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"THE GOVERNMENT MADE ME DO IT": A PROPOSED APPROACH TO ENTRAPMENT UNDER *JACOBSON V. UNITED STATES*

INTRODUCTION

> Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: "The serpent beguiled me and I did eat." That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will.[1]

Despite this ominous prediction by the New York Supreme Court in *Board of Commissioners v. Backus*, courts have recognized the need for a criminal defense that "strike[s] a balance between criminal predisposition and overzealous law enforcement practices."[2] Courts saw the need for this balance because "[h]uman nature is frail enough at best, and requires no encouragement in wrong-doing."[3] In the early years of this century, American courts struck a balance between these competing interests by recognizing the criminal defense of entrapment.[4]

Commentators and courts have applied two strands of analysis to the entrapment defense: the subjective approach and the objective approach. The subjective approach to entrapment focuses on the state of mind of the accused, while the objective approach concentrates on the involvement of government agents in the commission of the crime in question. Although both analyses have merit, a hybrid standard different from those proposed by commentators and used by various courts would ensure greater fairness to criminal defendants.

This Note traces the history and development of the subjective and objective entrapment analyses, as well as the hybrid approaches proposed by commentators or applied in various jurisdictions. Within this context, this commentary examines the recent Supreme Court case of *Jacobson v. United States*,[5] and analyzes the Court's approach to

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1 Board of Comm'rs v. Backus, 29 How. Pr. 33, 42 (1864).
2 PAUL MARCUS, THE ENTRAPMENT DEFENSE 1 (1989).
3 Saunders v. People, 38 Mich. 218, 222 (1878) (Marston, J., concurring).
4 *See* Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).
5 112 S. Ct. 1535 (1992).

the subjective entrapment defense. This Note asserts that the *Jacobson* opinion exemplifies some of the flaws inherent in the subjective approach to entrapment. Next, after weighing the comparative advantages and disadvantages of the subjective and objective approaches to entrapment, this Note proposes a new entrapment analysis which combines elements of both. Finally, this Note applies the new analysis to the facts of *Jacobson* to demonstrate its superiority over both the subjective and objective tests.

I
BACKGROUND

A thorough review of the entrapment defense is required to understand the various approaches adopted by courts and commentators.[6] In particular, a detailed overview of the history of entrapment helps illustrate the doctrinal tensions which underlie *Jacobson v. United States*[7] and demonstrates the need for a superior entrapment analysis.[8]

A. Origins of the Entrapment Defense

In the late nineteenth century, American courts began to recognize the validity of a doctrine that protected people from overreaching government investigations.[9] However, the criminal defense of entrapment was not officially recognized in the United States until 1915, when the Ninth Circuit decided *Woo Wai v. United States*.[10] The defendant, Woo Wai, at the urging of undercover immigration officers, transported Chinese immigrants across the Mexican border into the United States in violation of certain immigration laws. Although he at first rebuffed the government's suggestions that he illegally transport the immigrants,[11] the defendant finally acted after several months of government persuasion.

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6 For a synopsis of the history of entrapment, see Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5 (1986).

7 *Jacobson*, 112 S. Ct. at 1535.

8 Several commentators have expressed the need for changes in the current entrapment doctrine that address both moral and political concerns. *See, e.g.*, Charles E. Anderson, *Racism and Entrapment: Critics Claim Black Officials Singled Out For Prosecution*, 76 A.B.A. J. 32 (Nov. 1990); Gary T. Marx, *Under-the-Covers Undercover Investigations: Some Reflections On the State's Use of Sex and Deception in Law Enforcement*, 11 CRIM. JUST. ETHICS 13 (1992); Seth Kaberon, *Controls Needed For 'Stings'*, 130 CHI. DAILY L. B., Aug. 7, 1984, at 1; William Safire, *Legal or Not, Taping Phone Calls Is Morally Repugnant*, L.A. DAILY J., Nov. 13, 1992, at 6.

9 *See* United States v. Adams, 59 F. 674 (D. Or. 1894); United States v. Whittier, 28 F. Cas. 591 (E.D. Mo. 1878) (No. 16,688); O'Brien v. State, 6 Tex. Crim. 665 (1879); Saunders v. People, 38 Mich. 218 (1878).

10 223 F. 412 (9th Cir. 1915).

11 Woo Wai responded to the government's urgings: "This is in violation of the law. It could not be done." *Id.* at 413.

At trial, Woo Wai claimed that no crime had been committed because government agents had induced him to commit the act.[12] The Ninth Circuit reversed Woo Wai's conviction, stating that it is "against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case . . . a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes."[13]

The court's decision contradicted prior case law from other jurisdictions that rejected entrapment as a defense to a criminal charge.[14] The Ninth Circuit distinguished those earlier decisions, where "the criminal intention to commit the offense had its origin in the mind of the defendant,"[15] from *Woo Wai*, where "the suggestion of the criminal act came from the officers of the government."[16] The *Woo Wai* court emphasized that the intent to commit the crime originated with the government rather than the defendant. The court's policy seems sound: The legal system should not condone government acts that persuade an individual to commit a crime he otherwise would not have committed.

B. The Development of Divergent Doctrines: The Subjective and Objective Approaches to Entrapment

As interpreted by the Ninth Circuit in *Woo Wai*, analysis of the entrapment defense turns on the mental state of the defendant. The court must determine whether the defendant would have committed the crime "but for" government solicitation. However, courts quickly recognized that the idea embodied by the entrapment defense, that the government should not encourage otherwise innocent people to commit crimes, could be expressed in several ways.[17] The landmark Supreme Court decision, *Sorrells v. United States*,[18] illustrates the early development of a varied approach to entrapment analysis.[19]

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12 *Id.* at 412-13.

13 *Id.* at 415.

14 *Id.* (citing People v. Mills, 70 N.E. 786 (N.Y. 1904), where the court sustained a conviction for a crime facilitated by detectives and state officers).

15 *Id.*

16 *Id.*

17 See discussion of the emergence and development of the objective and subjective approaches to entrapment at the Supreme Court level *infra* notes 71-178 and accompanying text.

18 287 U.S. 435 (1932).

19 Because the entrapment defense is not based on the Constitution, different jurisdictions have discretion to adopt it and embrace a subjective, objective or hybrid approach to entrapment. Some commentators argue that the entrapment defense has a constitutional home in the due process clauses of the Fifth and Fourteenth Amendments, as well as in the Fourth Amendment's prohibition against illegal searches and seizures. *See, e.g.*, Banks v. United States, 249 F.2d 672 (9th Cir. 1957); United States v. Chisum, 312 F. Supp.

1. *The* Sorrells *Decision*

The Supreme Court first recognized the validity of the entrapment defense in the 1928 case of *Sorrells v. United States*.[20] Coming more than a decade after *Woo Wai*, *Sorrells* presented the Supreme Court with an opportunity to endorse the entrapment defense. The *Sorrells* Court found that the government entrapped the defendant as a matter of law.[21] The Court stated:

> [T]he evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, . . . 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.[22]

The Court recognized the need for an entrapment defense when "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense."[23] This approach to entrapment has been dubbed the "subjective" approach because it emphasizes the state of mind of the accused rather than the reasonableness of the government's conduct.[24] Under this approach, the prosecution can defeat the entrapment defense only by proving that the accused was independently predisposed to committing the crime.[25]

To rationalize its subjective approach to entrapment, the *Sorrells* majority invoked a rule of criminal statutory construction designed to avoid absurd and unjust results.[26] The majority reasoned that Congress could not have intended criminal statutes to punish people

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1307 (C.D. Cal. 1970); William C. Sherrill, Jr., *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63 (1967).

20 287 U.S. 435 (1932).

21 *Id.* at 452. The facts of *Sorrells* are fairly straightforward. In order to expose violations of the National Prohibition Act, the government placed an informant in Haywood County, North Carolina. Apparently, the defendant's reputation as a rumrunner prompted the agent, posed as a tourist, to visit his home and attempt to purchase alcohol in violation of the National Prohibition Act. Inside the defendant's home, the agent twice asked the defendant if he could obtain liquor. Both times the defendant refused. After being reminded by the agent that they were both war veterans, the defendant granted the agent's third request for liquor.

22 *Id.* at 441.

23 *Id.* at 442.

24 The reasonableness of the government's conduct forms the crux of the objective approach to entrapment, set forth below at notes 41-57 and accompanying text.

25 *See infra* notes 31-42 and accompanying text.

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

where government officials lured otherwise innocent citizens into the commission of a crime.[27] Since Congress did not intend to punish those who lacked the predisposition to commit the crime, the Court concluded that entrapment analysis should focus on the defendant's state of mind.[28] Hence, it used a subjective approach to entrapment.

Although Justice Roberts agreed with the majority's substantive result, his concurring opinion took a very different approach. Justice Roberts focused on the conduct of the government rather than the state of mind of the accused. He argued that the entrapment defense did not rest upon a "strained and unwarranted construction of . . . [criminal] statute[s]." Rather, it rests upon "a fundamental rule of public policy" which grants exclusive power to (and imposes a duty upon) a court to protect its own functions and preserve "the purity of its own temple."[29] Therefore, according to Justice Roberts, the entrapment doctrine should protect society from government overreaching by denying convictions "instigated by the government's own agents."[30]

Sorrells v. United States thus generated two separate strands of entrapment analysis. With its focus on the predisposition of the accused, the *Sorrells* majority endorsed a subjective approach to entrapment, while Justice Roberts, who focused upon the conduct of law enforcement agents, recommended a more objective approach.

2. *Development of the* Sorrells *Approaches*

This Note now examines the modern doctrinal characteristics of both of the *Sorrells* approaches, as well as the relatively recent evolution of dual entrapment analyses which combine elements of both.

a. *The subjective approach*

The defendant's relationship with the government forms the basis of the subjective entrapment test, which concentrates mainly on two factors: inducement and predisposition.[31] Inducement constitutes the threshold requirement that the defendant must meet before the court will consider predisposition. Initially, the defendant has the

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27 *Id.* at 448.

28 *Id.* at 451.

29 *Id.* at 456-57. Some critics argue that Justice Roberts' theory violates the doctrine of separation of powers. *See* Edmund P. Bergan, Jr., Case Note, *Entrapment in the Federal Courts—Subjective Test Reaffirmed Against Lower Court Departures*, 42 FORDHAM L. REV. 454, 460 (1973) (arguing that because the power to grant clemency belongs to Congress and the Executive, courts may only refuse to punish guilty defendants on constitutional as opposed to public policy grounds).

30 *Sorrells*, 287 U.S. at 457.

31 MARCUS, *supra* note 2, at 116. Presently, all federal courts and a majority of state courts focus their entrapment analyses upon the predisposition of the accused.

burden of providing sufficient evidence that the government induced the defendant to commit the offense.[32] Even at the federal level, courts disagree on the degree of inducement required to satisfy this evidentiary threshold.[33] In any event, the defendant often has an easy burden to meet.[34] Once the defendant establishes inducement, the burden shifts to the government to demonstrate the defendant's predisposition to commit the crime.

The issue of predisposition lies at the center of the traditional subjective entrapment analysis.[35] The Supreme Court's justification for the entrapment defense in *Sorrells* reflects the importance of the predisposition factor: Congress did not intend "persons otherwise innocent" to be punished for committing crimes at the behest of government agents.[36] Whether the accused was predisposed to commit the crime depends on whether he was "willing or eager to become involved in the criminal enterprise."[37]

When determining the defendant's predisposition, the trier of fact[38] is instructed to consider all relevant facts which may contribute to an assessment of the defendant's state of mind.[39] Courts recognize that "there is no infallible means of divining a defendant's predisposition to commit a crime after the fact . . . [because] predisposition is, by definition, 'the defendant's state of mind and inclination before his

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32 *Id.* at 121.

33 *See generally* United States v. Wolffs, 594 F.2d 77, 80 (5th Cir. 1979) (requiring evidence which amounts to "more than a scintilla"); United States v. Burkley, 591 F.2d 903, 914 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979) (requiring "some evidence" of government inducement).

34 *See* MARCUS, *supra* note 2, at 121 (stating that "the quantum of evidence needed on the inducement point is quite limited"). However, not all government involvement constitutes impermissible inducement. For instance, it is not enough for the defendant to show that the government offered the opportunity to commit an illegal act. Courts require some further amount of overreaching. For a more complete analysis of the inducement issue, see *id.* at 120-32.

35 For an in-depth discussion of the interpretations of "predisposition" offered by courts and commentators, see Jeffrey N. Klar, Note, *The Need for a Dual Approach to Entrapment*, 59 WASH. U. L.Q. 199, 200 n.10 (1981).

36 *Sorrells*, 287 U.S. at 448; *see supra* notes 18-26 and accompanying text.

37 MARCUS, *supra* note 2, at 133.

38 The determination of the defendant's state of mind is a question of fact which is ordinarily for the jury to decide. However, in circumstances where the evidence clearly shows that the accused possessed no independent tendency to commit the offense, courts may determine as a matter of law that the defendant lacked the necessary predisposition. For a complete discussion of the jury's role in determining predisposition, see MARCUS, *supra* note 2, at 136-38. For examples of cases in which predisposition was lacking as a matter of law, see discussions of *Sherman v. United States*, *infra* notes 77-89 and accompanying text, and *Jacobson v. United States*, *infra* notes 124-78 and accompanying text.

39 For a complete explanation of the factors assessed by the trier of fact, see MARCUS, *supra* note 2, at 141-62.

initial exposure to government agents.' "[40] However, courts have cited several factors as crucial to the predisposition determination. Factors indicating "[p]roof of predisposition can range from prior acts to later acts, from the defendant's eagerness to evidence of his reputation. All of these may properly be viewed in evaluating the defendant's state of mind for purposes of the entrapment defense."[41] If the prosecution, relying on such evidence, demonstrates to the jury beyond a reasonable doubt that the defendant was predisposed to commit the offense, the subjective entrapment defense will fail.[42]

b. *The objective approach*

The Supreme Court's subjective approach to entrapment has spread throughout the federal court system and beyond to a majority of state jurisdictions.[43] While the subjective approach focuses on the predisposition of the accused, the objective approach to entrapment emphasizes the propriety of police conduct in "reverse sting" operations.[44] Presently, a minority of states endorse the objective approach, either through legislative enactment or judicial pronouncement.[45] An examination of the common law of several states allows insight into the variety of objective approaches to entrapment.[46] Alaska was the first state to adopt an objective entrapment analysis in its 1969 supreme court decision of *Grossman v. State*.[47] The Alaska Supreme

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40 United States v. Kaminski, 703 F.2d 1004, 1008 (7th Cir. 1983) (quoting United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980)). *See also* United States v. Navarro, 737 F.2d 625, 635 (7th Cir.) (quoting *Kaminski* and *Jannotti*), *cert. denied*, 469 U.S. 1020 (1984).

41 MARCUS, *supra* note 2, at 146.

42 Commentators have voiced concern that the subjective entrapment analysis' emphasis on the predisposition of the accused will often motivate the jury to disregard the issue of police misconduct. *See* Stephen G. Mirakian, Note, *Entrapment: Time to Take an Objective Look*, 16 WASHBURN L.J. 324, 336 (1977); Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965) [hereinafter Yale Note].

43 *See* Marcus, *supra* note 2 (outlining the objective and subjective tests used by various states).

44 *Id.* at 83.

45 States that have adopted the objective approach include: Alaska, ALASKA STAT. § 11.81.450 (1989); Arkansas, ARK. CODE ANN. § 5-2-209 (Michie 1987); Colorado, COLO REV. STAT. § 18-1-709 (1986); Hawaii, HAW. REV. STAT. § 702-237 (1988); Iowa, State v. Mullen, 216 N.W.2d 375 (Iowa, 1974); Kansas, KAN. STAT. ANN. § 21-3210 (1988); Michigan, People v. Turner, 210 N.W.2d 336 (Mich. 1973); New York, N.Y. PENAL LAW § 40.05 (McKinney 1987); North Dakota, N.D. CENT. CODE § 12.1-05-11 (1993); Pennsylvania, 18 PA. CONS. STAT. § 313 (1983); Texas, TEX. PENAL CODE ANN. § 8.06 (Vernon, 1973); Utah, UTAH CODE ANN. § 76-2-303 (1990); Vermont, State v. Wilkins, 473 A.2d 295 (1983).

46 *See* cases cited *supra* note 45.

47 457 P.2d 226 (Alaska 1969). In *Grossman*, the government assigned agent Turner to report on criminal activities in the Anchorage area during November, 1967. During the several months Turner spent frequenting the defendant's bar, he requested and procured marijuana and amphetamines from the defendant. Finally, after a series of unsuccessful requests by the agent, the defendant supplied him with a ten "fixes" of morphine, in violation of ALASKA STAT. § 17.10.010 (repealed 1982). The trial court convicted the defendant.

Court tried to establish "a workable or rational set of rules for . . . [the] application" of the entrapment defense.[48] The court rejected the subjective approach outlined in *Sorrells* after concluding that it rested upon a weak foundation:

> To speak of entrapment as an implied statutory condition, and then to focus inquiry on the origin of intent, the implantation of criminal design, and the predisposition of the defendant does not make much sense. If entrapment is a substantive condition of guilt, then it ought to apply when private persons induce the commission of an offense.[49]

According to the *Grossman* court, if the entrapment doctrine rests upon an implied legislative intent to abstain from punishing those who lack an independent predisposition to criminal behavior, then it is illogical to distinguish between inducement by government agents and by private individuals.[50] Both cases lead to the same result: a person is enticed to commit a crime he would not otherwise have committed.

The *Grossman* court adopted an objective approach to entrapment because "[a]n external standard, if it can be achieved, is certainly preferable to a doctrine founded in theoretical riddles."[51] Although it recognized that an effective law enforcement process sometimes requires government involvement, the court stated: "[i]nducements should be limited to those measures which, objectively considered, are likely to provoke . . . the commission of crime only [by] those persons, and not others, who are ready and willing to commit a criminal offense."[52] The Court concluded that the entrapment analysis should focus on the conduct of the police, stating:

> [U]nlawful entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offense, induces another person to commit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who is ready and willing, to commit such an offense.[53]

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48 *Id.* at 227.

49 *Id.* at 229.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.* The *Grossman* Court offered some examples of government conduct that would trigger a successful entrapment defense based on the objective approach: pleas of illness, appeals based upon pity or close friendship, and offers of "inordinate" sums of money. *Id.* at 230. Although the court recognized that this construction of the entrapment defense might provide a "ready escape hatch" through which those predisposed to commit crimes may routinely escape prosecution, it responded that considerations of justice outweighed that risk: "under standards of civilized justice, there must be some control on the kind of police conduct which can be permitted in the manufacture of crime." *Id.*

California has also embraced an objective entrapment analysis. In the 1979 case of *People v. Barraza*,[54] the California Supreme Court conducted a thorough analysis of both the subjective and objective tests for entrapment, and ultimately chose the latter.[55] Arguing against the subjective approach, the court found it patently unfair to determine the criminal predisposition of the accused by evaluating past acts rather than by focusing on the particular characteristics of the transaction in question. The court found the objective approach superior because it iguored the defendant's past activities, while the subjective test relied upon such evidence to gain insight into the defendant's state of mind before the crime. The *Barraza* court declared that the success of the entrapment defense should not depend upon "differences among defendants; we are not concerned with who first conceived or who willingly, or reluctantly, acquiesced in a criminal project. . . . [W]e . . . care about . . . how much and what manner of persuasion, pressure, and cajoling are brought to bear by law enforcement officials to induce persons to commit crimes."[56] The court concluded that the proper entrapment test should ask whether "the conduct of the law enforcement agent [is] likely to induce a normally law-abiding person to commit the offense?"[57]

A number of states have adopted the objective approach to entrapment by statute rather than judicial decision.[58] Section 2.13 of

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54 591 P.2d 947 (Cal. 1979). The defendant in *Barraza* was arrested for selling heroin to an undercover agent at the agent's request. When the undercover agent approached Barraza, he stated that he had kicked his heroin addiction through a drug rehabilitation program. According to the agent's own testimony, the defendant was "hesitant to deal" because of his criminal record.

55 Before entering into its comparative analysis, the *Barraza* court observed that the entrapment defense has broad implications for the criminal justice system:

> [E]ntrapment is a facet of a broader problem. Along with illegal search and seizures, wiretapping, false arrest, illegal detention and the third degree, it is a type of lawless enforcement. They all spring from common motivations. Each is a substitute for skillful and scientific investigation. Each is condoned by the sinister sophism that the end, when dealing with known criminals or the 'criminal classes,' justifies the employment of illegal means.

Id. at 955. (quoting Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1111 (1951)).

56 *Barraza*, 591 P.2d at 954.

57 *Id.* at 955. This test stops short of proscribing all government involvement with the commission of crimes. Decoy programs usually offer only an opportunity for the criminal to act, and do not "pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." *Id.* Although the inquiry should focus on the conduct of law enforcement agents, it is not to do so in a vacuum; the determination must take into account "the transactions preceding the offense, the suspect's response to the inducements of the officer, the gravity of the crime, and the difficulty of detecting instances of its commission." *Id.* The court here refers the reader to *Grossman*, 457 P.2d at 230.

58 *See supra* note 45 and accompanying text.

the Model Penal Code is typical of objective entrapment statutes.[59] Under section 2.13, entrapment occurs when the law enforcement official or his agent "induces or encourages another person to engage in conduct constituting such an offense by . . . employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."[60] The Model Penal Code thus focuses on whether the government's conduct "creates a substantial risk" of ensnaring law-abiding citizens. The standard disregards subjective characteristics of the individual defendant, like mental state, and is aimed solely at deterring wrongful government conduct.

c. *The hybrid approach*

Several states have developed hybrid approaches to entrapment which combine elements of both the subjective and objective tests outlined above. New Jersey,[61] Florida[62] and Indiana[63] have promulgated criminal statutes codifying hybrid approaches. In addition, both New Hampshire[64] and New Mexico[65] have developed hybrid approaches through their respective common law.[66]

The New Jersey law represents the approach taken by jurisdictions adopting a hybrid approach via statute:

> (a) A public law enforcement official . . . perpetrates an entrapment if . . . he induces or encourages and, as a direct result, causes another person to engage in [illegal] conduct . . . 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) [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.[67]

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59 The Model Penal Code's approach to entrapment typifies generic objective entrapment statutes in that it concentrates on the permissibility of government conduct, rather than the mental state of the accused. *See* MODEL PENAL CODE § 2.13 (1985).

60 *Id.*

61 N.J. STAT. ANN. § 2C:2-12 (West 1982).

62 FLA. STAT. ANN. § 777.201 (West 1992).

63 IND. CODE ANN. § 35-41-3-9 (Burns 1985).

64 *See* State v. Little, 435 A.2d 517 (N.H. 1981).

65 *See* Baca v. State, 742 P.2d 1043 (N.M. 1987).

66 Of these hybrid jurisdictions, only Florida and New Mexico consider the objective and subjective prongs of analysis to be independently sufficient to find entrapment. In other words, either a showing of subjective entrapment or a showing of objective entrapment would constitute sufficient grounds for acquittal. The remaining jurisdictions require that both tests be satisfied.

67 N.J. STAT. ANN. § 2C:2-12 (West 1982).

This statute incorporates elements of the objective approach into part (a) by drawing explicit limits on the permissible actions of government agents attempting to entice an individual to commit a crime. However, part (b) of the statute touches upon the crucial element of the subjective test: the defendant's state of mind. It does so by allowing the defendant to show that he would not have committed the offense "but for" the government interference. If the defendant proves this by a preponderance of the evidence, the entrapment defense must succeed.

The objective and subjective elements of the statute appear to exist independently. Thus, if a defendant can satisfy *either* the subjective or the objective prongs of the statute, she will have a successful entrapment defense. In practice, however, courts have required that both prongs be satisfied.[68] As the New Jersey Supreme Court noted, "N.J.S.A. 2C:2-12a(2) changed the definition of entrapment to require both that the police conduct created a substantial risk that the crime would be committed by people who were not predisposed to commit it and that it caused the particular defendant to commit the crime."[69] In other words, "the defendant must prove, by a preponderance of the evidence, that the police conduct constituted entrapment by both objective and subjective standards."[70]

New Mexico's hybrid test, on the other hand, does not require that both the objective and subjective tests be met.[71] The New Mexico Supreme Court in *Baca v. State*[72] chose to expand the existing statutory defense of entrapment by allowing "a criminal defendant . . . [to] 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."[73]

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

69 *Id.* at 1239.

70 *Id.* at 1241. New Hampshire also requires that a defendant meet both a subjective and objective test for entrapment. See State v. Little, 435 A.2d 517 (N.H. 1981) for an explanation of the similar approach taken by this jurisdiction.

71 *See* Baca v. State, 742 P.2d 1043 (N.M. 1987). Florida has taken a similar approach in Cruz v. State, 465 So.2d 516 (Fla. 1985), *cert. denied*, 437 U.S. 905 (1985) by allowing the satisfaction of either the objective or subjective prongs to result in entrapment.

72 742 P.2d 1043 (N.M. 1987).

73 *Id.* at 1046 (emphasis added). For an in-depth analysis of the reasoning behind and the implications of the *Baca* decision, see Barbara A. Mandel, Note, *New Mexico Expands the Entrapment Defense:* Baca v. State, 20 N.M. L. REV. 135 (1990).

C. The Supreme Court Before *Jacobson*: Objective or Subjective Entrapment?

The Supreme Court first recognized the entrapment defense in *Sorrells v. United States*,[74] and adopted the subjective approach.[75] However, the Supreme Court decisions following *Sorrells* often have been inconsistent on the question of whether to apply the subjective or objective test. A majority of Justices have consistently applied the subjective approach to entrapment analysis, strengthening that approach over time. These developments provide the historical backdrop for the Court's decision in *Jacobson v. United States*.[76]

1. Sherman v. United States

Sherman v. United States[77] was the first post-*Sorrells* Supreme Court decision on entrapment.[78] The defendant was charged with selling narcotics to a government agent. In a 5-4 decision, the Court reversed the lower court's holding and found that the defendant had been entrapped as a matter of law.[79] The *Sherman* majority embraced the subjective approach by adhering to *Sorrells*.[80] The Court reasoned that the judicial system must distinguish between government activity which sets "the trap for the unwary innocent and the trap for the unwary criminal."[81] According to the majority, such government activity could be identified by concentrating on the mental state of the accused to determine whether the individual was indeed "innocent" or "criminal."[82] The majority thus relied upon a determination of whether the defendant was predisposed to commit the crime.

The concurring opinion offered by Justices Frankfurter, Douglas, Harlan and Brennan urged the majority to reconsider the subjective analysis of entrapment. Frankfurter, writing for the remaining three Justices, favored the objective test over the "sheer fiction" of the sub-

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74 287 U.S. 435, 443 (1932).

75 *See supra* notes 18-40 and accompanying text.

76 112 S. Ct. 1535 (1992).

77 356 U.S. 369 (1958).

78 In *Sherman*, the government agent first met the defendant while both were in a doctor's office to receive medical treatment for narcotics addiction. Several more meetings under similar circumstances followed, in which the agent and the defendant shared their experiences dealing with narcotics addiction and treatment. Finally the agent asked the defendant if he knew of a good source for narcotics. After "a number of repetitions of the request," the defendant procured for the agent a quantity of narcotics which they shared between them. The defendant cooperated with the agents request several times thereafter, prompting his indictment charging three sales of narcotics. *Id.* at 371.

79 *Id.* at 369, 378.

80 Sorrells v. United States, 287 U.S. 435 (1932). A discussion of the *Sorrells* decision is set forth *supra* at footnotes 18-28 and accompanying text.

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

82 *Id.* at 372, 373.

jective approach.[83] The concurring Justices believed that the Court should rethink the *Sorrells* decision because:

> In a matter of this kind the Court should not rest on the first attempt at an explanation for what sound instinct counsels. It should not forego re-examination to achieve clarity of thought, because confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued.[84]

According to these four Justices, the entrapment defense should pursue the "true ends" of providing limits on the legitimacy of government conduct geared towards the detection and prosecution of those who break the law.[85] Indeed, "the federal courts have an obligation to set their face against enforcement of the law by lawless means."[86] The concurring Justices felt that the objective approach to entrapment better provided the means to attain these ends.

The *Sherman* majority's decision to analyze the defendant's predisposition may be seen as an affirmation of the subjective test of entrapment first set forth in *Sorrells v. United States*.[87] However, two aspects of *Sherman* indicate that the strength of the subjective test remained far from overwhelming.[88] First, since four of the nine Justices remained wedded to the objective approach, the objective test remained one Justice away from the majority opinion. In addition, the *Sherman* decision achieved significance because it involved a reviewing court reversing a lower court to find entrapment as a matter of law. In so deciding, the *Sherman* Court disregarded evidence of the defendant's prior convictions despite the fact that past acts were thought to be legitimate factors that a court should consider in determining predisposition.[89] In light of these factors, it seems that *Sherman v. United States* added little strength to the subjective approach at the Supreme Court level.

2. United States v. Russell

In *United States v. Russell*,[90] the Supreme Court affirmed the preferred status of the subjective approach to entrapment. In *Russell* the defendant was convicted on charges of selling methamphetamines to

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83 *Id.* at 379.
84 *Id.*
85 *Id.*
86 *Id.* at 380.
87 *Id.* at 382.
88 *See supra* part I.C.1.
89 The evidence consisted of a nine-year-old sales of narcotics conviction and a five-year-old conviction for possession of narcotics. *Sorrells*, 287 U.S. at 375. Evidence of such convictions is routinely submitted to the trier of fact to assist in a determination of whether the accused was predisposed to commit the offense.
90 411 U.S. 423 (1973).

an undercover agent.[91] Although the majority in *Russell*, like that in *Sherman*, consisted of only five Justices, their decision to affirm the lower court's conviction may be read as adding significant strength to the subjective analysis.

The *Russell* majority decided that government agents had not entrapped the defendant even though they supplied him with a chemical ingredient essential to the drug manufacturing process.[92] The chemical had become scarce because private pharmaceutical companies had ceased selling it at the request of the Bureau of Narcotics and Dangerous Drugs.[93] The Court concluded that since Russell was predisposed to manufacture and sell the drug, the government's conduct did not "implant[] the criminal design in the mind of the defendant," and thereby did not entrap him.[94] The Court's analysis strengthened the subjective approach to entrapment by emphasizing the predisposition of the defendant, notwithstanding the government's participation in the crime. The Court's focus on predisposition thwarted Russell's entrapment defense even though the government played a crucial role in the criminal act by supplying him with an essential and scarce ingredient. Indeed, "but for" the government involvement in this case, the defendant would not have committed this particular crime.[95]

In addition, unlike in *Sherman*, the defendant in *Russell* expressly requested that the Court replace its subjective entrapment analysis with the objective approach.[96] Nonetheless, the *Russell* majority followed the precedent set forth in *Sorrells* and *Sherman*, leaving the subjective analysis intact.[97] The *Russell* majority concluded that the legislature would be in a better position to delineate the true dimen-

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91 *Id.* at 424, 427.

92 *Id.* at 436.

93 *Id.* at 426-27.

94 *Id.* at 436.

95 The manufacture of the narcotic sold to the undercover agents in *Russell* was possible only due to the government's contribution of ingredients. Although the subjective entrapment analysis is premised on an assurance that only the subjectively guilty will be punished, the *Russell* decision resulted in quite the reverse. Subjectively speaking, the defendant Russell would never have committed this offense if the government hadn't assisted. The irony of the result is obvious.

96 As the *Sherman* Court stated:

> It has been suggested that in overturning this conviction we should reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells v. United States*, 287 U.S. 435, 453. To do so would be to decide the case on grounds rejected by the majority in *Sorrells* and, so far as the record shows, not raised here or below by the parties before us. We do not ordinarily decide issues not presented by the parties and there is good reason not to vary that practice in this case.

356 U.S. 369, 376 (1957). The Court in *Russell v. United States* was not similarly restricted. 411 U.S. at 430-33.

97 *Russell*, 411 U.S. at 433.

sions of the entrapment analysis if they disagreed with the Court's interpretation of the subjective approach: "Since the defense [of entrapment] is not of a constitutional dimension, Congress may address itself to the question [of choosing between the subjective and objective approaches] and adopt any substantive definition of the defense that it may find desirable."[98]

The *Russell* Court's strengthening of the subjective approach should not be overemphasized. As was the case in *Sherman*, the *Russell* majority consisted of only five Justices. Also, as in *Sherman*, the four dissenting Justices felt that the objective approach was the better method to use in entrapment analysis.[99] In *Russell*, however, four Justices dissented because they felt that under the objective analysis, the defendant was entrapped as a matter of law. The dissenters felt that the entrapment defense was created because "the Government 'may not provoke or create a crime and then punish the criminal, its creature.' "[100] The fact that the government supplied the defendant with a necessary ingredient convinced the dissenters that the government was an "active participant" in the illegal activity.[101] The dissent believed that the government went too far in its pursuit of the defendant, and its actions constituted entrapment under the objective approach.[102]

3. Hampton v. United States

The subjective approach to entrapment continued to gain strength at the Supreme Court level with the 1976 case of *Hampton v. United States*.[103] This case represents the Supreme Court's most liberal view of government involvement in criminal activity that has not triggered a valid subjective entrapment defense. The defendant in *Hampton* was convicted of selling heroin to an undercover government

98 *Id.*

99 *Id.* at 436. However, only two of the four dissenting Justices in *Russell* had also favored the objective approach in their *Sherman* concurrence. This fact suggests the progress of the objective strand toward becoming good law. Justices Frankfurter, Douglas, Harlan and Brennan concurred in *Sherman*, while Douglas, Brennan, Stewart and Marshall dissented in *Russell*.

100 *Id.* at 439 (Stewart, J., dissenting) (quoting Casey v. United States, 276 U.S. 413, 428 (1928) (dissenting opinion)).

101 *Id.* at 437 (Douglas, J., dissenting).

102 Under the majority's subjective analysis, however, the fact that the defendant was inclined to produce and sell the illegal drug, and indeed had been doing so for some time, effectively precluded his entrapment defense. Since this was the route of analysis offered by five out of nine Justices, the conviction was affirmed.

103 425 U.S. 484 (1976).

agent.[104] The entrapment defense failed even though the government supplied the narcotic to the defendant.[105]

The plurality opinion paid little attention to the extent of government involvement, holding that the success of an entrapment defense hinges upon the state of mind of the defendant.[106] Justice Rehnquist, writing for the plurality, stated that the subjective test "ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established."[107] Under Rehnquist's interpretation of the subjective approach, once predisposition is established, the egregiousness of government involvement becomes irrelevant.[108] Justices Powell and Blackmun concurred in the judgment of the plurality insofar as they agreed that the defendant was without a defense in the present action.[109]

Justices Brennan, Stewart and Marshall dissented from Rehnquist's plurality opinion.[110] Brennan once again championed the objective over the subjective approach to entrapment. According to the dissenting opinion, "courts [should] refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction can-

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104 *Id.* at 485.

105 *Id.* at 485-87. This set of facts is somewhat different than in *Russell* where the Government supplied the defendant with a legal but scarce chemical compound which was essential to the manufacture of the drug.

106 *Id.* at 488-89 (plurality opinion).

107 *Id.*

108 Rehnquist's position that any government conduct should be considered legitimate so long as the defendant is predisposed to commit the offense seems extreme. Such a stance would be less intimidating if one considers that the defendant also possesses a due process defense to guard against particularly egregious conduct. However, Rehnquist also limits the scope of the due process defense to only those instances where the government conduct encroaches upon a constitutionally protected right. *Id.* at 490. Since the police conduct here did not deprive Hampton of any right guaranteed him by the Constitution, the due process defense was unavailable as an alternative remedy to entrapment. Rehnquist (and presumably Burger and White, who joined his opinion) effectively gives the goverument a free hand with which to coax, induce, and persuade an individual to commit a crime so long as the goverument abuses no right guaranteed by the Constitution, and the trier of fact reasonably finds him predisposed to commit the same offense independently. For a discussion of the origin and development of the due process "spin" on entrapment, see Klar, *supra* note 35, at 203-09.

109 *Hampton*, 425 U.S. at 491-95. The two disagreed, however, with the limited conception of the due process defense offered by Rehnquist. *See supra* note 108. Although both Powell and Blackmun adhered to the predisposition-intense focus of the subjective approach to entrapment, both recognized that limits must be placed upon the freedom of the government to encroach upon the individual liberty of citizens. *Id.* at 493 (Powell, J., concurring).

110 *Id.* at 495. Justice Stevens took no part in the consideration of the case.

not be countenanced."[111] Under the objective approach, Brennan concluded that the defendant was entrapped as a matter of law.[112] The dissenting Justices opined that when a government agent supplies the accused with contraband for the purpose of arresting the individual later when he sells it back to the government, "the . . . case falls below standards, to which common feelings respond, for the proper use of governmental power."[113] In such cases, the "Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary" such that the "intermediary" is thereby objectively entrapped.[114] Indeed, the very fact that such extreme circumstances failed to garner additional support for the objective approach to entrapment illustrates the degree to which a majority of the Supreme Court's Justices embrace the subjective approach.

4. Mathews v. United States

The 1988 decision of *Mathews v. United States*[115] solidifies the Supreme Court's preference for the subjective approach to entrapment,[116] but sheds little light upon the development of entrapment analysis. The *Mathews* Court did not conclude whether or not the defendant was entrapped in this particular case. Instead, the Court limited its scope of review to the procedural issue of whether a court may instruct a jury with regard to entrapment while the defendant simultaneously denies the commission of the crime.[117] In reversing the lower court, the Supreme Court held that a defendant is free to plead contradictory defenses under such circumstances.[118] With regard to the subjective/objective entrapment debate, Justice Rehnquist reiterated his conviction that the subjective approach is more appropriate, and

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111 *Id.* at 496 (Brennan, J., dissenting) (quoting Sherman v. United States, 356 U.S. 369, 380 (1958)).

112 *Id.* at 497.

113 *Id.* (quoting United States v. Russell, 411 U.S. 423, 441 (1973)).

114 *Id.* at 498-99.

115 485 U.S. 58 (1988).

116 The defendant in *Mathews* was an official in the Small Business Administration who provided government aid to small businesses. However, the government suspected that the defendant was hesitant to give aid to certain small corporations unless these corporations agreed to supply the defendant with 'loans.' After repeatedly requesting such a loan from the president of a small company in need of assistance, the corporation official agreed to offer the money. After receiving the money under the surveillance of the FBI, the defendant was arrested and charged with accepting a bribe in exchange for an official act, in violation of 18 U.S.C. § 201(g) (1984).

117 *Mathews*, 485 U.S. at 59. The defendant argued that the prosecution was unable to demonstrate a prima facie case against him, while at the same time claiming entrapment. Since entrapment is based upon the fact that a crime has indeed been committed, the defendant was pleading contradictory defenses, which prior to the *Mathews* decision was impermissible in a majority of jurisdictions. *Id.* at 59-60 n.1.

118 *Id.* at 66.

that the proper focus ought to be on the mental state of the accused.[119]

Mathews remains testament to the growing strength of the subjective entrapment analysis. In his concurring opinion, Justice Brennan withdrew his support of the objective approach, clearly signaling the dominance of the Court's preference for subjective entrapment analysis. Justice Brennan stated:

> Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the Government's conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to *stare decisis*, and today join the judgment and reasoning of the Court [to adopt the subjective analysis of entrapment].[120]

In addition to Justice Brennan's change of opinion, the two dissenting Justices, White and Blackmun, agreed with the subjective approach and dissented solely with regard to the issue of inconsistent defenses.[121]

Although the majority opinion does not strengthen the appeal of the subjective approach, Justice Brennan's complete reversal of opinion, coupled with the hands-off approach offered by Justices White and Blackmun, demonstrates that support for the objective entrapment test was extinct at the Supreme Court level. This trend in Supreme Court jurisprudence runs counter to a clear trend among the states, where the objective approach to entrapment had been steadily gaining popularity.[122] While many jurisdictions recognized the shortcomings of the subjective approach to entrapment,[123] the Supreme Court, rooted in *stare decisis*, remained firmly attached to the subjective approach.

D. Current Supreme Court Jurisprudence: *Jacobson v. United States*

The Supreme Court examined the entrapment defense most recently in its 1992 decision of *Jacobson v. United States*.[124] In *Jacobson*, the Supreme Court held that the U.S. Postal Service entrapped the defendant as a matter of law in a Government attempt to arrest him for violating the Child Protection Act.[125]

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119 *Id.* at 62-63.

120 *Id.* at 67 (Brennan, J., concurring).

121 *Id.* at 73 (White, J., dissenting).

122 *See* Klar, *supra* note 35.

123 *See supra* notes 41-58 and accompanying text.

124 112 S. Ct. 1535 (1992).

125 18 U.S.C. §§ 2251-2257 (1984).

1. *Facts*

In February of 1984, Keith Jacobson, a 56 year old Nebraska farmer who supported his elderly father, ordered two magazines and a brochure from a California adult bookstore.[126] These magazines were entitled "Bare Boys I" and "Bare Boys II," and contained pictures of naked preteen and teenage boys. Jacobson testified that he was "shocked" that the magazines contained photographs of boys at such a young age, as he had expected to find pictures of "young men 18 years or older."[127] Since the young boys in the magazines were not engaged in sexual activity, both the sale and receipt of the material were legal under federal as well as Nebraska law.[128]

However, three months after Jacobson's receipt of the material, Congress passed the Child Protection Act, which made it illegal to receive through the mail sexually explicit depictions of children.[129] Under the rubric of the newly passed law, postal inspectors examined the mailing lists of the California bookstore which had sent the "Bare Boys" magazines to Jacobson and found the latter's name and mailing address. With this information, the government began a two and a half year campaign to induce Keith Jacobson to order child pornography through the mail. Two government agencies attempted to coax Jacobson into committing the illegal act by approaching him under the guise of five fictitious organizations and one bogus pen pal.[130] After twenty six months of contact, Keith Jacobson finally ordered the material, whereupon he was immediately arrested.[131]

The creativity of the government's efforts pales in comparison with its persistence. Postal inspectors initially approached Jacobson by sending him a letter and membership application from the "American Hedonist Society." The brochure described the fictitious organization's doctrine: to promote "the right to read what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without restrictions being placed on us by outdated puritan morality."[132] After Jacobson returned a "sexual attitude questionnaire," the government did not contact him for about a year, at which time government agents approached Jacobson as a fictitious consumer research company called "Midlands Data Research."[133] The company sought responses from

126 *Jacobson*, 112 S. Ct. at 1537.
127 *Id.*
128 *Id.* at 1538.
129 18 U.S.C. § 2252(a)(2)(A) (1984).
130 Linda Greenhouse, *Justices, in Entrapment Case, Cast a Rare Vote Against Prosecutors*, N.Y. TIMES, April 7, 1992, at A1.
131 *Id.*
132 *Jacobson*, 112 S. Ct. at 1538-40.
133 *Id.* at 1538.

people who "believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite [sic] age."[134] Soon thereafter Jacobson informed the undercover government agency: "Please feel free to send me more information, I am interested in teenage sexuality."[135]

Next, the defendant heard from the fictitious "Heartland Institute for a New Tomorrow" (HINT) whose credo read that it was "an organization founded to protect and promote sexual freedom and freedom of choice. We believe that arbitrarily imposed legislative sanctions restricting *your* sexual freedom should be rescinded through the legislative process."[136] In response to the sexual questionnaire sent with HINT's material, Jacobson stated that he had an above average interest in "[p]reteen sex-homosexual" material, as well as a conviction to "be ever vigilant to counter-attack right wing fundamentalists who are determined to curtail our freedoms."[137] HINT responded to Jacobson's survey by telling him that it was a lobbying organization dedicated to the repeal of "all statutes which regulate sexual activities" as well as "lobbying to eliminate any legal definition of the 'age of consent.' "[138] HINT proposed to fund its lobbying efforts through the proceeds of sales from an upcoming catalog.

Although Jacobson declined to initiate contact with anyone on a list of potential pen pals offered by HINT, government agents approached him yet again under the guise of a pen pal with similar interests in pornographic material. Jacobson responded to a letter from the nonexistent "Carl Long," stating that: "As far as my likes are concerned, I like good-looking young guys (in their late teens and early 20's) doing their thing together."[139] After writing two letters, neither of which contained any reference to child pornography, Jacobson discontinued the communication. At this point, thirty-four months had passed since the government found Keith Jacobson's name on the California bookstore mailing list. The Postal Service had been actively soliciting him for twenty-six months, yet Jacobson offered the government no evidence that he had ever intentionally possessed child pornography.

At this stage a second government agency, the Customs Service, targeted Keith Jacobson in its own child pornography sting operation. As part of "Operation Borderline," the Customs Service approached Jacobson as a Canadian company named "Produit Outaouais," by

134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.* at 1539.

sending him a brochure containing advertisements for photographs of young boys committing sexual acts.[140] At that time, Jacobson placed an order which was never filled.[141]

The Postal Service maintained persistent contact with Keith Jacobson. The agency again wrote to Jacobson under the guise of the "Far Eastern Trading Company Ltd." which proclaimed itself as having:

> [D]evised a method of getting these [pornographic materials] to you without the prying eyes of U.S. Customs seizing your mail. . . . After consultation with American solicitors, we have been advised that once we have posted our material through your system, it cannot be opened for any inspection without authorization of a judge.[142]

The fictitious group next asked Jacobson to send them a signed proclamation stating that he was not a government agent seeking to entrap the Far Eastern Trading Company Ltd.[143] It then sent Jacobson a catalogue from which he ordered the magazine "Boys Who Love Boys," which contained photos of young boys participating in various sexual acts.[144] Government agents arrested Keith Jacobson after they delivered the magazine to his home.

2. *Procedural History*

The government indicted Keith Jacobson for violating the Child Protection Act of 1984,[145] which prohibits the knowing receipt of "visual depiction[s] involv[ing] the use of a minor engaging in sexually explicit conduct."[146] At trial, the judge instructed the jury regarding the entrapment defense, and the jury found *Jacobson* gnilty. Sitting *en banc,* a divided Eighth Circuit Court of Appeals affirmed the trial court's decision, concluding that the government activity did not constitute entrapment as a matter of law.[147] The Supreme Court granted certiorari.[148]

3. *Majority Opinion*

Justices Blackmun, Stevens, Souter and Thomas joined Justice White's majority opinion which, consistent with Supreme Court prece-

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140 *Id.*

141 *Id.* The Supreme Court opinion offers no reason why Jacobson's first order was left unfilled. The lower court decisions omit any reference to it as well.

142 *Id.*

143 *Id.*

144 *Id.* at 1539-40.

145 18 U.S.C. §§ 2251-2257 (1984).

146 18 U.S.C. § 2552(a)(2)(A).

147 916 F.2d 467, 470 (8th Cir. 1990).

148 111 S. Ct. 1618 (1991).

dent,[149] applied the subjective approach to entrapment. The Court recognized that a government agent "may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute."[150] The Court held that in order to defeat Jacobson's entrapment defense, the government would have to establish that Jacobson was independently predisposed to commit the offense prior to any government contact.[151] The Court found that the government failed to carry its burden.[152]

In concluding that government agents entrapped Jacobson as a matter of law, the Supreme Court examined the government's evidence on Jacobson's alleged predisposition. The Court divided this evidence into two groups: evidence gathered prior to the Postal Service's mail campaign, and evidence discovered during the ensuing investigation.[153] The Court noted that the only indication of Jacobson's state of mind prior to the government's investigation was his order of Bare Boys I and II. The majority stated:

> [T]his is scant if any proof of petitioner's predisposition to commit an illegal act, the criminal character of which the defendant is presumed to know. It may indicate a predisposition to view sexually-oriented photographs that are responsive to his sexual tastes; but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition.[154]

In addition, the Court emphasized that Jacobson lawfully ordered and received the Bare Boys magazines in February of 1984.[155] This act was not illegal under federal law until May of that year, or under Nebraska law until 1988.[156] Thus, the Court concluded that evidence concerning Jacobson's legal transaction had no bearing on his predisposition to commit the crime. The Court stated that "[e]vidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it."[157]

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149 *See supra* notes 74-123 and accompanying text.

150 *Jacobson*, 112 S. Ct. at 1540 (citing Sorrells v. United States, 287 U.S. 435, 442 (1932), and Sherman v. United States, 356 U.S. 369, 372 (1958)).

151 *Id.*

152 *Id.* at 1541.

153 *Id.*

154 *Id.*

155 *Id.* at 1541-42.

156 The federal law is found at 18 U.S.C. § 2252(a)(2)(A), while the Nebraska statute is located at NEB. REV. STAT. § 28-813.01 (1989).

157 *Jacobson*, 112 S. Ct. at 1542.

The Court also found that the evidence gathered during the government's investigation was insufficient to establish Jacobson's predisposition to commit the crime. The Court noted that Jacobson's responses to the government's communications were "at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Even so, petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails."[158] Accordingly, the essential question was not whether Jacobson was predisposed to possess or view child pornography, but whether he was predisposed to commit the crime of receiving child pornography through the mail. As the applicable statute makes clear, only the latter is illegal.[159]

In concluding that Jacobson had no predisposition to violate the law, the majority retreated from a strict emphasis on Jacobson's state of mind. Rather, the Court focused on the government's impermissible conduct. The Court reasoned that:

> [B]y waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights.[160]

As an example, the Court pointed out that the fictitious HINT promoted itself as a lobbying organization "founded to promote sexual freedom and freedom of choice," which funded its lobbying efforts through the sales of pornographic brochures.[161] In addition, both the American Hedonist Society and the letters written by "Carl Long" endorsed the principles of individual rights.[162]

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158 *Id.*

159 The Child Protection Act reads in pertinent part:

> (a) Any person who—
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> * * *
>
> (2) knowingly *receives, or distributes,* any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section. . . .

18 U.S.C. § 2252 (emphasis added).

160 *Jacobson,* 112 S. Ct. at 1542.

161 *Id.*

162 *Id.*

The Court also noted that the two 1987 solicitations professed that censorship was wrong and suggested that Jacobson had a right to receive pornographic material.[163] The majority felt that the two and a half years of government effort were aimed at convincing Jacobson that "he had or should have the right to engage in the very behavior proscribed by law."[164] Thus, because "the Government [may not] pla[y] on the weaknesses of an innocent party and beguil[e] him into committing crimes which he otherwise would not have attempted," the majority determined that "[r]ational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner,"[165] and that the government therefore had entrapped Jacobson as a matter of law.[166]

4. *Dissenting Opinion*

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Scalia, authored the dissenting opinion. The dissent voiced concern over three aspects of the majority decision.

First, the dissent felt that the majority failed to acknowledge the reasonableness of the jury's conclusion that Jacobson was predisposed to order child pornography through the mail. Justice O'Connor emphasized the fact that Jacobson ordered pornographic material from the government as soon as they sent him an advertisement for materials containing "young boys in sex action fun."[167] Upon placing his order, Jacobson demonstrated his willingness to order more: "I received your brochure and decided to place an order. If I like your product, I will order more later."[168] However, for undisclosed reasons, this order was never filled. The second time the government offered material to Jacobson, the magazine advertised that it included "11 year old and 14 year old boys [who] get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this."[169] Rather than characterize the government's actions as inducements to commit a crime, the dissent determined that such actions were merely to insure that Jacobson was genuinely interested in child pornography.[170] Thus, the dissent concluded that evi-

163 *Id.* at 1542-43.
164 *Id.* at 1543.
165 *Id.*
166 *Id.*
167 *Id.* at 1544.
168 *Id.*
169 *Id.*
170 Apparently, the dissent felt that the government waited before offering Jacobson the chance to buy child pornography to avoid shocking Jacobson and alerting his suspi-

dence of Jacobson's orders were sufficient to allow a reasonable jury to conclude that his inclination to make such an order "was independent and not the product of the attention that the Government had directed at [Jacobson]."[171]

Second, the dissent felt that the element of timing implicit in the majority's analysis was erroneous, and had the practical effect of imposing a requirement that the government have a "reasonable suspicion of illegal activity before contacting a suspect."[172] The cause of this result, according to the dissent, was the majority's erroneous examination of predisposition at the moment of initial government contact rather than at the time the government actually invited Jacobson to commit the illegal act. According to Justice O'Connor, the majority's "holding changes [the] entrapment doctrine. Generally, the inquiry is whether a suspect is predisposed before the Government induces the commission of the crime, not before the Government makes initial contact with him."[173] Thus, Justice O'Connor stated that the proper timing of the predisposition test was when the government actually sent Jacobson the order forms containing pornographic materials.[174]

Justice O'Connor reasoned that the majority's treatment of the timing element imposed a requirement that the government have "sufficient evidence of a defendant's predisposition" before contacting him.[175] The dissent likened this new requirement to that of a need for reasonable suspicion of criminal activity before beginning an investigation. The dissent feared that this would provide an unwieldy loophole through which criminals may slip by asserting that their predisposition to commit the crime did not exist independently, but rather was induced by government action.

Finally, the dissent found fault with the majority's interpretation of "predisposition" as used in the subjective entrapment analysis. According to Justice O'Connor, the majority infused "a specific intent to break the law" into the determination of predisposition.[176] However,

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cions. It was therefore necessary for the government to first gauge Jacobson's interest through solicitations. *Id.*

171 *Id.*

172 *Id.* Several scholars and authorities have supported the imposition of a "reasonable suspicion requirement prior to allowing government solicitation. *See e.g.*, Teri L. Chambers, Note, United States v. Jacobson: *A Call for a Reasonable Suspicion of Criminal Activity as a Threshold Limitation on Governmental Sting Operations*, 44 ARK. L. REV. 493 (1991).

173 *Jacobson*, 112 S. Ct. at 1545.

174 *Id.*

175 *Id.*

176 *Id.* at 1546. The dissent provides the following hypothetical situations in which a defendant would be able to manipulate the majority's interpretation of entrapment:

> A bribe taker will claim that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe later offered. A drug buyer will claim that the description of the drug's purity

the applicable statute required only "knowing receipt of visual depictions produced by using minors engaged in sexually explicit conduct."[177] The dissent noted that Jacobson had developed "a predisposition to view photographs of preteen sex" and stated that the majority erred in concluding that Jacobson must be predisposed to commit *an illegal act* in order to avoid being entrapped.[178] The dissent's argument is straightforward: the subjective entrapment defense is defeated if the prosecution can show that the defendant would have committed the crime anyway, and since Jacobson was predisposed to commit the acts which constitute the crime, his defense must fail.

II
ANALYSIS

This section will reexamine the application of the subjective entrapment analysis in *Jacobson* by discussing the criticisms voiced by the dissent. This approach will illustrate some of the practical difficulties in the subjective approach to entrapment. Next, this section will address the policy reasons supporting both the objective and subjective approaches to determine which is superior. Furthermore, it will describe a hybrid approach to entrapment, combining the best aspects of both approaches. Finally, this section will discuss how this proposed standard would have avoided the problems and controversies evident in the *Jacobson* dissent.

A. The Dissent's Points of Contention[179]

The dissenting opinion asserted a number of problems with the opinion offered by the *Jacobson* majority. Justice O'Connor's dissent stated that the majority: (1) altered the definition of predisposition; (2) misapplied the timing element of the predisposition analysis; and (3) inappropriately disregarded the reasonableness of the jury's conclusion with regard to the defendant's predisposition.[180] The dissent's first point was erroneous. Although the dissent's second point embraced the position adopted by a majority of jurisdictions, its reasoning was severely flawed. The dissent's third point, however, dem-

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and effects was so tempting that it created the urge to try it for the first time.

177 *Id.*

178 *Id.*

179 The issues brought up by Justice O'Connor's dissent will be analyzed without reference to the order in which they were initially raised because discussion of the later issues necessarily relies upon determination of the earlier.

180 In addition, the dissent states that the majority's analysis necessarily forces the government to have a reasonable suspicion of criminal activity before it initiates a sting operation. Footnote 206 discusses this issue further.

onstrates quite forcibly the most serious flaw in the majority's subjective analysis.

1. *Redefinition of Predisposition*

Justice O'Connor's dissent argued that the majority distorted the entrapment analysis by materially altering the concept of a predisposition. The majority reasoned that, as Jacobson's order of the Bare Boys I and II magazines was legal, it added little to determining his predisposition to break the law. The majority conceded that Jacobson had expressed a "predisposition to view photographs of preteen sex" but concluded that Jacobson's "responses hardly support an inference that he would commit the crime of receiving child pornography through the mails."[181] Justice O'Connor characterized the majority's argument as requiring "not only . . . [that] the Government show that a defendant was predisposed to engage in the illegal conduct, here, receiving photographs of minors engaged in sex, but also that the defendant was predisposed to break the law *knowingly* in order to do so."[182]

Justice O'Connor's dissenting argument was flawed on a number of grounds. First, the dissent's assertion completely disregarded the actus reus required by the statute at issue in *Jacobson.* The Child Protection Act, under which Jacobson was indicted, makes it a federal offense to "knowingly receive[ ], or distribute[ ], any visual depiction that has been transported or shipped in interstate or foreign commerce . . . if . . . the produc[tion] of such visual depiction involves the use of a minor engaging in sexually explicit conduct."[183] From the face of the statute it is apparent that the dissent was incorrect in stating that Jacobson's " 'predisposition to view photographs of preteen sex' . . . should have settled the matter,"[184] because it was not a crime merely to view photographs of preteen sex under the statute. Rather, the Child Protection Act requires Jacobson to be predisposed to *receiving* child pornography through the mails. Therefore, a literal reading of the statute shows that the dissent was incorrect in accusing the majority of having infused an unnecessary mens rea into the definition of predisposition.

Second, the dissent erred in disregarding the policy arguments forwarded by Justice White's description of an individual's reasons for obeying the law. Justice White stated that society makes certain practices illegal and punishes their commission to deter individuals from committing them in the future. It seems irrational, as well as contrary

181 *Jacobson,* 112 S. Ct. at 1542.
182 *Id.* at 1546 (emphasis added).
183 18 U.S.C. § 2252(a)(2)(A).
184 *Jacobson,* 112 S. Ct. at 1546.

to the basic deterrence theory of criminal justice, to claim that behavior is not modified by the characterization of an activity as illegal. The dissent overlooked this essential element when it disregarded the fact that, prior to government contact, the only time Keith Jacobson ordered pornographic magazines was when it was legal to do so. If one is to rely on the underlying rationale of the criminal justice system, Jacobson would have been less inclined to order pornographic material through the mail had he known the act was illegal. Therefore, it is extremely relevant, even crucial, to note that "[e]vidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal . . . ."[185] The dissent's allegation that the majority skewed the proper definition of predisposition is thus both flawed and groundless.

2. *Timing of the Predisposition Analysis*

Justice O'Connor's dissent argued that the *Jacobson* majority materially altered the entrapment analysis by compelling the prosecutor to show that the defendant's predisposition to commit the crime predated the government's first contact with the defendant. Her dissent declared:

> The rule that preliminary Government contact can create a predisposition has the potential to be misread by lower courts as well as criminal investigators as requiring that the Government must have sufficient evidence of a defendant's predisposition *before it ever seeks to contact him.* Surely the Court cannot intend to impose such a requirement, for it would mean that the Government must have a reasonable suspicion of criminal activity before it begins an investigation, a condition that we have never before imposed.[186]

Justice O'Connor's analysis seems flawed on several grounds. First, *Sherman v. United States*[187] and *United States v. Williams*,[188] the sources cited to support the position that predisposition must be determined when the government invites the defendant to commit a crime, are ambiguous. The dissent cited *Sherman* to support the argument regarding the timing element of the predisposition test because, although entrapment was found as a matter of law in *Sherman*, "[t]he Court found lack of predisposition based on the Government's numerous unsuccessful attempts to induce the crime, not on the basis of preliminary contacts with the defendant."[189] However, the *Sherman* Court emphasized that the prosecution's evidence was "insufficient to

185 *Id.* at 1542.
186 *Id.* at 1545 (emphasis in original).
187 356 U.S. 369 (1958).
188 705 F.2d 603 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983).
189 *Jacobson*, 112 S. Ct. at 1544.

prove petitioner had a readiness to sell narcotics at the time [the Government agent] approached him, particularly when we must assume from the record [that] he was trying to overcome the narcotics habit at the time."[190] The opinion makes no mention of the specific timing for the predisposition determination, but merely refers to the time when the defendant was "approached."[191] Such terminology is open to a variety of interpretations.

In addition, *Sherman* relied on *Sorrells v. United States*[192] to illustrate that entrapment exists "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[193] The structure of the above quote suggests that the proper time to analyze predisposition is prior to initial government contact. The logical progression for government entrapment is as follows: first the government derives the idea for the crime, then it implants in the mind of an innocent person the disposition to commit the crime, and finally, the government induces the crime. If this is indeed the order in which an entrapment case develops, then the individual will always be predisposed to commit the crime by the time the government induces them. Indeed, the only point at which one may determine whether the individual is innocent is prior to the government's act of "implanting" the disposition in the individual's mind, that is, prior to the government's contact.

Justice O'Connor's dissent also used *United States v. Williams*[194] to support its interpretation of the proper timing of the predisposition analysis. However, a close reading of *Williams* shows that it does not support the dissent's position. Although the passage in *Williams* cited by O'Connor initially appears supportive,[195] the footnote goes on to state: "We do not rule out the possibility, however, that cases may arise in which the agents in their preliminary contacts with a target

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190 *Sherman*, 356 U.S. at 375-76.

191 *Id.*

192 287 U.S. 435 (1932).

193 *Sherman*, 356 U.S. at 372 (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)).

194 705 F.2d 603 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983).

195 The footnote begins:

> The standard charge on entrapment requires the prosecution to prove that the defendant was ready and willing to commit the crimes charged 'before anything at all occurred respecting the alleged offense.' (citations omitted). In many cases, including this one, undercover government agents discuss non-criminal matters with a target before presenting a criminal opportunity. Such preliminary contact is normally not conduct 'respecting the alleged offense'.... Simply cultivating the friendship of a target preparatory to presenting a criminal opportunity is not inducement to commit a crime.

Id. at 618 n.9.

indirectly suggest that a crime might occur, even though they do not explicitly invite the target to commit one."[196] The facts of *Jacobson*, however, suggest that the initial government contact indeed "involved . . . discussions 'respecting the alleged offense' " which, even under the authority cited by the dissent, should have triggered the predisposition analysis well before the expiration of twenty-six months of government solicitation.[197]

Under Justice O'Connor's approach, in order to qualify as the proper moment to analyze the defendant's predisposition, government conduct must involve, at a minimum, the indirect suggestion that a crime might occur.[198] The facts of *Jacobson* show that the government's first contact consisted of an invitation to join the American Hedonist Society, an organization designed to promote the "right to seek pleasure without restrictions being placed upon us by outdated puritan morality."[199] Arguably, this initial invitation to defy legal restrictions indirectly suggested that a crime might occur. Thus, even under Justice O'Connor's analysis, this should be the proper point for a determination of Jacobson's predisposition.[200]

Other cases dealing with entrapment highlight the flaws inherent in Justice O'Connor's approach to the timing element. For instance, the decision in *United States v. Whoie*[201] contradicts the dissent's position by suggesting that the predisposition analysis must occur when the government makes its initial contact.[202] The *Whoie* court held that, in deciding the merits of an entrapment defense, the jury "must . . . consider whether the defendant was predisposed *before* the inducement to commit the offense."[203] Thus, *Whoie* reinforces the *Jacobson* majority's conclusion that the determination of predisposition occurs before the government begins its solicitation efforts.

Although *Whoie* reinforces the *Jacobson* majority's application of the timing element, authorities remain divided as to the proper point

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196 *Id.*

197 *Jacobson*, 112 S. Ct. at 1538.

198 *Id.*

199 *Id.*

200 Even assuming, *arguendo*, that the initial contact by the American Hedonist Society was insufficient to create the indirect suggestion that a crime might occur, the next contact sought responses from those who "believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the [neophyte] age." *Id.* at 1538. Here there is a pronounced connection between the communication (relating the joys of viewing children in a sexual setting) and the suggestion that the crime of receiving child pornography through the mails might occur. Analysis of Jacobson's predisposition at this juncture would look at events which occurred two years before those which the dissent wishes to examine.

201 925 F.2d 1481 (D.C. Cir. 1991).

202 *Id.* at 1483-84.

203 *Id.* at 1483 (emphasis added).

at which to determine the defendant's predisposition.[204] The majority of jurisdictions using the subjective entrapment approach define the timing element as concentrating on " 'the state of mind of a defendant before government agents *make any suggestion that he shall commit a crime.*' "[205] Thus, although the *Jacobson* Court has now taken a position on the timing element that is contrary to the view in a majority of jurisdictions, the Court's holding is consistent with its prior case law.[206]

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204 *See* MARCUS, *supra* note 2, at 358-60 (citing United States v. Lasuita, 752 F.2d 249 (6th Cir. 1985) (the proper time of the predisposition analysis is at the moment of the initial government contact); and Harrison v. State, 442 A.2d 1377 (Del. 1982) (the predisposition analysis must occur "just before a government agent enlisted [the defendant's] participation in the [illegal] venture")).

205 MARCUS, *supra* note 2, at 358 (emphasis added) (quoting United States v. Dion, 762 F.2d 674 (8th Cir. 1985), *rev'd on other grounds*, 476 U.S. 734 (1986)).

206 As was mentioned *supra* note 180, this Note will now examine and criticize an additional point asserted by the *Jacobson* dissent—that the majority's analysis necessarily forces government officials to have a reasonable suspicion of criminal activity before initiating a sting operation. Justice O'Connor's dissent erred by equating the requirement that predisposition be shown at the outset of government contact with a requirement that the government have a reasonable suspicion of criminal conduct before initiating an investigation. The dissent suggested that the examination of predisposition at the point of government contact allows any "defendant [to] claim that something the Government agent did before soliciting the crime 'created' a predisposition that was not there before." *Jacobson*, 112 S. Ct. at 1545. An examination of the dissent's examples evince the impropriety of such a claim:

> For example, a bribe taker will claim that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe later offered. A drug buyer will claim that the description of the drug's purity and effects was so tempting that it created the urge to try it for the first time.

Id.

O'Connor's analogy to the process of solicitation and contact initiated by the government with Keith Jacobson "exposes a flaw in the more limited" dissenting argument. *Id.* These hypotheticals suggest that a "description" of the criminal activity may serve as temptation to do the activity in question. A description of the money or drugs should not be considered sufficient to create a disposition to accept a bribe or to use drugs. In order for descriptions to instill a disposition to commit the act, the individual must be receptive to such coaxing, that is, be predisposed to commit the act.

On the other hand, the government did not solicit Jacobson through the use of especially enticing descriptions of the pornographic material in question. Although Jacobson illegally ordered the pornographic magazines described as depicting "young boys in sex action fun," there is no reason to believe that this advertisement was different from the others sent to Jacobson by the government during the twenty-six month solicitation, or from other pornographic brochures Jacobson encountered on his own. A logical conclusion is that Jacobson ordered the pornographic materials as a result of improper government inducement rather than from an independent predisposition. The government approached Jacobson by appealing to his sense of individual rights and his interest in protecting freedom of expression under the guise of artificial lobbying efforts against government censorship. Unlike the situation in the offered hypotheticals, these are desirable inducements in a democratic society. Society generally promotes freedom of expression and opposes the unfair censorship of unorthodox ideas. Toward this end, society tolerates certain kinds of unpopular or unorthodox expression, including some types of pornography. A direct comparison of the hypotheticals offered by Justice O'Connor with the actual

3. *Reasonable Finding*

Justice O'Connor's third and most cogent criticism of the majority's analysis concerned the failure to recognize the reasonableness of the jury's conclusion that Keith Jacobson was predisposed to order child pornography through the mail.

Under the subjective analysis of entrapment, the defendant's predisposition is a question of fact to be determined by the jury. In reaching a conclusion about predisposition, the jury can consider a variety of factors that contribute to the mental state of the accused.[207] In order to constitute predisposition as a matter of law, "the evidence must clearly have indicated that a government agent originated the criminal design; that the agent implanted in the mind of an innocent person the disposition to commit the offense; and that the defendant then committed the act at the urging of the government agent."[208]

The evidence in the record shows that, at a minimum, reasonable minds may differ with regard to whether Jacobson was predisposed to order child pornography. Certainly, if the determination of Jacobson's predisposition occurs prior to government contact rather than at the time the government invites the defendant to commit the crime, the government bears a heavier burden.[209] Even assuming, *arguendo*, that the proper stage to measure predisposition is at the moment of initial government contact, this Note argues that at the very least the evidence supports a rational jury conclusion.

In determining the reasonableness of the jury's verdict, one must initially examine the evidence in support of a finding of predisposition. The primary evidence was that Jacobson ordered two pornographic magazines entitled "Bare Boys I" and "Bare Boys II." At a minimum, this supports the conclusion that he was predisposed to order pornographic material involving homosexual content. Not only had Jacobson ordered pornographic material prior to the government contact, but such materials were still in his possession two and one half years after he received them. If Jacobson was truly "shocked" when he found out that the "Bare Boys" magazines contained pictures of naked boys, then the question of why he kept these materials for the next several years remains. In addition, as the dissent stated, the government twice offered pornographic material to Jacobson, and he

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facts of *Jacobson* show "the apparent lack of a principled basis," *id.*, for extending the majority's opinion to stand for the proposition that the government be required to have a reasonable suspicion of criminal activity before initiating an investigation.

207 *See supra* notes 36-40 and accompanying text for a discussion of the factors taken into account in determining predisposition.

208 MARCUS, *supra* note 2, at 123 (citing United States v. Shaw, 570 F.2d 770, 772 (8th Cir. 1978)).

209 In fact, the majority admits Jacobson's predisposition at this time. *Jacobson*, 112 S. Ct. at 1541.

responded positively each time.[210] Although predisposition analysis must concentrate on the moment the government begins solicitation, Jacobson's later conduct would also be relevant to the jury's determination of predisposition.[211] The evidence discussed above suggests that a reasonable trier of fact could conclude that Keith Jacobson was predisposed to order child pornography through the mail.

However, a determination of the reasonableness of the jury's findings must also examine evidence that suggests that the defendant was not predisposed. If Jacobson's order of the Bare Boys magazines suggests his propensity to commit the offense, then why did he not order more after he received these materials? Jacobson could have been assured of receiving them safely by availing himself of the same channels as he had in the first instance. Furthermore, in response to government letters sent via "Carl Long," Jacobson expressed his interests as being in "good-looking young guys (in their late teens and early 20's) doing their thing together."[212] Assuming that the government's attempts at anonymity were successful (a valid assumption since Jacobson eventually 'took the bait'), then one must assume that this response was completely candid. This would suggest that Keith Jacobson was predisposed to order homosexually-oriented sexual material depicting consenting adults. Such a predisposition suggests nothing criminal.

In sum, the above discussion suggests that the factual determination of whether Keith Jacobson was predisposed to order child pornography through the mail could have been decided either way by the jury. The Supreme Court thus may have reached too far in overruling the trier of fact and concluding that Jacobson was not predisposed to commit the crime as a matter of law.

B. The Significance of *Jacobson v. United States*

Jacobson v. United States, decided by a narrow five justice majority, illustrates some of the controversial concerns regarding current subjective entrapment analysis. In particular, the dissent suggested two important points that are arguably accurate: (1) the majority's rule for timing of the predisposition analysis is at odds with the majority of jurisdictions following the subjective approach, and (2) the record supported the jury's conclusion that Jacobson lacked predisposition. A question thus leaps to mind: why did the majority stretch the acceptable standards of entrapment analysis?

The likely answer is that the *Jacobson* majority stretched the accepted limits of the traditional subjective approach to entrapment to

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210 *Id.* at 1543 (O'Connor, J., dissenting).

211 *See* MARCUS, *supra* note 2, at 161-62.

212 *Jacobson*, 112 S. Ct. at 1539.

reach the truly "just" conclusion—that the government acted improperly in pursuing Keith Jacobson for twenty-six months to entice him to commit a crime. The Court, however, wedded its decision to cases which proclaim the subjective analysis as the correct approach in the federal forum. Prior case law forced the majority to approach the *Jacobson* case under the guise of the subjective approach, yet the Court struggled to reach the "correct" or "just" conclusion within the confines of this analysis.

This Note will now examine and compare the subjective and objective approaches to entrapment to determine the strengths and weaknesses of each. The Note will introduce a proposed entrapment standard that combines the strengths of both tests, while circumventing their difficulties. Finally, the Note will apply this new standard to the facts of the *Jacobson* decision to show that the standard would have allowed the Court to reach the desired result—that Keith Jacobson was entrapped as a matter of law.

C. Comparison of the Subjective and Objective Approaches

1. *Subjective Approach*

The subjective approach has several advantages, most notably the concern that those who would not commit a crime on their own should not be punished for committing it due solely to acts of the government. In other words, it is:

> [U]nconscionable . . . [and] contrary to public policy . . . to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.[213]

Since the subjective approach focuses upon whether the defendant would have committed the offense, in theory it punishes only those who would have committed the crime regardless of the government's action.

The subjective approach also has some disadvantages. First, it lacks a well-principled legal grounding. The *Sorrells* Court justified the subjective approach based on congressional intent not to punish "innocent" individuals enticed to commit a crime.[214] The subjective approach to entrapment supports such congressional intent because an individual who is not predisposed to commit the offense should be considered innocent. However, such an argument is flawed. It is inconsistent to say that the subjective test is based upon a legislative intent to protect the innocent because a criminal act must necessarily

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213 Butts v. United States, 273 F. 35, 38 (8th Cir. 1921).

214 *See supra* notes 19-21 and accompanying text.

have been committed to use the entrapment defense in the first place. The defense becomes available only to demonstrate that the act was committed because of improper government participation, rather than because of the defendant's predisposition. Further, it does not make sense to extrapolate congressional intent because Congress' obvious intent was to criminalize these acts and punish those who commit them. In addition, this rationale fails to explain why an individual who is not predisposed to commit a crime will be entrapped if the government induces the commission of the crime, but will be guilty if a private individual performs the same acts of inducement.[215]

The subjective approach is also flawed because it focuses on the past acts of the defendant to determine state of mind. This means that the determination of criminal liability will hinge upon the defendant's past behavior rather than solely on the defendant's behavior in the instant action. As Justice Frankfurter stated, "permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time and in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition."[216] Commentators have repeatedly criticized the subjective approach for its reliance on the commission of prior acts which may be entirely unrelated to the criminal act at hand.[217] Thus, the most egregious flaw in the subjective approach to entrapment is its reliance on factors and conditions which are temporally separate from the criminal act for which the defendant stands accused.[218]

2. *Objective Approach*

The objective approach to entrapment has several advantages. The objective approach, unlike the subjective, depends wholly upon the facts as developed in the instant action. The objective approach also disregards the past acts of the defendant and focuses solely upon the legitimacy of the government's participation in the present action.

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215 *See* United States v. Russell, 411 U.S. 423, 441-42 (1973); Grossman v. State, 457 P.2d 226, 229 (Alaska 1969). *See also* Damon D. Camp, *Out of the Quagmire After* Jacobson v. United States: *Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1068 (1993) (discussing predisposition and the problems it poses).

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

217 *See, e.g.*, Camp, *supra* note 215, at 1066; Stephen E. Leidheiser, Note, *Defense of Entrapment: The Confusion Continues*, 13 CUMB. L. REV. 373, 384 (1982); Mirakian, *supra* note 42, at 336. In addition, note that it is impermissible under the Federal Rules of Evidence, in both criminal and civil cases, to use evidence of particular conduct to show a greater than average propensity to commit a crime. FED. R. EVID. 404.

218 Aside from the unfairness to the defendant unfortunate enough to have committed an offense in the past, commentators have criticized the subjective approach as involving a denial of equal protection under the Fourteenth Amendment to the United States Constitution. *See* Yale Note, *supra* note 42.

In addition, the objective analysis applies both prospectively and retroactively. While the subjective analysis concentrates on insuring that those who are wrongfully accused go free, the objective standard aims to both evaluate the government's conduct in the present action and insure that the standard appropriately guards against government encroachment in the future.[219] The objective approach thereby insures that all citizens, not just those privy to the present action, remain free from the impositions of overzealous government enforcement practices.

Furthermore, unlike the subjective approach, the objective approach to entrapment helps prevent wasteful government conduct. In the *Jacobson* case, for example, government agents pursued the defendant for twenty-six months before successfully enticing him to order pornographic magazines. Under the objective analysis, this extended solicitation period would contribute to a finding of entrapment because of the unreasonableness of the government's conduct. In contrast, the subjective analysis ignores the duration of the solicitation provided the prosecution can show the defendant's predisposition to commit the crime.

One major criticism of the objective approach is that it places too much emphasis upon the behavior of the hypothetical "reasonable person."[220] The concern is that the objective analysis takes place in a vacuum of abstractuess where intangibles battle each other. Because the criminal justice system involves the stripping of a citizen's liberty right in retribution for wrongs committed against society, the objective approach appears to be too embedded in the abstract to provide a working basis for entrapment.[221]

In addition, commentators criticize the objective approach as an improper means to effectively deter police misconduct and government overreaching.[222] This criticism asserts that the objective approach requires standards that are too inflexible to meet the needs of effective government law enforcement through the use of sting operations.[223] This criticism remains unconvincing, however, because it assumes that an objective entrapment analysis must result in rigid, narrowly tailored standards. Although these standards should be well

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219 *See* Klar, *supra* note 35, at 211-12 (stating that defendants, courts, and the government would all benefit from more clearly defined standards delineating the scope of acceptable police behavior).

220 *See id.* at 218; Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 216-24 (1976).

221 Klar, *supra* note 35, at 199, 218-20 (criticizing the objective approach and supporting a dual approach "that places the primary focus on the defendant, but allows a focus on the police conduct under a due process rationale.").

222 *Id.* at 199, 210-24.

223 See *id.* at 200-02, for a more detailed explanation of the disadvantages of the objective approach.

defined, there is no *prima facie* requirement that they be restrictive. An objective entrapment analysis could provide an outer limit of acceptable police behavior, within which each jurisdiction could promulgate narrower guidelines.[224]

Commentators also criticize the objective approach for hindering the detection and prosecution of "victimless" crimes such as bribery, prostitution, and drug sales.[225] This criticism is not well founded because it assumes that the objective approach precludes all government solicitation and involvement in sting operations.[226] On the contrary, proponents of the objective approach recognize that government sting operations play a crucial role in the detection and prosecution of "victimless" crimes. As Justice Stewart pointed out in his dissenting opinion in *United States v. Russell*:[227]

> [An objective entrapment analysis] does not mean, of course, that the Government's use of undercover activity, strategy, or deception is necessarily unlawful. Indeed, many crimes, especially so-called victimless crimes, could not otherwise be detected. Thus, government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so.[228]

Thus, the objective approach does not eliminate government sting operations. Rather, it eliminates the ability of government agents to abuse the legal system by reaching beyond the proper standards of law enforcement.

D. The Solution: Proposal For A Hybrid Approach

The entrapment analysis currently applied in the federal court system should be revised to address the inadequacies of both the subjective and objective approaches. To do so, the federal court system could adopt a hybrid entrapment approach which would combine the strengths of both the subjective and objective approaches, while avoid-

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224 See *id.* at 220-22 for the argument that the Due Process Clause would be better suited for providing workable standards because it would involve ad hoc balancing of the seriousness of the crime with the need for government involvement, and that such balancing is inherently better than a set of "rigid" rules which would result from an objective entrapment analysis. I feel, however, that the Due Process analysis is too ambiguous and malleable to be effective in restricting government overreaching. Its ad hoc nature and the need for balancing a variety of factors would not be useful in promoting expectations with regard to permissible police conduct during sting operations.

225 *See* Leidheiser, *supra* note 217, at 384-85.

226 Such a preclusion may be a desired result, based upon commentator's assertions of a societal aversion to sting operations. *See, e.g.*, Richard C. Donnelly, *Judicial Control Of Informants, Spies, Stool Pigeons, And Agent Provocateurs*, 60 YALE L.J. 1091 (1951).

227 411 U.S. 423 (1973).

228 *Id.* at 445 (Stewart, J., dissenting) (citations omitted).

ing many of their respective difficulties. The proposed hybrid test is stated as follows:

> Entrapment is an affirmative defense which exists when the Government induces an individual to commit an offense if either:
>
> (a) the Government attempts to convince the individual that such an act is not illegal or employs methods which create a substantial risk that the act will be committed by persons other than those ready to commit the offense;[229] or
>
> (b) the individual is found *not to be predisposed* to commit the offense at the time he is approached by the Government.

Because this new test is an affirmative defense, the defendant bears the burden of proof. The accused must show by a preponderance of the evidence that *either* of the two prongs are met. The first prong of the proposed test incorporates the existing standards in jurisdictions that have adopted an objective entrapment analysis.[230] This prong thus retains the benefits of the traditional objective approach; it is aimed at deterring police misconduct and limiting government overreaching in attempts to enforce the law.

The second prong of the hybrid test infuses a subjective element into the analysis by focusing on the predisposition of the accused. This step differs from the traditional subjective analysis because the proposed standard is an affirmative defense: it is raised only if the defendant defends with proof of a lack of predisposition. Of course, once the defendant raises this subjective prong, the prosecution would be allowed to rebut such evidence by attempting to prove predisposition. In other words, the defendant alone chooses whether the court's attention should focus on his past acts to determine predisposition.

The hybrid approach has the benefits of the traditional subjective approach because it concentrates on the individual, rather than analyzing entrapment in terms of the abstract "reasonable person." At

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229 Some may claim that the characterization of "those ready to commit the offense" necessarily inserts a certain degree of subjectivity into what is intended to be a purely objective analysis. Such a criticism is based upon a misinterpretation of the role played by this limiting term. The reference to "persons other than those ready to commit the offense" is merely a measuring stick used to gauge governmental behavior. It refers to a hypothetical law abiding and reasonable person and determines if the government involvement would have affected such a person's behavior. It's wording is similar to that of the Model Penal Code, and likewise, "the application of the standard [does not] turn on the character of the particular defendant." MODEL PENAL CODE § 2.13 Explanatory Note.

230 *See* MODEL PENAL CODE § 2.13; Alaska, ALASKA STAT. § 11.81.450 (1989); Arkansas, ARK. CODE ANN. § 5-2-209 (Michie 1987); Colorado, COLO. REV. STAT. § 18-1-709 (1986); Hawaii, HAW. REV. STAT. § 702-237 (1985); Iowa, State v. Mullen, 216 N.W.2d 375, 381-82 (Iowa 1974); Kansas, KAN. STAT. ANN. § 21-3210 (1988), Michigan, People v. Patrick, 443 N.W.2d 499, 500 (Mich. 1989); New York, N.Y. PENAL LAW § 40.05 (McKinney 1987); Pennsylvania, 18 PA. CONS. STAT. § 313 (1983); Texas, TEX. PENAL CODE ANN. § 8.06 (West 1973); Utah, UTAH CODE ANN. § 76-2-303 (1990).

the same time, this test avoids the subjective approach's major problem: determining an individual's predisposition (and thereby his criminal liability) on the basis of past acts. The subjective aspect of this test will only come into play when a defendant attempts to show his lack of predisposition to commit the crime. Only then may the prosecution focus on the defendant's past acts to illustrate his predisposition. Therefore, the hybrid approach removes the inequity of delving into the defendant's past acts because such past behavior cannot be used unless the defendant attempts to prove a lack of such predisposition.

The proposed standard thus recognizes both the traditional objective and subjective approaches and retains strengths of each. In addition, the proposed standard is beneficial because either prong is sufficient to absolve the defendant from liability. The defendant is considered entrapped if either the government acted impermissibly or the defendant was not predisposed to commit the crime. While both prongs strive to establish the same result, they approach the entrapment analysis in very different ways. In most cases, both prongs would be satisfied. If, after being solicited by the government, an individual commits a crime which he was not predisposed to commit before coming in contact with the government, then the government must have acted improperly.

The proposed standard should be promulgated by Congress and presented to federal jurisdictions in the form of a statute. This procedure would provide uniformity by defining clear boundaries within which government agents may lawfully act. The present state of entrapment law has been criticized as being sorely in need of such uniformity.[231] However, the language of the statute must not be too intricate, as the detailed standards should be developed through use and development of the common law. This approach would be both flexible and uniform, with the necessary structure to provide guidelines to control future police conduct.

E. Application of the Proposed Test

Jacobson illustrates the flaws in the subjective approach to entrapment. The majority had to reshape several elements of the traditional subjective analysis[232] in order to reach the "just" conclusion—that Keith Jacobson was entrapped. Additionally, the Court had to get around a jury's conclusion that Jacobson was predisposed to commit the act. As is commonly the case,[233] the jury likely based its conclusion on Jacobson's past acts which were considered relevant to the

231 Leidheiser, *supra* note 217, at 394.

232 *See supra* notes 29-40 and accompanying text.

233 MARCUS, *supra* note 2, at 151.

commission of the criminal act—that he had ordered the "Bare Boys I" and "Bare Boys II" magazines from a California bookstore several years before he was persuaded to order additional pornography by the government. The jury's determination highlights the major flaw in the subjective approach's emphasis on predisposition—the defendant's predisposition is based upon acts committed before (perhaps years before) the commission of the acts for which he is on trial. Authorities and commentators on the criminal justice system have long recognized the inequities of a system that determines an individual's guilt according to past acts.[234] This kind of determination is patently unfair and should not be tolerated by our criminal justice system.

These doctrinal difficulties could have been avoided through the application of the proposed hybrid approach to entrapment as set forth above:[235]

> Entrapment is an affirmative defense which exists when the Government induces an individual to commit an offense if either:
>
> (a) the Government attempts to convince the individual that such an act is not illegal or employs methods which create a substantial risk that the act will be committed by persons other than those ready to commit the offense;[236] or
>
> (b) the individual is found *not to be predisposed* to commit the offense at the time he is approached by the Government.

Application of this approach to the facts of *Jacobson* produces the same result reached by the *Jacobson* majority: The government entrapped Keith Jacobson as a matter of law.

1. *The Objective Prong*

The first step in analyzing *Jacobson v. United States* under the proposed standard is to determine whether the objective prong is satisfied. Under the objective approach to entrapment, the analysis focuses on the conduct of the government, rather than the predisposition of the defendant. The primary purpose of the objective approach is to deter police misconduct,[237] while the subjective test is

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234 *See, e.g.*, Leidheiser, *supra* note 217, at 384; Mirakian, *supra* note 42, at 336; Sherman v. United States, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring) ("Past crimes do not forever outlaw the criminal.").

235 *See supra* notes 209-11 and accompanying text.

236 *See supra* note 209.

237 *See, e.g.*, MARCUS, *supra* note 2, at 172 (citing People v. Barraza, 591 P.2d 947, 953 (Cal. 1979)). Some see the objective approach as not only aiming to deter police misconduct, but also as aiming to provide standards by which to measure future police conduct—standards which would secure legitimate expectations as to the proper degree of police involvement. *See, e.g.*, Mirakian, *supra* note 42, at 340-41.

geared toward satisfying legislative intent that no innocent individual is sent to jail.[238]

The objective elements are satisfied in the *Jacobson* case. It cannot be refuted that the government induced Jacobson to commit a crime by ordering the pornographic magazine "Boys Loving Boys" from the fictitious Far Eastern Trading Company. Therefore, the analysis turns to whether either of subsection (a)'s objective elements have been met.

The first clause of the objective prong focuses on whether the government led the individual to believe that the act he was to commit was not prohibited by law. The facts in *Jacobson* suggest that this prong would have been met. Indeed, the majority opinion in *Jacobson* appears to address this very point. "The evidence that petitioner was ready and willing to commit the offense came only after the Government had *devoted 2 1/2 years to convincing him that he had or should have the right* to engage in the very behavior proscribed by law."[239] Not only has the first element of the proposed test has been met, but it also appears that the *Jacobson* majority echoed the concerns imbued in the objective analysis.

The second clause of the proposed test's objective prong would also be satisfied under the facts of *Jacobson.* This clause focuses on whether the government's conduct has created a substantial risk that the crime would be committed by persons other than those who are ready to commit it. The government solicitations repeatedly emphasized freedom of speech and criticized government censorship fueled by "outdated puritan morality."[240] The government also created fictitious organizations that supposedly lobbied against censorship. Arguably, these efforts could prompt persons concerned with the erosion of individual and privacy rights to fund organizations opposing government censorship through any means, including the purchase of their materials.

Jacobson's own response to the solicitation lends support to this conclusion. Jacobson wrote: "Not only sexual expression but freedom of the press is under attack. We must be ever vigilant to counter attack right wing fundamentalists who are determined to curtail our freedoms."[241] Jacobson's response indicates his concern with the erosion of a basic constitutional right: the First Amendment's protection of freedom of speech. It is plausible that an individual concerned with these issues would purchase pornographic magazines in an effort

238 *See, e.g.*, MARCUS, *supra* note 2, at 172 (citing People v. Barraza, 591 P.2d 947, 953 (Cal. 1979)).

239 112 S. Ct. 1525, 1543 (1992) (citations omitted; emphasis added).

240 *Id.* at 1538.

241 *Id.*

to contribute to a worthy cause, rather than to buy pornographic magazines qua pornographic magazines. At the very least there is a "substantial risk" that a criminal defendant such as Jacobson would be motivated by one of these higher purposes. The facts in *Jacobson*, therefore, meet the requirements of the objective prong included in the proposed standard.

The proposed standard contains objective and subjective components. The entrapment defense will prevail if the defendant can show that *either* of these components have been satisfied. The above analysis illustrates how the objective prong of the proposed test would have been satisfied under the facts of *Jacobson*. It suggests that the objective prong would have been met in either of two ways. If this Note represented an actual application of the proposed test, the defense of entrapment would be fully established. However, it is academically useful to examine *Jacobson* further under the subjective prong of the proposed test.

2. *The Subjective Prong*

The subjective portion of the proposed standard would be satisfied under the facts of *Jacobson v. United States*. Like the traditional subjective approach to entrapment, the proposed subjective element considers the accused's predisposition to commit the offense. However, unlike the traditional subjective treatment of predisposition, the subjective element of the proposed test will look at predisposition evidence only if the defendant attempts to show that he lacked the propensity to commit the offense.

To establish an absence of predisposition to commit the offense of ordering child pornography through the mails, Keith Jacobson could show the trier of fact that he never committed such a criminal offense. This fact would indicate his lack of predisposition to order child pornography. Jacobson would also want to introduce his financial support of his elderly father, thereby reflecting his commitment to traditional family values. In addition, Jacobson could educate the jury about his hesitant responses to repeated government solicitations. For example, Jacobson informed the fictitious organizations created by the Government that his sexual preferences involved "good-looking young guys (in their late teens and early 20's) doing their thing together."[242] Although the jury could view this evidence as some measure of the defendant's perversity, a limiting instruction would help to restrict the application of this evidence solely to the issue of whether Jacobson was predisposed to order child pornography. Jacobson's response indicates no such inclination.

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242 *Id.* at 1535, 1539.

3. *Avoiding the Conceptual Difficulties of* Jacobson

In *Jacobson v. United States*, the Supreme Court applied the subjective approach to reverse the defendant's conviction of ordering child pornography through the mail. In so doing, the majority stretched the traditional conception of the subjective approach to the entrapment defense. The *Jacobson* dissent was quick to pinpoint two viable criticisms of the majority's analysis: (1) the measurement of the defendant's predisposition at a time different from that used by a majority of jurisdictions, and (2) the rejection of the jury's reasonable conclusion that the defendant was predisposed to order child pornography through the mail.

The use of the proposed hybrid entrapment analysis would obviate the difficulties and concerns expressed in the *Jacobson* dissent. First, satisfaction of the objective prong under the proposed analysis would, in practice, end any further entrapment analysis and result in a verdict for the defendant. This would eliminate any debate concerning the trial court's predisposition analysis since predisposition is irrelevant in the objective approach. Moreover, since a jury's deliberations would center around the propriety of government conduct rather than the defendant's predisposition to commit the offense, the debate over the reasonableness of the jury's conclusions about Jacobson's predisposition would also be irrelevant. The jury would weigh only those facts pertaining to the government conduct: the fact that the government solicited the defendant for twenty-six months under the guise of five fictitious organizations and one bogus pen pal; that the solicitations characterized the overtures as part of a lobbying campaign against censorship; and that portions of these solicitations implied that the defendant should have the right to commit the illegal act. In light of this evidence of government's misconduct, the jury should acquit Jacobson on the basis of his entrapment defense.

F. Comparison of the Proposed Approach To Alternative Hybrid Approaches

The hybrid approach outlined above is not the first attempt to combine elements of the subjective and objective approaches to entrapment. The following section compares the proposed hybrid test with the hybrid approaches used by a number of jurisdictions, as well as those proposed by commentators.

1. *New Mexico and Florida Approaches*

The proposed standard is phrased in the disjunctive, such that the defense will succeed if either the subjective or the objective prongs are satisfied. The structure of the proposed standard closely

resembles the hybrid approach to entrapment recently adopted by New Mexico courts. In the 1987 case of *Baca v. State*,[243] the New Mexico Supreme Court modified the state's entrapment analysis[244] by holding that "a criminal 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. . . ."[245] The New Mexico approach is superior to either the pure subjective or objective approach. The standard proposed by this Note, however, is more useful than the *Baca* test because it delineates the limits of acceptable police behavior rather than couching its objective prong in ambiguous terms such as "exceed[ing] the standards of proper investigation."[246] Such ambiguous standards are of little help in providing either a reliable frame of reference for criminal defendants or a deterrent to overreach police conduct.[247]

Florida has also adopted a dual approach to entrapment, combining both the subjective and objective approaches so that satisfaction of either element results in a successful entrapment defense.[248] Although the Florida entrapment statute[249]only to impose an objective test, the 1985 decision of *Cruz v. State*[250] mandates that a dual approach be used. Under *Cruz*, the court first determines the permissibility of police conduct. If this objective test is satisfied, then the analysis turns to whether the defendant was predisposed to commit the crime.[251] The major difference between Florida's approach and

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243 742 P.2d 1043 (N.M. 1987).

244 For an explanation of New Mexico's entrapment law prior to *Baca*, see Mandel, *supra* note 73, at 139-42.

245 *Baca*, 742 P.2d at 1046.

246 *Id.*

247 For a thorough discussion of the pros and cons of the New Mexico hybrid approach to entrapment, see Mandel, *supra* note 73, at 156-60.

248 *See* Kelly M. Haynes, Note, *Florida Adopts A Dual Approach To Entrapment*—Cruz v. State, 13 FLA. ST. U. L. REV. 1171 (1986).

249 The Florida statute reads:

> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

FLA. STAT. ANN. § 777.201 (West 1992).

250 465 So. 2d 516 (Fla. 1985).

251 *Id.* at 521.

the standard proposed by this Note is that the subjective prong of the Florida analysis allows evidence of predisposition to defeat a defendant's entrapment claim. The Florida rule takes into account the defendant's past acts to establish his propensity to commit the offense in the present action. The Florida approach, therefore, retains the most egregious flaw of the traditional subjective entrapment analysis by allowing the prosecution to defeat the entrapment defense on the basis of prior bad acts, regardless of whether the defendant has chosen to raise the issue of predisposition.[252]

2. *Other Hybrid Jurisdictions*

Besides Florida and New Mexico, several other jurisdictions have adopted a hybrid approach to entrapment, either by statute or judicial decision.[253] However, unlike the hybrid approaches discussed above, these jurisdictions require that both the subjective and objective approaches be satisfied to find entrapment.

The New Jersey entrapment statute,[254] for example, contains both an objective and subjective prong similar to the test proposed in this Note.[255] The main difference, however, is that the New Jersey statute requires that both the objective and subjective prongs be satisfied. In other words, it requires that (1) the government conduct be such that it would cause a reasonable person to commit the crime *and* (2) the defendant was not predisposed to commit the offense. The

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252 For a discussion of the shortcomings of this aspect of the subjective approach, see *supra* notes 216-18 and accompanying text.

253 *See supra* notes 60-67 and accompanying text.

254 N.J. STAT. ANN. § 2C:2-12a (West 1982).

255 The New Jersey statute reads:

> (a) A public law enforcement official . . . perpetrates an entrapment if . . . he induces or encourages and, as a direct result, causes another person to engage in [illegal] conduct . . . 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) . . . [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.

N.J. STAT. ANN. § 2C:2-12(a)-(b) (West 1982).

Indiana[256] and New Hampshire[257] statutes also require that both the objective and subjective prongs be met in order to raise a successful entrapment defense. These jurisdictions require a defendant to first show entrapment via the objective standard, and then show a lack of predisposition—that 'but for' the entrapment, the defendant would not have committed the crime.

The approach proposed in this Note is superior to the hybrid approaches used in the above jurisdictions. These approaches share the weaknesses of both the objective and subjective approaches individually. In fact, such approaches are inferior to a straightforward objective analysis because they allow an entrapment claim to be defeated by a showing of predisposition. Like the subjective analysis, the defendant's past acts are examined in order to predict his propensity to commit the crime in the future. These hybrid approaches therefore retain the major shortcoming of the subjective approach: The entrapment defense can be defeated by the consideration of dubious and arguably impermissible factors, namely the past conduct of the defendant.

3. *Hybrid Approaches Offered By Commentators*

The entrapment standard proposed by this Note reflects the concerns of protecting innocent individuals as well as restricting government misconduct. Other commentators, such as Jeffrey Klar, have also offered hybrid approaches to entrapment which embrace both of these concerns.[258] Klar combines the traditional subjective analysis

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256 The Indiana statute reads:

> It is a defense that:
>
> (1) The prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
>
> (2) The person was not predisposed to commit the offense.
>
> (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

IND. CODE ANN. § 35-41-3-9 (Burns 1985).

257 The New Hampshire statute reads:

> It is an affirmative defense that the actor committed the offense because he was induced or encouraged to do so by a law enforcement official or by a person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence against him and when the methods nsed to obtain such evidence were such to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. However, conduct merely affording an opportunity to commit an offense does not constitute entrapment.

N.H. REV. STAT. ANN. § 626:5 (1986). Although strictly objective on its face, the statute has been interpreted by the courts to imply that an entrapment defense involves elements of both the subjective and objective tests. *See* State v. Little, 435 A.2d 517 (N.H. 1981).

258 Klar, *supra* note 35.

Damon Camp has suggested a three step entrapment analysis which also utilizes elements of both the traditional subjective and objective approaches. *See* Camp, *supra* note

and a concern for potential violations of the Due Process Clause. His approach to entrapment may be paraphrased as follows:

> Step 1: The court determines whether the defendant was predisposed to commit the offense.
> Step 2: If predisposition is established, then the court determines whether the government solicitation violates Due Process.[259]

The similarities between Professor Klar's dual approach and the approach proposed in this Note are apparent. Notably, if a court determines that the defendant lacked the predisposition to commit the offense, it may conclude that the government unlawfully entrapped him. Similarly, a showing of egregious government conduct will necessitate a finding of entrapment. Finally, the approaches proposed by both Professor Klar and this Note contain independent prongs: in both cases, a satisfaction of either the subjective or objective prongs results in a successful entrapment defense.

Although similarities between the two approaches exist, there are many differences. First, Professor Klar's test uses a traditional model of the subjective entrapment analysis. This Note relies on a more modern approach. While both Professor Klar and this Note argue for subjective prongs that involve a determination of the defendant's predisposition, the former would allow the prosecution to use the defendant's prior acts to demonstrate predisposition in every entrapment case. The latter would only focus on the defendant's past acts if and only if the defendant chooses to prove that he was not predisposed to commit the crime. In other words, the approach offered by this Note would only look to past acts if the defendant raises the propensity argument. By looking at criminal predisposition in all cases, Professor Klar's approach retains one of the major weaknesses of the subjective

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215, at 1085-87. Under Camp's analysis, the defendant must first show evidence of government impropriety. *Id.* at 1086. If the accused successfully meets this threshold test, the second step of Camp's analysis allows the government to rebut the defendant's contentions with evidence of the defendant's predisposition. *Id.* The third and final step of Camp's proposed entrapment test imposes upon the trier of fact the obligation to balance the severity of the government misconduct against the defendant's predisposition. *Id.* at 1087. While Camp recognized problems with his approach, he concluded that his test "clearly balances the primary concerns of both the subjective and objective approaches to entrapment." *Id.* However, Camp disregards the fact that his standard would be difficult, if not impossible, to use in practice. The final step of Camp's analysis requires the jury to balance two incomparable factors: the predisposition of the defendant and the impropriety of government conduct. Comparing these two different concerns would be analogous to comparing proverbial "apples and oranges." As these two factors lack a common frame of reference, "balancing" them against one another would be impossible in practice. Juries would either be unable to reach a verdict, or would base their decisions on additional factors not included in Camp's analysis.

259 Klar, *supra* note 35, at 216.

approach to entrapment: it allows the guilt or innocence of the accused to be determined on the basis of prior behavior.[260]

Second, Professor Klar's approach differs from the one proposed here by incorporating a due process element in his objective prong. Both our analyses share a common goal: to limit government intrusion by establishing proper limits of police investigation. Professor Klar argues that the flexibility of due process makes it a better vehicle to promulgate standards of police behavior.[261] However, the flexibility inherent in the due process analysis is the greatest weakness of Klar's approach. One of the major goals of both this Note's and Klar's entrapment approaches is to provide a workable framework which would guide police and government conduct in the future. Flexibility is indeed a necessary component to an effective entrapment analysis,[262] but in order to provide standards to restrain impermissible police activity, flexibility must be limited. This Note's approach is superior to Professor Klar's reliance on due process because it retains a degree of flexibility, yet deflnes the outer boundaries of appropriate police involvement.[263]

CONCLUSION

The two competing approaches to the entrapment defense, the objective and subjective, have left the doctrine of entrapment in a constant state of flux. In an effort to get the best of both worlds, a minority of jurisdictions have developed hybrid approaches to entrapment. The Supreme Court, however, has stubbornly retained the subjective analysis, which led to the controversial result in the recent case of *Jacobson v. United States*.[264]

A superior approach to the entrapment defense is a dual analysis combining the advantages of both the subjective and objective approaches. Under such an analysis, a defendant may be acquitted if she can satisfy either a subjective or an objective test. Such an analysis retains the advantages of the objective approach. It is prospective,

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260 *See supra* notes 216-18 and accompanying text for an explanation of the weaknesses inherent in the subjective approach to entrapment.

261 Klar, *supra* note 35, at 220. Recall the ease with which the Due Process Clause has been a fountainhead of new fundamental rights, and new standards of governmental behavior. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (interpreting the Fifth Amendment to require police officers to inform individuals in custody of their constitutional rights); Griswold v. Connecticut, 381 U.S. 479 (1965) (interpreting the Fourteenth Amendment Due Process Clause to include the right to privacy).

262 Indeed, this Note has recognized the merit of an objective entrapment analysis which retains a good deal of flexibility. *See supra* notes 222-24 and accompanying text.

263 The objective approach would allow each jurisdiction to establish its own standards of police conduct—either by statute or by common law. Flexibility would be attained through typically vague statutory langnage, or through the evolution of the common law.

264 112 S. Ct. 1535 (1992).

and provides a framework to limit future government misconduct. It also retains the advantages of the subjective approach. It allows an individual who is found not to be predisposed to use the defense, thus remaining faithful to the general congressional intent that the innocent not be punished.

The rule proposed in this Note avoids the weaknesses of both the objective and subjective approaches. It eliminates the subjective test's drawback: the possibility that the trier of fact may look to the past acts of the defendant to determine his predisposition and thereby defeat the entrapment defense. Under this Note's proposed test, the defendant is tried solely for the acts committed in the case at hand, rather than those committed in the past. The proposed test also eliminates the drawback posed by the objective test: the fact that the decision of guilt or innocence be determined by examining the likely effect of government solicitation on the hypothetical "reasonable person." This test is anchored in reality due to the infusion of a subjective prong, which emphasizes the actual predisposition of the defendant.

The time is right for federal courts to adopt a dual approach to entrapment that combines qualities of both the subjective and objective analyses. Such an approach is superior to both the traditional subjective and objective approaches, as well as those hybrid approaches implemented by a number of jurisdictions, or those offered by commentators. The adoption of a dual approach to entrapment would obviate the need for federal courts to stretch traditional entrapment doctrine in order to reach the "just" result, as occurred in *Jacobson v. United States.*

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James A. Henderson, Jr., A.B., LL.B., LL.M., Frank B. Ingersoll Professor of Law
Jennifer G. Hill, B.A., LL.B., BCL, Visiting Professor of Law (Spring 1994)
Rohert A. Hillman, B.A., J.D., Associate Dean for Academic Affairs and Professor of Law (Sabbatic Spring 1994)
Barbara J. Holden-Smith, B.A., J.D., Associate Professor of Law
Sheri Lynn Johnson, B.A., J.D., Professor of Law
Lily Kahng, B.A., J.D., LL.M., Associate Professor of Law
Rohert B. Kent, A.B., LL.B., Professor of Law, Emeritus
Jack Lipson, B.A., J.D., Visiting Practitioner (Spring 1994)
David B. Lyons, B.A., M.A., Ph.D., Professor of Law and Philosophy (on Leave 1993-94)
Jonathan R. Macey, B.A., J.D., J. DuPratt White Professor of Law
Peter W. Martin, A.B., J.D., Jane M.G. Foster Professor of Law
JoAnne M. Miner, B.A., J.D., Senior Lecturer (Clinical Studies) and Director of Cornell Legal Aid Clinic
Peter-Christian Müller-Graff, Dr. Jur., Visiting Professor of Law (Spring 1994)
Hiroshi Oda, LL.D., Visiting Professor of Law (Fall 1993)
Russell K. Osgood, B.A., J.D., Dean of the Law Faculty and Professor of Law
Larry I. Palmer, A.B., LL.B., Professor of Law (on leave 1993-94)
Ernest F. Roberts, Jr., B.A., LL.B., Edwin H. Woodruff Professor of Law
Faust F. Rossi, A.B., LL.B., Samuel S. Leibowitz Professor of Trial Techniques
Bernard A. Rudden, B.A., M.A., Ph.D., LL.D., DCL, Visiting Professor of Law (Fall 1993)
Stewart J. Schwab, B.A., M.A., J.D., Ph.D., Professor of Law
Robert F. Seibel, A.B., J.D., Senior Lecturer (Clinical Studies)
Howard M. Shapiro, B.A., J.D., Associate Professor of Law (on Leave Spring 1994)
Steven H. Shiffrin, B.A., M.A., J.D., Professor of Law
John A. Siliciano, B.A., M.P.A., J.D., Professor of Law
Gary J. Simson, B.A., J.D., Professor of Law
Katherine Van Wezel Stone, B.A., J.D., Professor of Law
Joseph Straus, Diploma in Law, J.D., Visiting Professor of Law (Spring 1994)
Barry Strom, B.S., J.D., Senior Lecturer (Clinical Studies)

Robert S. Summers, B.S., LL.B., William G. McRoberts Research Professor in the Administration of the Law
Winnie F. Taylor, B.A., J.D., LL.M., Professor of Law
James Justesen White, B.A., J.D., Visiting Professor of Law (Spring 1994)
David Wippman, B.A., M.A., J.D., Associate Professor of Law
Charles W. Wolfram, A.B., LL.B., Acting Associate Dean for Academic Affairs and Charles Frank Reavis Sr. Professor of Law

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Harry Bitner, A.B., B.S., L.S., J.D., Law Librarian and Professor of Law
W. David Curtiss, A.B., LL.B., Professor of Law
W. Tucker Dean, A.B., J.D., M.B.A., Professor of Law
W. Ray Forrester, A.B., J.D., LL.D., Robert S. Stevens Professor of Law
Jane L. Hammond, B.A., M.S. in L.S., J.D., Edward Cornell Law Librarian and Professor of Law
Harry G. Henn, A.B., LL.B., J.S.D., Edward Cornell Professor of Law
Milton R. Konvitz, B.S., M.A., J.D., Ph.D., Litt.D., D.C.L., L.H.D., LL.D., Professor, New York State School of Industrial and Labor Relations
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Rudolf B. Schlesinger, LL.B., Dr. Jur., William Nelson Cromwell Professor of International and Comparative Law
Gray Thoron, A.B., LL.B., Professor of Law

Elected Members from Other Faculties

Calum Carmichael, Professor of Comparative Literature and Biblical Studies, College of Arts and Sciences
James A. Gross, Professor, School of Industrial and Labor Relations
Paul R. Hyams, Associate Professor of History, College of Arts and Sciences