producing evidence of it. If the defendant has met his burden, the jury then goes on to decide whether the government has met its burden of proving predisposition.

Id. at 1483.

[56] The U.S. Supreme Court has addressed the concept of "entrapment as a matter of law" several times. In United States v. Sherman, 356 U.S. 369, 372 (1958), the Court ruled that such was the case when government agents beguiled an otherwise innocent person into committing a criminal offense. More recently, in Jacobson v. United States, 112 S. Ct. 1535 (1992), the Court ruled that a defendant was not predisposed as a matter of law and thus the case should not have gone to the jury. *See infra* note 102.

[57] The five factors include: (1) the defendant's character or reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant was motivated by profit; (4) whether there was any reluctance on the part of the defendant; and (5) the overall nature of the governmental inducement. While no single factor controls, emphasis is often placed on defendant reluctance. United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 821 (9th Cir.), *cert. denied*, 471 U.S. 1139 (1985).

[58] This general entrapment predisposition test was applied to a reverse-sting case in United States v. Wegman, 917 F.2d 1307 (9th Cir. 1990) (text in WESTLAW). In this case, United States Customs agents sent the defendant an unsolicited one-page advertisement offering photographs of boys and girls engaged in sexual conduct. Wegman responded with an order, a request for information on larger pictures, and an offer to sell publication rights to a book on "child love." Agents followed up by filling Wegman's order and with correspondence concerning the book. They eventually conducted a search of his house and recovered the "sting" photographs, as well as others, and additional material relating to child pornography. Wegman claimed that he was entrapped as a "matter of law" because there was insufficient evidence that would have convinced a reasonable juror that he was predisposed to commit the crime. The court disagreed. After reviewing the five-factor test, it concluded that "[n]othing in the record suggests that Wegman exhibited any reluctance to receive photographs of minors engaged in sexually explicit conduct [thus] there was sufficient evidence for a rational trier

entrapment by allowing the defendant to focus on the specific state of mind required for the offense to demonstrate predisposition.[59] Predisposition, therefore, may pose more problems than it resolves in cases where reverse stings are implicated. Predisposition is easy for the prosecution to prove, and it is quite likely that the government will parade evidence of any prior conduct before the jury in doing so. In an attempt to avoid these pitfalls, some defendants have argued that they were entrapped as a matter of law, but the courts have been relatively unsympathetic.[60] Regardless, if predisposition appears to be present, then, entrapment is an ineffective remedy under the subjective view.[61] As such, some defendants in-

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of fact to conclude that Wegman was predisposed to commit the crime." *Id.* Although the initial contact which led to the bogus sale was initiated by government agents, the court found sufficient evidence of predisposition to send it to a jury.

59 In United States v. Newman, 849 F.2d 156 (5th Cir. 1988), the court held that when an entrapment defense is raised, a defendant can introduce expert psychiatric testimony that indicates peculiar susceptibility to inducement. The circuit court examined this factor in the reverse-sting decision of United States v. Nunn, 940 F.2d 1148 (5th Cir. 1991). In this drug case that involved a huge operation netting over $600,000 a week, Nunn claimed that he was unduly influenced by his domineering father, Ralph Duke. The trial court denied the defendant's request that expert psychiatric testimony on his susceptibility to influence be admitted into evidence. The Fifth Circuit found that the trial court had not abused its discretion when it denied the request, particularly in light of overwhelming independent evidence of predisposition. *See also* United States v. Duke, 940 F.2d 1117 (5th Cir. 1991), a companion case involving Nunn's father, Ralph Chavous "Plukey" Duke. Court reports do not explain the difference in last names between Duke and Nunn.

60 Defendants have received mixed results at the circuit level from claims of entrapment as a matter of law. Reversals in this area include: Jacobson v. United States, 112 S. Ct. 1535 (1992); United States v. Skarie, 971 F.2d 317 (9th Cir. 1992); United States v. Dion, 762 F.2d 674 (8th Cir. 1985); United States v. Lard, 734 F.2d 1290 (8th Cir. 1984); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); Greene v. United States, 454 F.2d 783 (9th Cir. 1971). However, convictions have been confirmed in more cases: United States v. Nelson, 847 F.2d 285 (6th Cir. 1988); United States v. Irving, 827 F.2d 390 (8th Cir. 1987); United States v. Nixon, 777 F.2d 958 (5th Cir. 1985); United States v. So, 755 F.2d 1350 (9th Cir. 1985); United States v. Pennell, 737 F.2d 521 (6th Cir. 1984); United States v. Thoma, 726 F.2d 1191 (7th Cir. 1984); United States v. Kaminski, 703 F.2d 1004 (7th Cir. 1983); United States v. Sayers, 698 F.2d 1128 (11th Cir. 1983); United States v. McCaghren, 666 F.2d 1227 (8th Cir. 1981); and United States v. Townsend, 555 F.2d 152 (7th Cir. 1977).

61 This is not to say that predisposition is never examined in detail. At times, defendants raise questions about their lack of intent, often citing bizarre circumstances or explanations. Such was the case in United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), in which the defendant claimed that he believed that he was acting as a government agent and submitted evidence that he had been previously employed as a confidential informant. The court, however, rejected his claim, choosing to believe the government's version of the facts instead. A similar and perhaps more substantiated claim was rejected in United States v. Nixon, 777 F.2d 958 (5th Cir. 1985), discussed *infra*. Finally, the Third Circuit rejected a claim of no predisposition in United States v. Castro, 776 F.2d 1118 (3d Cir. 1985), in which the defendant maintained that he was at the scene of an initial discussion simply as a translator.

stead have attempted to utilize a due process/outrageous conduct claim.[62]

2. *The Objective Approach*

The objective approach focuses upon government misbehavior and ignores predisposition. This strategy, which is supported by a majority of commentators[63] and the Model Penal Code,[64] has been adopted in sixteen states either by the legislature or via caselaw in state court.[65] When government agents employ "methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it, entrapment has been employed."[66] In California, this concept is defined as conduct "likely to induce a normally law-abiding person to commit [a crime]."[67] Under both views, the presumption is that an ordinary reasonable person would not have engaged in the criminal behavior if not for the "overbearing conduct" of enforcement officers.[68] Suspect conduct may include "appeals to sympathy or friendship, offers of inordinate gain, or

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62 This strategy is not part of the subjective view of entrapment as clearly stated in Hampton v. United States, 425 U.S. 484 (1976). However, a number of courts have addressed this concept particularly in reverse-sting operations. Because the notion of "outrageous conduct" is so clearly linked to the objective view of entrapment, it will be discussed at the end of the next subsection.

63 LAFAVE & SCOTT, *supra* note 22, § 5.2(c), support this conclusion by listing seven different sources, including LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 265-73 (1967); Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683 (1975), and Paul W. Williams, *The Defense of Entrapment and Related Problems in Criminal Procedure*, 28 FORDHAM L. REV. 399 (1959).

64 MODEL PENAL CODE, § 2.13 (1985).

65 Technically, only 15 states have adopted the Model Penal Code approach. Although the California Supreme Court stated in People v. Barraza, 591 P.2d 949 (Cal. 1979), that the state had adopted a combination of the two approaches, a close reading of the case reveals that the objective view of entrapment controls. Other states to adopt the objective approach through case law include: Iowa, in State v. Mullen, 216 N.W.2d 375 (Iowa 1974); Massachusetts, in Commonwealth v. Harvard, 253 N.E.2d 346 (Mass. 1969); Michigan, in People v. Turner, 210 N.W.2d 336 (Mich. 1973): and Vermont, in State v. Wilkins, 473 A.2d 295 (Vt. 1983).

An additional 11 states have ratified this approach by statute. They include: Alaska, ALASKA STAT. § 11.81.450 (1989); Arkansas, ARK. STAT. ANN. § 5-2-209 (Michie 1987); Colorado, COLO. REV. STAT. § 18-1-709 (1986); Hawaii, HAW. REV. STAT. § 702-237 (1985); Illinois, ILL. REV. STAT. 720 ILCS 5/7-12 (1992); Kansas, KAN. STAT. ANN. § 21-3210 (1988); New York, N.Y. PENAL LAW § 40.05 (McKinney 1987); North Dakota, N.D. CENT. CODE § 12.1-05-11 (1985); Pennsylvania, 18 PA. CONS. STAT. ANN. § 313 (1983); Texas, TEX. PENAL CODE ANN. § 8.06 (West 1974); and Utah, UTAH CODE ANN. § 76-2-303 (1990).

66 MODEL PENAL CODE, § 2.13(i) (1985).

67 *Barraza*, 591 P.2d at 955.

68 *Id.*

persistent offers to overcome hesitancy."[69]

The rationale for the objective view rests on the notion that for public policy reasons, the courts should not "bless" otherwise improper governmental activity simply because a defendant was predisposed.[70] Clearly enunciated by the dissent in *Russell*, Justice Stewart drew from the concurring opinions of both *Sorrells* and *Sherman* in stating that "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;' " the fact that a defendant is induced by government officials rather than private individuals "does not make him any more innocent or any less predisposed."[71] Because the only difference in the two situations is the identity of the tempter, the focus should be on the conduct of government actors. Thus, entrapment cannot protect the otherwise innocent; it must control unlawful government officials. To do otherwise would violate public policy by condoning improprieties.

While the federal courts have specifically rejected the objective approach in favor of the subjective view of entrapment, there have been numerous attempts to embrace some of the elements of the former through the examination of "outrageous conduct" on the part of law enforcement officials. This has been particularly true in cases involving reverse stings and has been accomplished under the guise of "due process" claims.

In response to this concern over outrageous government conduct, the Supreme Court has developed a two-step analysis of entrapment defenses.[72] First, the court utilizes the subjective approach to determine if the defendant was predisposed to engage in the criminal conduct. If predisposition is found, then entrapment fails, but the defendant still may pursue a due process claim. Under this second step, government conduct can be reviewed to determine if it

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69 LAFAVE & SCOTT, *supra* note 22, § 5.2(c).

70 An argument could be made that under the subjective approach, a "governmental impropriety" threshold must be crossed before predisposition becomes a factor. This notion is supported by the results in *Sorrells* and *Sherman*: In both cases either the subjective view, adopted by the majority, or the objective approach, embraced by the concurring minority, could have been applied and the outcome would have been the same. However, the approach used would have had a divergent impact in *Russell* and *Hampton* where the minority/objective view differed sharply from the majority/subjective opinion as to what constitutes improper governmental behavior.

71 United States v. Russell, 411 U.S. 423, 441-42 (1973).

72 This line of cases includes: Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958); *Russell*, 411 U.S. 423; Hampton v. United States, 425 U.S. 484 (1976); and Mathews v. United States, 485 U.S. 58 (1988). *See supra* notes 36-62 and accompanying text for a discussion of these cases.

constituted some notion of "outrageousness" as referenced, but not defined, in *Hampton*.[73]

When defendants in federal cases have attempted to shift the emphasis to an examination of "outrageous conduct" on the part of government officials, the primary goal has been to demonstrate that government conduct was sufficiently intolerable to establish a Fifth Amendment due process violation.[74] Here, the circuit courts have viewed "outrageousness" narrowly, allowing government agents extensive latitude in their activities. Most of the decisions have followed the lead of *Hampton v. United States*, in which a divided Supreme Court recognized the notion that government activities could be sufficiently outrageous to constitute a due process violation.[75] Federal courts, however, have been reluctant to find such a due process violation.

Owen v. Wainwright[76] exemplifies this reluctance. *Owen* involved a typical reverse-sting operation, in which a confidential informant circulated information that certain individuals (government agents) were interested in purchasing large quantities of narcotics. The informant sought out potential sellers and arranged a meeting with the agents. A deal was consummated, and the agents then arrested the suspects. The *Owen* court found that "the government participation alleged here falls far short of the extremely outrageous and shocking conduct necessary to establish a due process violation."[77] This decision was made despite evidence that the informant was working on a contingency basis, where payment was based on a percentage of the transaction.[78] Similar findings were made in other

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[73] *See Hampton*, 425 U.S. at 489.

[74] It is argued that incredulous governmental behavior might be shocking to the conscience, as it was in Rochin v. California, 342 U.S. 165 (1952), thereby violating some notion of substantive due process. Numerous attempts have been made at the federal level to invoke the concept of "outrageous" governmental behavior. *See infra* notes 76-81 and accompanying text. However, as will be seen, these attacks have met with very little success.

[75] *Hampton*, 425 U.S. at 489.

[76] 806 F.2d 1519 (11th Cir. 1986).

[77] *Id.* at 1522.

[78] The court also specifically stated that the following did not constitute a due process violation:

> The appellants assert that the informant obtained their participation in the illegal activity through persistent lucrative offers, despite their initial refusals to become involved, in order to collect a contingency fee from the Sheriff's Department based on a percentage of the funds confiscated in the operation. The informant continued to provide assistance to the appellants in the preparation of the deal. Under the totality of the circumstances, the appellants claim that the informant's initiation and furtherance of the drug buy coupled with his contingent fee established an impermissible degree of police involvement in the illegal activity for which they were convicted.

cases.[79]

Case law clearly shows that the federal courts are hesitant to find due process violations in reverse-sting operations.[80] This may be due in part to an inclination to provide considerable latitude to government officials when predisposition has been established. In *United States v. Quinn*, the Eighth Circuit held that once it had been recognized that a defendant was predisposed to "commit an offense, we think that it may safely be said that investigative officers and agents may go a long way in concert with the individual in question without being deemed to have acted so outrageously as to violate due process or evoke the exercise by the courts of their supervisory powers so as to deny to the officers the fruits of their misconduct."[81]

Despite their tendency to give enforcement officials great latitude in these types of operations, there are two areas where the courts seem troubled with government conduct and have at times found due process violations. The first of these areas concerns situations in which the government acts as both seller and buyer, and the defendant serves as a go-between. The Third Circuit addressed this type of case, sometimes known as a circular sting, in *United States v. West*.[82] In *West*, the defendant was brought into a drug deal by a confidential informant, who supplied him with heroin with the full knowledge and approval of an undercover agent. The suspect subsequently sold the narcotics to the undercover agent, who then arrested him. The circuit court reversed two of the three distribution counts against West based on the government's intolerable conduct.

Id.

[79] *See, e.g.*, United States v. Sayers, 698 F.2d 1128 (11th Cir. 1983) (no outrageous conduct when, at the suggestion of DEA agents, convicted-awaiting-sentencing drug dealer acted as a confidential informant and enticed defendants to put up property in a marijuana deal); United States v. Walther, 867 F.2d 1334, 1345 (11th Cir. 1989) (no violation of due process where government agents were involved in "initiating the negotiations, providing the location for the transaction, providing the transportation for the narcotics, and supplying the narcotics," since conduct was not so outrageous and unconscionable that it violated due process); United States v. Nixon, 777 F.2d 958 (5th Cir. 1985) (reverse-sting operation not outrageous even though the undercover agent threw a violent temper tantrum which allegedly scared defendants into carrying out the planned purchase of marijuana with cash and warranty deeds to property).

[80] *See supra* notes 76-79 and accompanying text; *see infra* note 160. *See also* United States v. McCaghren, 666 F.2d 1227 (8th Cir. 1981); United States v. Alexandro, 675 F.2d 34 (2d Cir. 1982); United States v. Savage, 701 F.2d 867 (11th Cir. 1983); United States v. Mitchell, 915 F.2d 521 (9th Cir. 1990). Exceptions to this general rule, however, often surface when police use circular stings or paid confidential informants. *See infra* notes 82-90 and accompanying text.

[81] United States v. Quinn, 543 F.2d 640, 648 (8th Cir. 1976). The circuit reaffirmed this in the reverse-sting case of *McCaghren*, 666 F.2d 1227, in which DEA agents, once contacted by a confidential informant, became integrally involved in the transaction.

[82] 511 F.2d 1083 (3d Cir. 1975).

In *United States v. Bueno*,[83] the Fifth Circuit previously had made similar findings[84] when it reversed a conviction that resulted from a circular sting, finding entrapment as a matter of law.

The second area involves contingency fee-based confidential informants.[85] The circuits are somewhat split on this issue; early cases lean against the use of contingency fees,[86] but later cases approve of this practice. For example, the Fifth Circuit ratified a fee-based arrangement, where a confidential informant agreed to cooperate for a set fee in *United States v. Gentry*.[87] The Fourth Circuit held similarly in *United States v. Chavis*.[88] Neither of these cases, however, involved a fee based on a percentage of the gross recovery of narcotics or money.[89]

While neither of these areas represents an absolute trend in the federal courts, both illustrate the types of problems that often accompany reverse-sting operations. In the case of circular stings, the courts have tended to give law officers great latitude in constructing undercover operations designed to deal with major crime problems

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83 447 F.2d 903 (5th Cir. 1971). *See supra* note 61 and accompanying text. *See also* United States v. Mosley, 496 F.2d 1012 (5th Cir. 1974), in which the court reversed a conviction based on the absence of an entrapment instruction. In *Mosley*, the defendant claimed that he was given narcotics by an informer, who was an addict herself; the defendant, in turn, sold the narcotics to a federal agent, posing as the informant's boyfriend.

84 The issue was also addressed earlier in the Ninth Circuit in an illegal liquor case, Greene v. United States, 454 F.2d 783 (9th Cir. 1972). In this case the defendants had been targeted by revenue agents, and their "moonshine" business had been halted. However, the undercover agent in the case recontacted the defendants and convinced them to reopen the still. When they showed reluctance, the agent offered to supply the equipment needed, a person to run the still, and in fact did provide a large quantity of sugar. The court found this to be impermissible involvement on the part of the government and a violation of due process.

It should be noted, however, that simply supplying necessary ingredients is insufficiently outrageous under *Russell*. Russell v. United States, 41 U.S. 423 (1983). The Ninth Circuit went even further in this regard in when it affirmed a conviction in United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980). In this case, agents supplied a main ingredient of LSD (ergotamine tartrate) in exchange for the final product.

85 For an exhaustive review of this area, see Milton Hirsch, *Confidential Informants: When Crime Pays*, 39 U. MIAMI L. REV. 131 (1984).

86 *See* Williamson v. United States, 311 F.2d 441 (1962) (contingency-fee arrangement rejected because it might lead to "frame-ups").

87 839 F.2d 1065 (5th Cir. 1988) (government payment of a $5000 fee for services to a reforming cocaine abuser was not "overreaching").

88 880 F.2d 788 (4th Cir. 1989) (a $6000 fee paid to an informant for his assistance in a reverse-sting case held permissible).

89 It should be noted that in *Owen v. Wainwright*, 803 F.2d 1519 (11th Cir. 1986), the court ruled that a reverse-sting operation was not a violation of due process despite the fact that the confidential informant was working on a contingency fee basis which provided him with a percentage of the transaction. *See also supra* notes 76-79 and accompanying text.

like narcotics sales. As such, elaborate schemes have been designed to target drug dealers, which can result in agents (or their representatives) acting as both buyer and supplier. When a defendant caught in a circular sting raises an entrapment defense, it is easily defeated by a prosecutorial showing of predisposition.[90] A prior proclivity to engage in the activity also tends to increase judicial tolerance of what otherwise might be considered unconstitutional "outrageous" conduct. As a result, both public policy arguments that lie at the base of the subjective view of entrapment are violated: government officials are allowed to engage in improper and illegal behavior, and the crime that occurs is the result of government manufacturing.

In the area of contingency fee-based confidential informant involvement, these and other dangers are apparent as well. Suspect targeting, the initial contact, and the consummation of the actual transaction can be influenced or controlled by confidential informants. Acting as an extension of government, the confidential informant should be held to the same standards of propriety as agents. As an independent contractor,[91] however, the confidential informant can often operate in an rather autonomous fashion. When this independence is coupled with a fee contingent on arrest, particularly if the fee is based on a sliding scale dependent upon a percentage of a specific sale, problems of improper behavior and the manufacturing of crime are readily apparent. Contingency fee arrangements also smack of the due process concerns expressed in *Tumey v. Ohio*[92] and the inherent problems that surface when a participant in the enforcement chain has a direct, pecuniary interest in the outcome.

3. Application Inconsistencies Between the Two Approaches

To summarize, the subjective approach postulates that entrapment occurs when the otherwise innocent are enticed into criminal conduct. This type of activity should not be tolerated because it re-

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90 As illustrated in *West* and *Bueno*, discussed *supra* notes 82-84 and accompanying text, courts have found this type of conduct on the part of the police offensive and have vacated decisions based on due process violations. However, these actions have been taken only after a determination had been made that the defendant had *not* been entrapped because predisposition had been found. *See, e.g.*, United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986); United States v. Luttrell, 889 F.2d 806 (9th Cir. 1989).

91 An independent contractor normally is involved in autonomous work not subject to the supervision of an employer and responsible only for an end product. People v. Orange County Rd. Constr. Co., 67 N.E. 129 (N.Y. 1903).

92 273 U.S. 510 (1927). In this case, the Court ruled that a Mayor/Judge could not adjudicate cases when his salary was based in part on the fines he assessed. A similar conflict of interest argument could be made about confidential informants who stand to gain personally from a conviction.

sults in the conviction of persons not targeted by the legislation. Likewise, this behavior violates the notion of justice, which posits that it is not the job of government to make criminals out of non-criminals. The objective approach defines entrapment in terms of improper government activity alone and suggests that this type of misbehavior should be rejected for the policy reason that the court simply must not "consummate an abhorrent transaction."[93]

While both approaches overlap somewhat, in that either could cover certain circumstances,[94] quite different outcomes could result in other situations. This is due largely to the nature of each approach and the views of each concerning the two key factors: predisposition and governmental impropriety. Each presents a dichotomy of sorts. The defendant was either predisposed or was not predisposed. Activities on the part of governmental agents were either proper or improper. This produces four possible scenarios, as illustrated by the following matrix:

CURRENT STATUS OF ENTRAPMENT DEFENSE

	Predisposition[95]	No Predisposition
Proper Government Conduct[96]	**Type 1** *Objective*: No Entrapment *Subjective*: No Entrapment	**Type 2** *Objective*: No Entrapment *Subjective*: Entrapment
Improper Government Conduct	**Type 3** *Objective*: Entrapment *Subjective*: No Entrapment	**Type 4** *Objective*: Entrapment *Subjective*: Entrapment

93 Sorrells v. United States, 287 U.S. 435, 459 (1932) (Roberts, J., concurring).

94 *See supra* note 71.

95 In this dichotomy, the issue is whether the defendant was predisposed to commit the crime in question prior to engaging in the prohibited conduct. The answer is either "predisposition present," meaning that the accused was predisposed to commit the crime, or "no predisposition found," indicating that defendant had no prior proclivity to engage in the criminal conduct.

96 In the area of inducement, the conduct of the government is the target of inquiry.

"No Entrapment" (Type 1) scenarios present few problems. In this category, legitimate government activity induces or encourages a defendant who is predisposed to commit the crime in question. Regardless of the test used, subjective or objective, the defense of entrapment will be rejected. The opposite, and equally consistent, outcome results in "Entrapment" (Type 4) situations. When a non-predisposed defendant is improperly induced by government agents, both approaches would agree that entrapment has occurred and the defense would succeed. However, the other two scenarios (Type 2 and Type 3) provoke debate, as the results will differ depending on the approach taken.

In "No Predisposition/Proper Government Conduct" (Type 2) scenarios, the accused lacks predisposition, but the conduct of government officials is not considered inappropriate. A defendant would be convicted under the objective approach because the inducement used by government officials was proper. However, an entrapment defense would succeed under the subjective view if the jury was convinced that the defendant was not predisposed to commit the offense. On the other extreme, "Predisposition/Improper Government Conduct" (Type 3) scenarios, predisposition is present but government conduct is improper. Under these circumstances, a defendant could escape conviction if objective criteria were applied because the inducements utilized were improper. Yet, under the subjective approach, the entrapment defense would fail due to the defendant's predisposition.

Both of these categories present conflicting results and their own individual problems. "No Predisposition/Proper Government Conduct" (Type 2) situations violate the concern over the manufacturing of crime, in that non-predisposed individuals are encapsulated into the justice system due only to governmental inducements. Absent the government's encouragement, these otherwise innocent persons would not be facing criminal charges. This official manufacture of crime is objectionable for several reasons. First, scarce resources dictate that agents of the criminal justice system should not create additional crime or criminals.[97] Overcrowded jails, dockets, and prisons evidence the inability of the system to accommodate

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The major question is whether the officers' actions were within the bounds of acceptable behavior. While the outer limits of propriety are relatively easy to establish, distinguishing between what is proper and improper can be quite difficult. An example of a "proper" enticement might include an offer by an agent to buy contraband from a suspected drug dealer. An "improper" inducement might consist of a threat by an undercover officer to injure a suspect's spouse unless the individual assisted in a drug transaction.

97 Sherman v. United States, 356 U.S. 396, 372 (1958).

the offenders who come into contact with the courts on their own.[98] Second, the justice system is based on the concept of retroactivity. Criminal responsibility attaches at the point of commission, and the system is designed to react to criminal events. The system should not be in the business of encouraging criminal behavior by channeling would-be criminals into positions that they have not voluntarily placed themselves. Third, major principles upon which the justice system is based, such as the presumption of innocence, equal protection, and due process of law, are threatened if the manufacture of crime goes unchecked.[99] Finally, the role of government is to reduce crime, not contribute to it. This concept is reflected in penal codes and in the general discretionary policies promulgated by various components of the criminal justice system.[100]

While "No Predisposition/Proper Government Conduct" (Type 2) scenarios unnecessarily broaden the influence of the justice system, "Predisposition/Improper Government Conduct" (Type 3) circumstances do the opposite. Individuals who are willing to engage in crime are allowed to escape prosecution because the government acted improperly in securing their involvement. Of course, this improper persuasion was, by definition, unnecessary, as the defendant was already inclined to engage in the illegal behavior and almost any (proper) inducement would have sufficed. The results of "Predisposition/Improper Government Conduct" (Type 3) situations, while adhering to the public policy of intolerance toward improper government acts, circumvents the crime-control role of the justice system.

Such a result may be preferable, on the ground that "it is a less[er] evil that some criminals should escape than that the government should play an ignoble part."[101] An equally strong position demands that otherwise innocent persons not be convicted simply because officials duped them. Under the current subjective-objective dichotomy, however, it is impossible for both approaches to produce the same results. As a result, defendants who are encouraged by government agents to engage in criminal conduct will either be acquitted (via a successful entrapment defense) or convicted based solely on the type of entrapment approach taken.

This article advocates the adoption of a single entrapment standard, which utilizes both the subjective and objective criteria. A sin-

98 *See generally* GEORGE COLE, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 168 (6th ed. 1992).

99 LAFAVE & SCOTT, *supra* note 22, § 5.2.

100 *See* JOEL SAMAHA, CRIMINAL JUSTICE 25-31 (2d ed. 1991).

101 Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

gle standard would serve several purposes. First, such an approach would provide predictability and a well-grounded rationale for the defense. Entrapment would depend on a specific standard and not isolate solely on one's "objective" or "subjective" leanings. Second, a solitary approach would be easier to manage and monitor. Finally, adopting a single standard, which combines both the objective and subjective views of entrapment, will address problems of fairness and propriety. Government officials and defendants would have clear guidelines as to boundaries of acceptable government behavior. Such a strategy could provide the flexibility needed in undercover operations, while at the same time adhering to the public policy demands that are at the root of the entrapment defense. The solution proffered here would combine the two approaches by providing a balance between the extent of improper government conduct and the level of the defendant's predisposition to engage in the criminal conduct. The need for such a move is clearly illustrated in the case of Keith Jacobson.

III. THE CASE FOR REFORMATION: *JACOBSON V. UNITED STATES*

In 1992, the United States Supreme Court confronted the issue of entrapment and the reverse sting in the case of Keith Jacobson. Unlike many previous entrapment cases which had involved the distribution of narcotics, *Jacobson v. United States*[102] involved child pornography. In response to what is considered an international problem, Congress passed a series of tough laws to deal with the sexual exploitation of children.[103] The various statutes provided federal enforcement officials with broad latitude to target producers and purchasers of child pornography. Included in the arsenal were various enforcement techniques, including reverse stings.[104]

Two agencies organized elaborate reverse stings to apprehend

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

103 These include: Pub. L. No. 95-225; Pub. L. No. 98-292; Pub. L. No. 99-500; Pub. L. No. 99-628; and Pub. L. No. 100-690. For a global review of the problem of child pornography, see Note, *Can We End the Shame—Recent Multilateral Efforts to Address the World Pornography Market*, 23 VAND. J. TRANSNAT'L L. 435 (1990).

104 *See* Brief of Amici Curiae of National Center for Missing and Exploited Children, et al., which argued that:

> [r]everse sting investigations in federal child pornography cases have provided the most effective method to detect and stop the purchase and use of child pornography. Hundreds of individuals, most undoubtedly pedophiles or child molesters, who have been convicted over the past five years, would not have been detected nor caught with traditional investigative methods. The secretive underground network, which distributes and buys child pornography, is a continuing threat to children and can and must be pierced by 'reverse stings' to prevent further sexual abuse of children from child pornography.

Id. at 6.

child pornographers: the U.S. Customs Service set up "Operation Borderline," and the U.S. Postal Service operated several stings, the most notable of which was "Project Looking Glass." These operations primarily targeted producers and potential buyers, and involved fronts of child pornography businesses in Hong Kong and the Virgin Islands.[105] Typically, potential suspects were earmarked when they responded to ads placed in certain sexually exploitive magazines, when federal agents replied to ads which potential suspects placed in these magazines, or when agencies uncovered names from mailing lists or other records confiscated from previous arrests.[106] Once identified, targets were sent an unsolicited questionnaire, which requested information concerning sexuality. If the suspect responded and gave certain answers, then a catalog of available child pornography material was sent to the individual. If an order was placed, it was filled using a "controlled delivery,"[107] and enforcement officials obtained a search warrant. Officials then would conduct a search and arrest suspects, typically in possession of the "sting" material.[108]

In a series of cases commencing in the mid-1980s,[109] various circuits found that the reverse stings utilized in these operations were permissible. Defendants often asserted entrapment but consistently lost on this ground because predisposition was found.[110] By their very nature, such operations require at least some predisposition on the part of suspects.[111] As such, traditional entrapment arguments were largely ineffective.

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105 United States v. Goodwin, 854 F.2d 33, 35 (4th Cir. 1988).

106 *See* United States v. Esch, 832 F.2d 531, 539 (10th Cir. 1987).

107 A controlled delivery involves the dispatch or transfer, via the U.S. Mail or a commercial service, of a package under the control and supervision of government agents. *See* United States v. Rubio, 834 F.2d 442, 446 (5th Cir. 1987).

108 For a description of these arrests, see United States v. Mitchell, 915 F.2d 521 (9th Cir. 1990), and United States v. Wegman, 917 F.2d 1307 (9th Cir. 1990) [unpublished disposition available on WESTLAW].

109 *See, e.g.*, United States v. Gantzer, 810 F.2d 349 (2d Cir. 1987); United States v. Johnson, 855 F.2d 299 (6th Cir. 1988); United States v. Moore, 916 F.2d 1131 (6th Cir. 1990); *Rubio*, 834 F.2d 442 (5th Cir. 1987); and United States v. Thoma, 726 F.2d 1191 (7th Cir. 1984).

110 *See, e.g.*, *Rubio*, 834 F.2d at 450; *Thoma*, 726 F.2d at 1196-97.

111 Once suspects responded to an initial mailing, agency representatives used a variety of ploys to solicit further participation. In "Project Looking Glass," the follow-up contact was often made through a letter, which included the following language: "We have read the comments of Mr. Van Rabb of your Customs Service concerning the efforts of his agents to find 'children's pornography' and we find that many of you are denied a product because of that agency. . . . For those of you who have enjoyed youthful material from [certain publishers], we have devised a method of getting these to you without prying eyes of United States Customs seizing your mail." *Mitchell*, 915 F.2d at 523.

The U.S. Supreme Court directly confronted these issues in *Jacobson v. United States*.[112] In this reverse-sting case, the defendant was convicted of receiving child pornography through the mails in violation of 18 U.S.C. § 2252(a)(2).[113] While the Court ruled that, as a matter of law, Jacobson was entrapped because the government failed to prove he was predisposed to commit the crime, the Court provided few guidelines as to the minimum requirements of predisposition.

Although the facts appear to be fairly straightforward, considerable disagreement arose in the case over the government's initial targeting of the defendant. In February 1984, Keith Jacobson, a Nebraska farmer, ordered two magazines and a brochure from a California firm, the Electric Moon. The magazines, *Bare Boys I* and *Bare Boys II*, were billed as nudist publications, but their possession was not a violation of either state or federal law at the time of receipt.[114] In May 1984, government agents searched the Electric Moon business premises and seized a mailing list that contained Jacobson's name. Eight months later, a postal inspector, posing as the fictitious "American Hedonist Society," sent Jacobson a solicitation letter, an application for membership, and a survey on sexual attitudes.[115] Jacobson completed the application and also returned a survey, where he noted that he "enjoyed material on pre-teen sex."[116] Over the next two-plus years, postal authorities repeatedly contacted Jacobson under an array of guises, including an appeal to First Amendment values.[117] Eventually, in March 1987, Jacobson ordered an illegal magazine from a postal-front operation supposedly based in Hong Kong.[118] Postal authorities, through a controlled de-

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112 112 S. Ct. 1535 (1992).

113 This code section refers to a provision of the Child Protection Act of 1984, Pub. L. 98-292, which forbids the mailing of material depicting children engaged in explicit sexual conduct. 18 U.S.C. § 2252(a)(2)(A) (1992).

114 *See* United States v. Jacobson, 916 F.2d 467, 472 (8th Cir. 1990).

115 This activity on the part of the U.S. Postal Service was part of "Project Looking Glass;" which paralleled a similar effort on the part of the Customs Service, known as "Operation Borderline," discussed *supra* at note 111.

116 Brief for the United States at 5, Jacobson v. United States, 112 S. Ct. 1535 (1992)(90-1124).

117 At one point, a postal front organization suggested that Jacobson purchase material as part of a fight against censorship. "Heartland Institute for a New Tomorrow (HINT) described itself as 'an organization founded to protect and promote sexual freedom and freedom of choice' and stated that 'the most appropriate means to accomplish [its] objectives is to promote honest dialogue among concerned individuals and to continue its lobbying efforts with State Legislators.' " *Jacobson*, 112 S. Ct. 1535, 1546 (1992) (quoting from Record, Defendant's Exhibit 113). The Court went on to say that "these lobbying efforts were to be financed through catalogue sales." *Id.*

118 In March 1987, the U.S. Customs Service joined the investigation and mailed

livery, mailed Jacobson the publication, *Boys Who Love Boys*, that contained photographs which clearly violated the law.[119] On June 16, 1987, law enforcement officers arrested Jacobson and searched his home, finding only the materials originally purchased from Electric Moon and the magazine ordered during the sting operation. Jacobson's entrapment defense at trial failed, and he was convicted. An Eighth Circuit panel initially reveresed this conviction,[120] but the appellate court reinstated after an en banc hearing.[121]

The primary issue litigated at the appellate level was whether the government must have some minimum level of suspicion before it can launch an investigation. The panel overturned the conviction because before targeting Jacobson, the government had no evidence giving rise to a reasonable suspicion that Jacobson had committed a similar crime in the past or was likely to commit such a crime in the future.[122] The full circuit, however, affirmed the original conviction, concentrating on the government's conduct: "In our view, when the government's investigatory conduct does not offend due process, the mere fact the undercover investigation is started without reasonable suspicion 'does not bar the conviction of those who rise to its bait.' " [123]

The U.S. Supreme Court granted certiorari on only one issue—whether the defendant was entrapped as a matter of law.[124] Jacob-

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Jacobson a brochure patterned after genuine child pornography solicitations. He responded by placing an order for material that would have been illegal to possess under federal child pornography laws. The reason for non-delivery was not disclosed at trial. *See* Brief for the United States, *supra* note 116, at 4.

119 The specific code section of the Child Protection Act of 1984, Pub. L. 98-292, forbids the transfer via the mails of a "visual depiction [that] involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a)(2)(A) (1992).

120 United States v. Jacobson, 893 F.2d 999 (8th Cir. 1990).

121 United States v. Jacobson, 916 F.2d 467, 472 (8th Cir. 1990) (en banc).

122 *Id.* at 468 (1990).

123 *Id.* at 474 (quoting United States v. Jannotti, 673 F.2d 578, 609 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982)).

124 According to U.S. Law Week, Jacobson originally submitted seven questions for review, ranging in subject matter from evidence of predisposition to the existence of a defense of "outrageous government conduct" in federal cases, 59 U.S.L.W. 3640 (1990). The Court, however, only accepted the third question for certiorari (59 U.S.L.W. at 3723):

> (3) When government has attempted and failed in three separate undercover operations covering two years of testing and soliciting to persuade defendant to receive child pornography through mails and defendant does not qualify either under attorney general's guidelines for conduct of undercover operations or guidelines established by postal inspectors for inclusion in undercover operation in which defendant is finally ensnared, has defendant been entrapped as matter of law?

59 U.S.L.W. at 3640.

son continued to argue[125] that the government did not have reasonable suspicion in order to begin an investigation. According to Jacobson, the fact that he had ordered and received a publication that was legal at the time demonstrated that the government did not have reasonable suspicion.[126] The government contended that a reasonable suspicion is not required but, even if it was, Jacobson's ordering of material in the past provided sufficient foundation for the initial inquiry which was made in January 1985.[127] Interestingly, neither side directly addressed the issue of predisposition in their briefs to the Court.[128]

In a 5-4 decision, the Court reversed the conviction "[b]ecause the Government overstepped the line between setting a trap for the 'unwary innocent' and the 'unwary criminal,'. . . and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested."[129] Justice White, writing for the majority, ruled that when the government induces a defendant to commit a crime, a fact not disputed in this case, the prosecution must prove that the defendant was predisposed. The Court held that while government officials were permitted to induce defendants by merely offering an opportunity to purchase illegal material, they did more in this instance. "By the time petitioner finally placed his order, he had already been the target of twenty-six months of repeated mailings and communications from Government agents and fictitious organizations."[130] The Court also seemed troubled by two additional factors: (1) the fact that initial attention was drawn to Jacobson by his ordering of *Bare Boys I & II,* an act that was legal at the time; and (2) the constitu-

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125 Technically, the Court did not grant certiorari on this issue, as evidenced by Justice O'Connor's exchange with Jacobson's attorney at oral argument:

> Justice O'Connor: Do you take the position that the government must always prove predisposition by pointing to events that occurred before the sting?
>
> Moyer: Yes.
>
> O'Connor: Isn't that the same as requiring reasonable suspicion beforehand that the target was inclined to commit the crime?
>
> Moyer: Yes.
>
> O'Connor: But we didn't grant cert on that question.

60 U.S.L.W. 3393 (1990). Nevertheless, the idea that the government had insufficient cause to initiate the investigation continues to be a central point throughout the case.

126 At the time Jacobson bought the material, it was legal to do so according to both federal and Nebraska law. Jacobson v. United States, 112 S. Ct. 1535, 1541 (1992).

127 Brief for the United States, *supra* note 116 at 1553.

128 *See* Brief for the Petitioner, Jacobson v. United States, 112 S. Ct. 1535 (1992) (90-1124).

129 *Jacobson,* 112 S. Ct. at 1540 (citations omitted).

130 *Id.* at 1552.

tional problems inherent in pressuring Jacobson to obtain material in order to fight censorship.

The crux of the decision, however, was predisposition, or rather "pre-predisposition." The majority held that "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."[131] In other words, proof must be offered that the defendant was predisposed to commit the crime before being approached by enforcement officers. In this case, the Court rejected the government's argument that predisposition could be proved by Jacobson's participation in the exchange of correspondence.[132] However, the Court offered no advice as to precisely what constitutes prior predisposition, other than to hint that participation in a legal transaction (which was subsequently made illegal) was insufficient.[133]

The current state of the law on entrapment under *Jacobson* appears to hinge on predisposition. Initially, in order to rely on the defense, the accused must show that the government instigated the defendant's involvement in the offense. Once it is established that behavior on the part of officials spawned the offense, the burden of proof shifts to the prosecution to prove predisposition by the defendant. This proclivity must reach back to a point prior to government targeting of the suspect. While there are no guidelines as to what constitutes prior predisposition, it seems clear that without some evidence of an antecedent propensity to commit the crime, the trial court should find entrapment as a matter of law. With some evidence of prior predisposition, the matter is forwarded to the jury for a determination of the sufficiency of the defendant's proclivity to commit the crime. Should the jury find predisposition, the entrapment defense fails. Only if the court finds that the government's behavior is sufficiently reprehensible to constitute a due process violation will the defendant prevail.

The case of Keith Jacobson represents the inherent problems with this approach, and two scenarios illustrate the dilemma involved.[134] What if there had been some evidence of prior predisposition? Suppose that when federal authorities searched Jacobson's

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131 *Id.* at 1550 (emphasis added).

132 The minority argued that predisposition was demonstrated because both times that he was offered the opportunity to purchase material, Jacobson responded with an order. *Id.* at 1559.

133 *Id.* at 1542 n.3.

134 The following scenarios represent modifications of the facts in *Jacobson* for illustration only.

home, they had discovered a catalog offering illicit material, which the defendant had procured from an independent source *prior* to the investigation. A court could easily interpret this as prior proclivity and thus Jacobson's case would go to the jury and likely result in a conviction (as it actually did). In this first scenario, the defendant's conviction turns on a minor piece of evidence that does little to alter the government's behavior or the defendant's response to that conduct. There is only the slightest piece of evidence that the defendant had any prior leanings toward the crime in question. However, when the guidelines set forth in *Jacobson* are applied, the defendant under this set of circumstances is not entrapped as a matter of law, despite the fact that there is no evidence that he would have engaged in this type of activity had it not been for the persistence of federal agents.

On the other hand, what if Jacobson's post-contact behavior had demonstrated a voracious appetite for illicit child pornography? Suppose that once contacted, Jacobson began soliciting the participation of undercover agents and others in establishing a new underground network of child pornographers or had contracted to produce illegal photographs. According to the majority in *Jacobson*, the defendant could successfully argue that he was entrapped as a matter of law because there was no evidence of prior predisposition. In this second example, a much more reprehensible defendant is able to escape prosecution simply because no evidence can be produced that indicates a prior proclivity. The second variation of the facts also violates the purposes of the entrapment defense, which is to discourage improper government behavior and prevent the encapsulation of otherwise law-abiding individuals. In the second scenario, the defendant may avoid conviction simply because of a technicality: while ample evidence exists that the defendant was not motivated solely by government prompting, he is nonetheless allowed to go free because agents were unable to produce evidence of prior predisposition.

Neither outcome seems fair nor judicially defensible, and neither can be squared with the purposes and public policy concerns that are at the heart of the entrapment defense. In the first scenario, an arguably "otherwise innocent" person faces an uphill entrapment battle simply because there is meager evidence of prior proclivity. This outcome clearly violates the idea that the government should not manufacture crime. The other variation of the facts goes too far in the other direction. It allows an "undoubtedly predisposed" defendant to escape conviction not because of improper

conduct but due to the prosecution's failure to prove prior predisposition.

The dilemma posed in these two examples is potentially present in numerous reverse-sting operations. Like the case of the full-circle drug bust, the facts represented in the above scenarios encompass two fluid concepts: the predisposition of the defendant and the government's behavior in encouraging criminal behavior. These two concepts interact and thus should not be viewed as "either/or" notions.

IV. Potential Solution

In an effort to solve the problems raised by the reverse sting as illustrated by *Jacobson*, this article proposes a standard of entrapment that blends the two concepts of defendant predisposition and government misconduct. The article will first lay out the propositions of the recommended standard; then it will show why this proposal is more effective than other potential solutions.

Essentially, this standard balances government impropriety against offender predisposition. First, the proposal requires a demonstration of governmental impropriety. This matter, to be decided by the court, would embody a low threshold question of whether an ordinary person might be swayed by the government's conduct. The defendant would raise the issue and carry the burden of proving that the police operation entailed some inappropriate governmental behavior. If the court found that no impropriety existed, then it could conclude that officials merely offered the defendant an opportunity to commit the crime.

However, if the court found that the conduct of government officials entailed more than simply offering the defendant the opportunity to engage in criminal conduct, entrapment could be raised as a defense. The burden then would shift to the prosecution to prove the predisposition of the defendant. The defendant would be entitled to counter with evidence to the contrary and argue that, despite any proof of predisposition, improper conduct on the part of enforcement officials motivated the defendant's involvement in the criminal enterprise. The government obviously could rebut with proof that the conduct was proper. Finally, the jury would weigh the level of government misconduct against the degree of predisposition by the individual defendant. In doing so, it would determine whether the government's misconduct outweighed the defendant's predisposition, or whether the proclivity to engage in the conduct on the part of the accused overcame the government's

inappropriate behavior. The key question is whether prior disposition or government conduct was a more important influence on the defendant's involvement.

The proposed standard, then, involves a three-step process that encompasses both the objective and the subjective views of entrapment. In the first step, the defendant must convince the court that some government impropriety exists. The purpose of this initial threshold is to determine if entrapment is possible as a defense at all. If there is any evidence that an ordinary person might reasonably have been influenced by the government's conduct, then the court rules that the entrapment defense is available. This initial inquiry clearly embodies the *objective* test because it looks not to the individual defendant, but rather to the ordinary person to determine if the government's conduct unduly could have influenced behavior. This low threshold recognition, however, is tempered by the *subjective* approach. If the court determines that the government's conduct was not improper, then the defendant, at best, took advantage of an opportunity offered by enforcement officials. This conclusion is consistent with the current federal position under the subjective approach, in which offering a "mere opportunity" to engage in a criminal act does not constitute entrapment.[135] If the court finds that something more than the mere offer of an opportunity exists, it then proceeds to the next step.

In the second step, the prosecution must offer proof that the defendant was predisposed to commit the offense. This stage also involves a subjective threshold examination, which is essentially the test currently used in the federal courts. As described in the *Sorrells-Sherman* doctrine,[136] the court determines whether the defendant was predisposed to commit the offense in question. If there is no evidence of predisposition, then the court finds entrapment as a matter of law.[137] On the other hand, if there is some evidence that a jury could interpret as predisposition, then the matter is determined by the jury in step three.

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135 *See supra* note 37. It could be argued, however, that this entire first step in this proposed standard is duplicative of that outlined in *Jacobson*. However, it should be noted that under the current federal approach, the defense must show that the defendant's conduct was induced by government activity; it need *not* prove that the behavior of officials was improper. Under this proposed model, it is incumbent upon the defense to show that the government behaved improperly, if only marginally so.

136 *See supra* note 36.

137 This, too, represents current law as made clear in *Jacobson*, see *supra* notes 131-32 and accompanying text. In fact, according to the *Jacobson* Court, the prosecution must prove *prior* proclivity or lose to an entrapment defense. Proof of such propensity is *not* required under the standard proposed here.

In this final step, the jury is charged with weighing the defendant's predisposition against the government's misconduct, since the court already has determined that both exist.[138] The jury examines the defendant's predisposition in the context of the level of proclivity to become involved in the offense against a backdrop of improper government conduct.[139] The jury then compares the defendant's predisposition with the government's misbehavior to determine which factor motivated involvement in the offense. If the jury determines that the primary motivating factor was the improper conduct of enforcement officials, then it must find entrapment. If, on the other hand, it concludes that the defendant's predisposition outweighed the government's misconduct, then it must determine that no entrapment occurred.

While this proposed solution presents its own set of problems,[140] it provides a mechanism that clearly balances the primary concerns of both the subjective and objective approaches to entrapment. Returning to the matrix,[141] this proporal reconciles the two troublesome scenarios and results in consistent conclusions. In "No Predisposition/Proper Government Conduct"[142] (Type 2) situations, where an entrapment defense is possible under the subjective approach but not available with the objective view, the concerns of both the defense and the government would be weighed. In these instances, where defendant predisposition is absent and the government conduct is deemed proper, problems currently arise when defendants, who have little or no predisposition to commit a crime, are duped by a "tricky" yet legally acceptable government scheme. Under the proposed model, "otherwise innocent"[143] persons who are ensnared in a government scheme could escape conviction if their low level of predisposition is outweighed by an overbearing government scheme. They could not avoid criminal liability, however, if the overbearing aspects of the government's conduct were outweighed by the defendant's clear willingness to undertake the criminal activity.

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138 The court has determined the existence of government misconduct in the first step, and the potential presence of predisposition in the second.

139 The notion that the defendant's proclivity can be described in varying degrees assumes that the concept is not static, but flexible in nature. This position is based on the argument that predisposition is a fluid idea where there are levels of predilection. This position is buttressed by the *Jacobson* scenarios discussed earlier, *see supra* note 133 and accompanying text.

140 *See infra* pp. 1094-95 for a discussion of the drawbacks to this model.

141 *See supra* notes 95-96 and accompanying text.

142 *Id.*

143 *See supra* note 38.

To illustrate, in the variation of the *Jacobson* case,[144] where the prosecution presents evidence of prior proclivity, the defendant would not automatically lose the entrapment argument. Rather, the proposed procedure would provide a more balanced approach. If Jacobson wanted to pursue an entrapment defense, he would first need to convince the court that the postal inspectors' actions were improper. The appropriate inquiry at this stage would be whether an ordinary person subjected to such solicitations might be swayed by them. If the trial court found (as the Supreme Court apparently did) that the behavior was at least reprehensible, then the defendant would be allowed to present an entrapment defense, and the focus would shift to the issue of predisposition. The prosecution then would carry the burden of proving predisposition and would accordingly provide evidence of the defendant's prior proclivity. Jacobson then would have an opportunity to rebut this evidence and could argue that, despite any prior penchant to engage in the illegality, the government's outrageous conduct was a stronger motivating factor for the criminal act than the Jacobson's predisposition. After hearing evidence from both sides, the jury would weigh the government conduct against the defendant's predisposition to determine if Jacobson was entrapped. Rather than relying on the presence or absence of a scintilla of evidence, the entrapment decision would be based on a balance of predisposition against improper conduct: which one contributed most to the defendant's involvement?

With "Predisposition/Improper Government Conduct"[145] (Type 3) situations, a different set of problems exists. The entrapment defense is available under the objective approach, but not under the subjective method. Defendants may successfully argue entrapment only when government misconduct is present, regardless of the defendant's predisposition. Under this view, the central problem is that individuals who are ready, willing, and able to commit a crime—and would thus be swayed by virtually any government plan—are allowed to escape conviction due to improper law enforcement conduct. Under the proposed model, these "undoubtedly predisposed"[146] individuals will find it difficult to elude prosecution unless the government conduct is so outrageous that it

144 *See supra* note 134 and accompanying text. Under this variation of the facts, there is minimal evidence (such as the discovery of a catalog offering illicit material found during a search of his home) that Jacobson may have had predisposition to engage in the government operation prior to the initial contact.

145 *See supra* notes 95-96 and accompanying text.

146 With these individuals, clear evidence exists that they were predisposed to engage in the criminal conduct at issue.

overshadows an overt willingness to participate and, in effect, represents a violation of due process.

This scenario is exemplified when the other *Jacobson* variation is examined.[147] In this modification of the facts, following an initial contact, the defendant demonstrated an insatiable appetite for child pornography, even though no evidence of prior predisposition existed. Under the objective approach, Jacobson's entrapment would turn, *not* on his demonstrated willingness to participate in the scheme after being contacted, but rather on the government's activities. If these actions were deemed improper, then Jacobson would be acquitted. On the other hand, if the scheme was considered proper, then the defendant could not benefit from the defense. Under current law, however, this second scenario surely would end in an acquittal. The government could not prove prior proclivity on the defendant's part; therefore, entrapment would be present as matter of law.

The proposed model would produce a different result. Rather than ruling that the defendant was entrapped because the government could not prove prior predisposition (as is currently required in *Jacobson*), the court would first rule on the presence or absence of improper government conduct. Once established, the prosecution's inability to prove pre-contact proclivity would not end the matter. Instead, the jury would be given the opportunity to balance the government's conduct against the absence of the defendant's initial predisposition; the jury would still be able to consider, however, the presence of post-contact receptiveness. In this second variation, the defendant would not be released simply because there was no evidence of predisposition. The jury would decide whether the defendant's conduct exemplified that of an otherwise innocent individual who was duped by the government or a person who seized the opportunity to purchase illicit material.

The balancing approach offered here would address the problems which plague both the subjective and objective views of entrapment. It would allow the jury to balance the defendant's predisposition (including prior proclivity and post-contact behavior) to engage in crime, against the government's conduct in soliciting involvement. The model maintains the thrust of the current federal (subjective) approach through its recognition of predisposition.[148] Unjust outcomes involving this approach, however, would be

147 *See supra* note 134 and accompanying text.

148 The court, and not a jury, would handle persons who are not predisposed at all. If there was evidence of improper government conduct yet no proof of predisposition, the court would rule entrapment as a matter of law. On the other hand, if the court was

avoided when marginally predisposed defendants who are seduced by clearly improper government schemes are able to argue to the jury that their involvement was due more to the enticement than to their own proclivity. On the other hand, more savvy defendants, who willingly volunteered to become involved in government operations, would not be able to circumvent the goals of entrapment, and thereby escape criminal liability, simply because agents had constructed an insidious plan. The model also would be consistent with the objective approach in that, regardless of a defendant's predisposition, the entrapment defense would be available where the government's conduct is deemed reprehensible to the point that an ordinary person would find it hard to resist.

This approach presents a more equitable balancing test than the other options, which involve some combination of the subjective and objective views. Essentially, three basic strategies address the key elements of defendant predisposition and government impropriety. The first approach simply requires proof of both an absence of predisposition and the presence of impropriety; the second dictates the presence of *either*; and in the third, the two concepts blend together.

The first strategy is based on the position that government officials should be given a relatively free hand in undercover work and the defense of entrapment should be available only where no evidence of predisposition exists, but there is proof that the defendant was improperly induced to commit the crime. This approach would maximize the freedom of enforcement officials to "root out" criminals, while still preserving a defense where the truly "would be" innocent could seek relief through an affirmative defense.[149] The strategy here represents the "Entrapment" (Type 4) scenario[150] in the matrix and has been adopted in New Jersey. There, the high court has required that to prove entrapment, the defendant must satisfy both an objective and subjective test.[151] First, the de-

convinced that the government had provided only an opportunity to commit the crime, then entrapment would not be available as a defense.

149 This approach is in line with what Herbert Packer calls the "Crime Control Model" of justice. According to this model, emphasis is placed upon apprehending and punishing criminals in order to provide for a more crime-free society. Officials in the justice system are considered to be not only trustworthy but also in need of maximum flexibility if they are to be successful in bringing crime under control. HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 160-61 (1968).

150 *See supra* notes 95-96 and accompanying text.

151 The New Jersey Supreme Court relied on the state code, which reads:

Entrapment

a. A public law enforcement official or a person engaged in cooperation with such an official or one acting as an agent of a public law enforcement official perpe-

fendant must prove that conduct on the part of law enforcement officials was such that an average person might be induced to commit the offense, thereby meeting the objective prong. Second, the defendant must meet the subjective prong by showing that the "conduct in fact caused" the commission of the crime.[152] In *New Jersey v. Gibbons*,[153] the court expanded the subjective causation element to include predisposition. Therefore, to prove entrapment in New Jersey, defendants must first demonstrate that government conduct would have swayed an average person to engage in the criminal act; then they must prove that they were not predisposed to commit the crime, and thus must have been persuaded solely by the government's inducement.

While this approach is relatively simple, it presents problems that defeat the purpose of an entrapment defense and the subjective and objective strategies. Under this scheme, it is possible to convict persons who are not the target of the legislation at hand, thereby obviating a primary goal of the subjective approach. Ordinary people can be ensnared by overbearing government conduct unless they can prove that they lacked any personal predisposition. In addition, the New Jersey plan encapsulates the otherwise innocent, thus violating the other primary justification for the subjective approach. According to this strategy, even if defendants lack the requisite predisposition, they risk conviction unless they can prove that the government's actions would have enticed an ordinary person into committing the offense. This results in a clear path for law enforcement to "manufacture" crime by involving otherwise innocent persons[154] in conduct in which they would have never engaged but

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trates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such offense by either:

(1) Making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(2) Employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

b. Except as provided in subsection c. of this section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the trier of fact.

c. The defense afforded by this section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

N.J. REV. STAT. § 2C:2-12 (1990).

152 State v. Rockholt, 476 A.2d 1236, 1238 (N.J. 1984).

153 519 A.2d 350, 361 (N.J. 1987).

154 These individuals hold the status of the "otherwise innocent" because they were not predisposed to commit the crime.

for government enticement. On the reverse side, obviously improper government activity can result in a conviction which violates the foundation for the objective approach: although the court should not "consummate an abhorrent transaction,"[155] a conviction is likely when impropriety is present but so, too, is predisposition.

The second avenue is equally simple but founded on a different view of freedom for enforcement officials. Here, the entrapment defense would be available *unless* the defendant was both predisposed and induced by proper governmental conduct. In all other cases, the defense would be available when either the defendant was not predisposed or when government activities were deemed improper. Under this broad approach, the entrapment defense would be available in almost all circumstances. This would severely limit enforcement freedom in undercover operations but still would permit convictions of the obviously guilty, those who were predisposed to commit the offense and subject to proper government activities.[156] Under the second approach, defendants may demonstrate entrapment by proving *either* a lack of predisposition or a presence of government impropriety.[157] New Mexico created this broad either/or test for entrapment in *Baca v. State.*[158] In this "circular sting" case, the Supreme Court of New Mexico expanded the entrapment rule so that a defendant "may successfully assert the defense of entrapment, either by showing lack of predisposition to commit the crime for which he is charged, or, that the police exceeded the standards of proper investigation, as here where the government was both the supplier and the purchaser of the contraband and defendant was recruited as a mere conduit."[159] The problems with this approach are obvious. When the government is required to generate an undercover plan that is totally above-board and then must restrict their targeting to persons who are identifiable as "predisposed," most sting as well as reverse sting operations are rendered ineffective. While this strategy may insure that innocent persons are not en-

155 Sorrells v. United States, 287 U.S. 435, 459 (1932) (Roberts, J., concurring).

156 This second approach is consistent with Packer's "due process" model. Here, government officials are viewed with skepticism and the justice system is seen as a series of hurdles which must be cleared in order to secure any conviction. Freedom of the citizenry is put above the need to control crime and the acts of justice system officials are considered inherently suspect. PACKER, *supra* note 149, at 162.

157 This could be characterized as the reciprocal of "No Entrapment" (Type 1). Entrapment would be available under any of the other three scenarios: "No Predisposition/Proper Government Conduct" (Type 2), "Predisposition/Improper Government Conduct" (Type 3), and "Entrapment" (Type 4).

158 742 P.2d 1043 (N.M. 1987) (entrapment found where defendant sold drugs to an undercover officer that were supplied by a government informant).

159 *Id.* at 1046.

snared, it severely restricts the government's ability to ferret out hidden crimes and criminals. For example, a Keith Jacobson, who actively pursues the purchase and even production of child pornography, can avoid criminal liability if the tactics which government uses are suspect. Likewise, active drug dealers can escape prosecution if they happen to be caught in an impermissible reverse sting operation. In addition, as criminals become more sophisticated, government techniques to catch them must become more inventive. The case of Keith Jacobson indicates the lengths to which agents must go in order to attract attention.[160]

In the third strategy, the two approaches are melded together. Two sub-categories currently exist in this area. The first is demonstrated by the federal scheme where predisposition is viewed first, and if found to be present, then impropriety (in the form of outrageous conduct) is examined. The problems presented by this strategy are outlined above.[161] The second category is manifested by the system once adopted by Florida.

The Florida Supreme Court created a two-part test of entrapment utilizing both the subjective (predisposition) and objective (outrageous conduct) views in *Cruz v. State*.[162] Conceptually, this method places primary emphasis on government conduct and is therefore primarily objective in nature. Unless a defendant can convince the court that officials have acted improperly, the jury will never get the opportunity to examine predisposition. Thus, reverse-sting cases, like that of Keith Jacobson, may never reach the

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160 Although Jacobson's conviction was reversed by the Supreme Court, numerous other cases involving child pornography were affirmed, primarily due to findings of predisposition. *See, e.g.*, United States v. Driscoll, 852 F.2d 84 (3d Cir. 1988); United States v. Esch, 832 F.2d 531 (10th Cir. 1987), *cert. denied*, 485 U.S. 908, 991 (1988); United States v. Gantzer, 810 F.2d 349 (2d Cir. 1987); United States v. Goodwin, 854 F.2d 33 (4th Cir. 1988); United States v. Hunt, 749 F.2d 1078 (4th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985); United States v. Johnson, 855 F.2d 299 (6th Cir. 1988); United States v. Moore, 916 F.2d 1131 (6th Cir. 1990); United States v. Musslyn, 865 F.2d 945 (8th Cir. 1989); United States v. Nelson, 847 F.2d 285 (6th Cir. 1988); United States v. Rubio, 834 F.2d 442 (5th Cir. 1987); and United States v. Thoma, 726 F.2d 1191 (7th Cir. 1984), *cert. denied*, 467 U.S. 1228 (1984).

161 *See supra* notes 96-101 and accompanying text.

162 465 So. 2d 516, 521 (Fla.), *cert. denied*, 437 U.S. 905 (1985). In 1987, the Florida State legislature may have derailed this attempt to combine the two approaches when it established entrapment as a statutory defense. The law now provides that the defendant must prove, by a preponderance of evidence, that law enforcement induced the commission of the crime through conduct "which created a substantial risk that such crime [would] be committed by a person other than one who is ready to commit it." FLA. STAT. ch. 771.201 (1992). This statute has been interpreted in various ways by the state appellate district courts. *See* Bowser v. State, 555 So. 2d 879 (Fla. Dist. Ct. App. 1989); Gonzales v. State, 571 So. 2d 1346 (Fla. Dist. Ct. App. 1990); and Krajewski v. State, LEXIS 2182 Mar. 13, 1991, Case No. 90-0703 (Fla. Dist. Ct. App. 1991).

stage where the jury can determine if defendant was a proper target. Even if the jury does receive the case, its review is restricted to an examination of predisposition only. Non-predisposed defendants who get swept up by a marginally improper scheme may never be able to even offer an entrapment argument because the government's conduct is deemed by the court to be insufficiently improper to warrant review.

This article proposes a model proposed which combines the two approaches and avoids the problems confronted by the other alternatives. It bypasses the pitfalls found in New Jersey's strict approach of requiring proof of both defendant predisposition and government misconduct. The model also stops short of the New Mexico's liberal "either/or" position. In addition, it represents a more reasoned and balanced approach than the mixed alternatives. Unlike the current federal strategy, which favors predisposition over "outrageous conduct," or the "old" Florida approach, that places more importance on the review of government conduct than on the proclivity of the accused, the proposal here attempts to truly balance the two.

The proposed model, however, is not without its drawbacks. First, the model places a major burden on the federal judiciary to rule on entrapment matters heretofore not addressed. Judges must make a determination as to whether government conduct was sufficiently improper that it could lure an ordinary person into a scheme. District courts could scuttle the balancing approach simply by setting high standards for "outrageousness." If a defendant cannot convince the court that the government acted inappropriately, then the jury will never decide if the predisposition outweighed impropriety. This type of court action would eventually result in a *de facto* objective system where few decisions would be based on predisposition because most would turn on government conduct. Potential problems with the judiciary, however, will likely be tempered by the long legacy of the subjective approach which has been present in the federal courts for decades. This could be buttressed by the strong endorsement of this approach in *Jacobson*.

This model also shoves the jury into the entrapment quagmire. The members of the jury would have to wrestle with both predisposition and "outrageousness," and would have to do so with little historical guidance. A plethora of other, more technical, problems would have to be addressed as well. Jury instructions would have to be developed and tested in the courts; inconsistencies among the circuits would have to be ironed out. Furthermore, adoption of this model would require the overturning of caselaw that has developed

over decades. These obstacles, however, can be overcome. Whenever the Court institutes a major change, juries must be instructed differently, inconsistencies arise and must be ironed out, and case law must be overturned. However, these problems are less troublesome than maintenance of the current *Jacobson* doctrine.

The model proposed here provides a logical and workable answer to many of the problems posed by entrapment in general, and the reverse sting in particular. If implemented, the entrapment defense could become an effective means of dealing with the thorny problems associated with governmental attempts to handle major criminal activities without the manufacturing of crime or engaging in outrageous conduct.

IV. Conclusion

In its review of the entrapment defense and the reverse sting, this article has demonstrated that the current method of dealing with the problem is not only arduous, but also unworkable as it is now structured. Presently, there are two fundamental approaches to entrapment that have been adopted. The subjective approach focuses on the individual defendant to determine if there is evidence of predisposition prior to involvement in a government-instigated operation. The objective view looks strictly to the conduct of government officials and considers predisposition irrelevant. Under this approach, if the conduct of government officials would have lured the average person to commit a crime, then a defendant has been entrapped and must be acquitted.

At the federal level, the courts use a two-step process to deal with entrapment. First, the defendant's behavior is examined to determine if there is evidence of predisposition to commit the crime. If none is found, then the accused is acquitted based on entrapment. When the court finds evidence of predisposition, entrapment is unavailable but the defendant may claim that the government's improper actions violated due process. While this entrapment strategy seems to work reasonably well with many types of law enforcement designs, it presents problems with certain operations, such as reverse stings, where agents pose as sellers rather than buyers of illicit goods and services.

The federal courts' approach reverse sting cases in a manner similar to that taken in other entrapment situations. Once the defendant's predisposition is established, the court reviews the government's conduct for "outrageousness." However, like non-reverse sting cases, juries seldom acquit and circuits rarely reverse

on the basis of entrapment. Furthermore, once predisposition has been established, appellate courts are very reluctant to overturn decisions because of government misconduct. Inasmuch as entrapment is separated from the due process concerns of outrageous conduct, a defendant must clear two hurdles in sequence to address effectively the two issues of entrapment: predisposition and improper government conduct. The problems evidenced by the federal approach are best understood in the context of the recent decision of *Jacobson v. United States*.[163] In this case, the Court ruled that the government must prove that a defendant was predisposed to engage in a crime *before* becoming a target of an investigation. Because the prosecution failed to do so in Jacobson's case, the Court ruled that he was entrapped as a matter of law.

The issues raised by the federal approach, and exacerbated by the reverse sting, may be illustrated by viewing two would-be offenders who each have different fates depending on the approach (subjective or objective) taken, but who should, at least theoretically, be treated in a uniform manner. The first is the "otherwise innocent" person who, but for a government scheme that entices involvement, would never commit the criminal offense at issue. The second example is the career criminal, who is most undoubtedly predisposed but is ensnared by a clearly improper reverse-sting operation. The "otherwise innocent" avoids conviction under the subjective (and federal) view but does not under the objective approach because the government's action was proper. The career criminal is not entrapped in the federal system (though it may be possible to prove a due process violation) but is likely to escape conviction under the objective approach despite the fact that this individual would have engaged in the criminal conduct even without the improper government conduct.

There are several ways out of this theoretical quagmire, all of which involve some combination of the two approaches. First, entrapment could require *both* defendant predisposition and government misconduct. This would promote consistency but also would ensnare the "otherwise innocent" described above. Second, proof of entrapment might hinge on *either* predisposition or "outrageous conduct." This too would provide for congruous results but also would allow the "career criminal" to escape prosecution.

The third avenue involves the melding of the two approaches, and a specific model has been suggested here. The proposal entails a three-step process. The first step involves a threshold require-

163 112 S. Ct. 1535 (1992).

ment that the defendant convince the court that the government's conduct was sufficiently questionable that an ordinary person *might* be enticed to participate. The second includes a summary examination to determine if there is some evidence of predisposition. If evidence of questionable government conduct and of the defendant's predisposition is offered, the issue of entrapment can be presented to the jury. Here, the jury weighs evidence of the government's conduct against proof of the defendant's predisposition. The standard that would be applied is whether the defendant's participation is more attributable to the government's conduct than to the accused individual proclivity to join the activity. If the defendant's involvement is based more on the former (the government's conduct) than on the latter (the predisposition of the accused), then entrapment would have been proven.

This model, while not without its own drawbacks, provides a balance between the two prevailing views. It also deals with some of the principle concerns surrounding the defense. The model assists in preventing the conviction of persons who are not "otherwise innocent." However, it also provides a mechanism whereby the "career criminal," who is not specifically predisposed, can be successfully prosecuted. Finally, the model addresses the major principles that are at the heart of the entrapment defense. It circumvents the encapsulation of persons not targeted by the specific legislation in question. It does not promote the manufacture of crime. Lastly, it does not endorse reprehensible government conduct. This proposal provides a workable alternative to the current approaches to entrapment by balancing the major concerns in this thorny area.