CRIMINAL PROCEDURE—ENTRAPMENT—DEFENDANT HAS BEEN ENTRAPPED AS A MATTER OF LAW WHEN THE GOVERNMENT'S PROTRACTED AND INSISTENT EFFORTS CREATE IN DEFENDANT A PREDISPOSITION TO ENGAGE IN UNLAWFUL CONDUCT—*Jacobson v. United States*, 112 S. Ct. 1535 (1992).

Entrapment[1] is an affirmative defense available to a criminal defendant who has been induced into committing a crime that the individual would not have contemplated absent the government's enticement.[2] The defense may bar the prosecution of an otherwise law-abiding citizen who has been deceived into committing a crime by an undercover government investigation.[3] Essentially all courts would acquit an innocent target of such a scheme, but courts remain divided on the legal basis for acquittal.[4] Indeed, since the entrapment doctrine emerged, alternative bases for acquittal have permeated the courts and created debate over the defense's application.[5] The controversy has centered around two distinct approaches to the defense's application: the subjective approach, which focuses the individual's "predisposi-

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[1] "Entrapment" is defined as "[t]he act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him." BLACK'S LAW DICTIONARY 532 (6th ed. 1990); Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., concurring) (setting forth the classic definition of entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer"). *See* Michael A. DeFeo, *Entrapment as a Defense to Criminal Responsibility: It's History, Theory and Application*, 1 U.S.F. L. REV. 243, 272 (1967) ("The entrapment device does not disprove the commission of crime, it merely implements the common feeling that innocent people should not be tricked into unnecessary criminal acts.").

[2] WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 5.1, at 248 (1985) (citing *Sorrells v. United States*, 287 U.S. 435 (1932)).

[3] William E. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 248 (1942). The entrapment defense is not available to an individual unless the person who induces the crime is a government agent or informant. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 48, at 370 (1972).

[4] Leslie W. Abramson & Lisa L. Lindeman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. L. 139, 139 (1980).

[5] *See* Molly Kathleen Nichols, Comment, *Entrapment and Due Process: How Far is Too Far?*, 58 TUL. L. REV. 1207, 1207 (1984). Secondary issues also being debated with regard to the entrapment controversy include procedural matters, such as who should decide the entrapment issue—the judge, as a question of law, or the jury, as a question of fact. Susan D. Edwards & Paul N. Edwards, *Entrapment in the Federal Courts: Variations on a Theme*, 8 OHIO N.U. L. REV. 223, 223 (1981). Other procedural issues concern the relative burdens of proof on the prosecution and the defendant and whether a defendant may raise the entrapment defense simultaneously with a not guilty plea. *Id.*

tion" to commit the crime,[6] and the objective approach, which focuses on governmental "inducement" in persuading the individual to commit the crime.[7] These dissimilar focal points, however, have spawned inconsistent decisions in the courts.[8]

Despite the divergence in the analytic approaches, the rationale underlying the entrapment defense is straightforward.[9] Foremost, the defense seeks to deter government from luring people into criminal activities that they would not otherwise have engaged in.[10] The common belief is that law-enforcement activity should target only those individuals who are prone to break the law.[11] In addition, the defense protects the citizenry from

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6 Nichols, *supra* note 5, at 1207. The majority of the Supreme Court has consistently followed the subjective approach. John S. Knowles III, Note, *Entrapment as a Matter of Law: Contraband Supplied to Defendants by Government Agents*, 4 MISS. C. L. REV. 99, 101 (1983). The subjective approach, although widely criticized and not universally followed in lower courts, remains the accepted majority approach. Nichols, *supra* note 5, at 1211.

7 Nichols, *supra* note 5, at 1207. The objective approach determines whether evidence relevant to the prosecution of an individual was gathered in violation of administrative justice. *Id.* at 1210-11. Additionally, the objective approach allows the issue of entrapment to be decided by the judge as a matter of law. *Id.* The Model Penal Code adopts the objective approach:

> A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) 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. . . .

MODEL PENAL CODE § 2.13 (Official Draft 1962).

8 *See* Nichols, *supra* note 5, at 1207. "The defense is a stepchild of the law, neither codified nor constitutional, easily manipulated by prosecutors, defendants, and courts." *Id.*

9 DeFeo, *supra* note 1, at 272.

10 *Id.* " 'The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise avoid.' " *Id.* (quoting Becker v. United States, 62 F.2d 1007, 1009 (2d Cir. 1933)). Acquitting entrapped defendants is merely a common notion of humanity. *Id.*

11 Alan Raphael, *Entrapment: Under What Circumstances Does Government Inducement to Commit a Crime Provide a Defense?* 3 PREVIEW 82, 83 (1991). Rather than expending vast efforts in pursuing pliable suspects, limited police resources should be directed at more deserving matters. *Id.* Law enforcement officials must consider three questions before commencing an undercover investigation: "What evidence, if any, is necessary before a subject may be extended the opportunity to commit a controlled offense; what constitutes predisposition; and what tactics must be avoided in extending the opportunity." George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 249 (1975). Some have argued that law enforcement officials should obtain a warrant before inducing or soliciting a target of an under-

overzealous undercover agents.[12] Because law enforcement officials must employ various means to uncover criminal activity,[13] undercover law enforcement efforts ("sting" operations)[14] have become extremely prominent in recent years.[15] Judicial integrity and individual privacy, however, necessarily limit the government in its efforts to control crime.[16] Courts have also developed a substantive due process defense as an additional deterrent to overly ambitious government conduct.[17] Although the Supreme

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cover operation to commit a crime. LAFAVE & ISRAEL, *supra* note 2, § 5.4, at 257. Securing a warrant eliminates or reduces the problem of selective and discriminatory entrapment by law enforcement officials. *Id.* The application of the entrapment doctrine has led courts to recognize that the stronger the criminal tendency, the less of a provocation is needed to induce the crime. Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1113 (1951). "A man is led into crime because of an instability of three factors—criminalistic tendencies, mental resistance, and the situation." *Id.* *See* Maura F. J. Whelan, *Lead Us Not Into (Unwarranted) Temptation: A Proposal To Replace The Entrapment Defense With a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1217 (1985) (suggesting that before commencing an undercover sting, police should show that they have a reasonable suspicion that the target is involved in criminal activity or that a criminal enterprise is occurring).

12 Whelan, *supra* note 11, at 1212.

13 22 C.J.S. *Criminal Law* § 61, at 79 (1961). An undercover investigator, employed to detect crime can use artifice, trickery and deception. *Id.* A citizen has no constitutional right to be free from government investigation. Knowles, *supra* note 6, at 100 (citing Sorrells v. United States, 287 U.S. 435, 441 (1932)).

14 "Sting" is defined as: "An undercover police operation in which police pose as criminals to trap law violators." BLACK'S LAW DICTIONARY 1414 (6th ed. 1990).

15 *See* Raphael, *supra* note 11, at 83. Infamous undercover cases decided in the last decade involved John Z. DeLorean (drug-related operation), Washington D.C. Mayor Marion Barry (drug-related operation), and Operation Abscam (investigation of Congressional members for bribe-taking). *Id.*

16 *See* Whelan, *supra* note 11, at 1212-14. There is a "fear that such unrestrained activity will do more than just root out elusive criminals, that it will actually create crime and corrupt the innocent." *Id.* at 1212. Salient concerns over police misconduct are "judicial integrity, the perversion of law enforcement, and the creation of crimes that would not have been committed otherwise . . . ." *Id.* at 1212-13 (footnotes omitted).

17 Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457, 457-60 (1990). The defendant who raises a due process defense concedes a predisposition to commit the crime. *Id.* at 457. The defendant must then prove that the government's conduct was so outrageous that prosecution would be unconstitutional. *Id.* Courts have been reluctant to reverse convictions on due process grounds and, therefore, the defense is more difficult to prove than entrapment. *Id.* at 458. *See* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (finding due process standards "implicit in the concept of ordered liberty"); *see also* Rochin v. California, 342 U.S. 165 (1952) (reversing conviction of drug possession on due process grounds because forcing defendant to get his stomach pumped was outrageous government conduct); *infra* note 84 (discussing *Rochin*); *see generally* Kevin H. Marino, *Outrageous Conduct: The Third Circuit's Treatment of the Due Process Defense*, 19 SETON HALL L. REV. 606, 606-42 (1989) (outlining development of due process defense in Third and Ninth Circuits); Teri L. Chambers, Case Note, United

Court has yet to decide an entrapment case on this basis, the Court has nevertheless acknowledged its existence.[18]

In a recent case, *Jacobson v. United States*,[19] the United States Supreme Court considered whether a defendant has been entrapped when the government succeeds in engaging the defendant in unlawful conduct, but only after several years of failed attempts to entice the defendant to violate the law.[20] Specifically, the Supreme Court examined whether the prosecution proved beyond a reasonable doubt that Jacobson was predisposed, as a matter of law, to violate the Child Protection Act[21] independent of governmental solicitation and seduction.[22] Adhering to the subjective approach, the Supreme Court, in a five to four decision, reversed Jacobson's conviction, holding that prior to governmental intervention Jacobson was not predisposed to violate the law.[23]

Petitioner Keith Jacobson ordered two magazines depicting nude teenage boys from a bookstore at a time when such purchase was lawful.[24] After passage of the Child Protection Act,

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States v. Jacobson: *A Call for Reasonable Suspicion of Criminal Activity as a Threshold Limitation on Governmental Sting Operations*, 44 ARK. L. REV. 493, 502-14 (1991) (assessing the defendant's due process defense claiming outrageous government conduct).

18 For example, in United States v. Russell, the Court stated:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed.

411 U.S. 423, 431 (1973). *See also* Hampton v. United States, 425 U.S. 484, 495, 499 (1976) (plurality opinion) (concurrence and dissent acknowledging the due process defense, but emphasizing that it applies only to outrageous government conduct); Mathews v. United States, 485 U.S. 58, 67 (1988) (Scalia, J., concurring) (recognizing that "some government conduct might be sufficiently egregious to violate due process"); *infra* notes 78-114 and accompanying text (discussing cases that have considered the due process defense).

19 112 S. Ct. 1535 (1992).

20 *Id.* at 1537.

21 18 U.S.C. §§ 2251-2255, 2516 (1988 & Supp. III 1990).

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

23 *Id.* at 1541.

24 *Id.* at 1537-1538. Jacobson, a 56 year-old Nebraska resident, purchased two magazines, *Bare Boys I* and *Bare Boys II*, via mail-order from a California bookstore. *Id.* at 1537. Jacobson also purchased a brochure providing names of various other bookstores that sold pornography. United States v. Jacobson, 916 F.2d 467, 468 (8th Cir. 1990), *rev'd*, 112 S. Ct. 1535 (1992). Jacobson alleged that he was startled by the magazines when he received them, because he had expected that the magazines would depict pictures of " 'young men 18 years or older.' " *Jacobson*, 112 S. Ct. at 1537 (citation omitted).

When Jacobson received the two magazines, neither federal nor state law pro-

which made illegal receipt through the mails of pornographic depictions of children, government agents acquired Jacobson's name from the bookstore mailing list.[25] An undercover sting operation that spanned a twenty-six month period ensued.[26] The operation included the government's use of five fictitious organizations that sent brochures, surveys and pen pal letters to names on the mailing list.[27] Jacobson, one of the investigation's targets, finally relented to the solicitation efforts and placed a mail order for a pornographic magazine displaying young boys engaged in sexual activities.[28] Upon his receipt of the pornographic mate-

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hibited obtaining sexually explicit pictures of children through the mail. *Id.* at 1538. With the passage of the Child Protection Act, however, federal law prohibited receipt of such magazines through the mails. *Id. See* Child Protection Act of 1984, 18 U.S.C. §§ 2251-2255, 2516 (1988 & Supp. III 1990).

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

26 *Id.*

27 *Id.* The Postal Service began the undercover investigation in June of 1985, and the Customs Service subsequently targeted Jacobson in its own investigation to further solicit Jacobson. *Id.* at 1538-39. The postal inspector's efforts commenced with a letter from the fictitious "American Hedonist Society," containing a membership application and statements expressing the Society's philosophy: "[We have] 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." *Id.* at 1538. (quoting Record, Government Exhibit 7). Jacobson responded to the solicitation and returned a questionnaire in which he indicated that he "enjoy[ed]" preteen sex, but did not approve of pedophilia. *Id.* After a brief lull, a "new 'prohibited mail specialist' " continued sending Jacobson solicitation. *Id.* Jacobson thus received correspondence from another fictitious company, "Midlands Data Research," which reached out to 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.' " *Id.* (quoting Record, Government Exhibit 8). In response, Jacobson wrote: " 'Please feel free to send more information, I am interested in teenage sexuality. Please keep my name confidential.' " *Id.*

Later, the fictitious "Heartland Institute for a New Tomorrow" (HINT), contacted Jacobson, asserting that it opposed legislative restrictions on sexual freedom. *Id.* Petitioner completed and returned another enclosed survey expressing facts regarding his sexual interests and willingness to oppose " 'right wing fundamentalists who are determined to curtail our freedoms.' " *Id.* (quoting Record, Government Exhibit 9). In subsequent correspondence directed to Jacobson, HINT portrayed itself as a lobbying organization seeking to remove statutory restrictions on sexual behavior. *Id.* HINT offered Jacobson a catalogue of "interesting and stimulating" items, as well as a listing of other members of the organization, but Jacobson made no further efforts to communicate with HINT. *Id.*

The prohibited mail specialist, in the meantime, also began sending Jacobson letters from a "Carl Long," inquiring into Jacobson's interests. *Id.* Jacobson responded, but his letters contained no reference to child pornography. *Id.* The Customs Service, as part of its own sting operation, concurrently mailed Jacobson a brochure displaying sexual pictures of young boys. *Id.* Jacobson ordered pictures, but his order was never filled. *Id.*

28 *Id.* at 1539-40. The postal inspector, under the guise of the "Far Eastern

rial, Jacobson was arrested.[29]

In the United States District Court for the District of Nebraska, Jacobson raised an entrapment defense.[30] Jacobson claimed that he ordered the magazine only after the government letters had enticed his interest, and that he was not sure what type of sexual behavior was depicted in the magazines to which the letters referred.[31] Rejecting the entrapment defense, the jury convicted Jacobson of knowingly receiving child pornography through the mails in violation of the Child Protection Act.[32]

The United States Court of Appeals for the Eighth Circuit, determining that the government lacked a reasonable basis for beginning the undercover investigation, reversed Jacobson's conviction.[33] The appellate panel reviewed the case en banc, vacated the reversal and affirmed.[34] At rehearing, Jacobson asserted three defenses.[35] First, Jacobson alleged that the government improperly conducted the undercover investigation because it lacked a reasonable suspicion that he was predisposed to commit the crime for which he was convicted.[36] Second, Jacobson contended that the government's outrageous conduct violated his due process rights.[37] Third, Jacobson claimed that he was entrapped.[38] In response to these contentions, the court of appeals explained that because Jacobson's conduct was not constitutionally protected, and because due process allows undercover agents wide latitude in law enforcement, Jacobson had

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Trading Company," sent Jacobson a letter promising confidentiality and soliciting Jacobson to send for more information. *Id.* Jacobson responded and the organization sent a catalogue from which Jacobson finally ordered a pornographic magazine, *Boys Who Love Boys*. *Id.*

29 *Jacobson*, 112 S. Ct. at 1540. Jacobson received a photocopy of *Boys Who Love Boys* as part of a controlled delivery and was arrested. *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 1537, 1540. Jacobson was sentenced to two years probation and 250 hours of community service. United States v. Jacobson, 893 F.2d 999, 999 (8th Cir.), *reh'g granted and opinion vacated*, 899 F.2d 1549 (8th Cir.) (en banc), *aff'd*, 916 F.2d 467 (8th Cir. 1990) (en banc).

33 *Id.* at 1002.

34 United States v. Jacobson, 916 F.2d 467, 470 (8th Cir. 1990)(en banc).

35 *Id.* at 468-70.

36 *Id.* at 468. Although the issue was not raised below, the court allowed both the government and Jacobson to brief and argue Jacobson's position that the government must first have reasonable suspicion that the subject is predisposed to criminal activity before beginning an undercover investigation of the person. *Id.*

37 *Id.* at 469. The Court noted that the Eighth Circuit based undercover investigation reviews on due process principles. *Id.*

38 *Id.* at 470.

no right to be free from investigation.[39] The court of appeals declared that the Constitution does not require the government to have a reasonable suspicion before commencing an investigation.[40] The court, acknowledging that outrageous government conduct may violate due process, nevertheless declared that the government's solicitation activity did not amount to a demonstrable due process violation.[41] Finally, the court concluded that Jacobson was not entrapped as a matter of law because his responses to the various surveys and brochures demonstrated his predisposition, beyond a reasonable doubt, to violate the law.[42]

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[39] *Id.* at 469. *See* Hampton v. United States, 425 U.S. 484, 490 (1986) (noting that due process "come[s] into play only when the [g]overnment activity in question violates some protected right of the *defendant*"); *see also* United States v. Kaminski, 703 F.2d 1004, 1009 (7th Cir. 1983) (articulating that due process gives law enforcement officials latitude to carry out investigations); Terry v. Ohio, 392 U.S. 1, 27 (1968). In *Terry*, the Court permitted a carefully restricted search of person's clothing upon a police officer's reasonable belief that a person is armed and a threat to the safety of the police officer or others. *Id.* at 27. The court of appeals in *Jacobson* refused to extend the deliberately limited scope of a *Terry* search to Jacobson's insistence upon reasonable suspicion because, the court explained, Jacobson had no privacy right to be protected. *Jacobson*, 916 F.2d at 469.

[40] *Jacobson*, 916 F.2d at 469. *See also* United States v. Jenrette, 744 F.2d 817, 824 (D.C. Cir. 1984) (contending that lack of suspicion is not a due process violation), *cert. denied*, 471 U.S. 1099 (1985); United States v. Jannotti, 673 F.2d 578, 609 (3d Cir.) ("Where the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait."), *cert. denied*, 457 U.S. 1106 (1982); United States v. Myers, 635 F.2d 932, 941 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980) (stating that the Constitution does not require a reasonable suspicion before an undercover operation may begin). *But see* United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991) (dismissing the reasonable suspicion requirement upon rehearing); *infra* notes 107-14 and accompanying text (examining *Luttrell*).

[41] *Jacobson*, 916 F.2d at 469-70. *See, e.g.*, Gunderson v. Schlueter, 904 F.2d 407, 410-11 (8th Cir. 1990) (stating that due process bars a conviction when government conduct is outrageous); United States v. Musslyn, 865 F.2d 945, 947 (8th Cir. 1989) (finding that a child pornography sting did not violate due process principles); *see also Kaminski*, 703 F.2d at 1009 (offering reasonable means of inducement to commit a crime is a valid means of investigation); United States v. Russell, 411 U.S. 423, 431-32 (1973) (asserting that government conduct may be so outrageous that due process will prevent a conviction); Rochin v. California, 342 U.S. 165, 172 (1952) (stating that government conduct shocked the conscience of the Court).

[42] *Jacobson*, 916 F.2d at 470. The court construed the evidence "in the light most favorable to the government" and determined that the entrapment defense was properly submitted to the jury. *Id.* Considering the various factors that outline a predisposition to commit a crime, the court further concluded that the entrapment issue was properly sent to the jury for determination of the *contradicted* testimony. *Id.* Jacobson framed his defense in a manner explicated in *United States v. Pfeffer*:

> To establish entrapment as a matter of law, the evidence must clearly indicate (1) that a government agent originated the criminal design; (2) that the agent implanted in the mind of an innocent person the

The United States Supreme Court granted Jacobson's petition for certiorari[43] to delineate the permissible scope of governmental undercover activities.[44] The Supreme Court concluded that because the government had transcended permissible bounds, it did not, as a matter of law, prove that Jacobson was predisposed to commit the crime for which he was convicted, independent of government intervention.[45] The Court found that the government had ensnared an otherwise innocent citizen into committing a crime.[46] Therefore, the Court reversed, holding that the prosecution did not establish facts to support the jury's verdict that Jacobson was inclined, beyond a reasonable doubt, to violate the law before becoming the target of investigation.[47]

The entrapment defense originated in state and lower federal courts in the late 1800s.[48] In 1932, the United States Supreme Court fully recognized the defense in *Sorrells v. United*

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disposition to commit the offense; and (3) that the defendant committed the criminal act at the urging of the government agent.

United States v. Pfeffer, 901 F.2d 654, 656 (8th Cir. 1990) (citing United States v. Williams, 873 F.2d 1102, 1104 (8th Cir. 1989)).

43 111 S. Ct. 1618 (1991) (mem.).

44 *Jacobson*, 112 S. Ct. 1535, 1537 (1992). The Court instructed that government agents, despite their enthusiasm to enforce the law, "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." *Id.* at 1540 (citations omitted).

45 *Id.* at 1541.

46 *Id.* at 1543.

47 *Id.*

48 Donnelly, *supra* note 11, at 1098. The lower federal courts recognized the entrapment defense as early as 1878. *Id.* In 1915, the first federal court to acquit on the basis of entrapment was Woo Wai v. United States, 223 F. 412, 415 (9th Cir. 1915). Mikell, *supra* note 3, at 246; Donnelly, *supra* note 11, at 1098-99. In *Woo Wai*, an Immigration Commission agent devised a scheme to entrap certain officers of the Immigration Commission and Woo Wai who they believed were illegally smuggling Chinese women into the United States. *Woo Wai*, 223 F. at 413. The Immigration agent implicated Woo Wai by convincing him to participate in an illegal scheme to bring Chinese across the Mexican border. *Id.* at 413-14. Woo Wai was subsequently arrested for conspiracy after carrying out the Government's suggested plan. *Id.* at 412-13. The Court of Appeals for the Ninth Circuit overturned Woo Wai's conviction on the grounds that 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 criminal statutes." *Id.* at 415.

From the *Woo Wai* decision in 1915 until *Sorrells v. United States* was decided in 1932, hundreds of cases claiming entrapment reached state and federal appellate courts. Donnelly, *supra* note 11, at 1099 (citing, inter alia, 18 A.L.R. 146 (1922)). Many of these entrapment cases arose from prosecutions under the National Prohibition Act. *Id.* For early discussions of the entrapment defense see Comment, *Entrapment*, 2 S. CAL. L. REV. 283 (1929); Note, *Entrapment as a Defense to Criminal Prosecution*, 44 HARV. L. REV. 109 (1930).

States.[49] The Supreme Court, however, articulated polar approaches to the defense, precipitating the controversy that was to continue for the next seventy years.[50] In *Sorrells*, the issue before the Court was whether the trial court erred in disallowing a jury instruction on the issue of entrapment.[51] Although eight of the nine Justices ultimately agreed to reverse Sorrells's conviction, three Justices disagreed with the Court's basis for allowing the entrapment defense.[52]

Chief Justice Hughes, writing for the Court, reversed Sorrells's conviction and ruled that there was sufficient evidence to send the issue of entrapment to the jury.[53] Construing the federal statute under which Sorrells was convicted,[54] the Court reasoned that it could not have been Congress's intent to hold Sorrells responsible for a crime that he had no predisposition to commit.[55] Thus, the Court, inquiring into the defendant's

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[49] 287 U.S. 435 (1932). *See* Donnelly, *supra* note 11, at 1099 (stating that not until *Sorrells* did the Supreme Court carefully examine the entrapment doctrine).

[50] Jerry Schreibstein, *Entrapment in Light of* Mathews v. United States*: The Propriety of Inconsistency and the Need for Objectivity*, 24 U.S.F. L. REV. 541, 545 (1990).

[51] *Sorrells*, 287 U.S. at 439. In *Sorrells*, an undercover government agent, disguised as a tourist, came to Sorrells's home accompanied by Sorrells's friends. *Id.* While reminiscing about wartime experiences, the agent asked Sorrells if he could obtain some liquor. *Id.* The agent badgered Sorrells when Sorrells refused his request. *Id.* Finally, Sorrells relented and retrieved some illegal liquor, which he sold to the agent. *Id.* Sorrells was subsequently arrested and charged with possessing and selling liquor in violation of the National Prohibition Act. *Id.* at 438. At trial, Sorrells pleaded not guilty, asserting that he was entrapped. *Id.* The trial court refused to send the entrapment issue to the jury, ruling that there was no entrapment "as a matter of law." *Id.* The United States Circuit Court of Appeals for the Fourth Circuit affirmed, *id.* at 439, and the United States Supreme Court granted certiorari. 287 U.S. 584 (1932).

[52] *Sorrells*, 287 U.S. at 435-59. A sole dissenter, Justice Reynolds, called for affirmance of the lower court's judgment. *Id.* at 453 (Reynolds, J., dissenting).

[53] *Id.* at 452.

[54] *Id.* In considering the statutory purpose of the National Prohibition Act, the Court noted:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

Id. at 447 (citation omitted). Justice Hughes stressed that the Government cannot prosecute for a crime that occurred as a result of its own instigation. *Id.* at 452. Therefore, the Justice declared, Sorrells's conduct did not come under the statute because prosecution would be "a gross perversion of its purpose." *Id.*

[55] *Id.* at 448. Justice Hughes noted that "[c]lemency is the function of the Executive" and therefore, the Court could not uphold Sorrells's entrapment defense on public policy or estoppel. *Id.* at 448 (citation omitted). *But see* United States v. Kaiser, 138 F.2d 219, 220 (7th Cir. 1943)(noting that an entrapped defendant con-

mental state, created the "subjective approach" to the entrapment defense.[56]

A second approach to the entrapment defense also emerged from the *Sorrells* case.[57] Justice Roberts, in his concurring opinion, criticized the majority for its statutory interpretation.[58] The Justice instead advocated the "objective approach,"[59] which focuses on governmental activity, preventing government agents from enticing citizens to commit crimes.[60] Justice Roberts asserted that the entrapment defense is based on public policy.[61]

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cedes committing the crime, but the courts invoke an estoppel defense because of improper government conduct), *cert. denied*, 320 U.S. 801 (1944). In *Casey v. United States*, recognized by the *Sorrells* Court, Justice Holmes refused to adopt the notion of inducement in blaming the government for the defendant's illegal conduct. Casey v. United States, 276 U.S. 413, 418 (1928). Conversely, Justice Brandeis, dissenting in *Casey*, stated that the government agent "instigated" the criminal activity and, consequently, the conviction should be overturned on the basis of entrapment. *Id.* at 423 (Brandeis, J., dissenting).

56 *See Sorrells*, 287 U.S. at 451; Abramson & Lindeman, *supra* note 4, at 140-41 (discussing the traditional entrapment defense created in *Sorrells*). The *Sorrells* Court explained:

> The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.

Id. The subjective approach has also been called the "origin of intent" approach. Edwards & Edwards, *supra* note 5, at 224 n.8.

The *Sorrells* majority further addressed the ancillary issue of whether a defendant may simultaneously plead not guilty and entrapment. *See Sorrells*, 287 U.S. at 452. The *Sorrells* majority stated that, despite the government's contentions to the contrary, a defendant may plead not guilty and simultaneously assert an entrapment defense because the government may not claim that a defendant is guilty where the government instigated the defendant's conduct. *Sorrells*, 287 U.S. at 452. *See* Mikell, *supra* note 3, at 248 (noting that the *Sorrells* majority took the view that a defendant may raise the entrapment defense by motion or plea).

57 *See Sorrells*, 287 U.S. at 453-59 (Roberts, J., concurring). Justice Roberts was joined by Justices Stone and Brandeis. *Id.* at 459. The *Sorrells* Court was split five to four with regard to the reasoning because although eight of the Justices agreed to reverse the conviction, only five of the eight agreed with the new statutory construction approach. Edwards & Edwards, *supra* note 5, at 225-26.

58 *Sorrells*, 287 U.S. at 455-56 (Roberts, J., concurring). Justice Roberts claimed that reading a statutory exception into the Prohibition Act was "strained and unwarranted." *Id.*

59 *Id.* at 454-55 (Roberts, J., concurring). This approach has also been coined the "judicial purity" approach. Edwards & Edwards, *supra* note 5, at 226.

60 Nichols, *supra* note 5, at 1210-11; *Sorrells*, 287 U.S. at 455 (Roberts, J., concurring).

61 *Sorrells*, 287 U.S. at 457 (Roberts, J., concurring). The reason for allowing the defendant to go free based on an entrapment defense is grounded in public policy: it is necessary to inhibit law enforcement officials from employing means to entrap innocent and unwary citizens. *See* LAFAVE & SCOTT, *supra* note 3, § 48, at 372; Peo-

The Justice further disagreed with the majority's conclusion that entrapment is a question of fact for the jury.[62] Rather, the Justice asserted, because the courts are charged with regulating the criminal justice system, judges should determine whether the defendant was entrapped as a matter of law.[63]

The Supreme Court did not return to the subject of entrapment until it decided *Sherman v. United States*.[64] The *Sherman* majority employed the subjective approach adopted in *Sorrells* and, in the process, the statutory construction rationale.[65] Accord-

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ple v. Perez, 401 P.2d 934, 938 (1965) (the entrapment defense is justified to hinder law enforcement agents from creating rather than preventing crime). A frequently quoted statement, penned by Justice Roberts in his concurrence defines "entrapment" as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." *Id.* at 454 (Roberts, J., concurring).

62 *Sorrells*, 287 U.S. at 457 (Roberts, J., concurring). Justice Roberts acknowledged that the Court may turn to the jury for factual advice, but posited that the court alone holds the power to determine whether the accused has been entrapped. *Id.* The objective approach favors the court deciding the entrapment issue because it preserves the purity of the court function. LAFAVE & ISRAEL, *supra* note 2, at 254.

63 *Sorrells*, 287 U.S. at 457 (Roberts, J., concurring).

64 356 U.S. 369 (1958). *See* Edwards & Edwards, *supra* note 5, at 227 (observing that the entrapment issue was largely absent from the courts for 10 years). The companion case of *Masciale v. United States* was decided the same day as *Sherman*. *See* Masciale v. United States, 356 U.S. 386 (1958). In *Masciale*, the Supreme Court addressed the same issue as it did in *Sherman*: Was there sufficient evidence to establish that the defendant was entrapped as a matter of law? *Id.* at 386. A government informant introduced Masciale to a government agent who represented himself as a narcotics buyer. *Id.* at 387. Masciale expressed that he could get someone to sell narcotics to the agent. *Id.* For six weeks, Masciale and the agent were in contact and during that time, discussed Masciale's efforts to locate a narcotics dealer. *Id.* Masciale finally introduced the agent to a seller who sold the agent narcotics. *Id.* at 388. Masciale was subsequently arrested and charged with two counts of selling narcotics and one count of conspiracy to sell narcotics. *Id.* at 386. Masciale claimed that he was entrapped because the informer persuaded him with the lure of big money. *Id.* at 388. The Court observed that Masciale never claimed that the agent or the informer persuaded him to enter the narcotics trafficking business. *Id.* at 386-87. The issue of entrapment was sent to the jury and Masciale was convicted. *Id.* at 386. The United States Court of Appeals for the Second Circuit affirmed, Masciale v. United States, 263 F.2d 601 (1956), and the United States Supreme Court granted certiorari. Masciale v. United States, 352 U.S. 1000 (1957). The Supreme Court found that the entrapment issue was properly sent to the jury and affirmed the judgment. *Masciale*, 356 U.S. at 388.

Justices Frankfurter, Douglas, Harlan and Brennan, the four concurring Justices in *Sherman*, dissented in *Masciale*. *See id.* at 389. (Frankfurter, J., dissenting). The dissent, critical of the majority's statutory construction approach, emphasized that the Court should not have submitted the entrapment issue to the jury and that the case should have been remanded to the district court for determination by the trial judge. *Id.*

65 *See* Edwards & Edwards, *supra* note 5, at 234; *Sherman*, 356 U.S. at 372. The

ingly, the Court held that Sherman was entrapped as a matter of law because the government informant had induced him to commit a crime for which he had no predisposition.[66] The Court emphasized that an informant had played on Sherman's sympathies, as one narcotic addict to another, by continuously requesting that Sherman procure narcotics for the informant.[67] Although Sherman finally relented and committed the crime, the Court found that he lacked the requisite predisposition and reversed the conviction.[68] Further, the Court added that the jury, not the judge, should be responsible for evaluating the defendant's innocence or guilt and, therefore, must be the final arbiter on the entrapment defense.[69]

Sherman dispute entered the courts after Sherman was arrested for selling narcotics to a government informant. *Id.* at 370-71. At trial, Sherman raised an entrapment defense which was sent to the jury to determine whether Sherman was predisposed to commit the crime or whether the informant had persuaded and convinced an unwilling victim. *Id.* at 371. Sherman's first trial resulted in a conviction that was reversed because of improper jury instructions. United States v. Sherman, 200 F.2d 880 (1952). The second trial also resulted in a conviction, and Sherman was ultimately sentenced to ten years imprisonment. *See Sherman*, 353 U.S. at 372. The United States Court of Appeals for the Second Circuit affirmed, United States v. Sherman, 240 F.2d 949 (1957), and the United States Supreme Court granted certiorari, Sherman v. United States, 353 U.S. 935 (1957), to determine what level of conduct would establish lack of predisposition as a matter of law. *Sherman*, 356 U.S. at 370, 372.

66 *Sherman*, 356 U.S. at 372. Following the foundation laid in *Sorrells*, the Court stressed: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Id.* The majority conceded that the government may use undercover agents and a strategic plan, but the police may not manufacture a crime. *Id.* The majority stated that an inappropriate use of stealth and strategy would be as objectionable as unlawful searches and seizures and coerced confessions. *Id.*

67 *Id.* at 371. The Court noted that the informant met Sherman for the first time in the doctor's office where Sherman received treatment for narcotics addiction. *Id.* Sherman and the informant, the Court explained, had simultaneous appointments for allegedly the same treatment and they also met occasionally at the same pharmacy. *Id.* Chief Justice Warren related that because of their mutual similarities, the informant and Sherman became confidants. *Id.*

68 *Id.* at 376, 378. Rejecting the government's proof of Sherman's "ready complaisance," the Court stated that the defendant's previous two convictions of selling and possessing narcotics, nine and five years prior, were insufficient to prove a predisposition for selling the narcotics for which he was arrested. *Id.* at 375. The Court further stressed that Sherman was in rehabilitation when the government informant approached him. *Id.* at 375-76. The Court described the government's conduct as "play[ing] on the weaknesses of an innocent party and beguil[ing] him into committing crimes which he otherwise would not have attempted." *Id.* at 376 (citation omitted).

69 *Id.* at 377. The Court recognized *Sorrells*, as well as the lower courts' adherence to it, and refused to alter its grounds for fear of creating more confusion. *Id.* at 377-78.

The concurring Justices in *Sherman* followed the reasoning expounded by Justice Roberts in *Sorrells*, and rejected the statutory construction approach in favor of an objective and fundamental fairness approach.[70] The concurring opinion, written by Justice Frankfurter, asserted that once Sherman committed the crime, he was guilty regardless of whether the government instituted the criminal activity.[71] Justice Frankfurter, however, would also have reversed Sherman's conviction, but on the basis that the governmental conduct involved could not be "countenanced."[72]

Justice Frankfurter's "public policy" approach addressed acceptable standards of governmental conduct,[73] labeling deceitful governmental temptation as intolerable.[74] The Justice explained that whether the idea to violate the law originated with Sherman or the informant was irrelevant with regard to Sherman's actual guilt, but would be used to determine whether the government employed impermissible methods in bringing Sherman to justice.[75] The Justice further adhered to the *Sorrells* concurrence by stressing that the issue of entrapment should be decided by the court, not the jury, because only the court could provide with certainty the requisite guidance for official conduct.[76]

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[70] *See id.* at 378-85 (Frankfurter, J., concurring). Justice Frankfurter, joined by Justices Douglas, Harlan and Brennan, criticized the majority for relying on a pure interpretation of *Sorrells*. *Id.* at 378-79 (Frankfurter, J., concurring). The Justices were persuaded that *Sorrells* should be re-examined because lower courts had been unable to extrapolate a satisfactory rule from the decision and, in some cases, simply avoided the *Sorrells* theory. *Id.* at 379 (Frankfurter, J., concurring).

[71] *Id.* at 379-80. Justice Frankfurter stated: "In these circumstances, conduct is no less criminal because the result of temptation, whether the tempter is a private person or a government agent or informer." *Id.* at 380.

[72] *Id.* The concurrence quoted Justice Holmes:

> "It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . [F]or my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

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

[73] *Id.* at 382 (Frankfurter, J., concurring).

[74] *Id.* at 380 (Frankfurter, J., concurring).

[75] *Id.* at 380-82 (Frankfurter, J., concurring). The concurrence stressed that in every entrapment case the intention to commit the particular crime derives from the police but stated that an entrapment defense could not be used in circumstances where the police merely supplied an opportunity to break the law. *Id.* (citing Grimm v. United States, 156 U.S. 604 (1895)).

[76] *Sherman*, 356 U.S. at 385 (Frankfurter, J., concurring).

For twenty-five years, the *Sorrells-Sherman* predisposition test remained the majority approach while the concurring opinions of Justices Roberts and Frankfurter gained support from appellate courts and commentators.[77] In 1973, although adhering to the subjective approach, the Supreme Court, in *United States v. Russell*,[78] created the possibility that a substantive due process defense may apply in an entrapment case.[79] In *Russell*, the United States Supreme Court considered whether a government agent, who infiltrated an already existing drug manufacturing operation and provided the members with an ingredient necessary to produce methamphetamine, was excessively involved in the enterprise.[80] Russell, conceding predisposition to violate the law under which he was arrested, raised an entrapment defense based on the objective approach.[81] Russell claimed that because the government agent was excessively enmeshed in the crime for which he was convicted, due process and fundamental fairness required his conviction to be overturned.[82] The majority ac-

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77 *See generally* Edwards & Edwards, *supra* note 5, (reviewing the progression of the entrapment doctrine).

78 411 U.S. 423 (1973).

79 *See id.* at 431-32. *See also* Abramson & Lindeman, *supra* note 4, at 158-79 (providing a broad overview of circuit court decisions upholding the due process defense).

80 *Russell*, 411 U.S. at 430. The *Russell* controversy entered the district court when Russell was charged with and convicted of three counts of unlawfully manufacturing, processing, selling and delivering the drug, methamphetamine. *Id.* at 424. Russell's attempted assertion of the entrapment defense failed. *Id.* The United States Court of Appeals for the Ninth Circuit reversed. Russell v. United States, 459 F.2d 671 (1972). Noting that the government agent furnished an ingredient for the drug that Russell was convicted of manufacturing and selling, the court concluded that such behavior constituted excessive involvement. *Id.* at 673. The court of appeals held that Russell was entrapped as a matter of law because "a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise." *Id.* The United States Supreme Court granted certiorari, United States v. Russell, 409 U.S. 911 (1972), and reversed the appellate court judgment. *Russell*, 411 U.S. at 425, 436.

81 *See id.* at 433. Russell, the Court observed, asked that the Court follow the approach advanced by the *Sorrells-Sherman* opinions of Justices Roberts and Frankfurter, respectively, which focused on the type and degree of government involvement and activity in determining whether a defendant has been entrapped. *Id.*

For other cases applying the objective approach, see United States v. Bueno, 447 F.2d 903, 906 (5th Cir. 1971) (entrapment found when government supplies the contraband even if the defendant is predisposed); Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971) (conviction reversed because government agent was directly and continuously involved in the criminal enterprise over sustained time period); United States v. Chisum, 312 F. Supp. 1307, 1312 (C.D. Cal. 1970) (entrapment defense sustained because the government supplied the contraband for which the defendant was convicted).

82 *Russell*, 411 U.S. at 430.

knowledged that a due process defense eventually may be plausible, but rejected Russell's defense.[83] The Court stated that the governmental activity did not rise to the required level of outrageous conduct that would be " 'shocking to the universal sense of justice.' "[84] Relying on a subjective analysis, the Court concluded that because the government agent did not implant the

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[83] *Id.* at 431-32.

[84] *Id.* at 432 (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960)). The Court noted three reasons for rejecting Russell's due process defense. *Id.* at 430-32. First, the Court stated, infiltration of a drug ring and supply of an ingredient did not violate any federal statute. *Id.* at 430. Second, the Court continued, the item supplied was not an illegal substance and was therefore accessible to any member of society. *Id.* at 432. Third, as the Court noted, the drug ring members had prior experience with the ingredient and could access it without the government's help. *Id.* at 431.

Opening the door to a possible new approach to the entrapment doctrine, the Court hinted: "While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, . . . the instant case is distinctly not of that breed." *Id.* at 431-32 (citing Rochin v. California, 342 U.S. 165 (1952), in which the United States Supreme Court recognized the Due Process Clause of the Fourteenth Amendment as a defense to the defendant's conviction).

In *Rochin*, three deputy sheriffs unlawfully entered Rochin's home and forced themselves into his bedroom because they believed he was selling narcotics. *Rochin*, 342 U.S. at 166. Upon entering his room, the sheriff noticed two capsules on his nightstand. *Id.* Rochin put the capsules in his mouth and the sheriffs attempted to extract them. *Id.* The attempt to retrieve the capsules failed, so the sheriffs handcuffed and took Rochin to the hospital where, without his consent, his stomach was pumped. *Id.* The primary piece of evidence at Rochin's trial were the two capsules that were forced from Rochin against his will. *Id.* Rochin was convicted of possessing a morphine preparation and was incarcerated for two months. *Id.*

The district court of appeals affirmed Rochin's conviction, California v. Rochin, 101 Cal. App. 2d 140 (1950), and the California Supreme Court denied a rehearing without opinion. 101 Cal. App. 2d 140 (1951). The United States Supreme Court granted certiorari, Rochin v. California, 341 U.S. 939 (1951), to determine the extent to which the Due Process Clause of the Fourteenth Amendment placed some limitation on state law enforcement activity. Rochin v. California, 342 U.S. 165, 168 (1952). The Court stated that due process protects personal immunities that are " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' " (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)), or are "implicit in the concept of ordered liberty." *Id.* at 169 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Recognizing that the criminal process involves human rights, the Court asserted that criminal procedure is subject to due process judgment. *Rochin*, 342 U.S. at 169. The *Rochin* Court concluded that the sheriff's outlandish behavior in attacking Rochin and subjecting him to a forcible stomach pump "is conduct that shocks the conscience." *Id.* at 172. The Court analogized coerced verbal confessions to this type of physical invasion as equally "offend[ing] the community's sense of fair play and decency." *Id.* at 173. The Court recognized that law enforcement officials may apply modern devices in ascertaining and arresting criminals, but emphatically declared that the police may not offend human dignity in their efforts to carry out their duties. *Id.* at 174.

criminal scheme in Russell's mind, the defendant was predisposed to violate the law without the government's inducement.[85]

The debate over the entrapment defense continued in *Hampton v. United States,*[86] in which the Court bolstered the predisposition test.[87] The *Hampton* plurality proscribed the use of the entrapment defense when the defendant's predisposition has been proven, even when the government supplied the contraband.[88] Hampton, conceding his predisposition, nonetheless

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[85] *Russell*, 411 U.S. at 436. The Court drew its conclusion because the government agent merely joined an already existing drug manufacturing operation. *Id.* Four Justices dissented, as Justice Douglas, joined by Justice Brennan, authored one dissent while Justice Stewart joined Justice Marshall in a separate dissent. *See id.* at 436, 439 (Douglas, J., dissenting). Justice Douglas, in agreement with the objective approach, vehemently declared that the conviction should remain overturned because the government agent had supplied an essential ingredient in the manufacture of the drug and carried on as an active participant. *Id.* at 437 (Douglas, J., dissenting). The dissent admonished the government for diminishing the integrity of the court system by instigating and manufacturing criminal activity. *Id.* at 439 (Douglas, J., dissenting).

The *Russell* dissent paralleled Justice Roberts's concurrence in *Sorrells*, *supra* notes 57-63 and accompanying text, and Justice Frankfurter's concurrence in *Sherman*, *supra* notes 70-76 and accompanying text. For additional cases following the objective approach, see Casey v. United States, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) ("The Government may set decoys to entrap the criminals. But it may not provoke or create a crime and then punish the criminal, its creature."); Lopez v. United States, 373 U.S. 427, 434 (1963) ("The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents.").

[86] 425 U.S. 484 (1976).

[87] Emily K. Smith, *Sex, Lies, and Entrapment:* United States v. Jacobson, 24 CREIGHTON L. REV. 1087 (1991).

[88] *Hampton*, 425 U.S. at 485 (Rehnquist, J., plurality). Hampton was the target of a narcotics scheme between a government informant and two agents. *Id.* at 486. (Rehnquist, J., plurality). The informant told Hampton that he could find a buyer if Hampton could supply the drugs. *Id.* The informant introduced Hampton to two government agents and the three consummated a sale. *Id.* At this meeting, Hampton notified the agents that he could obtain additional narcotics. *Id.* At a subsequent meeting, Hampton made a second heroin sale to the agents and was then arrested. *Id.* In the United States District Court for the Eastern District of Missouri, Hampton conceded his predisposition, rejected the standard entrapment instruction and requested a jury instruction based on due process. *Id.* at 485, 487-88 (Rehnquist, J., plurality). The trial court refused the due process instruction and Hampton was found guilty and convicted on two counts of distributing heroin. *Id.* at 485, 488 (Rehnquist, J., plurality). Hampton appealed to the United States Court of Appeals for the Eighth Circuit, claiming that he should be acquitted if the jury believed that the government had supplied the contraband. United States v. Hampton, 507 F.2d 832 (8th Cir. 1974). The Eighth Circuit also rejected Hampton's due process defense and affirmed his conviction. *Id.* at 832. Thereafter, the United States Supreme Court granted certiorari. Hampton v. United States, 420 U.S. 1003 (1975).

urged that his due process rights were violated.[89] Three Justices,[90] affirming Hampton's conviction, endorsed the subjective view, stating that Hampton could not rely on the entrapment defense because he and the government officials had acted in concert.[91] The Justices further observed that due process concerns were not implicated because the police conduct did not deprive Hampton of any constitutional right.[92]

In a separate opinion, Justices Powell and Blackmun affirmed, but refused to foreclose the potential due process defense suggested in *Russell*.[93] The Justices refuted the plurality's contention that whenever the defendant's predisposition is established, neither due process principles nor the Court's supervisory power can bar a conviction.[94] Although reasoning that the due process defense should remain a viable option, the two-Justice

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89 *Hampton*, 425 U.S. at 487 & n.3, 488 (Rehnquist, J., plurality). The plurality noted Hampton's contention that his situation was analogous to that anticipated in dicta by the *Russell* decision, that is, that the government's conduct was so outrageous that his conviction should be barred by due process principles. *Id.* at 489. The plurality recognized that the contraband supplied by the government agents was not only illegal, but was also the *corpus delecti* of the sale for which Hampton was convicted. *Id.* Nevertheless, Justice Rehnquist stated that the case did not involve a violation of Hampton's due process rights and, furthermore, Hampton's case was different only in degree, not in kind. *Id.*

90 Justice Rehnquist was joined in his opinion by Chief Justice Burger and Justice White. *Id.* at 485 (Rehnquist J., plurality).

91 *Id.* at 488-90 (Rehnquist, J., plurality).

92 *Id.* at 490-91 (Rehnquist, J., plurality). Justice Rehnquist observed: "If police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Id.* at 490 (citing O'Shea v. Littleton, 414 U.S. 488, 504 (1974), in which the Court denied relief for lack of constitutional standing, but also suggested that relief is available through other processes, and Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976), wherein the Court emphasized that civil immunity for government officials does not insulate them from other forms of punishment for misconduct).

93 *Hampton*, 425 U.S. at 491-95 (Powell, J., concurring). Justice Powell, joined by Justice Blackmun, rejected Hampton's contention that the government's supplying of the drug constituted a "per se denial of due process." *Id.* at 491.

94 *Id.* at 492-93, 495 (Powell, J., concurring). Justice Powell claimed that only in the rare case would police over-involvement reach the requisite level of intolerable outrageousness to constitute a due process violation when the defendant conceded his predisposition. *Id.* at 495 n.7 (Powell. J., concurring). Justice Powell declared: " '[T]here is certainly a [constitutional] limit to allowing governmental involvement in crime. . . . Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction.' " *Id.* at 493 n.4 (Powell, J., concurring) (quoting United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973) (citation omitted)). *See, e.g.*, Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971) (police over-involvement reached a greater degree than had ever been before the United States Supreme Court). *See also* McNabb v. United States, 318 U.S. 332, 341 (1943) (artic-

concurrence determined that the governmental conduct in this case was not sufficiently outrageous to justify the reversal of Hampton's conviction.[95]

The dissenting Justices, advocating the historical minority view, stressed that the focus should be squarely upon the conduct that constituted the government's seduction of the victim.[96] The dissent stressed that the criminal activity for which Hampton was convicted began and ended with the government's involvement.[97] Governmental solicitation of contraband clearly implicated Hampton, and the Court declared that Hampton's conviction should therefore be overturned regardless of whether he was predisposed to commit the crime.[98]

The *Hampton* dissent presaged the circuit court decision in *United States v. Twigg*.[99] In *Twigg*, the United States Court of Appeals for the Third Circuit addressed whether police involvement in an undercover operation was so outrageous that it would bar conviction based on due process principles.[100] Reversing the

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ulating that the judiciary is charged with overseeing the criminal justice system, including investigations and prosecutions).

95 *Hampton*, 425 U.S. at 491, 495 (Powell, J., concurring).

96 *Id.* at 495-96 (Brennan, J., dissenting). Justice Brennan was joined by Justices Stewart and Marshall. *Id.* at 495.

97 *Id.* at 498 (Brennan, J., dissenting). Criticizing the majority's reliance on predisposition, Justice Brennan maintained that the appropriate focus was on government conduct. *Id.* at 498-99. *Cf.* United States v. West, 511 F.2d 1083 (3d Cir. 1975). In *West*, a case indistinguishable from *Hampton*, the Court found that there could be no conviction where the government supplied narcotics to a defendant who then sold them to an undercover agent. *Id.* at 1085 (citing with approval United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), and United States v. Mosley, 496 F.2d 1012 (5th Cir. 1974)).

98 *Hampton*, 425 U.S. at 500 (Brennan, J., dissenting). Justice Brennan advocated Justice Powell's view—the majority's subjective approach is only one available defense; due process and the Court's supervisory power should also remain viable for situations in which government conduct exceeds the bounds of decency. *Id.* at 499 (Brennan, J., dissenting). The dissent further called for the adoption of a per se rule that convictions should be overturned where the crime is for the sale of governmentally supplied contraband. *Id.* at 500 (Brennan, J., dissenting). *See* United States v. McGrath, 468 F.2d 1027, 1030 (7th Cir. 1972) (finding government supply of contraband "repugnant to the most elemental notions of justice"); United States v. Bueno, 447 F.2d 903, 906 (5th Cir. 1971) (defendant's conviction overturned because government supplied contraband). *But see* Whelan, *supra* note 11, at 1227 (deeming the *Bueno* rule too strict because undercover investigators need leeway to infiltrate the drug ring and to gain the trust of its members).

99 588 F.2d 373 (3d Cir. 1978).

100 *Id.* at 377. Twigg, one of two defendants, became involved in a drug manufacturing operation that had been set in motion by the Drug Enforcement Administration (DEA). *Id.* at 376. The DEA collaborated with an informant who was friendly with the second defendant, Neville. *Id.* at 375. The informant supplied the necessities—ingredients, glassware and a laboratory—with considerable assistance

convictions of both Twigg and his co-defendant on due process grounds, the court declared that the extent of governmental involvement was intolerable.[101] The court noted that governmental agents not only supplied the ingredients to manufacture an illicit drug, but conceived and contrived the crime as well.[102] Distilling the various opinions set forth in *Hampton*, the court concluded that "fundamental fairness" bars any prosecution for a crime engendered by outrageous government conduct.[103]

Subsequent to *Twigg*, however, the Third Circuit responded to a proliferation of due process defenses and withdrew from its holding.[104] Nonetheless, the *Twigg* decision has exerted an enor-

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from the DEA. *Id.* Twigg entered the operation to repay an outstanding debt to Neville and played a relatively minor role, as the informant basically ran the production. *Id.* at 375-76. Neville and Twigg were arrested and subsequently convicted. *Id.* at 374, 376. Twigg could not raise an entrapment defense because he was not brought into the criminal activity by a government agent. *Id.* at 376. Both Twigg and Neville challenged their convictions on appeal by raising a due process defense. *Id.* at 375.

101 *Id.* at 382. The defendant's convictions were reversed with the exception of Neville's charge of possession of cocaine. *Id.* The court did not base its reversal on the entrapment defense because Neville exhibited a predisposition to illegally manufacture methamphetamine hydrochloride. *Id.* at 376, 381. The court recognized that the United States Supreme Court had not reversed any conviction on due process principles. *Id.* at 377. Nevertheless, the court adhered to Justice Powell's separate opinion in *Hampton*, explaining that when scrutinizing government behavior courts should "consider the nature of the crime and the tools available to law enforcement agencies to combat it." *Id.* at 378 n.6.

In *Greene v. United States*, a government agent was intimately involved in the defendant's criminal activity of manufacturing alcohol for two years. Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971). The agent provided the defendants with a location, sugar at wholesale prices, an operator and materials to manufacture the alcohol. *Id.* at 786. In addition, the agent was the only purchaser of the illegal alcohol. *Id.* at 787. The defendants' conviction was reversed because the court found that although the defendant exhibited a predisposition, the government's involvement was outrageous and egregious. *Id.* at 786-87. The court asserted that "when the Government permits itself to become enmeshed in criminal activity, from beginning to end, . . . the same underlying objections which render entrapment repugnant to American criminal justice are operative." *Id.* at 787.

102 *Twigg*, 588 F.2d at 378.

103 *Id.* at 378-79. The *Twigg* court referred to another Third Circuit case, *United States v. West*. *Id.* at 379. In *West*, a government agent supplied the defendant with narcotics and also introduced him to another government agent. United States v. West, 511 F.2d 1083, 1085 (3d Cir. 1975). The defendant sold the narcotics to the second government agent and subsequently was arrested. *Id.* The court reversed the conviction based on fundamental fairness principles. *Id.* The court articulated that this government activity "serve[d] no justifying social objective" because it did not combat already existing criminal activity. *Id.* This conduct, the court opined, allowed law enforcement officials to devise a crime and then arrest the victim who carried out the official's scheme. *Id.*

104 Marino, *supra* note 17, at 636. In withdrawing from its position in *Twigg*, the Third Circuit has adopted Judge Adams's dissenting view in that case. *Id.* at 628.

mous influence throughout the federal courts.[105] Most courts, however, with the notable exception of the Ninth Circuit, have rejected *Twigg*, relying on the Third Circuit's own retreat from the case.[106] Exemplifying the Ninth Circuit's stance toward the due process defense, the court in *United States v. Luttrell*,[107] recognized that a court may dismiss an indictment on the ground that the government's conduct violated the defendant's right to due process.[108] The *Luttrell* court declared that constitutional norms

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Judge Adams stated in his dissent: "I do not believe that government incitement, however much I question its advisability, can be seen as the crucial element establishing the level of outrageousness necessary to find a violation of the due process clause." *Twigg*, 588 F.2d at 387 (Adams, J., dissenting). *See* Marino, *supra* note 17, at 628-36 (discussing in detail *Twigg*'s progeny in the Third Circuit).

105 Marino, *supra* note 17, at 636-37. Primarily, criminal defendants in circuit courts throughout the country regularly cite *Twigg* in seeking to invoke a due process defense to outrageous governmental conduct. *Id.* (citing cases).

106 *Id.* at 637-38 (citing cases that have adopted and rejected *Twigg*).

107 889 F.2d 806 (9th Cir. 1989), *reh'g granted*, 906 F.2d 1384 (9th Cir. 1990), *vacated and amended in part*, 923 F.2d 764 (9th Cir. 1991). The United States brought charges against Luttrell and her co-conspirator, Kegley, for illegal possession and trafficking of credit card drafts. *Luttrell*, 889 F.2d at 807-08. The government approached Kegley with the entire scheme and solicited Kegley's participation in the fraud. *Id.* at 808. Luttrell joined Kegley and the two agreed to go along with the government's plan and to accept profits. *Id.* When the co-conspirators expressly renounced their involvement in the government's scheme, the government agents refused to accept their renunciation. *Id.* at 809. Luttrell and Kegley were subsequently arrested. *Id.* The two were convicted under 18 U.S.C. § 1029(a)(1)-(3), § 1029(a)(1) and § 1029(b)(1) and appealed to the United States Court of Appeals for the Ninth Circuit. *Id.* at 807.

108 *Id.* at 811. Before examining the due process "reasonable suspicion" requirement, the Ninth Circuit acknowledged two other previously established due process defenses. *Id.* at 811-12. The circuit court explained that the first traditional due process defense, based on the "sphygmomanometer test," tracks governmental conduct and will safely reverse a conviction if it is "so extreme as to shock the judicial conscience." *Id. See, e.g.*, United States v. Ryan, 548 F.2d 782, 789 (9th Cir. 1976), *cert. denied*, 430 U.S. 965 (1977). The court recognized that this threshold is very hard to pass and that many courts refuse to overturn a conviction on this basis. *Luttrell*, 889 F.2d at 811. *See* United States v. Simpson, 813 F.2d 1462, 1465 (9th Cir. 1987) (government coercion forcing a woman to engage in sexual activity with a suspect found not violative of due process); United States v. Emmert, 829 F.2d 805, 812 (9th Cir. 1987) (government threats, intimidation, and payment of $200,000 as inducement found not violative of due process).

The second basis for the due process defense, the circuit court continued, is when the government creates the criminal plan and operates the scheme from its initiation to consummation upon arrest. *Luttrell*, 889 F.2d at 812. In *Greene v. United States*, for example, a bootlegging operation was initiated and operated with the help of government agents. Greene v. United States, 454 F.2d at 783, 786-87 (9th Cir. 1971). The court reversed the bootlegger's conviction because the government was too involved in the criminal enterprise. *Id.* at 787. The *Greene* court stated: "Although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment re-

set limits on permissible governmental investigatory activity.[109] The court, conceding the necessity of undercover investigations to combat ongoing criminal activity,[110] nonetheless asserted that unfounded investigations promote no redeeming societal interest.[111] The court underscored that an investigation without a reasonable basis is an arbitrary and inefficient way to enforce the law.[112] The court, without reversing, however, remanded the

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pugnant to American criminal justice are operative." *Id.* *But see* United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981) (no due process violation was found when a government agent bogusly represented himself and suggested an illegal scheme to public officials to pass legislation). This second approach is more difficult to prove and has also faced opposition by the courts because not many criminal enterprises are controlled solely by undercover agents. Marcus, *supra* note 17, at 467. The Ninth Circuit's activist approach to this case has provoked much debate and commentary. *Id.* at 469. Additionally, the *Luttrell* decision was reheard by the Ninth Circuit en banc. *Id.* *See generally* Chambers, *supra* note 17, at 512-14, 516-17 (discussing *Luttrell* prior to its reversal). For an overview of other decisions regarding the due process defense, see United States v. Williams, 791 F.2d 1383, 1386 (9th Cir. 1986) (stating that due process will only be recognized in narcotics cases when the government has created the crime by "engineer[ing] and direct[ing] the criminal enterprise from start to finish"); United States v. Porter, 764 F.2d 1, 9 (1st Cir. 1985) (denying due process defense on the grounds that government's conduct did not rise to the demonstrable level of outrageousness given the defendant's active participation in procuring potential narcotics buyers); United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978) (although not applying the due process defense to the conviction, the court recognized its existence); United States v. Leja, 563 F.2d 244, 247 (6th Cir. 1977) (relying on the factual evidence proving predisposition, the court denied the due process defense); United States v. Smith, 538 F.2d 1359, 1361 (9th Cir. 1976) (rejecting the due process defense as the government law enforcement activity was not outrageous or grossly shocking).

109 *Luttrell*, 889 F.2d at 813. The Court denoted several constitutional requirements, such as the Fourth Amendment right to a determination of probable cause and the privacy right protected by the Fifth Amendment, that make "the processes of criminal investigation move deliberately, purposefully and fairly." *Id.* *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[T]he right to be left alone—the most comprehensive of rights and the right most valued by civilized men.").

110 *Luttrell*, 889 F.2d at 813.

111 *Id.* In vehement disagreement with the government's activities of dragging Luttrell and Kegley into a credit card scheme, devised and operated solely through the government, the Ninth Circuit declared:

> The principle that people who are scrupulously conforming to the requirements of the law should not be made the objects of highly intrusive, random police investigations is an important ingredient of our liberty. We see substantial mischief in any pattern of law enforcement that arbitrarily targets for intrusion the lives of individuals who, to all reasonable appearances, are minding their own business.

Id.

112 *Id.* The Circuit Court further discredited the government's investigation because of its use of an informant. *Id.* The judge suggested that informants are compelled to uncover illegal activity for the police because of some external persuasion, such as a plea bargain. *Id.* Because informants act as puppets for government

case with instructions to determine whether the government possessed a reasonable suspicion prior to targeting the sting operation victim.[113] Finding no due process violation upon rehearing, the Ninth Circuit, en banc, rejected the "reasoned grounds" requirement and joined four sister circuits who also reject the requirement under the Due Process Clause.[114]

Against this fabric of conflicting interpretation, the United States Supreme Court confronted the entrapment defense in *Jacobson v. United States*.[115] The Court discussed the boundaries within which government agents must limit their activities consistent with the investigatory target's right not to be induced to commit a crime.[116] Determining that the government had crossed the permissible boundary,[117] the Court held that the prosecution had not met its burden of proving that Jacobson was disposed to violate the Child Protection Act[118] *before* the government began its investigation.[119]

Writing for the majority,[120] Justice White recognized the evils of child pornography and noted the difficulties in legally combatting the problem.[121] The Justice acknowledged the gov-

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agents, the judge continued, their sources of information may lack credibility, reasonableness, or fair play. *Id.* at 813-14.

113 *Id.* at 814. The Ninth Circuit affirmed in part and remanded in part. *Id.* The judge did not want to reverse the convictions until the trial court further developed the record as to whether the government had a reasonable basis for targeting the defendants. *Id.*

114 923 F.2d 764, 764 (9th Cir. 1991). *See, e.g.*, United States v. Jenrette, 744 F.2d 817, 824 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); United States v. Gamble, 737 F.2d 853 (10th Cir. 1984); United States v. Jannotti, 673 F.2d 578, 609 (3d Cir. 1982) (en banc), *cert. denied*, 469 U.S. 880 (1984); United States v. Myers, 635 F.2d 932, 941 (2d Cir. 1980), *cert. denied*, 449 U.S. 956 (1980).

115 112 S. Ct. 1535 (1992).

116 *Id.* at 1537, 1540.

117 *Id.* at 1537.

118 The Child Protection Act of 1984 provided 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 by any means including by computer or through the mails, if-
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . . .

18 U.S.C. § 2252 (a)(2)(A) (1988).

119 *Jacobson*, 112 S. Ct. at 1537.

120 Justices Blackmun, Stevens, Souter and Thomas joined in the majority opinion. *Id.*

121 *Id.* at 1540. *See* Osborne v. Ohio, 495 U.S. 103, 110 (1990) (recognizing that

ernment's privilege to use undercover investigators in law enforcement.[122] Undercover agents, the Court posited, traditionally employed "artifice and stratagem"[123] in apprehending law breakers.[124] Justice White stressed, however, that the government may not entice an otherwise innocent and law-abiding citizen into the commission of a crime entirely created and devised by the government and then arrest the citizen for that crime.[125] The Court emphasized the prosecution's burden of proving beyond a reasonable doubt that the defendant was predisposed to commit the crime before being approached by the government.[126] Justice White reasoned that the predisposition

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child pornography has a largely underground existence); New York v. Ferber, 458 U.S. 747, 759-64 (1982) (same). The *Ferber* Court recognized that child pornography exploits and abuses children, and held that the First Amendment does not protect "works that *visually* depict sexual conduct by children below a specified age." *Id.* at 764. The Court noted that a child is defined as a person under age 18 in 16 States, under age 17 in four States and under 16 in federal law and 16 States. *Id.* at 764 n.17.

122 *Jacobson*, 112 S. Ct at 1540.

123 *Id.* at 1540 (quoting Sorrells v. United States, 287 U.S. 435, 441 (1932) ("Artifice and stratagem may be employed to catch those engaged in criminal enterprises."); Sherman v. United States, 356 U.S. 369, 372 (1957); United States v. Russell, 411 U.S. 423, 435-36 (1973)). "Artifice," in this context, is defined as "[a]n ingenious contrivance or device of some kind, . . . it corresponds with trick or fraud. It implies craftiness and deceit, and imports some element of moral obliquity." BLACK'S LAW DICTIONARY 113 (6th ed. 1990). "Stratagem" is defined as "[a] deception either by words or actions, in times of war, in order to obtain an advantage over an enemy." *Id.* at 1421.

124 *Jacobson*, 112 S. Ct at 1540.

125 *Id.* (citing Sorrells v. United States, 287 U.S. 435, 442 (1923); Sherman v. United States, 356 U.S. 369, 372 (1957)).

126 *Id.* The *Jacobson* jury was instructed:

> If the defendant was entrapped he must be found not guilty. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.
>
> If the defendant before contact with law-enforcement officers or their agents did not have any intent or disposition to commit the crime charged and was induced or persuaded by law-enforcement officers o[r] their agents to commit that crime, then he was entrapped. On the other hand, if the defendant before contact with law-enforcement officers or their agents did have an intent or disposition to commit the crime charged, then he was not entrapped even though law-enforcement officers or their agents provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.

Id. at 1540 n.1.

The Court recited that, when entrapment is raised as a defense, the government must persuade the jury that the defendant had a disposition to commit the crime for which he was charged before governmental intervention. *Id.* at 1540 (citing United States v. Whoie, 925 F.2d 1481, 1485 (D.C. Cir. 1991)). In *Whoie*, the Federal District Court for the D.C. Circuit explained that various courts have

standard is therefore not a hindrance to government investigations.[127]

Justice White next asserted that the government failed to prove Jacobson's predisposition to commit the crime independently of governmental interference.[128] Although conceding that Jacobson was inclined to break the law the day he ordered the pornographic magazine, Justice White stressed that the government failed to prove that Jacobson was predisposed twenty-six months before his arrest, when he became the target of investigation.[129] The Court implied that the government's comprehensive and elaborate scheme had, in effect, created Jacobson's predispo-

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adopted either the "unitary-approach" or the "bifurcated approach" to the entrapment defense. *Whoie*, 925 F.2d at 1483. The court suggested that the Supreme Court's consistent insistence upon predisposition has led some courts to follow the "unitary-approach," requiring a defendant who claims to have been entrapped to bear the burden of production that the defendant was persuaded by the government and was not previously disposed. *Id.* (quoting United States v. El-Gawli, 837 F.2d 142, 145 (3d Cir.), *cert. denied*, 488 U.S. 817 (1988)). If the defendant meets the burden of production before the judge, then the government must persuade the jury "that it did not entrap the defendant." *Id.*

Jurisdictions adhering to the "bifurcated-approach," on the other hand, require the defendant to present his burden of production to the jury, rather than the judge. *Whoie*, 925 F.2d at 1483. Having passed this hurdle, the defendant must then persuade the jury that the government induced him. *Id. See, e.g.*, United States v. Burkley, 591 F.2d 903, 915 (D.C. Cir. 1978) (if the jury finds no inducement, then the question of predisposition is not reached; if inducement is found as a matter of law, then the question of inducement is withheld from the jury which must then determine whether prosecution has proved predisposition), *cert. denied*, 440 U.S. 966 (1979).

127 *Jacobson*, 112 S. Ct. at 1540-41 n.2. The Court acknowledged that the standard was established in *Sorrells*, the first Supreme Court case to uphold the entrapment defense. *Id.* The *Jacobson* Court expressed: "The Government may not punish an individual 'for an alleged offense which is the product of the creative activity of its own officials . . . .' " *Id.* at 1541 n.2 (quoting Sorrells v. United States, 287 U.S. 435, 451 (1932)). The Court quoted the government's own guidelines limiting undercover operations:

> (a) there [must be] a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; *or*
> (b) The opportunity for illegal activity [must be] structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

Id. (quoting *Attorney General's Guidelines on FBI Undercover Operations* (1980), *reprinted in* S. REP. No. 682, 97th Cong., 1st Sess. 551 (1982)).

128 *Id.* at 1541. The Court explained that if the government merely offered Jacobson the opportunity to buy pornographic magazines and Jacobson readily availed himself of the purchase, then an entrapment defense would probably not have been appropriate. *Id.*

129 *Id.* The Court noted that Jacobson ordered the magazine but only after 26

sition to break the law.[130]

Emphasizing that predisposition is to be assessed before government involvement,[131] Justice White rejected the prosecution's evidence of Jacobson's predisposition to commit an illegal act.[132] The Justice identified Jacobson's initial mail-order purchase of child pornography as the prosecution's only preinvestigation evidence, and dismissed it as a manifestation of predisposition to break the law for two reasons.[133] First, the Court declared that purchasing sexually explicit material merely suggests an inclination to view such materials, which is not in itself indicative of either criminal conduct or a predisposition to break the law.[134] Second, the Court maintained that at the time Jacobson purchased these materials he was acting fully within the law.[135] Indeed, the Court noted, Jacobson did not even realize that the materials depicted minors until the magazines arrived at his home.[136]

The Court next attacked the prosecution's evidence of predisposition that was collected during the course of the undercover operations.[137] First, Justice White stated that Jacobson's answers to the fictitious organization's letters and questionnaires failed to prove his inclination to break the law.[138] The Justice stressed that Jacobson's responses evinced, at most, a penchant for examining pictures of preteen sex and that he would support

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months of solicitation from fictitious government organizations by way of repeated mailings and communications. *Id.*

130 *Id.* Justice White stated: "[T]he Government did not prove that this predisposition was independent and not the product of the attention that the [g]overnment had directed at petitioner since January 1985." *Id.* (citations omitted).

131 *Id.* The Court recalled the government's concession at trial that predisposition is to be assessed before police contact. The government claimed, however, Justice White observed, that its investigation turned up evidence of Jacobson's state of mind before the government began investigating. *Id.* at 1541 n.2 (quoting Transcript of Oral Argument 41, 49).

132 *Id.* at 1541.

133 *Id.*

134 *Id.*

135 *Id.* The Court explained that receiving child pornography through the mails for personal consumption did not become illegal until May 1984 under federal law and 1988 under Nebraska law. *Id.* at 1541-42; *see* NEB. REV. STAT. § 28-813.01 (1989). A predisposition to commit an act that formerly was lawful, stated Justice White, does not necessarily imply a predisposition to commit the same act once it has been prohibited. *Jacobson*, 112 S. Ct. at 1542. Most people, Justice White explained, obey the law regardless of whether or not they agree with it. *Id.*

136 *Id.*

137 *Id.* *See supra* notes 27-29 and accompanying text (detailing the investigations).

138 *Id.*

certain activities through lobbying efforts.[139]

Second, the Court admonished the government's investigation activities for exciting Jacobson's interest in and pressuring Jacobson into ordering the pornography.[140] The majority asserted that the government's emphasis on individual rights and the need to fight censorship suggested to Jacobson that he should be permitted to engage in the very activities the government was soliciting of him.[141]

Finally, Justice White stated that Jacobson's apparent "ready response" to the government's inducement was insufficient to prove beyond a reasonable doubt his predisposition to violate the law.[142] The Justice reminded that Jacobson succumbed to government solicitation only after protracted efforts to engage him in the behavior were brought to bear.[143] Indeed, the Court stressed, the ultimate inducement occurred after two and one-half years of extensive solicitation.[144] The Justice concluded that no reasonable jury would find, beyond a reasonable doubt, that Jacobson's predisposition existed independently of the government's creative and elaborate scheme.[145]

Justice White stated that it could not have been the intent of Congress, in enacting the Child Protection Act, to allow the judi-

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139 *Id.* Justice White enunciated that "a person's inclinations and 'fantasies . . . are his own and beyond the reach of government . . . .' " *Id.* (quoting Paris Adult Theater I v. Slaton, 413 U.S. 49, 67 (1973)). *Cf.* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

140 *Jacobson*, 112 S. Ct. at 1542. The Court suggested that the efforts of the fictitious entities—HINT, the American Hedonist Society and pen pal Carl Long—reinforced to Jacobson that the most appropriate way to preserve individual sexual freedom and promote freedom of choice was to establish " 'honest dialogue among concerned individuals and to continue [its] lobbying efforts with State Legislators.' " *Id.* (quoting Record, Defendant's Exhibit 113).

The Court suggested that solicitations and mailings from the Customs Service (advocating that "extreme measures" need to be taken to ensure delivery on previously legal material that had been forced "underground") and the Postal Service (calling laws against child pornography "hysterical nonsense" and reassuring Jacobson that any order he placed could not be inspected by anyone without a judge's authorization) suggested to Jacobson that this form of censorship was wrong and that he should be entitled to receive the material offered. *Id.*

141 *Id.* at 1542-43.

142 *Id.* at 1543.

143 *Id.* *See supra* notes 27-29 (describing the protracted government efforts).

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

145 *Id.* Justice White quoted: " '[T]he 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.' " *Id.* (quoting Sherman v. United States, 356 U.S. 369, 376 (1958)).

ciary to punish an innocent citizen after the government seduced the citizen into committing a crime.[146] Additionally, Justice White stressed that courts should intercede whenever the government arrests a citizen who, but for the government's overzealous instigation, would never have committed the offense.[147] The majority concluded that the prosecution did not prove beyond a reasonable doubt that Jacobson was predisposed to receiving illegal child pornography free of the government's involvement.[148]

Justice O'Connor authored a poignant dissent.[149] The Justice expressly stated that the majority erred in three respects—by redefining predisposition, adding a reasonable suspicion requirement to government sting operations, and not recognizing the reasonableness of the jury's determination of predisposition.[150] The thrust of the dissent, however, focused on the majority's position regarding when the defendant's predisposition should be assessed.[151] The Justice declared that a defendant's predisposition should not to be determined as of the time the government began its investigation, but rather, when the government first proposed the actual crime to the defendant.[152] The dissent ex-

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146 *Id.* (citing Sorrells v. United States, 287 U.S. 435, 448 (1932)). The Court quoted:

> [We are] 'unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.'

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

147 *Id.* Justice White declared that "[l]aw enforcement officials go too far when they 'implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute.' " *Id.* (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)) (emphasis added).

148 *Id.*

149 *Id.* Justice O'Connor was joined by Chief Justice Rehnquist and Justice Kennedy. *Id.* Justice Scalia joined except as to Part II of the dissent. *Id.*

150 *Id.* at 1544 (O'Connor, J., dissenting).

151 *Id.*

152 *Id.* (citing Sherman v. United States, 356 U.S. 369 (1958)). In *Sherman*, the Supreme Court found that the defendant had no predisposition to commit the crime of selling narcotics because he continuously refused to buy the drugs after a substantial amount of coaxing and pressure from the government agent. *Sherman*, 345 U.S. 369, 374-76 (1958). The *Sherman* Court declared that the defendant's past convictions for sale and possession of narcotics were irrelevant to proving his inclination to repeat his past offenses. *Id.* at 375. The Supreme Court determined that Sherman's predisposition was to be assessed at the time the government agent induced commission of the crime, not when the government agent first approached him. *Id.* at 375-76.

See United States v. Williams, 705 F.2d 603, 618 n.9 (2d Cir.) ("Simply cultivating friendship of a target preparatory to presenting a criminal opportunity is not

plained further that, according to precedent, the relevant time to assess a defendant's predisposition to commit a crime is when the government agent suggests the crime, not the point at which the agent makes a preliminary contact.[153]

Justice O'Connor posited that the government letters and questionnaires sent to Jacobson elicited responses indicative of Jacobson's interest in child pornography.[154] The government, according to the Justice, was fully justified in making such contact as part of an undercover operation, without any evidence of the sting target's predisposition.[155]

The dissent observed that Jacobson ordered child pornogra-

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inducement to commit a crime."), *cert. denied*, 464 U.S. 1007 (1983). In *United States v. Reynoso-Ulloa*, Judge William J. Jameson compiled a list of factors from two United States Supreme Court opinions on the entrapment defense that evidence a defendant's predisposition:

> [T]he character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government.

United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (citing Sorrells v. United States, 287 U.S. 435 (1932), Sherman v. United States, 356 U.S. 369 (1958) (footnotes omitted)). Judge Jameson emphasized that "[w]hile none of the factors alone indicates either the presence or absence of predisposition, the most important factor, as revealed by the Supreme Court and other decisions, is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement." *Id.* at 1336. Judge Jameson stated that the court could not find a case in which a defendant who did not claim to be reluctant to commit the crime succeeded with an entrapment defense. *Id.* at 1336 n.11.

153 *Jacobson*, 112 S. Ct. 1544, 1545 (O'Connor, J., dissenting). Justice O'Connor stated: "Until the Government actually makes a suggestion of criminal conduct, it could not be said to have 'implant[ed] in the mind of an innocent person the disposition to commit the alleged offense and induce its commission.' " *Id.* at 1544 (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)). "Inducement" is defined as "that which leads or tempts to the commission of crime. . . . [G]overnment conduct which creates substantial risk that undisposed person or otherwise law-abiding citizen would commit the offense." BLACKS'S LAW DICTIONARY 775 (6th ed. 1990).

154 *Jacobson*, 112 S. Ct. at 1544 (O'Connor, J., dissenting).

155 *Id.* at 1545 (O'Connor, J., dissenting). Justice O'Connor explained that the government first sent questionnaires to make sure that Jacobson was interested before they sent any potentially offensive materials. *Id.*; *see* 39 U.S.C. § 3010 (1980) (Postal Service regulation of sexually oriented advertisements); *see also* Pent-R-Books, Inc. v. United States Postal Serv., 328 F. Supp. 297, 310 (E.D.N.Y. 1971) (§ 3010 is not intended to effect the receipt of sexually oriented advertisements by those who requested them, but will not protect the mailer who initially sends a neutral advertisement followed up by a sexually oriented advertisement that the receiver would not anticipate); *cf.* FCC v. Pacifica Foundation, 438 U.S. 726, 748

phy and requested additional purchases each time the government sent him mail-order catalogs.[156] Noting that the majority failed to view this as evidence of Jacobson's predisposition, the dissent accused the majority of recharacterizing the entrapment doctrine and of adding a reasonable suspicion prerequisite to government sting operations.[157] The Justice perceived the majority's interpretation of entrapment as problematic for law enforcement.[158] Justice O'Connor decried the rule that the government can create a predisposition through preliminary contact as potentially misleading to courts and criminal investigators alike.[159] This would seem to impose on the government, Justice O'Connor reasoned, a requirement that the government knows the defendant is predisposed even before it attempts to make contact.[160] Justice O'Connor therefore asserted that a reasonable suspicion requirement was unprecedented and was likely to deter future sting operations.[161]

In addition, the dissent accused the majority of failing to distinguish government solicitation that merely tempts the suspect and solicitation that is coercive, threatening or insincerely sympathetic.[162] The Justice questioned the majority's conclusion that there was substantial pressure asserted on Jacobson.[163] On the contrary, the Justice reasoned, the initial letters Jacobson received merely suggested the need for legislative reform of obscenity laws.[164] Subsequent letters, the Justice continued, either did not imply that the proceeds from the purchase of the various materials would fund political projects, or, if they did, the catalogs that followed came from different fictional suppliers.[165]

(1978) (all individuals have a constitutional right of privacy to be free from unsolicited offensive materials in their home).

156 *Id.* at 1544 (O'Connor, J., dissenting). *Cf.* United States v. Hunt, 749 F.2d 1078, 1085 (4th Cir. 1984) (proof of predisposition is shown by quick response to solicitation), *cert. denied*, 472 U.S. 1018 (1985).

157 *Jacobson*, 112 S. Ct. at 1544 (O'Connor, J., dissenting).

158 *Id.* at 1545 (O'Connor, J., dissenting).

159 *Id.* Under this rule, Justice O'Connor premonished, all bribe takers would contend that the amount of money was too enticing to refuse and all drug buyers would claim that the "purity and effects" of the drug were too beguiling to reject. *Id.*

160 *Id.*

161 *Id.*

162 *Id.* *See supra* notes 49-63 and accompanying text (discussing *Sorrells*); *supra* notes 64-76 and accompanying text (discussing *Sherman*).

163 *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting). The dissent opined that the record was devoid of any evidence of substantial pressure. *Id.*

164 *Id.*

165 *Id.* at 1545-46 (O'Connor, J., dissenting).

Thus, according to Justice O'Connor, Jacobson could easily have ignored or discarded the letter advocating legislative action.[166] The dissent suggested that Jacobson's curiosity to pursue further information was subject to more than one interpretation.[167] Accordingly, Justice O'Connor stated, the issue was a matter to be interpreted by the jury.[168] The dissent insisted that the jury's inference that Jacobson was predisposed beyond a reasonable doubt was supportable, despite the existence of other possible inferences, and opined that the Court should have interpreted the evidence in favor of the government.[169]

Justice O'Connor lamented that the Court had seemingly added a specific intent element to proving predisposition.[170] The Justice explained that the majority required the prosecution to prove that the defendant was *knowingly* predisposed to break the law.[171] The dissent stated, however, that the Child Protection Act requires knowing receipt of child pornography, not the specific intent to engage in illegal activity.[172] The Justice stated that

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166 *Id.* at 1545 (O'Connor, J., dissenting). The dissent noted that the letter's subtle suggestion of illegality could have had the effect of dissuading Jacobson from purchasing the advertised materials. *Id.* at 1546 (O'Connor, J., dissenting). One letter was clearly suggestive: " 'For those of you who have enjoyed youthful material . . . we have devised a method of getting these to you without prying eyes of U.S. Customs seizing your mail." *Id.* (quoting Record, Government Exhibit 1).

167 *Id.*

168 *Id.* Justice O'Connor articulated that whether Jacobson was predisposed or an innocent dupe of the government is a matter for the jury, for "the jury is the traditional 'defense against arbitrary law enforcement.' " *Id.* at 1547 (O'Connor, J., dissenting) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)). *Cf.* United States v. Glaeser, 550 F.2d 483, 487 (9th Cir. 1977) ("If the evidence presents no genuine dispute as to whether the defendant was entrapped, there is no factual issue for the jury . . . .").

169 *Jacobson*, 112 S. Ct. at 1546 (O'Connor, J., dissenting). *Cf.* Glasser v. United States, 315 U.S. 60, 80 (1942) (stating that an appellate court will sustain a jury verdict when there is substantial evidence viewed in the light most favorable to the prosecution); Burks v. United States, 437 U.S. 1, 17 (1978) (stating that the jury's verdict must be upheld when there is sufficient evidence viewed in the government's favor).

170 *Id.* at 1546 (O'Connor, J., dissenting). Predisposition, "for purposes of the entrapment defense, may be defendant's inclination to engage in illegal activity for which he has been charged, *i.e.*, that he is ready and willing to commit the crime. It focuses on defendant's state of mind before government agents suggest that he commit crime." BLACK'S LAW DICTIONARY 1177 (6th ed. 1990).

171 *Jacobson*, 112 S. Ct. at 1546 (O'Connor, J., dissenting) (emphasis added). The majority, however, denied holding that the government was required to prove specific intent and reiterated its position that Jacobson's generalized personal inclinations were insufficient to prove, beyond a reasonable doubt, that he was predisposed to commit the crime for which he was convicted. *Id.* at 1542 n.3.

172 *Id.* at 1546 (O'Connor, J., dissenting). In *United States v. Moncini*, the defendant, upon request from a government agent, mailed pictures and a child pornogra-

the statute criminalized the receipt of child pornography regardless of whether there had been government inducement; a specific intent requirement, therefore, would provide no basis for a distinction between violators who were subject to inducement and those who were not.[173] The dissent concluded that it was a task for the jury, not the court, to decide whether Jacobson willingly participated in criminal activity or was an innocent party who was entrapped.[174] The jury was fully apprised of the law of entrapment, the dissent asserted, and nevertheless concluded that Jacobson was guilty.[175] Justice O'Connor posited that the evidence was sufficient to support the jury's verdict.[176]

The difficulty in applying the entrapment defense lies in its lack of constitutional and legislative foundation.[177] In addition, the Supreme Court has had to create an entrapment doctrine without the guidance of a sufficient body of federal entrapment law.[178] Moreover, the delegation of authority to the jury in entrapment cases has led the Court to avoid setting forth a clear framework to support its entrapment theory.[179] The entrapment doctrine's difficult nature is reflected in the first four entrapment cases to reach the Supreme Court, which sharply divided the Court on the relative merits of the subjective and objective approaches to the defense.[180]

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phy videotape into the United States from Italy. United States v. Moncini, 882 F.2d 401, 402-03 (9th Cir. 1989). Moncini was subsequently arrested. *Id.* at 403. At trial, he claimed the defenses of entrapment and ignorance of the law. *Id.* at 403, 406. Moncini's ignorance of the law defense failed because § 2252(a) of the Child Protection Act merely requires "knowledge of the nature of the contents of the visual depictions and that the depictions were to be transported or shipped in interstate commerce or foreign commerce or mailed." *Id.* at 404 (citations omitted). The Court stated that "knowledge of the illegality of sending child pornography through the mails is not an element of the offense," therefore there were no grounds upon which to base an entrapment defense. *Id.* at 406.

173 *Jacobson*, 112 S. Ct. at 1546 (O'Connor, J., dissenting).

174 *Id.* at 1547 (O'Connor, J., dissenting).

175 *Id.*

176 *Id.*

177 Laura Gardner Webster, *Building a Better Mousetrap: Reconstructing the Federal Entrapment Theory from* Sorrells *to* Mathews, 32 ARIZ. L. REV 605, 612 (1990); Nichols, *supra* note 5, at 1207.

178 Webster, *supra* note 177, at 616.

179 *Id.*

180 *See* Sorrells v. United States, 287 U.S. 435 (1932) (eight Justices agreed to reverse the conviction, but divided on whether to apply subjective or objective approach); *see also* United States v. Russell, 411 U.S. 423 (1972) (the Court split five to four in favor of the subjective approach); Sherman v. United States, 356 U.S. 369 (1958) (same); Hampton v. United States, 425 U.S. 484 (1976) (plurality op.) (same).

By adopting the subjective approach in *Jacobson v. United States*, the Court has taken a step toward the creation of a unified entrapment theory. While both the majority and dissent focused on the issue of whether the defendant was predisposed, the Court remains divided on the point in time at which predisposition is to be assessed.[181]

It is not at all obvious that Jacobson, as a law-abiding citizen, would have violated the law had the government left him alone.[182] For this reason, the majority correctly insisted on proof that Jacobson's predisposition was independent of the government's interaction.[183] If the government agent's contact is prolonged and persistent, it is entirely possible for the agents to implant in the sting target's mind unlawful ideation that would not have been present absent the agent's efforts.[184] The majority would, accordingly, fix the time for assessing inducement at the point the government contacts the defendant.[185] The dissent, on the other hand, would disregard all government conduct—for the purpose of determining predisposition—that could be considered preliminary contacts.[186] As the dissent would have it, regardless of the level of governmental contact with the defendant, predisposition to commit the crime would be determined, not at the point of initial contact, but the point at which the government agent actually suggested the crime.[187]

One possible resolution to the conflict may be the adoption

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181 *See Jacobson*, 112 S. Ct. at 1544 (O'Connor, J., dissenting).

182 Jacobson lives on a farm, supports his elderly parents and is a commemorated war veteran. United States v. Jacobson, 893 F.2d 999, 999-1000 (8th Cir. 1990). Jacobson had no criminal record other than a driving while intoxicated conviction. *Id.*

183 *See Jacobson*, 112 S. Ct. at 1541.

184 *See* Sorrells v. United States, 287 U.S. 435, 448 (1932). The *Jacobson* majority quoted:

> [We are] unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.

Jacobson, 112 S. Ct. at 1543 (quoting *Sorrells*, 287 U.S. at 448).

185 The underlying rationale of the entrapment defense is that innocent people should not be tricked into the commission of crimes. DeFeo, *supra* note 1, at 272. The majority quoted the landmark *Sorrells* case to illustrate this point: "Law enforcement officials go too far when they 'implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute.' " *Id.* at 1543 (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)).

186 *See Jacobson*, 112 S. Ct. at 1544 (O'Connor, J., dissenting).

187 *Id.* at 1544-45 (O'Connor. J., dissenting).

of a reasonable suspicion requirement to the government's commencement of a sting operation. As the majority noted, the government's own internal guidelines for sting operations require reasonable suspicion *or* a structured opportunity that reveals the target's predisposition.[188] Because of the slippery and unresolved nature of the predisposition analysis, both law enforcement and the judiciary would be served by imposing a strict requirement of reasonable suspicion.[189] Reasonable suspicion has the advantage of striking an even balance between "necessary" government investigation and individual privacy rights.

In the absence of reasonable suspicion, there is nothing to shield an otherwise law-abiding citizen from becoming the target of a government sting operation. On the other hand, if the government has some reason to suspect an individual of violating the law, it can more efficiently focus its resources on likely targets and less judicial resources will be wasted on weak cases. Moreover, a reasonable suspicion prerequisite to a sting operation will protect the "unwary innocent"[190] from an unwarranted invasion of privacy, as well as insulate the prosecution's case from allegations that the government created the subject's disposition to violate the law.

While the government's solicitation of Jacobson may not have risen to the demonstrable level of "outrageousness" that is required for reversal on due process grounds,[191] the case is permeated with a heavy flavor of inducement. But, the Court sidestepped the due process analysis, even though the government provided the contraband, and even though the illegal activity began and ended with the government's participation.

Criminal activity in modern society—drug abuse, child pornography, bribery—call for highly technical and strategic undercover investigation.[192] If law enforcement officers sometimes

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188 *Id.* at 1540-41 n.2.

189 *See* United States v. Luttrell, 889 F.2d 806, 812-14 (9th Cir. 1989) (calling for a reasonable suspicion requirement, which was, however, vacated on remand).

190 *See* Sherman v. United States, 356 U.S. 369, 372 (1958).

191 *See* United States v. Russell, 411 U.S. 423, 431-32 (1972) ("[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ."); *see also* Rochin v. California, 342 U.S. 165 (1952) (reversing conviction on due process grounds).

192 *See* Jeffrey N. Klar, *The Need for a Dual Approach to Entrapment*, 59 WASH. U. L.Q. 199, 199 (1981); Donnelly, *supra* note 11, at 1113-14. *Cf.* 22 C.J.S., *Criminal Law* § 61, at 79 (1961) ("The use of deception, subterfuge, or artifice to obtain a conviction is not entrapment.").

engage in activity that appears to exceed the bounds of morality, that may be the price we pay to combat these societal evils. In any event, government agents *are* given a wide latitude to carry out their duties. Such broad discretion, however, may not transgress any individual's fundamental rights.[193] A reasonable suspicion requirement, therefore, may be justified on the ground that it would protect the individual rights of privacy and freedom from unjustifiable intrusions.[194] Therefore, due process should serve as a barrier to reverse a conviction obtained in violation of these protected constitutional rights.[195]

Thus far, no entrapment case before the Supreme Court has produced a clear consensus among the Court's membership.[196] Consequently, the Court has not created a cohesive theory to guide lower courts and law enforcement officials. Perhaps the time is ripe for Congressional action. In the meantime, the *Jacobson* decision, while providing no bright line test, at least appears to restrain the government from prolonged and unfettered enticement of individuals in its efforts to draw out wrongdoers.

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193 The New York Court of Appeals provided a list of factors that determine whether law enforcement officials exceed the bounds of due process:

> (1) Whether the police manufactured the crime or only took part in ongoing criminal activity; (2) whether the police themselves engaged in criminal conduct; (3) whether the police overcame the defendant's reluctance to commit the crime with the appeals to past friendships, temptation of financial gain or repeated solicitations; and (4) whether the police had a legitimate motive for conducting the investigation.

People v. Isaacson, 44 N.Y.2d 511, 521 (1978) (citations omitted).

194 *See* LAFAVE & ISRAEL, *supra* note 2, § 5.4, at 257; *see* Stanley v. Georgia, 394 U.S. 557, 565-66 (1969) (finding a right to privacy in one's own home); *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .").

195 *See* Hampton v. United States, 425 U.S. 484, 490 (1976) (Rehnquist, J., plurality opinion).

196 *But see* Mathews v. United States, 485 U.S. 58 (1988). In *Mathews*, the United States Supreme Court decided the procedural issue of whether a defendant can simultaneously plead not guilty and entrapment as an affirmative defense. *Id.* at 59-60. The majority opinion, authored by Chief Justice Rehnquist, held that Mathews could plead entrapment in conjunction with not guilty as long as there was sufficient evidence to send the defense to the jury. *Id.* at 62. In dicta, a unanimous Supreme Court adhered to the subjective approach to entrapment. *Id.* at 62-63. Further commentary can be found in Webster, *supra* note 177, at 608-10, 624-32; Schreibstein, *supra* note 50, at 541-70; Jeffrey Charles Renz, *Availability of Entrapment Defense to a Defendant Who Denies Elements of a Crime*, 19 CUMB. L. REV. 435, 435-47 (1989); George Robert Hicks, III, *The "No I Didn't, and Yes I Did But. . ." Defense: Is The Entrapment Defense Available To Criminal Defendants Who Deny Doing The Crime?*, 11 CAMPBELL L. REV. 279, 279-309 (1989).