California Adopts the Unproven Federal Minority View of Entrapment

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Against a backdrop of federal law, the author shows how and why the California Supreme Court has changed the standard to be applied in criminal cases involving the defense of entrapment. Relying heavily on the federal minority view, the California Supreme Court has abandoned their hybrid subjective/objective test and, in this author’s opinion, adopted a standard from which only the legislature can rescue the people of California.

The theory of entrapment, from its inception as a criminal defense, has received similar practical treatment by the California and United States Supreme Courts. People v. Barraza, however, reversed that pattern by mandating California’s judicial adoption of the federal minority view and by squaring the state’s rule with its longstanding rationale for the defense.

Under federal law one cannot effectively defend with entrapment unless he can prove that he did not harbor “original intent” or predisposition to commit the crime prior to governmental intervention. Thus, the federal test has appropriately been labelled the “subjective” or “origin of intent” test because it emphasizes the defendant’s motives rather than the nature of police involve-

1. Traditionally entrapment has been defined, both federally and in California, as follows:

   Entrapment is 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. Sorrells v. United States, 287 U.S. 435, 454 (1932); People v. Lindsey, 91 Cal. App. 2d 914, 916, 205 P.2d 1114, 1115 (1949).

   “Officer” includes policemen, law enforcement agents and informers. People v. Perez, 62 Cal. 2d 769, 775, 401 P.2d 934, 937, 44 Cal. Rptr. 326, 329 (1965). See Note, Entrapment, 73 Harv. L. Rev. 1333, 1340-41 (1960). For the purposes of this article, the terms will be used interchangeably.

   With the adoption of the objective test, the latter portion of the definition becomes obsolete, however, because one may assert entrapment successfully without having to prove he would not have perpetrated the crime absent governmental intervention. See notes 32-34 and accompanying text infra.

2. It has been suggested that the defense of entrapment was first asserted by Eve in the Garden of Eden. When faced by God with the charge that she had eaten fruit of the tree of knowledge of good and evil, Eve contested, “The serpent beguiled me, and I did eat.” Gen. 3:13 (King James); Groot, The Serpent Beguiled Me and I (Without Scienter) Did Eat—Denial of Crime and the Entrapment Defense, 1973 U. ILL. L.F. 254.


4. See notes 16-22 and accompanying text, infra.
ment. Based on a legal fiction, the United States Supreme Court has always maintained that one entrapped into committing a crime is truly "innocent," rationalizing that Congressional intent in drafting federal statutes was to except from their coverage the entrapped citizen.

A strong minority view has consistently advocated an "objective" rather than "subjective" test for entrapment, arguing that the only valid rationale for the defense is police deterrence and that judicial scrutiny should be removed to governmental conduct. Until March of 1979, California paid lip service to the police deterrence rationale but refused to extend application of its accompanying "objective" test. In keeping with California's apparent trend toward providing greater protection for the criminal defendant than deemed necessary by the United States Supreme Court, "People v. Barraza" finally effectuated just such an exten-

5. See note 14, infra.
8. Indeed, the number of United States Supreme Court justices maintaining a position contrary to that of the majority opinion has been as great and steady in the area of entrapment as it has been in any other area of the law. A five to four verdict was reached in United States v. Russell, 411 U.S. 423 (1973), because of disagreement as to the correct entrapment test while the other two decisions comprising the federal entrapment trilogy were divided five to four as to this specific issue, though consistent in the ultimate result of the case. See Sorrells v. United States, 287 U.S. 435 (1932) and Sherman v. United States, 356 U.S. 369 (1958).
11. Significant examples of California's greater individual protection as compared with the United States Supreme Court standards include: 1) greater restriction on the scope of police search incident to arrest, see People v. Superior Ct. of L.A. County, 7 Cal. 3d. 186, 496 P.2d 120, 101 Cal. Rptr. 837 (1972) (scope of the search must depend on the circumstances); cf. United States v. Robinson, 414 U.S. 218 (1973) (full body search allowable whenever an arrest is made); 2) standing to object to illegally obtained evidence extended to anyone affected by introduction of that evidence, see People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955); cf. Allderman v. United States, 394 U.S. 165 (1969) (standing given only to those whose rights were violated by the illegal activity); 3) inventory searches and seizures restricted to items in plain view within the car, see Mozzetti v. Superior Ct. of Sacramento County, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1973) (no closed containers or areas may be searched); cf. South Dakota v. Opperman, 428 U.S. 364 (1976) (glove compartment allowed to be searched); 4) illegally seized evidence
sion, necessitating a new state standard for the entrapment defense.

Unfortunately, new standards in criminal law engender uncertainty for law enforcement officials and correspondingly increased courage for law offenders. Whether the problems solved by the new test will offset those the test threatens to create is a question that can only be answered by litigation over the course of time.

This article will serve to contrast the evolution of entrapment in the federal context with California's hybrid development and will examine the positive and negative implications brought about by California's final separation with federal majority theory in People v. Barraza.

I. FEDERAL ENTRAPMENT LAW—MAJORITY AND MINORITY VIEWS

Federal entrapment law can best be studied by analyzing a trilogy of United States Supreme Court cases: Sorrells v. United States;12 Sherman v. United States;13 and United States v. Rus-


It must be noted that California's change of the entrapment test arguably provides less protection to the defendant. See notes 100-03 and accompanying text, infra.

12. 287 U.S. 435 (1932). Sorrells is the first United States Supreme Court decision dealing with entrapment. However, the defense was first introduced successfully into federal law very early in Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). See Mikell, The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. Rev. 245-47 (1942) for a discussion of the earliest cases recognizing the defense, which apparently arose in the nineteenth century.

Sorrells was a prohibition case in which the defendant had been indicted for possession and sale of one-half gallon of whiskey. Testimony demonstrated that the government agent was introduced to the defendant by mutual friends, posing as a tourist. Conversation established that the defendant and the agent were both veterans and had been members of the same division. After discussing war experiences, the agent asked the defendant three consecutive times whether he could secure for him some liquor. Twice the defendant refused but at the third request left his home and returned with the whiskey. Producing only evidence of the defendant's general reputation as a "rum runner," the government succumbed to the defense of entrapment. For an interesting historical discussion of the federal doctrine and its influence by concurrent developments in alcohol prohibition, see Murchison, The Entrapment Defense In Federal Courts: Emergence Of A Legal Doctrine, 47 Miss. L.J. 211 (1976).

13. 356 U.S. 369 (1958). In Sherman, defendant was convicted for the sale of narcotics. Defendant became familiar with the government's informer during a medical treatment program for drug addiction, which each was undergoing. After several meetings, the two began discussing their mutual experiences, including
While the three cases span a period of forty years, the federal law applicable to entrapment has undergone no significant change. In spite of strong minority opinions and continuous evolution in other fields of law, the battle lines regarding entrapment have become entrenched, with the footing of both majority and minority views on grounds identical to those existing when the defense was first introduced.15

A. The Majority Subjective Position

In 1939, *Sorrells v. United States* established the subjective, or "origin of intent," entrapment test that remains in use today. The test is designed to determine where intent to commit the crime originates. Once a defendant has raised and plead the defense of entrapment, the issue is submitted to the trier of fact for a de-

their attempts to overcome addiction. Finally, the informer asked defendant if he could supply him with a source of narcotics because he was not responding to treatment. Defendant's initial response was refusal and to the informer's repeated attempts, evasiveness and hesitancy. Eventually defendant acquiesced and sold the informer a quantity of narcotics for an amount less than cost to the defendant. The Supreme Court dismissed the indictment, refusing to remand the case.

14. 411 U.S. 423 (1973). *Russell* involved a conviction for the manufacture and sale of methamphetamine ("speed"). An F.B.I. agent, on assignment to locate an illegal narcotics laboratory, was taken to the home of the defendant where he observed the instruments necessary to manufacture the drug. Defendant explained that he had been involved in making the drug for a number of years and gave the agent a bag containing a sample. The agent offered to supply propanone, a necessary chemical ingredient, to defendant for a price and defendant accepted, purchasing the chemical the following day. The Court rejected defendant's defense of entrapment and upheld his conviction.

15. Although the subjective test is still the law federally, attempts to avoid its application have been many and varied in the lower appellate courts. For a thorough discussion of these methods and their case context, see Note, *Entrapment—Predisposition of Defendant Crucial Factor in Entrapment Defense*, 59 Cornell L. Rev. 546, 562-63 (1974).

16. After describing the facts and stating the well settled rule that police temptation of itself will not defeat prosecution, the Court in *Sorrells v. United States*, 287 U.S. 435 (1932), delineates the federal scope of inquiry:

The appropriate object of this permitted [police] activity ... is to reveal criminal design ... and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

*Id.* at 441-42. Interpreting the *Sorrells* approach, the latest Supreme Court decision concerning entrapment stated: "[T]he thrust of the entrapment defense was held to focus on the intent or predisposition of the defendant." *United States v. Russell*, 411 U.S. 423, 429 (1973). Following consideration of other perspectives, the Court upheld the subjective approach. *Id.* at 433-36.

17. Entrapment is a defense which the defendant must affirmatively raise, police activity being presumed proper. "To invoke the defense it must necessarily be assumed that the act charged as a public offense was committed." *People v. Schwartz*, 109 Cal. App. 2d 450, 455, 240 P.2d 1024, 1027 (1952). *See also People v. Benford*, 53 Cal. 2d 1, 9 n.5, 345 P.2d 928, 936 n.5 (1959); *People v. Terry*, 44 Cal. 2d 371, 372, 282 P.2d 19, 20 (1955).
termination as to whether or not the defendant was predisposed to commit the crime before the government became involved.\textsuperscript{18} Even if the evidence shows that the defendant committed every technical element of the crime,\textsuperscript{19} his entrapment defense will be successful if he can prove by a preponderance of the evidence\textsuperscript{20} that, but for police inducement,\textsuperscript{21} he would not have thought to do

\textsuperscript{18} Because the subjective standard of entrapment revolves around intent, a factual issue, the matter is generally submitted for jury determination. Sherman v. United States, 356 U.S. at 377 n.8. However, the issue may be decided by the judge as a "matter of law" where defendant produces no substantial evidence from which entrapment can reasonably be inferred. Inversely stated, the rule is that "[e]ntrapment as a matter of law is not established where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused." People v. Terry, 44 Cal. 2d 371, 372-73, 282 P.2d 19, 20 (1955).

Sorrells overturned a trial court ruling which refused to submit the issue to the jury, holding there was no entrapment as a matter of law. Conversely, Sherman upheld a lower court ruling which found that there was entrapment as a matter of law.

Russell rejected an argument that entrapment could be found as a matter of law "regardless of predisposition, whenever the government supplies contraband to the defendant." United States v. Russell, 411 U.S. at 427. The argument was premised on two lower court cases (United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970)) but was seen as constitutional in nature and thus unfounded, entrapment having no basis in the Constitution.

\textsuperscript{19} Federally, entrapment is a "relatively limited defense," reserved for the individual "who has committed all the elements of a proscribed offense but was induced to commit them by the government." United States v. Russell, 411 U.S. at 435.

\textsuperscript{20} The defendant has the burden of proving, by a preponderance of the evidence, that he was induced to commit the crime. United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952); Gorin v. United States, 313 F.2d 641, 654 (1st Cir. 1963), cert. denied, 374 U.S. 829 (1963).

Some circuits appear to take a contrary view on this issue. See Motaro v. United States, 363 F.2d 169 (9th Cir. 1966), in which it was held that the prosecutor must establish guilt beyond a reasonable doubt and thus has the burden of proving that the defendant was not wrongfully entrapped. But see note 93 infra, for the California judicial rebuttal of this argument.

Federally, a defendant cannot assert that he was entrapped and also plead innocence of the crime. "The appellant cannot maintain that on this particular occasion he did not sell anything but that, in any case, he was entrapped into it." United States v. Rodriguis, 433 F.2d 780, 761 (1st Cir. 1970), cert. denied, 401 U.S. 943 (1971). See also United States v. Shameia, 464 F.2d 629 (6th Cir. 1972). But see Crisp v. United States, 262 F.2d 68 (4th Cir. 1954) (dictum). California allows the pleading of inconsistent defenses, including entrapment. See note 93, infra.

\textsuperscript{21} The thought or idea to commit the crime must be implanted in the mind of the defendant for the express purpose of inducing him to commit that crime and to prosecute the same. Mere inadvertent suggestion is insufficient. "Entrapment occurs only when the criminal conduct was 'the product of the creative activity of law enforcement officials'" (emphasis added). Sherman v. United States, 356 U.S. at 372, quoting Sorrells v. United States, 287 U.S. at 451.

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so. He is thus held to be "otherwise innocent." Conversely, if the government can establish that the defendant harbored an intent to commit the illegal act prior to police involvement, the defendant will lose on the issue of entrapment no matter what degree of fraud or outlandish conduct exists on the part of police officials.

Limited in nature, the entrapment defense and its federal standard are premised on the notion that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." Temptation and deceit are viewed as necessary elements in the government's battle against crime and mere utilization of inducement and infiltration will not be held im-

22. The phrase "otherwise innocent," or variations thereof, is key language used frequently in the federal majority opinions. See United States v. Russell, 411 U.S. at 429, 455; Sorrells v. United States, 287 U.S. at 441, 448, 451; Sherman v. United States, 356 U.S. at 371, 372. It connotes the image of a person who has committed all of the technical elements of a crime and would be convicted under any other circumstances but who would have been innocent of such a crime had not the police enticed him to do the act. See United States v. Russell 411 U.S. at 442-43 for a strong criticism of the phrase as misleading.

23. Defendant in Russell asserted that the defense of entrapment should rest on constitutional grounds and argued that when a government investigator supplies contraband he becomes "so enmeshed in the criminal activity that the prosecution of the defendants [would be] . . . repugnant to the American criminal justice system." United States v. Russell, 411 U.S. at 428. The theory was adopted from Green v. United States, 454 F.2d 783 (9th Cir. 1971). Based on "fundamental principles of due process," defendant contended that such a rule is mandated by the same factors that lead to the exclusionary rule in illegal searches and seizures, Mapp v. Ohio, 367 U.S. 643 (1961), and confessions, Miranda v. Arizona, 384 U.S. 436 (1966). Refusing to extend the analogy, the Court distinguished the two concepts. While the rationale behind the exclusionary rule is the government's "failure to observe its own laws," United States v. Russell, 411 U.S. at 430 (quoting Mapp v. Ohio, 367 U.S. at 659), in the entrapment situation no independent constitutional right is violated and no rule or statute is disobeyed.

Interestingly, the Court did not completely foreclose the possibility of a successful due process argument in future cases.

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, cf. Rochin v. California, 342 U.S. 165 (1952), the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment.


The rationale behind allowance of the defense is unique to entrapment law. When an individual is induced by law enforcement officials to commit a crime he did not previously intend to perpetrate, his activity is outside the scope of the criminal statutes. Although the entrapped defendant may have committed all of the elements necessary to qualify his acts under the criminal statutes, it is said that he must be technically innocent inasmuch as Congress could not have intended to include him within its punitive proscriptions. While no express legislative intent evidences

25. "It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." Sorrells v. United States, 289 U.S. at 441 (citations deleted). Russell observes that narcotics convictions would be all but impossible without permissible deceit allowing infiltration. It states that the supply of "some item of value" to drug peddlers is a necessary element of said deceit in that it is generally the only way government agents can gain the confidence of "illegal entrepreneurs." United States v. Russell, 411 U.S. at 432. Indeed, certain crimes such as contraband sales and prostitution are devoid of an innocent victim to act as complaining witness. Since participants in such crimes obviously have no incentive to produce self-implicative evidence, the only way to procure such evidence is through "undercover" police investigations. See Comment, Elevation of Entrapment To A Constitutional Defense, 7 Mich. J.L. Ref. 361 (1974).

26. The Supreme Court in Sorrells based its rationale on what it called general rules of statutory construction, i.e., that "[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence" and that "'[t]he reason of the law in such cases should prevail over its letter.'" Sorrells v. United States, 287 U.S. at 447, (quoting United States v. Kirby, 74 U.S. (7 Wall) 482 (1868)). It then articulated the rationale:

We are unable to conclude that 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. . . . If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute . . . the same considerations justify the conclusion that the case lies outside the purview of the act and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice.


Initial arguments against allowing the defense were also based on statutory construction and legislative intent. Opponents protested that when one intentionally commits all of the constituent parts of a crime, his action is illegal by statutory definition. The legislature, acting as arbiter of public policy, drafted the statute specifically intending to make such activity wrongful and in the absence of other express legislative history, the facial statute should govern. See Sorrells v. United States, 287 U.S. at 445-46.

Cf. the federal rationale for the exclusionary rule, another prophylactic doctrine, Weeks v. United States, 232 U.S. 383, 393 (1914), which consists of pure police de-
such a proposition, such intent is implied from the deduction that Congress could not have designed its ordinances to motivate police manufacture of crime for the sole purpose of its prosecution.

Attendant to the subjective test are two evidentiary precepts: 1) that the issue of entrapment should be decided by a jury and 2) that evidence concerning the defendant's past conduct and reputation is permissible. Because of the subjectivity of the majority test, intent of the defendant is a material factual issue and, as such, must be submitted to the jury as trier of fact. Subjective terrence. United States v. Russell, 411 U.S. 423 (1973), rejected the argument that police deterrence should be the rationale for entrapment for the same reasons that it is the federal rationale behind the exclusionary rule. It distinguished the two; while the exclusionary rule is based on the citizen's constitutional rights and protects the public from the "Governments 'failure to observe its own laws,'" entrapment does not involve constitutional violations. Id., quoting Mapp v. Ohio, 367 U.S. at 639 (1961). See Note, The Defense of Entrapment is Available Solely to a Defendant who Lacked Predisposition to Commit the Crime, 40 BROOKLYN L. REV. 802 (1974). But see United States v. Russell, 411 U.S. at 431-32, where the Court leaves open the possibility that a case may arise in which police enticement will be subject to a due process attack.

27. The Court in Russell admits that criticism claiming "the implied intent of Congress is largely fictitious" is not "devoid of appeal." United States v. Russell, 411 U.S. at 433.

28. See Sorrells v. United States, 287 U.S. at 442 and United States v. Russell, 411 U.S. at 434. While the majority rationale for entrapment purportedly stands on statutory construction and implied legislative intent, see note 4, supra, apparently the true soil out of which the defense grows is strong public policy adverse to governmental spawning of crime. See Sorrells v. United States, 287 U.S. at 444, 445, 449, 450. This observation has generated the arguments in opposition to the majority approach. See notes 36 and 37, infra.


30. Federally, the following Sorrells procedural evidentiary rule still applies: [I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense.

Sorrells v. United States, 287 U.S. at 451-52. Simply stated, the rationale is fair play. If the defendant can question the conduct of governmental agents, he cannot and should not be given preferential treatment. See United States v. Russell, 411 U.S. at 429, 434 and Sherman v. United States, 356 U.S. at 376-77 and n.7. Evidence of defendant's predisposition may take three forms: 1) evidence of past criminal convictions involving similar crimes; 2) direct proof that the accused stood ready to commit the crime for which he is charged; and 3) testimony that the defendant was anything but reluctant to participate in the governmental offer of criminal activity. United States v. Becker, 62 F.2d 1007, 1008 (2d Cir. 1933); Note, Entrapment: Sorrells to Russell, 49 NOTRE DAME L. 579, 583 (1974).

The prejudicial impact of such testimony has also been a mainstay in the minority's objection to the subjective test. See notes 45-46, infra. However, California has never allowed evidence admitted concerning defendant's past criminal conduct.

31. Id. Cf. the objective view which, if adopted by the federal courts, would lead to rules of law concerning unacceptable police conduct and would be decided by a judge. See notes 41-44, 71 infra. But see notes 106-07 and accompanying text,
intent varies from case to case; under the standard, precise judicial opinions are not necessary to inform the public or guide police officials as to proper conduct.

More controversial is admission of the defendant’s criminal record and reputation. Although possible prejudicial impact is recognized by the majority, such evidence is considered necessary for effective determination of origin of intent and for fair opportunity of governmental rebuttal to the defense.

B. The Minority Objective Approach

A strong minority approach has developed and persevered, albeit unsuccessfully, throughout the federal evolution of entrapment law. This view advocates an objective test for entrapment which focuses on the nature of governmental inducement rather than the illusive intent of the parties involved. Measured by a hypothetical individual, the objective test solely examines police activity to determine whether it would be likely to induce an aver-

infra, in which California adopted the objective test but refused to take the issue from the jury.


33. The “hypothetical person” or “normal, law-abiding citizen” concept has its origin in Justice Frankfurter’s language contained in the concurring opinion of Sherman v. United States, 356 U.S. at 384, and is the natural outgrowth of the objective approach. See People v. Barraza, 23 Cal. 3d 675, 690-91, 591 P.2d 947, 955, 153 Cal. Rptr. 459, 467-68 (1979), for California’s adoption and embellishment upon the “hypothetical person” standard. See also, the proposed Federal Criminal Code definition which incorporates the objective test with the “hypothetical person” standard and provides:

§ 702 Entrapment.

(1) Affirmative Defense. It is an affirmative defense that the defendant was entrapped into committing the offense.

(2) Entrapment Defined. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(3) Law Enforcement Agent Defined. In this section “law enforcement agent” includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.

NATIONAL COMM’N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE 58 (1971). Cf. MODEL PENAL CODE § 2.13, (Proposed Draft, 1962), which adopts the objective test but excludes the hypothetical standard. It delineates the defense as follows:

(1) 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 en-
age, law abiding citizen to commit the crime. If so, the entrapment defense would be successful.

This view does not negate all forms of police temptation. Rather, it scrutinizes governmental methods to determine whether they are unreasonably overbearing and importuning. Possible examples of such conduct, according to the minority in Sherman v. United States, are "appeals to sympathy, friendship" and provision of "the possibility of exorbitant gain."

Predicated on public policy considerations, the minority view suggests that the only valid reason for allowing an entrapment defense is the deterrence of unconscionable governmental activity. The fact that an individual has effectuated every act necessary to...
be deemed illegal evidences an intent contrary to that of the legislature. To declare otherwise elevates fiction over fact. Thus, intellectual honesty requires that police deterrence, rather than nonexistent legislative intent, be proclaimed the true rationale.\textsuperscript{40}

In direct opposition to the majority view, the minority asserts: 1) that the issue of entrapment should be decided by the bench\textsuperscript{41} and 2) that the defendant's past conduct and criminal reputation should be immaterial.\textsuperscript{42} Since the purpose of entrapment should be to deter police misconduct, specific rules must necessarily be formulated as indicators of the conduct to be considered impermissible.\textsuperscript{43} Until such time as Congress codifies these rules, judicial opinion is essential in sculpting the same.\textsuperscript{44} Once formulated, these rules will presumably become matters of law, properly ruled upon only by a judge or justice.

Inasmuch as intent has no place in an objective analysis, the defendant's background similarly has no bearing on the entrapment issue.\textsuperscript{45} To allow evidence of defendant's past conduct will act to remove judicial attention from governmental activity and

\textsuperscript{40} The artificiality allegation has been rebutted by the proposition that the majority view is consistent with the allowance of common law defenses such as insanity and duress which also permit acquittal of persons who have performed all of the technical elements proscribed by a criminal statute. See Park, \textit{The Entrapment Controversy}, 60 MINN. L. REV. 163, 247 (1976).

\textsuperscript{41} Sorrells v. United States, 287 U.S. at 457; Sherman v. United States, 356 U.S. at 385.

\textsuperscript{42} Sorrells v. United States, 287 U.S. at 459; Sherman v. United States, 356 U.S. at 382-83; United States v. Russell, 411 U.S. at 443-44.

\textsuperscript{43} See Sherman v. United States, 356 U.S. at 385. "Only the court, through the gradual evolution of \textit{explicit standards} in accumulated precedents, can [give significant guidance] with the degree of certainty that the wise administration of criminal justice demands." \textit{Id.} (emphasis added).

\textsuperscript{44} Jury decisions would have no effect in this regard since they would be accompanied only by a statement of the verdict rather than by a legal analysis. See text accompanying notes 107-10, \textit{infra}.

\textsuperscript{45} Justice Frankfurter forcefully articulates this principle: [A] test that looks to the character and predispositions of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.


The principle is debatable even in the objective context. It can be argued that in order to determine what is unreasonable under the circumstances, knowledge concerning the nature of the defendant is necessary. See note 54 and text accompanying notes 87-90, \textit{infra}.
redirect it toward the defendant; a result incongruous with the test. The minority views such evidence as prejudicial and imma-
terial to the central question.46

II. CALIFORNIA ENTRAPMENT LAW—BEFORE AND AFTER

People v. Barraza

Until Barraza, California's entrapment law was dictated by its
own trilogy of state supreme court cases: People v. Benford;47
People v. Moran;48 and Patty v. Board of Medical Examiners.49

46. In truth, federal admissibility of the defendant's record and reputation
may be more of a catalyst toward minority advocacy of the objective test than an
attendant result thereto. Justice Stewart delineates two reasons for denying the
admission of such evidence: 1) evidence taken concerning an individual's "predis-
position" will generally include "hearsay, suspicion, and rumor—all of which
would be inadmissible in any other context . . ." and 2) it is "highly prejudicial"
and allows government entrapment of an ex-convict just because of his past rec-
ord or criminal reputation. United States v. Russell, 411 U.S. at 443-44.

47. 53 Cal. 2d 1, 345 P.2d 928 (1959). Benford involved a conviction for the sale
and possession of marijuana. The government officer had met defendant through
neighbors about one month before the incident. Evidence tended to show that de-
fendant had been reluctant to sell the drug but had done so after repeated re-
quests, gestures of friendship and appeals to sympathy. However, defendant's
statements conflicted as to circumstances of the sale and it was proven that the
price paid for the drugs was not exorbitant. Defendant's allegation that entrap-
ment had been established as a matter of law was rejected and his conviction af-
firmed.

A creative, though unsuccessful argument put forth by defendant's counsel was
that the CAL. HEALTH & SAFETY CODE § 11710 (West 1971) (repealed 1972), immunizing
police officers and "any person working under their immediate direction from
prosecution," should be applicable to his client because defendant had acted at
the impetus of the government agent and because it was shown that defendant
was only meant to be a pawn, manipulated in order to apprehend more important
individuals. 53 Cal. 2d at 14, 345 P.2d at 937.

48. 1 Cal. 3d 755, 463 P.2d 763, 83 Cal. Rptr. 411. Defendant was convicted of
sale and possession of lysergic acid diethylamide (LSD). He testified that the gov-
ernment informant who induced his activity was a friend and classmate. Said in-
formant asked defendant if he could obtain LSD and stated that a friend of his
needed the drug badly. Defendant refused on two separate occasions but on a
third approach agreed to and did sell the informant's "friend," a police officer, 20
tablets for $80. Observing that defendant had possessed the tablets for two
months, the supreme court ruled that the jury could have reasonably inferred that
intent to sell the tablets had originated with the defendant and upheld the deci-
sion, denying defendant's allegation that entrapment had been established as a
matter of law.

49. 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473. Pursuant to a complaint lodg-
ed against the defendant, a medical doctor with an outstanding and pure back-
ground, government investigators initiated action to determine whether defendant
was indeed unnecessarily prescribing large amounts of narcotics. Utilizing four
young women, the investigators sent the women, at separate times, to the defend-
ant's office to make requests for prescription drugs. Although the defendant was
found to have prescribed certain of these drugs for no valid reason, it was also
found that he had denied prescribing others and that the whole chain of events
took place during a time of personal illness on the defendant's part. Defendant
was brought before the Board of Medical Examiners in a disciplinary proceeding
and asserted the entrapment defense unsuccessfully. On appeal, the superior

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These cases essentially adopted the federal subjective approach tempered with certain parochial characteristics. *People v. Barraza* overruled these decisions and incorporated the objective test into state law.

**A. The Pre-Barraza Hybrid View**

California’s pre-*Barraza* entrapment law developed similarly to that of the federal majority approach but borrowed some of the elements favored by the minority as well.

Differing on theoretical grounds, the California Supreme Court rejected the federal majority’s artificial entrapment rationale consisting of statutory interpretation and implied legislative intent. In *People v. Benford*, the court recognized the defense as resting on “sound public policy,” arising “out of regard for [the state’s] own dignity” and was allowed, principally, to deter police malfeasance.

Unpredictably, however, the disparate rationale was not accompanied by application of the objective test. California felt that the courts should “place at least as much emphasis on the susceptibility of the defendant as on the propriety of the methods of the police” and upheld the subjective test as valid. To create balance and to ensure that the courts could not ignore police activity as an essential analytical element, California refused to admit evi-

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50. *People v. Benford*, 53 Cal. 2d at 8-10, 345 P.2d at 933-34.
51. *Id.*

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dence concerning one's past criminal conduct or reputation.53 This view allowed judicial flexibility and seemingly incorporated the best characteristics of the federal majority and minority approaches. The court rejected the majority rationale by recognizing its inadequate foundation. Conversely, the court also realized the need to consider a defendant's predisposition.54 It utilized a method for examining predisposition without necessitating either prejudice against the defendant55 or a possible lack of concentration on the specific crime involved. Thus, while the California approach was subjective, it was a hybrid form of the federal majority approach.

In addition to retaining the factual aspect of intent as a consideration, California also retained the correlative procedure of submitting the entrapment issue to the jury.56 Since police activity necessarily varies depending on the type of suspect pursued,57 the hybrid approach dealt with entrapment on a case by case basis and did not envisage concrete rules as workable or expedient.

B. People v. Barraza Aligns California With the Federal Minority Approach

Abrogating the longstanding hybrid position, California's high court in People v. Barraza58 embraced the federal minority approach, incorporating the objective test into state law.

In Barraza, defendant was convicted by the trial court on two counts of selling heroin.59 Both the female government agent and

54. Even when examining circumstances objectively, predisposition and intent of the defendant become relative as circumstances. Those with preconceived intent to commit crime will react differently from those who have no such intent. The hardened criminal planning a crime is generally more cautious than the novice and will require more drastic persuasion by the police. "Reasonableness" of police methods can only be determined by examining the individual who has been the object of those methods. See text accompanying notes 87-90, infra.
55. Whether the rule excluding evidence of defendant's reputation actually negated prejudice before Barraza is debatable. Indeed, in People v. Benford, 53 Cal. 2d 1, 345 P.2d 928 (1959), the court itself, in support of a rebuttal argument, alludes to two cases in which defendant's prior conduct was admitted. Despite the rule, admission was predicated on the prosecution's assertion that it was not for the specific purpose of refuting the entrapment defense. Id. at 12, 345 P.2d at 935-36.
57. See note 54, supra and text accompanying notes 87-90, infra.
58. 23 Cal. 3d 675, 591 P.2d 947, 153 Cal. Rptr. 459.
59. His arrest was predicated on section 11352 of the Health and Safety Code. CAL. HEALTH & SAFETY CODE § 11352 (West 1979).
the male defendant testified that the agent had initiated the first contact between them; she had telephoned the mental health/detoxification center where defendant was employed several times before actually speaking with him. Their versions conflicted from that point forward. The agent alleged defendant was cautious merely because he had previously spent time in prison and "couldn't afford" incarceration again. She testified that after convincing him she was not a "cop", he agreed to introduce her, by written note, to a drug dealer and help her obtain the heroin, which he eventually did.

Defendant averred he had succumbed to the agent's nagging only because he was afraid of losing his job if she did not refrain from calling him at work. He explained that the note he had given the agent, addressed to the seller, was given only to "get her off . . . [his] back." Further, he stated that he did not have any knowledge, at the time he wrote the note for the agent, whether the addressee possessed narcotics.

The case was submitted to the jury and following four days of deliberation the jury reported a deadlock on one of the two charges. Consequently, the trial judge delivered an "Allen charge" to the jurors, reminding them of the importance of a decision and instructing them to try once more. Resuming deliberation, the jury returned one hour later with a verdict of guilty on both counts.

The California Supreme Court reversed defendant's conviction on Count I because it perceived the "Allen charge," as rendered, to be improper and prejudicial. It then progressed to consideration of Count II and the trial court's failure to instruct the jury sua sponte on the defense of entrapment.

Relegating its initial discussion to a survey of the federal majority and minority approaches, the opinion drew heavily from the dissenting and concurring opinions within the federal trilogy supporting the objective test. It then reviewed California's trilogy of entrapment cases and explained the development of the hybrid

60. The charge is set forth in its entirety in People v. Barraza, 23 Cal. 3d at 680-82, 591 P.2d at 950, 153 Cal. Rptr. at 462. An "Allen charge," sometimes cynically referred to as a "dynamite" charge, is a jury instruction designed to persuade a deadlocked jury to continue deliberations until it reaches a verdict.

61. The first issue considered in Barraza was the prudency of the "Allen charge" delivered by the trial judge. Disposing of the issue, the court concluded that the charge was prejudicial and erroneous.
approach, emphasizing California's "public policy/deterrence rationale,"62 Highlighting Chief Justice Traynor's dissenting opinion in People v. Moran,63 the court in Barraza agreed with his observation that by applying a subjective test, the state has "seriously undermined the deterrent effect of the entrapment defense on impermissible police conduct."64 Citing heavy academic support for the objective test65 and recent acceptance of the federal minority approach in several states,66 the high court went on to adopt the objective approach, "recognizing that such a test is more consistent with and better promotes the underlying purpose of the entrapment defense."67

The California Supreme Court then proceeded to delineate the "proper test of entrapment": "[W]as the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense"68 (emphasis added). For purposes of the test, the law continues to be that official temptation and mere offers to commit crime are permissible, since it is presumed that the hypothetical test person would normally resist such temptation.69 What was held impermissible was "for the police or their agents to pressure the suspect by overbearing conduct such as

64. People v. Barraza, 23 Cal. 3d at 688, 591 P.2d at 954, 153 Cal. Rptr. at 466.
65. Id. at 689, 591 P.2d at 954-55, 153 Cal. Rptr. at 466-67. The objective test has been the overwhelming favorite of legal commentators. For a thorough compilation of the articles, notes and comments advocating the objective test or some variation thereof, see Rossum, The Entrapment Defense and The Teaching of Political Responsibility: The Supreme Court as Republican Schoolmaster, 6 AM. J. CRIM. LAW 287, 296 n.43, 297 n.44 (1978).
67. People v. Barraza 23 Cal. 3d at 689, 591 P.2d at 955, 153 Cal. Rptr. at 467.
68. Id. at 690, 591 P.2d at 955, 153 Cal. Rptr. at 467.
69. Id.
badgering, cajoling, importuning or other affirmative acts likely to
induce a normally law-abiding person to commit the crime."\textsuperscript{70}

In an attempt to provide direction, the court legislated\textsuperscript{71} two
principles to be considered when employing the "new" test.
"First, if the actions of the law enforcement agent would generate
in a normally law-abiding person a motive for the crime other
than ordinary criminal intent, entrapment will be established."\textsuperscript{72}
An example of such conduct is an appeal by the police that would
induce an act motivated by friendship or sympathy rather than by
a desire for personal gain or "other typical criminal purpose."

"Second, affirmative police conduct that would make commis-
sion of the crime unusually attractive to a normally law-abiding
person will likewise constitute entrapment."\textsuperscript{73} Illustrations of the
above include guarantees that the act is not illegal or that the of-
fense will go undetected, and offers of exorbitant consideration.
The court further endeavored to buffer transition from the old
approach by proclaiming that while the inquiry is to primarily focus
on police conduct, such conduct is to be judged by the effect it
would have on the "normally law-abiding person" situated in the
circumstances at hand.\textsuperscript{74}

Remaining consistent with the old hybrid approach are two im-
portant factors: 1) evidence of defendant's character and past
criminal conduct is inadmissible\textsuperscript{75} and 2) the issue of entrapment
is to be decided by the jury rather than the bench.\textsuperscript{76} Inadmissibil-
ity of character evidence conforms to the federal minority posi-
tion and to the police deterrence rationale. The idea of jury
submission does not.\textsuperscript{77}

\textsuperscript{70} Id.
\textsuperscript{71} Judicial "legislating" has taken place with regard to the exclusionary rule
but such has been based on the traditional power of courts over evidentiary con-
cepts. The defense of entrapment, however, is not so based and allows the guilty
to go free, i.e., it provides clemency. Ex Parte v. United States, 242 U.S. 27, 42
(1916), proclaimed clemency a power rightfully delegated to the executive branch
and, thus, there appears to be no justification for judicial "legislation" in the area
of entrapment. See Comment, The Defense of Entrapment in California, 19 Has-

\textsuperscript{72} People v. Barraza, 23 Cal. 3d at 690, 591 P.2d at 955, 153 Cal. Rptr. at 467.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} People v. Barraza, 23 Cal. 3d at 690-91, 591 P.2d at 956, 153 Cal. Rptr. at 468.
Although this has always been the rule in California, its previous ineffectiveness
may have been a motivating factor in transforming the test. See note 53, supra.
\textsuperscript{76} Id. at 691 n.6, 591 P.2d at 956 n.6, 153 Cal. Rptr. at 468 n.6.
\textsuperscript{77} Federal minority opinions have always maintained that effective imple-
Adoption of the new test led the Court to reverse the lower court decision on Count II, feeling that the circumstances in an objective light warranted *sua sponte* instruction on the issue of entrapment. The decision will undoubtedly lead to greater and more important consequences in the future.

**C. Barraza’s Impact: Certain Uncertainty in California**

California’s bold step in *People v. Barraza* converted a once “black and white” area of law into a “gray” one. While California’s previous hybrid approach may have injected uncertainty into the results of each particular case due to its subjective nature, the parties involved at least knew the limits of its standard and the required elements of proof to meet that standard. With the new objective test comes uncertainty as to the standard itself. Even more speculation with regard to the results of each case arises because specific rules and boundaries defining “impermissible” police conduct have not yet been formulated. Presented are obvious questions: whether the change is necessary, whether it will prove profitable and whether it will fulfill the goals its proponents claim it is capable of fulfilling. The following sections will examine these questions from both perspectives, setting out the proposed positive effects and then delineating the possible negative consequences. Several of the negatives arise because of the nature of the objective test, while others are produced because of California’s unique application of that test. In either event, the hypothesized objections cast doubt on *Barraza’s* prudence and create apprehensions that can only be alleviated by time-tested litigation.

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1. Is the Objective Rule Consistent With the Deterrence Rationale?

The federal minority has consistently maintained that the correct rationale behind entrapment should be police deterrence and that the objective test is the only way to effect such deterrence. California’s rationale has always been police deterrence; in adopting the objective test the State merely squares its rule with what the federal minority claims it should be.

Truly, the objective test seems intellectually more consistent with the deterrence rationale, which directs court attention to police conduct. If the sole basis for allowance of the entrapment defense is the public policy of abhorrence of governmental malfeasance, a rule which examines only police activity seems appropriate. It is argued that the subjective approach distracts judicial scrutiny from its main purpose by requiring analysis of defendant’s intent. Since police deterrence is the object, defendant’s intent should be immaterial. An improper act perpetrated by the government is culpable no matter who it is directed against.

On the other hand it has been asserted that the objective test is


81. “The success of an entrapment defense should not turn on differences among defendants; . . . As Chief Justice Warren observed, the function of law enforcement manifestly ‘does not include the manufacturing of crime.’” People v. Barraza, 23 Cal. 3d at 688, 591 P.2d 954, 153 Cal. Rptr. 459, 466 (quoting Sherman v. United States, 365 U.S. 369, 372 (1958)).

The quote from former Chief Justice Earl Warren of the United States Supreme Court is self-serving at best. It is extracted from a context in which Chief Justice Warren distinguishes allowable temptation from inducement of an “innocent person” and later highlights “creative activity” by the government. Thus, Chief Justice Warren used the language quoted in a context designed to prove the opposite of the assertion in Barraza, i.e., that entrapment should turn on differences among defendants, depending on their predisposition.

In fact, Mr. Warren’s drafting of the majority opinion in Sherman may be a predominant reason that the subjective test has remained federal law. Justice Clark, in a separate dissenting opinion in Barraza recognizes this factor and cynically observes:

[T]his court appears to see itself as keeper of the flame that might otherwise have died with the passing of the Warren era.

. . . .

Whatever else one might say of the Warren Court, it refused to take the step the majority of this court takes today . . . With today’s decision this court outdoes its mentor in rendering guilt irrelevant.

not necessarily an outgrowth of the public policy/police deterrence rationale. Under the deterrence rationale, prosecution of the entrapped defendant is stymied in order that impermissible conduct by the police will not be rewarded. Why is the conduct impermissible? It is only improper because its victim was innocent in the first place. Thus, the subjective test is the only approach that can adequately deter police misconduct because it is the only one that can define whether the conduct was indeed wrongful (by examining the defendant’s predisposition). If the defendant harbored criminal intent prior to governmental intervention, he would likely have committed the act absent police temptation. Therefore, enticement of this individual is not impermissible because it does not generate crime for the purpose of prosecuting it, generation having its inception in the defendant himself. Of course, the objective test purports to redefine “impermissibility” as measured by the hypothetical individual. Until that is done through litigation or legislation, the “circular reasoning” criticism will remain a valid one.

Another criticism, possibly more devastating, is equally circular in reasoning. Arguably, the advocacy for necessary objective police standards should be equally as persuasive for concrete objective civilian standards, with the logical outgrowth being abolition of the entrapment defense itself. The reasoning behind the objective approach is that the law should define exactly what conduct is permissible and punish any activity that exceeds that definition, so as to deter further misconduct. Since this same concept has already been effected for the public citizenry by statutory legislation, one whose activities overstep the statutory boundaries should be punished regardless of the factors that lead him to commit the crime, in order to deter further misconduct. Just as the objective approach advocates that certain police conduct should be punished regardless of the factors behind such apparently overbearing activity, the one who commits a crime should be punished whether or not he was entrapped. Carrying the objective rationale to full fruition then, the entire entrapment

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82. See Note, Entrapment, 73 HARV. L. REV. 1333, 1333-34 (1960); Comment The Defense of Entrapment in California, 19 HASTINGS L.J. 825, 830-31 (1968).


84. Indeed, while the reasoning had not yet reached full circle, the original arguments used for disallowance of the defense altogether were based upon the pure, literal interpretation theory; i.e., that the legislature “is the arbiter of public
defense should be abrogated. Naturally, this will not be done but the theory favors the subjective rationale over the objective.

2. Is the Objective Standard More Workable than the Subjective One?

By its nature and as suggested by its label, the objective approach is designed to eliminate illusive issues of intent and focus on the activity involved. It purports to disallow diversion of "the court's attention from the only proper subject of focus in the entrapment defense: the dubious police conduct which the court must deter." Upon meticulous examination however, subjective language emerges in statements accompanying the objective test. In United States v. Russell, Justice Stewart dissents from the majority view and advocates federal adoption of the objective test. None-theless, within his opinion surfaces the following statement:

[W]hen the agent's involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character of propensities of the particular person induced—I think entrapment has occurred. (emphasis added)

Although the language quoted is used principally in support of the minority's view that past criminal reputation should not be admissible, it illustrates a paradox that is consistent throughout the federal minority opinions. To determine whether police conduct is reasonable, the language alludes to examination of the defendant's willingness to commit the crime. Thus, intent again becomes material.

Indeed, the governing principles set forth to accompany the ob-

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85. The English judiciary does not permit the entrapment defense, under similar reasoning, it reasons that there is no legal justification for it either in case law or statute. See G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 256, at 784 (2d ed. 1961); DeFeo, Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application, 1 U.S. F.L. REV. 243, 274 (1967).
86. People v. Barraza, 23 Cal. 3d at 688, 591 P.2d at 954, 153 Cal. Rptr. at 466.
88. Id. at 439-50.
89. Id. at 445. The identical "ready and willing" phrase occurs just prior to the language here quoted, as well.
90. See text accompanying notes 82-83, supra, for a more detailed description of the circular reasoning involved.
jective standard in People v. Barraza are equally confusing. To determine “impermissibility,” intent of the hypothetical person must be ascertained. Had the California Supreme Court refrained from further “definition,” the standard would likely have proven workable, just as the “average reasonable man” standard has proven operative in the field of negligence. 91 It is the Court’s expanded explanation that nullifies the standard’s clarity. For instance, the first principle given establishes entrapment when the police activity is found to have generated in the normal, law-abiding citizen “a motive for the crime other than ordinary criminal intent.” 92 It neither explains what is to be considered “ordinary criminal intent” nor why it must be considered at all. After directing attention to the “normally law-abiding citizen” the court diverts to a consideration of the “ordinary criminal”—two opposite standards which would likely give rise to diverse results when applied to the same circumstances.

Further, this principle loses sight of the specious nature of “ordinary criminal intent.” Apparently “friendship” and “sympathy” are deemed outside “ordinary criminal intent” 93 and are thus undesirable motives for government cultivation. Such a notion ignores the probability that many crimes are motivated by just such emotions. There is indeed a thin line between friendship and peer pressure, the latter undoubtedly bearing greatly on many illegalities. And certainly no one can accurately estimate the number of crimes facilitated by financial hardship and consequent sympathy for one’s family or friends.

The second principle set forth in Barraza is likewise unclear. It states that conduct making the crime appear “unusually attractive” to the normal person is not allowed. 94 Examples of attractiveness supplied by the court include guarantees that the act is not illegal and/or offers of “exorbitant consideration.” While the first example is appropriate, the second is tortured by relativity. One man’s home is another man’s castle and what appears exorbitant to one juror may appear of little value to another, depending upon economic circumstance. Also, in certain types of crimes such as prostitution, a monetary quantity-for-quality ratio is surely hard to prove (at least in open court).

The apparent difficulties with workability of the objective test may be cured by its literal utilization in California’s trial courts, as opposed to its theoretical application on the printed page. Per-

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91. People v. Barraza, 23 Cal. 3d at 690, 591 P.2d at 955, 153 Cal. Rptr. at 467.
92. Id.
93. See the example given accompanying the courts first principle. Id.
94. Id.
haps jurors will place themselves in the position of the defendants involved and ignore the "clarifying" language of the state's scholarly high court. In any event, a standard can hardly be imagined that would be more troublesome to apply than the subjective "origin of intent" test; the verdict as to objective test practicability must be withheld pending courtroom service.

3. Will the Objective Test Ease or Harshen the Defendant's Treatment and Burden of Proof?

Superficially, California's new objective test indicates an attenuated standard of proof for the suspect and a resultant increased usage of the entrapment defense. Whereas under the hybrid approach the defendant had to go forward with evidence showing his own lack of predisposition to commit the crime, now he needs only to prove that the police activity was overbearing or oppressive. While the burden of proof remains upon the

95. This may provide a valid reason for California's retention of jury, as opposed to bench, consideration of the entrapment issue. It is probably safe to say that most jurors see themselves as average law abiding citizens. As such, they may be able to apply the "hypothetical person" standard better than the judge possessed with technical, superior and sometimes oppressive knowledge of the law.

96. The burden of proof is on the defendant in California and he must show by a preponderance of the evidence that he was induced to commit the crime by police officials. People v. Moran, 1 Cal. 3d 755, 760-61, 463 P.2d 763, 765, 83 Cal. Rptr. 411, 413-14 (1970); People v. Valverde, 246 Cal. App. 2d 318, 325, 54 Cal. Rptr. 528 535 (1966). For statutory agreement, see MODEL PENAL CODE § 213(2) (Proposed Draft, 1962). It has been argued that because the prosecution has the ultimate burden of proving one guilty "beyond a reasonable doubt," the defendant need only put forth that amount of evidence which establishes a reasonable doubt as to whether he was entrapped. The California courts have rejected the argument, based on CAL. PENAL CODE § 1896 establishing the prosecution's ultimate burden, because the argument's foundation is based on the premise that one is innocent until proven guilty. Since California's rationale for the entrapment defense is public policy rather than the federal standard of defendant's innocence of the crime, the argument carries no force. See People v. Valverde, 246 Cal. App. 2d at 322, 54 Cal. Rptr. at 530; People v. Moran, 1 Cal. 3d at 760-61, 463 P.2d at 766; Comment, The Defense of Entrapment In California, 19 Hastings L.J. 825, 834 (1968); Comment, California Entrapment Law—A Need For Statutory Clarification, 5 Pac. L.J. 603, 611-16 (1974). Such reasoning for rejection of the argument would seem to indicate that the argument might be successful at the federal level. See note 18, supra, for the federal rule concerning burden of proof.

The defendant is allowed to plead innocence as well as entrapment in California. See People v. Barraza, 23 Cal. 3d at 691-92, 591 P.2d at 956, 153 Cal. Rptr. at 468. Cf. federal rule at note 18, supra.

97. This apparently produced many situations in which the defendant would lose because only his word would stand against the officer's and thus he could not sustain his burden.
defendant, emphasis of the law is shifted from the accused to the accuser and the facts that need to be proven are more concrete and seemingly much easier to establish.

Theoretically, under the new test's emphasis, a defendant can be a constant entrepreneur of crime, maintain a pre-existing intent to commit the same and yet be acquitted because his initial high degree of suspicion forced a correspondingly high degree of governmental persuasion. Due to the overly burdensome nature of police involvement and the immateriality of defendant's intent and background, defendant will be in a much better position presently than prior to *People v. Barraza*.99

Regardless of first blush impression, the new objective standard may in truth prove harsher overall and will undoubtedly work to the detriment of the first time offender as opposed to the hardened criminal. The objective "hypothetical individual" approach is premised on Justice Frankfurter's belief that "[P]ermissible police activity does not vary according to the particular defendant concerned. . . ."100 Applying the same standard to all defendants, and developing specific limits on police inducement, ignores the fact that the professional and hardened criminal is extremely cautious in all of his dealings and much more wary of possible police involvement. As such, repeated attempts to gain his confidence and a greater degree of temptation are necessary before he will commit the act. Under the objective test and measured by the "normally law abiding" standard, these acts of inducement may appear unreasonable and excessive. Because the government cannot produce evidence of the defendant's past criminal record, the suspect's criminal disposition may never receive jury attention and the extraordinary and excessive police involvement will result in a successful entrapment defense.

In another situation, the more gullible first-time offender may fall for any simple trick the agent directs his way. Since the actual governmental activity will be light, the entrapment defense will fail and the accused will be convicted. Thus, under an objective analysis, the entrapment defense is likely to "acquit the

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99. *Contra*, *People v. Gorce*, 240 Cal. App. 2d 304, 49 Cal. Rptr. 392 (1966). Shooting pool with the defendant, an undercover agent mentioned that he was saving his last $50 for a marijuana cigarette and asked defendant if he would purchase him one. Defendant did so, with no profit to himself. The court observed that under the objective test it would be difficult to hold the agent's conduct unreasonable. But left to a jury under the subjective test, defendant was acquitted because it was found that the defendant was not predisposed to commit the crime.

wolves and convict the lambs.”

At the extreme end of the spectrum is the possibility that the objective standard will effectuate practical exclusion of the entrapment defense. Fear of binding police hands and a feeling that the normal citizen (the juror) is hardened to temptation may cause juries to set very broad limits which will require outrageous conduct to sustain a finding of unreasonability. If this becomes the case, defendants may wish that evidence of their prior “innocence” or clear record be permitted as a factor in their favor.

Again, the course the new standard takes and the patterns it develops will only be determined by time and the development of cases on this issue. Indeed, the necessity of hard and fast rules for consistent and fair application of the objective approach gives rise to further criticism of its adoption regarding the time needed for development of such rules. Whether the rules can be developed by the methods California has chosen and whether the rules, once formed, will be profitable are also questions which lend uncertainty to the present status of entrapment law.

4. Will Concrete Rules Emerge From the Objective Approach and If So, Will They Promote Societal Security?

Approaching entrapment from an “objective” standpoint requires redefinition of “impermissible police conduct” (since the same no longer varies with the circumstances) and necessitates concrete rules to guide police activity. Obviously, the California Supreme Court is of the opinion that its Barraza approach will spawn formulation of such rules; thus, it has laid down principles to help in the evolutionary process.

Extolled positive societal affects of specific rules include notice to police of their limitations and equality of treatment for all defendants under entrapment law. Definition, through case law, of

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The Brown Commission, which promotes the “hypothetical person” test for adoption in the proposed Federal Criminal Code, acknowledges the validity of this criticism. “Persons who were not predisposed to commit crime may be convicted when the police conduct is not so offensive as to violate the statutory standard for entrapment.” 1 U.S. NAT. COMMISSION ON REFORM OF FED. LAWS, WORKING PAPERS 306 (1970).
“impermissibility” seemingly aids the government officer by providing him with security when enacting his permissible conduct and by informing him of when to redirect efforts that might otherwise prove wasted.

Expressing support of the objective approach, Justice Frankfurter states the equality rationale behind the formulation of absolute rules:

[S]urely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he ... is said to have a criminal disposition. ... A contrary view runs afoul of fundamental principles of equality under the law, and would espouse the notion that when dealing with the criminal classes anything goes.102

Thus, the objective view mandates specific guidelines so that all will be treated alike according to the conduct surrounding the crime charged and without regard for former criminal activity.103

Arguments opposing precise rules include the loss of judicial flexibility and the immunization from future prosecution provided to the calculating malefactor. As discussed earlier, rules bind the courts and force them to deal with all factual situations alike, according to the police conduct only and regardless of the nature of the defendant or the superior knowledge and intuition of governmental agents. While supposedly eliminating the case by case nature of the defense, it will take years for the courts to formulate concrete rules. Until such rules are developed, the step by step process will continue.

The immunization argument carries more appeal. It proposes that when a criminal becomes informed of the limitations prohibiting police conduct, he can design his enterprise so that every person he deals with will be forced to overstep at least one of those prohibitions. In so doing, the culpable individual guarantees acquittal, if government agents are involved, on grounds of official misconduct.104

Unfortunately, a question greater than societal profitability at-

103. Contra Note, Entrapment—Predisposition of Defendant—Crucial Factor in Entrapment Defense, 59 CORNELL L. REV. 546 (1974). The authority suggests that the equality argument would be valid were constitutional rights involved but because United States v. Russell, 411 U.S. at 431-32, specifically rejected entrapment as a constitutional issue, different degrees of temptation must be permitted to allow for the different degrees of criminality involved. But see United States v. Russell at 431-32, where the court suggests that one day an incident of outrageous government conduct may be held violative of the Due Process Clause of the fifth amendment. The court cites Rochin v. California, 342 U.S. 165 (1952).
104. See Rossum, supra note 98, at 300. See also Desk, Crack in the Foundation of Criminal Justice, 46 ILL. L. REV. 385, 391-92 (1951); Park, supra note 98, at 228. Professor Jerome Skolnick illustrates the dilemma. In Oakland, California, the undercover police have a policy of not allowing prostitutes to touch them and of never setting the price. Prostitutes, therefore, often seek to determine whether their customers are officers by initially attempting to kiss them or by asking them
tends California's adoption of the entrapment defense. Simply, the state's refusal to reserve exclusive bench consideration for the entrapment defense raises doubts as to whether specific rules will ever be delineated.

Central to the federal minority approach is the tenet that the theory's operation and development depend upon submission of the issue to a judge rather than a jury.

[A] jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands.105

People v. Barraza disapproved this principle summarily, explaining in a footnote that “[i]n view of [the defense’s] potentially substantial effect on the issue of guilt,” entrapment will remain a jury issue.106 In so doing, the California Supreme Court seemingly defeated the entire rationale of police deterrence that it had staunchly applauded. While such a policy may sustain some of the balance provided by the old hybrid approach,107 it practically defeats most, if not all, of the benefits derived from the objective test. A simple statement of “guilty” or “not guilty” from a jury can give no one guidance concerning specific conduct and maintains the uncertainty of result associated with the subjective “origin of intent” test. An opinion from the bench generally applies legal standards to the circumstances at hand and formulates conclusions of law and holdings based on monological analysis. It thereby provides guidance and hands down the principles necessary for consistent and fair application of an objective standard.

Conversely, a jury decision provides no reasoning, rules or guidance. It fails to expose whether acquittal was reached because

the amount they intend to pay for their services. J. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 103 (1966).


106. People v. Barraza, 23 Cal. 3d at 690 n.6, 591 P.2d at 956 n.6, 153 Cal. Rptr. at 468 n.6.

107. Retaining jury arbitration of the defense may indirectly guarantee that defendant predisposition will nevertheless be considered without direct and prejudicial evidence to establish the same. It is no secret that juries often opt for justice over the letter of the law. Thus, evidence indirectly admitted concerning defendant’s prior intent will likely still play a part in the final verdict.
of the entrapment defense or because of some other equally persuasive defense.

Had the supreme court relegated responsibility for consideration of the entrapment defense to the bench, it would doubtless have taken many years and countless cases to formulate the kind of definitive rules the objective approach is designed to accommodate. With submission of the issue to the jury, those rules may never come without legislative intervention.

A proverbial "vicious cycle" will be eventuated by the prolonged uncertainty and will also act to defeat the police deterrence rationale. Police officers and officials throughout the state will be increasingly frustrated by the unpredictable and disparate outcome of each case. The frustration will likely cause a greater degree of oppressive and improper government conduct. The pervasive feeling that a verdict cannot be controlled by forbearance will lead enforcement officials to gamble on the outcome of a case. Indeed, the uncertainty may lead to incidental perjury, "justified" in the agent's mind by a personal belief that his actions were not wrong and that the court is unsure as to what should be permissible in any event.108

Assuredly, the lack of law cannot work to the good of society. California's limbo status, due to the *Barraza* decision, and irrespective of the test used, can only initiate greater societal instability. "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."109

### III. Conclusion

California entrapment law before *People v. Barraza* developed in a hybrid manner, introducing elements of both the federal majority and minority views. In so doing, the state seemingly utilized the best of both the "subjective" and "objective" approaches, allowing for a study of the defendant's predisposition but disallowing evidence of defendant's reputation or past conduct which might unduly prejudice him. Though the hybrid approach caused an uncertain result in each case, such was necessary, due to the diverse nature of criminal suspects and the correspondingly diverse degrees of police inducement.

108. See Rossum, *supra* note 98. The author suggests that the possibility of police perjury is greater in the case of entrapment than in the case of other prophylactic rules because entrapment allows outright acquittal (as opposed to, for instance, denial of the admission of certain evidence when applying the exclusionary rule).

Perceiving the hybrid approach as inconsistent with the State’s police deterrence rationale behind entrapment, the California Supreme Court in People v. Barraza abrogated its use and adopted the federal minority view in which judicial scrutiny extends only to the nature of governmental involvement. This decision may have been prudent and workable had the Court refrained from “clarifying” the objective test and had it adopted the federal minority view en toto. By setting forth principles to help determine how the “normally law-abiding person” will react, the supreme court obscured the “new” test’s emphasis. Worse, by refusing to mandate bench consideration of entrapment, as opposed to submission of the defense to a jury, California negated the positive effects it hoped to create. Without judicial opinions in the area of entrapment, no objective rules will be formulated and therefore no practical guidance will result. The absence of such guidelines will eventuate a long period of uncertainty in California, accompanied by a new wave of unnecessary litigation and a renewed period of “gambling” on the part of both the government agent and the criminal. All of these factors will defeat the public policy rationale behind the entrapment defense.

Only legislative intervention can act as the savior in this situation. The Legislature would do the State of California a service by reinstating the former hybrid approach.

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