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# The Evolution of the Federal Law of Entrapment: A Need for a New Approach

*Jacobson v. United States*<sup>1</sup>

## I. INTRODUCTION

How far can the government go in combatting crime? Should the government be able to surreptitiously observe those it suspects of criminal activity? May the government offer such suspects opportunities to commit crimes or induce them to commit crimes?

The entrapment defense has been used to provide a check on government investigation of criminal activity. Historically, there has been much disagreement about the proper basis of the entrapment defense and its applicability to particular situations. In *Jacobson v. United States*, the United States Supreme Court had occasion to examine the proper role of the entrapment defense in the federal courts. This Note will explain and critique the reasoning used by the Court in *Jacobson*, as well as that used by proponents of a competing theory of the defense, and recommend a more rational way to deal with government inducement.

## II. FACTS AND HOLDING

In February, 1984, Keith Jacobson, a Nebraska farmer, ordered two magazines, entitled *Bare Boys I* and *Bare Boys II*, from a California bookstore.<sup>2</sup> The magazines contained photographs of nude preteen and teenage boys.<sup>3</sup> Jacobson testified that he was surprised at the contents of the magazines because "he had expected to receive photographs of 'young men 18 years or older.'"<sup>4</sup> This testimony was unchallenged at trial.<sup>5</sup> Jacobson's receipt of this material was legal under both federal and Nebraska law.<sup>6</sup>

Three months later, Congress passed the Child Protection Act of 1984.<sup>7</sup> The Act made it illegal to knowingly receive through the mails a "visual depiction [that] involves the use of a minor engaging in sexually explicit

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1. 112 S. Ct. 1535 (1992).

2. *Id.* at 1537.

3. *Id.*

4. *Id.*

5. *Id.* at 1542.

6. *Id.* at 1538.

7. Pub. L. No. 98-292, 98 Stat. 204 (1984).

conduct.<sup>8</sup> In the same month that the Act became law, postal inspectors discovered Jacobson's name on the mailing list of the bookstore from which he had ordered *Bare Boys I and II*.<sup>9</sup>

In January, 1985, a postal inspector sent Jacobson a sexual attitude questionnaire and an application for membership in the "American Hedonist Society," a fictitious organization.<sup>10</sup> Jacobson enrolled in the society and indicated on the survey that he enjoyed preteen sex but was opposed to pedophilia.<sup>11</sup> During the next sixteen months, the government did not initiate further contact with Jacobson.<sup>12</sup>

In May of 1986, the government sent Jacobson a solicitation from "Midlands Data Research," a fictitious consumer research company.<sup>13</sup> Jacobson responded: "Please feel free to send me more information, I am interested in teenage sexuality. Please keep my name confidential."<sup>14</sup> Jacobson then received a survey from "Heartland Institute for a New Tomorrow" (HINT).<sup>15</sup> Jacobson responded to the survey and "indicated that his interest in '[p]reteen sex-homosexual' material was above average, but not high."<sup>16</sup>

After Jacobson responded to the HINT survey, a government agent initiated correspondence with him under the pseudonym "Carl Long."<sup>17</sup> Jacobson responded to his "pen pal" that he was interested in "male-male

8. 18 U.S.C. § 2252(a)(2)(A) (1988).

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

10. *Id.* Included with these materials was a letter stating the Society's doctrine: "that members had the 'right to read what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without restrictions being placed on us by outdated puritan morality.'" *Id.*

11. *Id.* The survey asked Jacobson to "rank on a scale of one to four his enjoyment of various sexual materials, with one being 'really enjoy,' two being 'enjoy,' three being 'somewhat enjoy,' and four being 'do not enjoy.'" [Jacobson] ranked the entry 'preteen sex' as a two . . . "*Id.*

12. *Id.*

13. *Id.* The solicitation "[sought] a response from those 'who believed in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophyte [sic] age,'" without indicating whether it referred to minors, young adults, or both. *Id.*

14. *Id.*

15. *Id.* HINT portrayed itself as a lobbying organization which sought to promote sexual freedom and freedom of choice by urging the repeal of all statutes regulating sexual activities, with the exception of those proscribing violent behavior. HINT also provided its members with "pen pals" through a computer matching service; Jacobson did not initiate correspondence with any of his potential "pen pals." *Id.* at 1538-39.

16. *Id.* at 1538. Jacobson also wrote: "Not only sexual expression but freedom of the press is under attack. We must be ever vigilant to counter attack right wing fundamentalists who are determined to curtail our freedoms." *Id.*

17. *Id.* at 1539. The government was using a tactic known as "mirroring," which was described as "reflecting whatever the interests are of the person we are writing to." *Id.*

items," and that he liked "good looking young guys (in their late teens and early 20's) doing their thing together."<sup>18</sup> Jacobson ended his correspondence with "Carl Long" after two letters.<sup>19</sup>

In March, 1987, the Customs Service received Jacobson's name from the Postal Service.<sup>20</sup> The Customs Service sent Jacobson a brochure from "Produit Outaouais," a fictitious Canadian company, offering child pornography for sale.<sup>21</sup> Jacobson ordered photographs of young boys engaging in sex. The order was never filled.<sup>22</sup>

The Postal Service also continued to investigate Jacobson.<sup>23</sup> It mailed a letter to him purportedly from the "Far Eastern Trading Company Ltd.," yet another fictitious organization,<sup>24</sup> and invited him to send for more information.<sup>25</sup> The letter also requested that Jacobson certify he was not an undercover agent seeking to entrap Far Eastern Trading Company.<sup>26</sup> Jacobson responded and received a catalogue in return.<sup>27</sup> He then placed an order for *Boys Who Love Boys*<sup>28</sup> and was arrested after a controlled delivery of the magazine.<sup>29</sup> Federal agents searched Jacobson's home and found *Bare Boys I* and *II* and the materials sent by the government during the course of its investigation.<sup>30</sup> Jacobson was indicted on September 24, 1987 for violating 18 U.S.C. § 2252(a)(2)(A).<sup>31</sup> At trial, Jacobson claimed that he had been entrapped by the government through its communications with him over a twenty-six month period prior to his arrest.<sup>32</sup> Jacobson testified that he ordered the magazines because "the government had succeeded in piquing his

18. *Id.*

19. *Id.*

20. *Id.* The Customs Service was conducting a child pornography sting known as "Operation Borderline." *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* The letter stated that "much hysterical nonsense [had] appeared in the American media concerning 'pornography,'" and that "we have devised a method of getting these to you without prying eyes of U.S. Customs seizing your mail . . . once we have posted our material through your system, it cannot be opened for any inspection without authorization of a judge." *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1539-40. *Boys Who Love Boys* was a "pornographic magazine depicting young boys engaged in various sexual activities." *Id.* at 1540.

29. *Id.* at 1539-40.

30. *Id.* at 1540.

31. *Id.* at 1537.

32. *Id.*

curiosity."<sup>33</sup> The jury was instructed on the entrapment defense,<sup>34</sup> and Jacobson was convicted.<sup>35</sup>

Jacobson appealed his conviction.<sup>36</sup> The Eighth Circuit Court of Appeals overturned Jacobson's conviction, holding that "[t]he government must reasonably suspect that a crime has occurred or is likely to occur before targeting an individual."<sup>37</sup> The government then petitioned the court for rehearing en banc, which was granted.<sup>38</sup> Upon rehearing, the court held that reasonable suspicion was not required prior to an undercover investigation because the Constitution afforded individuals such as Jacobson no right to be free from investigation.<sup>39</sup> The court also rejected Jacobson's claim that the conduct of the government violated due process.<sup>40</sup>

The Supreme Court granted certiorari<sup>41</sup> and overturned Jacobson's conviction.<sup>42</sup> The Court made no mention of the reasonable suspicion requirement imposed by the Eighth Circuit prior to the en banc rehearing. However, the Court's statement that the government may employ inducement if it proves predisposition beyond a reasonable doubt impliedly repudiated that requirement.<sup>43</sup> The Court held that when the government induces the defendant to commit a crime and the defense of entrapment is properly raised,

33. *Id.* at 1540. Jacobson stated: "Well, the statement was made of all the trouble and the hysteria over pornography and I wanted to see what the material was. It didn't describe the—I didn't know for sure what kind of sexual action they were referring to in the Canadian letter . . . ." *Id.*

34. *Id.* The jury was instructed:

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

If the defendant before contact with law enforcement officers or their agents did not have any intent or disposition to commit the crime charged and was induced or persuaded by law enforcement officers or[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.

35. *Id.* at 1540.

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

37. *Id.* at 1001. The court of appeals also held that evidence of reasonable suspicion must be obtained independently of the investigation. *Id.*

38. *United States v. Jacobson*, 899 F.2d 1549 (8th Cir. 1990).

39. *United States v. Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990).

40. *Id.*

41. *Jacobson v. United States*, 111 S. Ct. 1618 (1991).

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

43. *Id.* at 1540.

the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime before the initial contact with the government took place.<sup>44</sup> The Court also held that evidence of predisposition to do something which is legal is not sufficient to show predisposition to engage in similar conduct which is illegal.<sup>45</sup>

### III. LEGAL BACKGROUND

#### A. *Origin of the Entrapment Defense in the Federal Courts*

The first federal case in which a defendant was excused on the ground of entrapment was *Woo Wai v. United States*.<sup>46</sup> In *Woo Wai*, an agent of the Immigration Commission suspected that the defendant had knowledge of unlawful importations of Chinese women into San Francisco.<sup>47</sup> The agent devised a scheme to pressure the defendant to reveal this information.<sup>48</sup> Government agents approached the defendant and presented a plan to make money by illegally bringing Chinese women across the Mexican border.<sup>49</sup> On several occasions, the defendant expressed reluctance to participate in the scheme,<sup>50</sup> but he finally assented and was convicted of conspiracy to violate the immigration laws.<sup>51</sup>

The Ninth Circuit Court of Appeals reversed based on two grounds.<sup>52</sup> First, the facts of the case did not establish a conspiracy.<sup>53</sup> Second, "a sound public policy [could] be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes."<sup>54</sup> The court cited six cases to support the doctrine of entrapment.<sup>55</sup> Although entrapment was discussed and condemned in all of

44. *Id.*

45. *Id.* at 1542.

46. 223 F. 412 (9th Cir. 1915).

47. *Id.* at 413.

48. *Id.* The agent believed the defendant had information regarding the involvement of Immigration Commission officers in the unlawful importations. *Id.*

49. *Id.* Immigration inspectors in San Diego represented to the defendant that they would allow him to bring Chinese women across the border if he paid the inspectors \$50 per head. *Id.*

50. *Id.* at 413-14.

51. *Id.* at 412.

52. *Id.* at 414.

53. *Id.*

54. *Id.* at 415.

55. *Id.* at 415-16. The six cases were: *People v. McCord*, 42 N.W. 1106 (Mich. 1889); *Love v. People*, 43 N.E. 710 (Ill. 1896); *Commonwealth v. Bickings*, 12 Pa. Dist. 206 (1903); *Commonwealth v. Wasson*, 42 Pa. Super. 38 (1910); *Saunders v. People*, 38 Mich. 218 (1878); and *O'Brien v. State*, 6 Tex. App. 665 (1879).

them,<sup>56</sup> in none was the defendant acquitted on that ground.<sup>57</sup> By basing its holding on "a sound public policy," the court implied that the entrapment defense was a matter of judicial discretion.<sup>58</sup> The court did not assert any basis for the defense, and it did not specify the circumstances that would trigger its availability. Seemingly, the holding would require a court to find entrapment and acquit the defendant as a matter of law any time inducement was employed by the government. The existence of the entrapment defense in the federal courts was thus established by *Woo Wai*, but the contours of the doctrine remained nebulous.

The Supreme Court attempted to clarify the nature and boundaries of the entrapment defense in *Sorrells v. United States*.<sup>59</sup> In *Sorrells*, the defendant was convicted of possessing and selling liquor in violation of the National Prohibition Act.<sup>60</sup> A government agent went to the defendant's home along with three acquaintances of the defendant.<sup>61</sup> The agent asked the defendant to get him some liquor, and the defendant refused.<sup>62</sup> After repeated requests, the defendant acquiesced and obtained liquor for the agent.<sup>63</sup> At trial, the court ruled that no entrapment had occurred as a matter of law.<sup>64</sup>

The Supreme Court reversed.<sup>65</sup> The Court held that if the government merely affords opportunities for the commission of the offense, entrapment has not occurred.<sup>66</sup> However, if "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," entrapment has occurred.<sup>67</sup> The Court stated that the defense was based on a principle of statutory construction: Congress did not intend for the Prohibition Act to apply to otherwise innocent persons whom the government encouraged to commit the offense.<sup>68</sup>

56. See William E. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 247 (1942).

57. *Id.*

58. *Woo Wai*, 223 F. at 415.

59. 287 U.S. 435 (1932).

60. *Id.* at 438.

61. *Id.* at 439.

62. *Id.*

63. *Id.* at 439-40. The agent stated that he was a member of the same division of the military as the defendant and that he wanted the whiskey for a friend of his; the defendant stated that he "did not fool with whiskey," but finally agreed to see if he could get some. *Id.*

64. *Id.* at 438.

65. *Id.* at 452.

66. *Id.* at 441.

67. *Id.* at 442.

68. *Id.* at 448.

If an offense is instigated by the government, the government can overcome the defense of entrapment by showing that the defendant was predisposed to commit the crime.<sup>69</sup> The government can introduce evidence of the defendant's prior conduct which is relevant to show predisposition.<sup>70</sup> In turn, the defendant can introduce evidence of the activities of the government agents to show inducement.<sup>71</sup> If reasonable people could differ regarding the issues of inducement and predisposition, the entrapment defense should be submitted to the jury.<sup>72</sup> The Court noted that it did not intend for its holding to apply to crimes so heinous that the applicable statute would admit of no exceptions.<sup>73</sup>

Justice Roberts concurred in the result but wrote separately to propound a different theory of the defense.<sup>74</sup> Roberts stated, "entrapment is the conception and planning of an offense by an officer [of the government], and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."<sup>75</sup> Roberts disagreed with the statutory construction rationale relied on by the majority.<sup>76</sup> He thought the statutory construction rationale was artificial because the defendant's act, coupled with intent, fell within the letter of the statute.<sup>77</sup> Roberts believed the true basis for the defense was one of public policy; a policy similar to that exercised by courts of equity when they refuse to use their process to consummate a wrong.<sup>78</sup>

If the government instigates or induces the commission of an offense, and the defendant would not have committed the offense in the absence of such inducement, the defense of entrapment can be raised successfully because "no self respecting tribunal ought to permit the consummation of so revolting a plan as activating the commission of an offense solely for the purpose of obtaining a conviction."<sup>79</sup> In Roberts' view, the defendant's predisposition

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69. *Id.* at 451.

70. *Id.*

71. *Id.*

72. *Id.* at 452.

73. *Id.* at 451.

74. *Id.* at 453 (Roberts, J., concurring).

75. *Id.* at 454.

76. *Id.* at 456.

77. *Id.*

78. *Id.* at 455.

79. *Id.* at 454-55.



to commit the offense is irrelevant.<sup>80</sup> Moreover, he thought the issue of entrapment was a question of law.<sup>81</sup>

The opinion in *Sorrells* raised more questions than it answered. The Court did not specify the applicability of the statutory construction rationale. It is unclear whether the holding applied to all federal statutes or only to those creating crimes *malum prohibitum*.<sup>82</sup> The Court also did not provide any standard for measuring predisposition. Testimony regarding the defendant's reputation was held to create a jury question on predisposition.<sup>83</sup> The Court did not indicate whether evidence about a defendant's reputation would always be sufficient to create a jury question on predisposition, or if stronger evidence would be required in some instances.

### B. Application by the Supreme Court After *Sorrells*

The framework enunciated by the majority in *Sorrells* was affirmed by Chief Justice Warren, who wrote for the majority in *Sherman v. United States*.<sup>84</sup> In *Sherman*, a government agent approached a narcotics addict undergoing treatment to cure his addiction.<sup>85</sup> The agent repeatedly requested that the defendant supply him with narcotics; the defendant refused several times, but eventually agreed.<sup>86</sup> Subsequently, the defendant was convicted of selling narcotics.<sup>87</sup>

The Supreme Court overturned the defendant's conviction.<sup>88</sup> Despite the fact that the defendant had two prior narcotics-related convictions,<sup>89</sup> the Court held as a matter of law that predisposition was not established.<sup>90</sup> The Court rejected the approach espoused by Justice Roberts in *Sorrells*,<sup>91</sup> and

80. *Id.* at 455. Thus, the defendant can introduce evidence of the government's conduct to establish inducement, but the government cannot introduce evidence of the defendant's prior conduct to show predisposition.

81. *Id.* at 457.

82. *Malum prohibitum* is defined as "a thing which is wrong because it is prohibited." BLACK'S LAW DICTIONARY 960 (6th ed. 1991).

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

84. 356 U.S. 369 (1958).

85. *Id.* at 371. The agent was being treated by the same doctor as the defendant for narcotics addiction. *Id.*

86. *Id.* The agent told the defendant he needed the drugs because he was suffering from withdrawal. *Id.*

87. *Id.* at 370.

88. *Id.* at 378.

89. *Id.* at 375. Nine years earlier, the defendant had been convicted of selling narcotics, and five years earlier he had been convicted of possessing narcotics. *Id.*

90. *Id.* at 375-76.

91. *Id.* at 376-77.

instead followed the approach of the *Sorrells* majority.<sup>92</sup> The Court noted that the government would be placed at a disadvantage under the Roberts approach: although the defendant could claim inducement, the prosecution could not show that the offense was committed because of the defendant's own readiness and not because of the inducement.<sup>93</sup>

The Court claimed to base its holding that predisposition was not established as a matter of law on the fact that the defendant was undergoing treatment to cure his narcotics addiction when the government intervened.<sup>94</sup> However, the Court then took occasion to condemn the government for enticing a narcotics addict undergoing treatment to sell and return to the habit of using narcotics.<sup>95</sup>

*Sherman* also raised questions regarding the doctrine of entrapment. Why did the Court criticize the conduct of the government during the investigation?<sup>96</sup> If it truly relied on the *Sorrells* framework,<sup>97</sup> the government's conduct should have been irrelevant. According to *Sorrells*, predisposition of the defendant is the focus of the inquiry, not whether the court approved of the government's conduct.<sup>98</sup> Further, why didn't the prior convictions create a jury question on predisposition?<sup>99</sup> Surely prior convictions for the same offense are at least as probative on the issue of predisposition as reputation testimony regarding the defendant, which was used in *Sorrells*.<sup>100</sup> *Sherman* seemed to indicate that while a defendant's predisposition might nominally be relevant to rebut a claim of entrapment, in actuality the Court would consider the conduct employed by the government in determining whether the defendant was predisposed. Thus, the *Sherman* Court seemed to follow Justice Roberts' approach<sup>101</sup> under the guise of predisposition. The Court did not want to adopt the approach used by Justice Roberts, however, because of the severe handicap placed on the prosecution if it could not show that the offense was committed because of the defendant's own readiness and not because of the inducement.<sup>102</sup>

Although *Sherman* purported to affirm the *Sorrells* framework,<sup>103</sup> subsequent lower court decisions created exceptions to it. In *United States v.*

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92. *Id.* at 372-73.

93. *Id.* at 376-77; *cf. supra* note 80.

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

95. *Id.* at 376.

96. *See supra* note 95 and accompanying text.

97. *See supra* notes 68-73 and accompanying text.

98. *See supra* notes 68-73 and accompanying text.

99. *See supra* note 90 and accompanying text.

100. *See supra* note 83 and accompanying text.

101. *See supra* notes 74-81 and accompanying text.

102. *See Sherman*, 356 U.S. at 376-77.

103. *See supra* notes 68-73 and accompanying text.

*Chisum*,<sup>104</sup> the defendant was charged with knowingly receiving counterfeit money.<sup>105</sup> Without solicitation, the defendant approached a known counterfeiter and indicated his interest in purchasing counterfeit bills.<sup>106</sup> The counterfeiter told the defendant that he was not personally interested in the proposition, but he directed the defendant to an undercover agent.<sup>107</sup> Subsequently, the agent sold counterfeit money to the defendant, at which time the defendant was arrested.<sup>108</sup>

The district court granted the defendant's motion to dismiss the indictment because "the acts of the government agent in delivering and supplying the counterfeit bills constitute entrapment as a matter of law."<sup>109</sup> The court reasoned that "[e]ntrapment is indistinguishable from other law enforcement practices which the courts have held to violate due process."<sup>110</sup> Thus, allowing the government to proceed against the defendant would violate due process.<sup>111</sup>

The two principles announced in *Chisum* were striking. First, entrapment would be established as a matter of law any time the government supplies contraband to a defendant.<sup>112</sup> Second, the entrapment defense was based on the Due Process Clause.<sup>113</sup> The first of these principles was a departure from the *Sorrells* framework.<sup>114</sup> The *Chisum* court concluded that even though predisposition is present, a defendant is entrapped as a matter of law if the government supplies the contraband.<sup>115</sup> However, the *Sorrells* Court held that entrapment is not present if the defendant is predisposed to commit the crime.<sup>116</sup> No exception was made for instances when the government supplied the contraband.

The second principle stated in *Chisum* was also a departure from *Sorrells*. The *Sorrells* Court expressly stated that the entrapment defense was based on a principle of statutory construction.<sup>117</sup> The *Sorrells* majority did not even mention the Due Process Clause. By employing a due process analysis,<sup>118</sup>

104. 312 F. Supp. 1307 (C.D. Cal. 1970).

105. *Id.* at 1308.

106. *Id.*

107. *Id.*

108. *Id.* at 1308-09.

109. *Id.* at 1309.

110. *Id.* at 1312.

111. *Id.*

112. *Id.*

113. *Id.*

114. See *supra* notes 68-73 and accompanying text.

115. *Chisum*, 312 F. Supp. at 1310-12.

116. *Sorrells*, 287 U.S. at 451.

117. *Id.* at 448.

118. *Chisum*, 312 F. Supp. at 1312.

*Chisum* was engrafting its own notions of fundamental fairness onto the entrapment defense. In substance, this analysis does not seem much different from the analysis employed by Justice Roberts.<sup>119</sup> Rather than focusing on predisposition, *Chisum* focused on the tactics employed by the government.

*United States v. Bueno*<sup>120</sup> is a decision which reached a result similar to that in *Chisum*. In *Bueno*, the defendant was charged with selling narcotics.<sup>121</sup> The defendant was a narcotics addict, and one of his acquaintances was a government informer.<sup>122</sup> The informer had purchased heroin in Mexico and transported it to the United States.<sup>123</sup> The defendant and the informant prepared the heroin for sale by mixing it with brown sugar.<sup>124</sup> The defendant then sold the heroin to a government agent.<sup>125</sup>

The Fifth Circuit Court of Appeals found entrapment as a matter of law.<sup>126</sup> The court held that the defendant's predisposition did not defeat the availability of the entrapment defense.<sup>127</sup> The court instead concluded that when an informer supplies the contraband, entrapment as a matter of law is established.<sup>128</sup> Unlike *Chisum*,<sup>129</sup> the court did not invoke the Due Process Clause. Rather, it stated that "[t]he defense of entrapment has undergone much maturation since first announced by the Supreme Court," and that the heroin sale resulted from the "creative activity of the government."<sup>130</sup> Thus, without explaining why, the Fifth Circuit held that entrapment is established as a matter of law when the government furnishes contraband.<sup>131</sup> No attempt was made to square this holding with the *Sorrells* framework. The true reason for the holding in *Bueno* seems to be that the court found the conduct of the government distasteful. This focus on the government's conduct smacks of the analysis recommended by Justice Roberts in *Sorrells*.<sup>132</sup>

119. See *supra* notes 74-81 and accompanying text.

120. 447 F.2d 903 (5th Cir. 1971).

121. *Id.* at 904 n.1.

122. *Id.* The defendant was not aware that the informer was employed by the government. *Id.* at 904-05.

123. *Id.* at 904.

124. *Id.* at 905.

125. *Id.*

126. *Id.* at 906.

127. *Id.*

128. *Id.* at 905.

129. *Chisum*, 312 F. Supp. at 1312.

130. *Bueno*, 447 F.2d at 906.

131. *Id.*

132. See *supra* notes 74-81 and accompanying text.

An unusual decision that also had the effect of departing from the *Sorrells* framework was *Greene v. United States*.<sup>133</sup> In *Greene*, an undercover agent was introduced to the defendants by a government informer.<sup>134</sup> The defendants told the agent that they had illegally sold liquor in the past and asked the agent if he was interested in purchasing one hundred to two hundred gallons of liquor per week.<sup>135</sup> After several deliveries of bootleg liquor,<sup>136</sup> the defendants were convicted for possession of unregistered distilling equipment, illegal liquor sales, and conspiracy.<sup>137</sup> The defendants argued that they had been entrapped as a matter of law.<sup>138</sup>

The Ninth Circuit Court of Appeals held that the entrapment defense was not available because the facts indicated that predisposition was present.<sup>139</sup> However, it then reached a curious conclusion. The court held that (1) because the investigation lasted nearly three years, (2) the government agent was significantly involved in the bootlegging, (3) the government agent induced the defendants to sell the liquor, and (4) the agent was the only customer of the defendants, the government was not entitled to prosecute the defendants.<sup>140</sup> It cited *Sherman* for its contention that, although the case did not involve entrapment, "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 repugnant to American criminal justice are operative."<sup>141</sup> Thus, although entrapment was not present, the government's conduct was such that the defendant should be acquitted based on the same rationale as the entrapment defense. The court failed to note that the entrapment defense is *the* response to government overreaching when such overreaching does not violate due process. If entrapment is not present, the government did not overreach. Perhaps the Court was trying to use an analysis like that used by Justice Roberts<sup>142</sup> but did not comprehend that under Roberts' approach, entrapment was present when the government engaged in overreaching,<sup>143</sup> Roberts' approach in no way excused a defendant if entrapment was not present.

133. 454 F.2d 783 (9th Cir. 1971).

134. *Id.* at 784.

135. *Id.* The liquor sales were illegal because no tax had been paid on the alcohol. *Id.*

136. *Id.* at 784-86.

137. *Id.* at 783-84.

138. *Id.* at 786.

139. *Id.*

140. *Id.* at 787.

141. *Id.*

142. *See supra* notes 74-81 and accompanying text.

143. *See supra* notes 74-81 and accompanying text.

The Supreme Court had occasion to reexamine the basis for the entrapment defense in *United States v. Russell*.<sup>144</sup> Justice Rehnquist, writing for the majority, affirmed the *Sorrells* framework.<sup>145</sup> In *Russell*, a government agent approached the defendant and his two codefendants and offered to supply them with an essential ingredient for the manufacture of methamphetamine, in return for one-half of the drug produced.<sup>146</sup> During the conversation, one of the codefendants stated that he had been making methamphetamine for the last seven months, and gave the agent a bag of methamphetamine representing "the last batch that we made."<sup>147</sup> Subsequently, the defendant was convicted of unlawfully manufacturing and selling methamphetamine.<sup>148</sup>

The Ninth Circuit Court of Appeals reversed the defendant's conviction on the ground that the agent supplied an essential ingredient to the manufacturing process.<sup>149</sup> The court stated, "[A] defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise."<sup>150</sup>

The Supreme Court reversed and rejected the notion that the defense of entrapment is established by an intolerable degree of governmental participation when the defendant is predisposed to commit the crime.<sup>151</sup> The Court held that the defense of entrapment is relatively limited and only comes into play when the government implants the criminal design in the mind of the defendant.<sup>152</sup> The Court rejected the concepts set forth in *Chisum*, *Bueno*, and *Greene*.<sup>153</sup> The Court stated,

The defense of entrapment enunciated in [*Sorrells* and *Sherman*] was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations.<sup>154</sup>

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144. 411 U.S. 423 (1973).

145. *Id.* at 433.

146. *Id.* at 425.

147. *Id.*

148. *Id.* at 424.

149. *United States v. Russell*, 459 F.2d 671, 673-74 (9th Cir. 1972).

150. *Id.* at 673.

151. *Russell*, 411 U.S. at 436.

152. *Id.* at 435-36.

153. *Id.* at 435.

154. *Id.*

Thus, when lower courts excused defendants from the consequences of their illegal actions because of "overzealous law enforcement," they were doing so contrary to the dictates of *Sorrells* and *Sherman*.<sup>155</sup> The Court also offered two criticisms of the dissenters' claim<sup>156</sup> that Justice Roberts' approach should be adopted in the federal courts. First, the defendant could claim that he was induced to commit the crime by the government, but the government could not show that the defendant committed the crime because of his own readiness and not because of the inducement.<sup>157</sup> Second, the Court did not think it desirable to grant complete immunity to one who planned to commit a crime and then committed it "simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed."<sup>158</sup>

The *Russell* Court recognized the need to focus on the conduct of the government agents in particularly outrageous instances.<sup>159</sup> In such instances, due process could bar the government from obtaining a conviction.<sup>160</sup> The Court noted, however, that the entrapment defense itself has no constitutional basis.<sup>161</sup> Thus, *Chisum* was incorrect in predicating the entrapment defense on the Due Process Clause.<sup>162</sup>

Justice Stewart, joined by Justices Brennan and Marshall, dissented.<sup>163</sup> Stewart recommended focusing on whether the government instigated the offense, not on the defendant's predisposition.<sup>164</sup> Stewart also stated that the approach of Justice Roberts in *Sorrells* was more consistent with the underlying rationale of the defense,<sup>165</sup> which Roberts believed was to prevent the consummation of a wrong by the government.<sup>166</sup>

The approach in *Russell* appears consistent with that used in *Sorrells*. However, it did not clarify the scope of the entrapment defense any more than *Sorrells* did.<sup>167</sup> Although it did state that the conduct of the government was

155. *Id.*

156. *Id.* at 441 (Stewart, J., dissenting).

157. *Id.* at 434. The Court quoted *Sherman* in support of this proposition. *Id.*; see *supra* note 93 and accompanying text.

158. *Russell*, 411 U.S. at 434.

159. *Id.* at 431-32. The Court cited *Rochin v. California*, 342 U.S. 165 (1952), in which an emetic solution was forced into the defendant's stomach to induce vomiting in order to recover capsules suspected of containing narcotics, as an example of a "particularly outrageous instance." *Russell*, 411 U.S. at 431-32.

160. *Russell*, 411 U.S. at 431-32.

161. *Id.* at 433.

162. See *id.*; cf. *Chisum*, 312 F. Supp. at 1312.

163. *Russell*, 411 U.S. at 439 (Stewart, J., dissenting).

164. *Id.* at 441.

165. *Id.*

166. See *supra* note 78 and accompanying text.

167. See *supra* text accompanying note 81.

irrelevant to a finding of predisposition in most instances,<sup>168</sup> it did not set forth any standard to guide lower courts in determining whether predisposition is present. *Russell* also did not indicate the types of crimes to which the entrapment defense was applicable. By leaving these issues unresolved, *Russell* left the door open for courts to focus on the conduct of the government by fine-tuning the concept of predisposition.

#### IV. INSTANT DECISION

##### A. *The Majority Opinion*

The majority<sup>169</sup> addressed Jacobson's contention that he had been entrapped by the government,<sup>170</sup> and noted that when the government induces the commission of an offense, the entrapment defense is typically of little use because the ready commission of the offense provides a strong inference of predisposition.<sup>171</sup> However, Jacobson's situation was different because he had been targeted by government agents for twenty-six months prior to ordering the magazines.<sup>172</sup> Although he was predisposed to break the law at the time he ordered the magazines, it does not necessarily follow that he was so predisposed at the time of his initial contact with the government.<sup>173</sup>

The Court next examined the prosecution's evidence of predisposition.<sup>174</sup> Jacobson's purchase of the *Bare Boys* magazines was found merely to indicate predisposition to view sexually oriented material.<sup>175</sup> His responses to government communications during the course of the investigation were viewed as evincing a willingness to view photographs of preteen sex and to promote a given political agenda.<sup>176</sup> Moreover, the government excited his

168. See *supra* notes 152-54 and accompanying text.

169. Justice White wrote the majority opinion in which Justices Blackmun, Stevens, Souter, and Thomas joined.

170. *Jacobson*, 112 S. Ct. at 1541.

171. *Id.* The Court also noted that if the government had merely afforded Jacobson the opportunity to purchase child pornography and he had promptly responded, a jury question on entrapment would have existed. *Id.*

172. *Id.*

173. *Id.* At oral argument, the government conceded that the accused must be shown to be predisposed prior to contact with law enforcement officers. *Id.* at 1541 n.2.

174. *Id.* at 1541. The prosecution's sole evidence of predisposition prior to the investigation was the purchase of the *Bare Boys* magazines. *Id.*

175. *Id.*

176. *Id.* at 1542.



interest in illegal sexual materials and pressured him to take part in a fight against the ban on these materials.<sup>177</sup>

The Court then held that evidence of predisposition to do what was once lawful does not, by itself, show predisposition to do the same thing after it has been made illegal.<sup>178</sup> The Court further held that Jacobson's communications with the government were not sufficient to show predisposition prior to his initial contact with the government because by the time of these communications, the government had succeeded in arousing his interest in illegal child pornography.<sup>179</sup>

### B. Dissent

The dissent<sup>180</sup> gave great weight to the fact that Jacobson ordered child pornography each time he was offered the opportunity to do so.<sup>181</sup> The government's investigatory strategy was viewed as a permissible means of ascertaining whether an individual was inclined to purchase child pornography.<sup>182</sup> The dissent then stated that predisposition should be assessed at the time of inducement, not at the time of initial contact.<sup>183</sup> The dissent thought that requiring a showing of predisposition at the time of initial contact would be misread by the lower courts as imposing a reasonable suspicion requirement on the government before it begins undercover operations.<sup>184</sup>

The dissent next took issue with the majority's holding that Jacobson's purchase of the *Bare Boys* magazines was not sufficient to establish predisposition to purchase illegal child pornography.<sup>185</sup> This requirement was seen as effectively engrafting a specific intent element onto the statute because not only must the prosecution prove that a defendant was predisposed to order child pornography, but also that the defendant was predisposed to knowingly break the law.<sup>186</sup>

177. *Id.*

178. *Id.*

179. *Id.* at 1543.

180. Justice O'Connor authored the dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined, and in which Justice Scalia joined except as to Part II. *Id.*

181. *Id.* The dissent quoted *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir.), *cert. denied*, 436 U.S. 926 (1977) for the proposition: "the most important factor . . . is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated government inducement." *Id.*

182. *Jacobson*, 112 S. Ct. at 1544. The dissent noted that a "cold call" offering an opportunity to purchase child pornography would be viewed with suspicion. *Id.*

183. *Id.* The dissent cited *Sherman v. United States*, 356 U.S. 369, 372-76 (1958) in support of this proposition.

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

185. *Id.* at 1546.

186. *Id.*

The dissent believed that the true basis for the majority's holding was that it disapproved of the investigatory methods employed by the government.<sup>187</sup> However, since the jury was properly instructed and sufficient evidence of predisposition existed, its verdict should have been upheld.<sup>188</sup>

## V. COMMENT

The *Jacobson* decision marks a turning point in the Supreme Court's analysis of the entrapment defense. By holding that prior legal conduct could not as a matter of law be used to show predisposition,<sup>189</sup> the Court seemed to be returning to the approach used in *Sherman*<sup>190</sup> and focusing on the conduct of the government rather than on the defendant's predisposition. The Court did not clarify the scope of the entrapment defense or indicate the types of crimes to which it was applicable. The Court restricted the type of evidence that can be used to show predisposition, but it did not set forth a standard to guide the lower courts in determining if predisposition is present.

The holding in *Jacobson* did not depart from precedent. However, this statement is practically devoid of meaning when one considers the elasticity of the entrapment defense as applied in *Sorrells*, *Sherman*, and *Russell*.<sup>191</sup> Basically, these cases held that it is permissible for the government to induce a defendant to commit a crime so long as the defendant was predisposed to commit it.<sup>192</sup> However, by not announcing any clear standards to guide lower courts in determining if predisposition is present, the Supreme Court leaves courts free to fashion their own interpretations of what does or does not establish a jury question on the issue: In *Sorrells*, the issue of predisposition was submitted to the jury due to testimony regarding the defendant's reputation.<sup>193</sup> In *Sherman*, two prior convictions of the offense for which the defendant was on trial were held as a matter of law not to constitute predisposition.<sup>194</sup> In *Russell*, oral declarations of the defendant's co-defendants created a jury question on predisposition.<sup>195</sup> These cases do not set forth any principles for courts to use in determining if predisposition is

187. *Id.* at 1547.

188. *Id.*

189. *Id.* at 1542.

190. *See supra* notes 101-102 and accompanying text.

191. *See supra* notes 68-73, 89-95, 152-162 and accompanying text.

192. *See supra* notes 68-73, 89-95, 152-62 and accompanying text.

193. Testimony was given at trial that Sorrells had the reputation of being a rum runner. *Sorrells*, 287 U.S. at 452 (1932).

194. *See Sherman v. United States*, 356 U.S. 369, 375 (1958).

195. The co-defendants stated that they and the defendant were willing to manufacture methamphetamines. *Russell*, 411 U.S. at 425.

present. Moreover, *Sherman* is inconsistent with *Sorrells* and *Russell*, yet *Sherman* purports to base its holding on *Sorrells*,<sup>196</sup> and *Russell* quotes *Sherman* approvingly.<sup>197</sup> It is unclear why the two prior convictions in *Sherman* were held as a matter of law not to constitute predisposition,<sup>198</sup> while reputation testimony was held to create a jury question in *Sorrells*.<sup>199</sup> The only explanation is that the courts were simply using the concept of predisposition to reflect their degree of approval of the conduct employed by the government.

The *Jacobson* court used the concept of predisposition in the same manner as its predecessors. The Court held that Jacobson's prior purchase of child pornography, coupled with his survey responses indicating a willingness to view preteen sex, did not create a jury question on the issue of predisposition to view child pornography.<sup>200</sup> This holding was purportedly based on two factors: first, Jacobson's prior purchase of pornography was legal;<sup>201</sup> second, his responses to the government mailings were merely indicative of his personal inclinations, not his willingness to break the law.<sup>202</sup>

Although a jury could have agreed with the Court and found Jacobson not to be predisposed, it would have been equally justified in finding predisposition to be present. If testimony as to reputation alone is sufficient to create a jury question on predisposition<sup>203</sup> then previously committing the same act for which the defendant is on trial,<sup>204</sup> coupled with communications evincing a willingness to do so,<sup>205</sup> is also sufficient. There is no rational basis for the Court's holding that evidence of predisposition to do what was once lawful does not, by itself, show predisposition to do the same thing after it has been made illegal.<sup>206</sup> Logically, *any* prior conduct of the defendant which shows a willingness to engage in the act which constitutes the crime is relevant to show predisposition, because the issue is whether the defendant is predisposed to commit an act which constitutes a crime, not whether the defendant is predisposed to break the law.<sup>207</sup> Thus, Jacobson's predisposition to order child pornography was relevant regardless of whether he knew it was illegal. This conclusion is buttressed by the fact that the defendant's

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196. See *Sherman*, 356 U.S. at 372-73.

197. See *Russell*, 411 U.S. at 434.

198. See *Sherman*, 356 U.S. at 375.

199. See *Sorrells*, 287 U.S. at 452.

200. *Jacobson*, 112 U.S. at 1542.

201. *Id.*

202. *Id.*

203. See *Sorrells*, 287 U.S. at 452.

204. See *Jacobson*, 112 U.S. at 1542.

205. See *id.* at 1538-39.

206. See *id.*, at 1542.

207. *Sorrells*, 287 U.S. at 451-52.

ignorance as to the illegality of his or her act is normally of no consequence in a criminal prosecution. Why could Jacobson's predisposition only be shown by prior *illegal* conduct when he could have been prosecuted for doing an illegal act without any knowledge of the act's illegality?

Although the holding of the majority has no logical underpinnings, the dissent is incorrect in stating that the majority added a specific intent element to the crime of receiving child pornography through the mails.<sup>208</sup> The majority's holding is more akin to promulgating a rule of evidence than imposing a specific intent requirement. Had receiving child pornography through the mails been illegal at the time Jacobson ordered the *Bare Boys* magazines, his prior purchase would create a jury question on predisposition, according to the rule announced by the majority.<sup>209</sup> However, if that had been the case the majority likely would have used some other device to adjust the concept of predisposition, rather than focusing on whether Jacobson's conduct was illegal, because their holding actually rested on their disapproval of the investigation of Jacobson. This case should not be read as imposing a specific intent requirement, but instead as showing the Court's willingness to scrutinize the conduct of the government in undercover investigations.

The majority conceded that Jacobson was predisposed to order child pornography at the time he ordered it.<sup>210</sup> However, the Court then held that his predisposition was the product of the government's investigation.<sup>211</sup> The reasoning used by the majority is strange. The Court stated that normally, a defendant's ready commission of an offense demonstrates predisposition.<sup>212</sup> However, because the government sent various surveys to the defendant over a twenty-six month period, his predisposition could not be established independently of the government communications.<sup>213</sup> A more realistic analysis is that Jacobson's responses to the surveys<sup>214</sup> created a jury question on whether he was predisposed to purchase child pornography, because a rational jury could find that one interested in preteen sex would be inclined to order child pornography. At no time did Jacobson refuse to order child pornography or do anything other than show an interest in it.<sup>215</sup>

The dissent was quick to dispute the majority's findings with regard to predisposition,<sup>216</sup> but the dissenters also applied an incorrect analysis. Their contention that predisposition should be assessed at the time the government

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208. *See Jacobson*, 112 U.S. at 1546-47 (O'Connor, J., dissenting).

209. *Id.* at 1541-42.

210. *Id.* at 1543.

211. *Id.* at 1542.

212. *Id.* at 1541.

213. *Id.*

214. *See id.* at 1538.

215. *Id.* at 1543.

216. *See id.* at 1544 (O'Connor, J., dissenting).

agent first suggested the crime, not at the time of initial contact,<sup>217</sup> is based on an improper reading of *Sherman*. The *Sherman* Court held that predisposition must be shown at the time the defendant is approached by the government agent.<sup>218</sup> However, the distinction between time of approach and time of inducement is irrelevant in this case. This distinction is germane only when there is some evidence that the defendant was initially reluctant to commit the crime<sup>219</sup> and this reluctance is overcome by government inducement. If the defendant manifests predisposition after government contact, this predisposition was presumed present when the defendant was first approached by the government: predisposition does not change overnight. Absent any indication otherwise, such as initial reluctance or refusal to commit the proscribed act, this presumption should stand.

Jacobson's survey responses should have been viewed as showing predisposition to purchase child pornography *before* the government began its investigation. Because he did not manifest any hesitancy to purchase or view child pornography but instead indicated an interest in doing so, the time of approach/time of inducement distinction made by both the majority and the dissent is meaningless.

The true basis for the holding in *Jacobson* is that the Court simply did not approve of the government's investigatory tactics. The Court did a Roberts-type analysis under the guise of predisposition.<sup>220</sup> The Court discussed at length the extensive investigation of Jacobson,<sup>221</sup> and this investigation undoubtedly strongly influenced the Court's fine-tuning of the concept of predisposition. Although the Court used a Roberts-type approach in reaching its decision, it probably did not want to explicitly adopt that approach for use in the federal courts because of the disadvantages to the prosecution in using it as mentioned by *Sherman*<sup>222</sup> and *Russell*.<sup>223</sup> The reasoning used by the Court is illogical, but *Sorrells*, *Sherman*, and *Russell* leave plenty of room for courts to decide cases illogically while not departing from the precedential guidelines.<sup>224</sup> No standards exist to guide courts confronted with the defense other than a vague framework which leaves courts free to reach whatever result is to their liking.

The *Jacobson* decision is a prime example of the incoherence associated with the federal law of entrapment. The decision did nothing to clarify the

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217. *Id.* at 1543.

218. *Sherman*, 356 U.S. at 375.

219. *See, e.g., Woo Wai v. United States*, 223 F. 412, 413-14 (9th Cir. 1915).

220. *See Sorrells*, 287 U.S. at 453-57 for Justice Roberts' analysis.

221. *Jacobson*, 112 S. Ct. at 1538-40.

222. *See Sherman*, 356 U.S. at 375-76.

223. *See Russell*, 411 U.S. at 434.

224. *See Russell*, 411 U.S. at 435-36; *Sherman*, 356 U.S. at 375-76; *Sorrells*, 287 U.S. at 451-57.

scope of the entrapment defense, nor did it set forth any guidelines for lower courts. Further, it did not indicate the types of crimes to which the defense is inapplicable. The Court merely concluded that Congress did not intend for the statute prohibiting the receipt of child pornography through the mails to apply to Jacobson.<sup>225</sup> The Court in effect restated the principles of *Sorrells* without offering any guidance as to how these principles should be applied. As stated in connection with *Sorrells*,<sup>226</sup> the defense is based on a principle of statutory construction: Congress did not intend for the statute in question to apply to individuals induced to commit the crime by the government if the individuals were not otherwise predisposed.<sup>227</sup> This rationale for the defense simply does not hold up when subjected to careful analysis.

*Ignorantia legis neminem excusat* (ignorance of the law excuses no one) is a doctrine deeply imbedded in Anglo-American criminal jurisprudence.<sup>228</sup> In *Rosen v. United States*,<sup>229</sup> the defendant was indicted for mailing obscene matter, and defended on the ground that he did not know the matter he mailed was obscene. To this defense the Court replied, "Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States."<sup>230</sup> The possible injustice to the defendant was not a factor in the Court's decision.

However, as one commentator has noted,<sup>231</sup> the injustice involved in applying the statute in a typical entrapment case is certainly less than in cases in which the defendant did not and could not know of the existence of the statute,<sup>232</sup> yet entrapment is allowed on the ground of Congressional intent. It is difficult to see how Congress intended entrapment as a defense when a person knowingly violates the law while under no compulsion, necessity, or infirmity of reason.<sup>233</sup> Congress' intent in enacting criminal statutes is to prevent the forbidden conduct by punishing those who violate their provisions.<sup>234</sup> It cannot seriously be contended that Congress intended to punish those unaware of the illegality of their conduct, yet it did not intend to punish those who intentionally violate the law but were subject to government inducement. The preoccupation with predisposition in *Sorrells*,<sup>235</sup>

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

226. *See Sorrells*, 287 U.S. at 448.

227. *See id.*

228. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 13.01 (1987).

229. 161 U.S. 29 (1896).

230. *Id.* at 41.

231. Mikell, *supra* note 56, at 257.

232. *See id.*

233. *See id.*

234. *See id.*

235. *See Sorrells*, 287 U.S. at 439.

*Sherman*,<sup>236</sup> *Russell*,<sup>237</sup> and *Jacobson*<sup>238</sup> has no merit because it has no foundation upon which to rest.

The inadequacy of the statutory construction principle, highlighted by the Supreme Court's tergiversations on the issue of what constitutes predisposition,<sup>239</sup> compels the conclusion that statutory construction should be discarded as a basis for the entrapment defense. An alternative basis for the defense was stated by Justice Roberts in his *Sorrells* concurrence.<sup>240</sup> Roberts believed that the true basis of the defense was one of public policy, analogous to courts of equity not allowing the use of their process to consummate a wrong.<sup>241</sup> However, the basis for the defense stated by Roberts does not withstand close scrutiny.

Roberts' analogy to the equity rule is effectively refuted by the *Sorrells* majority.<sup>242</sup> The majority pointed out:

When courts of law refuse to sustain alleged causes of action which grow out of illegal schemes, the applicable law itself denies the right to recover. Where courts of equity refuse equitable relief because complainants come with unclean hands they are administering principles of equitable jurisprudence governing equitable rights. But in a criminal prosecution, the statute defining the offense is necessarily the law of the case.<sup>243</sup>

As one commentator has noted, a better analogy than the equity rule is the use of the Fourth Amendment exclusionary rule because Fourth Amendment cases also involve wrongful government conduct.<sup>244</sup> In Fourth Amendment cases, however, the illegally seized evidence is merely excluded;<sup>245</sup> the defendant is not entitled to an acquittal because of the illegal acts of the government.<sup>246</sup> That being the case, acquittal does not seem justified merely because the defendant was subjected to government inducement.

Roberts' claim that the doctrine of entrapment rests on a rule of public policy<sup>247</sup> is anomalous. In his concurrence, Roberts stated, "The protection of its own functions and the preservation of the purity of its own temple

236. See *Sherman*, 356 U.S. at 375-76.

237. See *Russell*, 411 U.S. at 436.

238. See *Jacobson*, 112 S. Ct. at 1544-45.

239. See *supra* notes 96-102; 220-23 and accompanying text.

240. See *Sorrells*, 287 U.S. at 453-57 (Roberts, J., concurring).

241. See *id.* at 455.

242. *Id.* at 450.

243. *Id.*

244. Mikell, *supra* note 56, at 262.

245. See, e.g., *Weeks v. United States*, 232 U.S. 383 (1914).

246. See Mikell, *supra* note 56, at 262.

247. See *Sorrells*, 287 U.S. at 455.

belongs only to the court. It is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law."<sup>248</sup>

It has already been noted that the entrapment defense has no constitutional basis.<sup>249</sup> Thus, applying a statute to a defendant induced to commit the offense by the government is not unconstitutional. Hence, what grounds does a court have for refusing to apply a constitutional statute intended by the legislature<sup>250</sup> to apply to the facts of a particular case?<sup>251</sup> To say that courts can set aside a constitutional statute because its enforcement would violate public policy is to say either that Congress did not consider the rules of public policy in enacting the statute, or that Congress intended to violate these rules; yet the reason Congress promulgated the statute was that it determined the *prohibited conduct* was against public policy.<sup>252</sup>

In attempting to justify the doctrine of entrapment, the *Sorrells* majority and concurring opinions cancel each other out. What is left is a defense that has been applied in a vagarious fashion because it simply has no basis. The current approach to the defense, as exemplified by *Jacobson*, should be eliminated. Defendants induced to commit a crime by the government deserve less sympathy than some defendants who are convicted,<sup>253</sup> yet they can be excused on the ground of entrapment.<sup>254</sup>

If public policy compels the elimination of government inducement, Congress should so specify when it enacts a particular statute. For example, a criminal statute could be worded: "It shall be unlawful to knowingly . . . *unless such acts were induced by government officials.*" This type of wording would provide an affirmative defense to those who committed the offense at the behest of the government.

Conversely, should Congress decide that induced defendants should not be entitled to an acquittal, but government inducement should be prohibited, it could pass statutes forbidding government agents from inducing people to commit crimes.<sup>255</sup> If government agents were subject to criminal penalties for inducing the commission of crimes, the practice of entrapment would likely cease.<sup>256</sup>

Either of these approaches would avoid the uncertainties present in the current state of the law. Courts would not need to determine on a case-by-

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248. *Id.*

249. *See Russell*, 411 U.S. at 433.

250. *See Mikell*, *supra* note 56, at 257.

251. *Id.*

252. *See id.*

253. *See id.*

254. *Id.* at 264.

255. *See id.*

256. *See id.*



case basis whether or not Congress intended for the statute at issue to apply to the particular defendant. Further, a defendant's conviction would not depend on whether the current Supreme Court has adopted a relatively rigid or low threshold for establishing predisposition, which would introduce a degree of predictability in the law. The advantages of this predictability are apparent. For example, Keith Jacobson was found not to be predisposed to purchase child pornography even though he had done so previously,<sup>257</sup> yet a defendant such as the one in *Sorrells* faces conviction due to mere testimony regarding his or her reputation.<sup>258</sup> This result is not fair. A criminal conviction should not depend on a court's construction of the ill-defined concept of predisposition when Congress has at its disposal the means to rectify this situation. The decision of what to do with induced defendants should be made by Congress, not by the courts.

J. PATRICK SULLIVAN

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257. *Jacobson*, 112 S. Ct. at 1541-42.

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