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RECENT DEVELOPMENT

Criminal Law—ENTRAPMENT—PREDISPOSITION OF DEFENDANT CRUCIAL FACTOR IN ENTRAPMENT DEFENSE

United States v. Russell, 411 U.S. 423 (1973)

Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer.¹

It is the Government's duty to prevent crime, not to promote it.²

With the increasing sophistication of organized crime's illegal business enterprises and the ever-rising tide of drug related offenses, infiltration and the use of undercover agents by law enforcement agencies may appear to be the only practical means of detecting such criminal activities. However, law enforcement procedures which are inimical to a sense of justice and which threaten to mislead and entangle innocent persons must be controlled in order to safeguard individual liberty and maintain respect for law. One method of controlling police conduct used by the federal courts in criminal prosecutions is the affirmative defense of entrapment.³ In implementing this defense, the courts attempt to draw the line between permissible and impermissible police conduct by distinguishing between "the trap for the unwary innocent and the trap for the unwary criminal."⁴ However, considerable controversy has been generated in the federal courts⁵ as to exactly

¹ *Sherman v. United States*, 356 U.S. 369, 372 (1958).

² *United States v. Russell*, 411 U.S. 423, 449 (1973) (Stewart, J., dissenting).

³ Although the defense is recognized in most states, a diversity of approaches is followed. One commentator has surveyed the states to establish the pattern. See Comment, *The Doctrine of Entrapment and Its Application in Texas*, 9 Sw. L.J. 456, 465 n.44 (1955). This Note will seek only to clarify the federal approach.

⁴ *Sherman v. United States*, 356 U.S. 369, 372 (1958).

⁵ Justice Frankfurter, critical of the approach taken by the majority of the Supreme Court in *Sherman*, noted:

[T]he basis of this defense, affording guidance for its application in particular circumstances, is as much in doubt today as it was when the defense was first recognized over forty years ago, although entrapment has been the decisive issue in many prosecutions. The lower courts have continued gropingly to express the feeling of outrage at conduct of law enforcers that brought recognition of the defense in the first instance, but without the formulated basis in reason that it is the first duty of courts to construct for justifying and guiding emotion and instinct.

Id. at 378.

The commentators appear sharply divided on the status and proper direction of the law on entrapment. See, e.g., DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History*,

where and how this line should be drawn. *United States v. Russell*⁶ is the third and most recent attempt by the Supreme Court to clarify the defense of entrapment.⁷

I

HISTORICAL DEVELOPMENT

Entrapment was first explicitly recognized in the federal courts in *Woo Wai v. United States*.⁸ Confusion in the lower courts, however, as to the nature of the defense⁹ led the Supreme Court to render its first opinion on entrapment in *Sorrells v. United States*¹⁰—a case which arose out of violations of the National Prohibition Act.¹¹ A government agent, posing as a tourist, was introduced to Sorrells by three acquaintances. By means of repeated and persistent requests for liquor to “take back [home] . . . to a friend”¹² and by reference to mutual experiences as members of the same division in World War I,¹³ the agent induced Sorrells to procure one-half gallon of whiskey for him.¹⁴

Chief Justice Hughes, writing for the Court,¹⁵ conceded that government agents may afford opportunities or facilities for the commission of an offense as part of the police weapons of stealth and stratagem necessary for the detection of certain types of crime.¹⁶ In this case, however, police conduct went beyond permissible limits. Here, “the criminal design originate[d] with the officials of the Government . . . [who implanted] in the mind of an *innocent*

Theory, and Application, 1 U. SAN FRAN. L. REV. 243 (1967); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Note, *Entrapment: An Analysis of Disagreement*, 45 BOSTON U.L. REV. 542 (1965); Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63 (1967).

⁶ 411 U.S. 423 (1973).

⁷ The Supreme Court considered the defense earlier in its decisions in *Sherman v. United States*, 356 U.S. 369 (1958), and *Sorrells v. United States*, 287 U.S. 435 (1932). See notes 10-52 and accompanying text *infra*.

⁸ 223 F. 412 (9th Cir. 1915).

⁹ See Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 245-50 (1942).

¹⁰ 287 U.S. 435 (1932).

¹¹ *Id.* at 438.

¹² *Id.* at 440.

¹³ *Id.* at 439.

¹⁴ *Id.* at 439-41.

¹⁵ The Supreme Court split on the rationale underlying the entrapment defense. Four justices agreed with the Chief Justice's majority opinion, while three justices participated in a strong concurring opinion. See notes 31-44 and accompanying text *infra*.

¹⁶ 287 U.S. at 441. This concession has been the only noncontroversial area of the courts' decisions on entrapment. See notes 25-52 and accompanying text *infra*.

person the disposition to commit the alleged offense and induce its commission in order that they [might] prosecute."¹⁷ Such activities, said the Court, constituted entrapment.

The Court's test in *Sorrells* was subjective, with emphasis on the predisposition of the accused to commit the crime, although of course, the conduct of government officials was relevant to a consideration of circumstances surrounding commission of the crime.¹⁸ Of special significance in *Sorrells* was the fact that the agent had to repeat his request for liquor several times in the face of the defendant's obvious reluctance to engage in the proscribed activities. Furthermore, the government produced no evidence showing that the defendant had been engaged in a continuing course of liquor violations or had a past record of such conduct.¹⁹

The majority then provided the theoretical foundation for its decision. Its finding of entrapment presented the Court with a dilemma: how could it release a defendant who had clearly violated a criminal statute? To do so would be to grant clemency, a power reserved to the President.²⁰ The Court avoided the difficulty by statutory construction. It concluded that Congress could not have intended to include an entrapped defendant's conduct as criminal within the purview of the statute.²¹

In *Sherman v. United States*,²² the Supreme Court considered the entrapment defense a second time. As in many of the more recent cases in which entrapment has been claimed, narcotics sales were involved.²³ A government informer established a friendship with Sherman through meetings in a doctor's office where both went for treatment of narcotics addiction. After some discussion,

¹⁷ 287 U.S. at 442 (emphasis added).

¹⁸ Presumably, the majority concluded that so long as a defendant was predisposed to commit a crime, the likelihood of its commission was great enough even without police interference.

In *Sorrells*, the concurring justices did not use this subjective rationale to justify a finding of entrapment. See note 33 *infra*.

¹⁹ 287 U.S. at 441.

²⁰ *Id.* at 449.

²¹ Chief Justice Hughes wrote:

We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by Government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute.

Id. at 448.

²² 356 U.S. 369 (1958).

²³ See, e.g., *United States v. Privett*, 443 F.2d 528 (9th Cir. 1971); *Holloway v. United States*, 432 F.2d 775 (10th Cir. 1970); *Perez v. United States*, 421 F.2d 462 (9th Cir. 1970).

the informer asked the defendant if he knew of a good source of narcotics. Although Sherman attempted to avoid the issue, the informer persisted, allegedly because of the effects of the inadequate medical treatment he was receiving. Sherman finally relented and obtained narcotics which he shared with the informer in return for the cost of the drugs and his necessary incidental expenses.²⁴

In the majority opinion,²⁵ Chief Justice Warren reaffirmed and embellished the principles outlined in *Sorrells*.²⁶ Predisposition on the part of the accused remained the principal ingredient of the test. Although the majority opinion first considered the government informer's methods of inducement, appeals to friendship and sympathy for the suffering of a fellow addict,²⁷ it was only after a careful evaluation of the evidence of the *defendant's predisposition*, including his obvious reluctance to become involved and his attempts to overcome his narcotics habit, that the Court reached its conclusion that Sherman was entrapped.²⁸ Again the Court adhered to the rationale that Congress could not have intended the criminal law to apply to entrapment situations.²⁹ The majority in *Sherman* also made it clear that entrapment, as part of the factual decision of guilt or innocence, is a jury question unless the evidence is undisputed and so clear as to make out a case as a matter of law.³⁰

²⁴ 356 U.S. at 371.

²⁵ As in *Sorrells*, there was a strong concurring opinion in *Sherman*. See note 31 *infra*.

²⁶ 356 U.S. at 372-73. The majority opinion quoted the basic *Sorrells* test with approval. See notes 17-18 and accompanying text *supra*. Chief Justice Warren then added gloss often quoted in the lower courts:

Entrapment occurs only when the criminal conduct was "the product of the *creative acúvity*" of law-enforcement officials. . . . To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. . . . On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence.

Id. at 372-73 (emphasis in original).

²⁷ *Id.* at 373.

²⁸ The majority opinion called two prior narcotics convictions insufficient without more to show predisposition. Chief Justice Warren noted the defendant's hesitancy to comply with the informer's request as well as his apparent attempts to overcome the narcotics habit. Furthermore, no narcotics were found in a search of Sherman's apartment at the time of his arrest nor had he made a profit on the sale of the drugs. *Id.* at 375.

²⁹ *Id.* at 372.

³⁰ The *Sherman* court found entrapment as a matter of law by emphasizing that the evidence of no predisposition was so strong that it was not "choosing between conflicting witnesses, nor judging credibility." *Id.* at 373.

II

DIFFICULTIES WITH THE TRADITIONAL APPROACH

The concurring justices in both *Sorrells* and *Sherman*³¹ were justifiably troubled by the theoretical and pragmatic problems inherent in an approach to entrapment which attempted to ascertain the defendant's predisposition to commit the crime. They proposed a test which examined only the police conduct in a given situation and determined whether such conduct would have induced the *average* person to commit the crime.³² By ignoring the predisposition of a particular defendant, the minority laid the groundwork for an objective test³³ which could provide fairly specific guidelines for law-enforcement officials³⁴ while hopefully

³¹ The concurring opinions in *Sorrells* and *Sherman*, represent, respectively, the views of Justices Roberts, Brandeis, and Stone and Justices Frankfurter, Douglas, Harlan, and Brennan. The position of these justices has been popularly called the "minority view," the "objective view," or the "police-conduct approach."

³² 356 U.S. at 382; 287 U.S. at 458-59.

³³ The approach of the concurring justices in *Sorrells* has often been called the "objective approach" because it focuses solely on police conduct. The *Sorrells* majority approach on the other hand has been commonly labelled the "subjective approach" because it relies on a case-by-case determination of the predisposition of the accused. The majority's test is subjective because the same course of police conduct could yield findings of both guilt and innocence when applied to different defendants with differing degrees of predisposition.

A restatement of the subjective (majority) and objective (minority) tests, respectively, would be: (1) Was the defendant in the present case and under the attendant circumstances initially unwilling to commit the crime in question? (2) Would the average person have been induced to commit the crime by the tactics used? Comment, *Present and Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 U. COLO. L. REV. 261, 264 (1969).

³⁴ Justice Frankfurter first called his view an objective one which could "give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised." 356 U.S. at 384. He noted that the standard could be developed only over time as new crimes and methods of detection were considered by the courts. *Id.* The advantage would be a growing body of precedent. Of course, creation of this standard would be possible only if determinations were left to the court rather than to the jury. See note 41 *infra*.

One commentator has suggested six criteria by which to evaluate police conduct when entrapment is claimed:

(1) appeals to a defendant's humanitarian instincts such as sympathy or past camaraderie; (2) temptation by exorbitant gain; (3) persistent solicitation in the face of obvious reluctance; (4) the setting where the inducement was offered; (5) the manner in which the particular criminal business is usually carried out; (6) the secrecy and difficulty of detection of the crime.

Schecter, *Police Procedure and the Accusatorial Principle*, 3 CRIM. L. BULL. 521, 527 (1967). Cases illustrating proscribed police conduct can be categorized along similar lines. The divisions are blurred, however, because the courts also considered predisposition in most of the cases. Nevertheless, it may be helpful to list the types of police misconduct which may

not unduly handicapping the prosecution.³⁵ Arguably, the subjective, majority approach allows the police added flexibility in dealing with particular individuals, but the objective test would go far toward enhancing equality of treatment under the law and discouraging brinksmanship in police relations with recidivists.³⁶ As Justice Frankfurter noted, "[p]ublic confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."³⁷ By focusing upon the predisposition of the defendant, the majority

give rise to a claim of entrapment: (1) appeals to friendship or past comradeship (*Sorrells v. United States*, 287 U.S. 435 (1932); *Walker v. United States*, 285 F.2d 52 (5th Cir. 1960); *United States v. Kros*, 296 F. Supp. 972 (E.D. Pa. 1969)); (2) appeals to sympathy to relieve suffering, especially in narcotics cases (*Sherman v. United States*, 356 U.S. 369 (1958); *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967)); (3) use of persons especially close to defendant (such as former mistress) in appeal for help (*Wall v. United States*, 65 F.2d 993 (5th Cir. 1933)); (4) appeals to one in serious financial difficulties (*United States v. Catanzaro*, 407 F.2d 998 (3d Cir. 1969); *Carbajal-Portillo v. United States*, 396 F.2d 944 (9th Cir. 1968); *United States v. Dillet*, 265 F. Supp. 980 (S.D.N.Y. 1966)); (5) promises of exorbitant gain (*Morei v. United States*, 127 F.2d 827 (6th Cir. 1942)); (6) repeated and persistent solicitation to a clearly reluctant victim (*United States v. Klosterman*, 248 F.2d 191 (3d Cir. 1957)); (7) threats of violence or bodily harm (*United States v. Silver*, 457 F.2d 1217 (3d Cir. 1972)); *United States v. Lefner*, 422 F.2d 1021 (9th Cir. 1970)); (8) use of informers or special agents paid on a contingent fee basis (*Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965)); (9) government organizing or directing plans for the crime, or providing necessary materials (*United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973)). See Comment, *Entrapment in the Federal Courts*, 1 U. SAN FRAN. L. REV. 177, 179 (1967).

³⁵ The *Sherman* majority had argued that adoption of the objective approach would have unduly stifled government efforts at law enforcement.

Mr. Justice Roberts asserted that although the defendant could claim that the Government had induced him to commit the crime, the Government could not reply by showing that the defendant's criminal conduct was due to his own readiness and not to the persuasion of government agents. The handicap thus placed on the prosecution is obvious.

356 U.S. at 376-77. This criticism ignores the fact that the defendant would have to show more than mere inducement under the objective test. He would have to show that police conduct went beyond the limits of that which "would entrap only those ready and willing to commit crime." *Id.* at 384 (Frankfurter, J., concurring). The average-predisposed-criminal standard by which government conduct would be judged would substantially lessen any handicap on the prosecution.

At least in the narcotics area, one survey has indicated that police views of behavior that would constitute entrapment per se often were stricter than those of the courts. Bancroft, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U. CHI. L. REV. 137, 157 (1963).

The police-conduct approach would not disallow the use of strategem or informers. It would merely establish an objective standard by which controls over some of the most objectionable of law enforcement activities could be exercised. See generally P. TAPPAN, *CRIME, JUSTICE, AND CORRECTION* 302-03 (1960).

³⁶ See note 18 *supra* and notes 39 & 42 *infra*.

³⁷ 356 U.S. at 380.

approach implicitly precludes the equality of treatment upon which the fair and honorable administration of justice depends.³⁸ In allowing a bad reputation or prior criminal record to negate the ill effects of some police conduct, the Court allows the greatest latitude in objectionable behavior toward the weakest elements in society, those least likely to be able to resist the temptation.³⁹

In addition to inequality, other difficulties of practical

³⁸ Judge Learned Hand, in *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933), outlined three now famous criteria, proof of which would be considered to establish predisposition: "[A]n existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance." *Id.* at 1008.

One commentator has noted that these criteria have expanded over the years. Proof of an existing course of criminal conduct similar to the offense with which the defendant is charged would logically demonstrate a predisposition. . . . The defendant need not have been convicted for these prior offenses, nor need the course of conduct be of the exact nature of the crime charged.

Note, *Entrapment: An Analysis of Disagreement*, *supra* note 5, at 552-53 (footnotes omitted).

Allowing predisposition to rest on charges of past offenses for which the defendant was not convicted seems especially objectionable. The defendant in such a proceeding is put in a weaker position merely because he was charged with a crime that he may not even have committed.

³⁹ [T]here is no intention to excuse persons who yield to temptation, or to hamper or limit the acts of officers of the law in detecting crime by any means or device; but the zeal to detect crime ought not to be so vigorous as to induce officers to originate and procure the commission of the very offenses which they are enjoined to prevent. No faithful officer of the law will be hampered, nor will any criminal be aided by the observance of this rule. Its disregard, however, may, and likely will, subject to persecution and conviction weak and spineless persons, who find it hard to resist temptation; and the government, through the zeal for conviction . . . , may become the means of the ruin of its citizens, instead of their safeguard and protection.

United States v. Echols, 253 F. 862, 863 (S.D. Tex. 1918).

In addition, the majority approach, by allowing prior convictions to evidence predisposition, seems to ignore the goals of the criminal corrections system, which theoretically is designed to rehabilitate offenders. Educational and vocational training in federal prisons is oriented toward creating a new life-style for offenders. Job placement and supportive programs for ex-offenders attempt to insure adjustment to a life away from crime. See TASK FORCE ON CORRECTIONS, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 7 (1967).

Police tactics aimed at the ex-offender undermine this objective. They tend to break down reintegration by appealing to former felons to return to crime. Government agents and informers often attempt to rebuild broken underworld ties of one just released from prison or to secure the return to narcotics addiction of one undergoing treatment. See *Sherman v. United States*, 356 U.S. 369 (1958); *Perez v. United States*, 421 F.2d 462 (9th Cir. 1970). Justice Frankfurter elaborated on the prejudice to criminal classes under a rule which emphasized criminal disposition:

Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. . . . A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes.

356 U.S. at 383 (Frankfurter, J., concurring).

significance arise under the majority approach in *Sherman*. One of the most troubling aspects is the requirement that the issue of entrapment be submitted to the jury.⁴⁰ The problems attendant with this requirement include a lack of precedential guide to law enforcement agencies⁴¹ plus the high probability of prejudice to the defendant when a jury considers the defense.⁴² Moreover,

⁴⁰ *Id.* at 377. Chief Justice Warren listed a series of cases from courts of appeals which followed the principle of jury submission, including a representative decision from each circuit. *Id.* n.8. The concurring justices were distressed by the Court's acceptance of this principle. *Id.* at 382.

At least one appellate court has allowed the issue to be submitted to the jury with considerable reluctance.

We think it requires but little reflection to convince that the difficulties in giving effect to the public policy upon which the miscalled "defense" of entrapment is based would lessen considerably, if the matter were withdrawn as a fact question for the jury and consigned to the "supervisory authority over the administration of criminal justice in the federal courts."

Robison v. United States, 379 F.2d 338, 346 (9th Cir. 1967), *vacated on other grounds*, 390 U.S. 198 (1968).

See DeFeo, *supra* note 5, at 270-71. Mr. Michael DeFeo gives three reasons for submitting the issue to the jury. He first notes that the defense involves close questions of fact turning on the credibility of witnesses, thus placing it particularly within the competence of the jury. Second, DeFeo observes that under the majority view, determination of the defendant's motive and intent requires the collective judgment of the jury as to the reasonable man. Finally, he states that juries express community standards, acquitting whenever police practices shake the common conscience regardless of legal technicalities. *Id.* at 270.

However, the very closeness of questions turning on credibility makes even the most minimal prejudice of the jury doubly important. The judge may be the better party to impartially view the question. See notes 42 & 43 *infra*. Second, a reasonable man test is not really involved, even under the majority approach. Instead, the majority test focuses on a particular defendant in a particular set of circumstances. See note 33 *supra*. The minority test logically places this standard within the purview of the court as a matter of law, giving rise to more uniformity in application. See note 41 *infra*.

⁴¹ See 356 U.S. at 384. A series of court decisions based on a reasonable man standard would help define guidelines for police by defining particular types of behavior as either acceptable or unacceptable. Over a period of time, some certainty could be injected into the area.

⁴² *Id.* at 382 (Frankfurter J., concurring); see 36 A.L.I. PROCEEDINGS 227-32 (1959).

Under the majority approach, once the defendant has raised the issue of entrapment his record and reputation are admissible as evidence of predisposition. 356 U.S. at 373-75. This rule places the defendant in the difficult position of either not raising the defense at all or risking the prejudicial effect that evidence of his past character will have upon the jury. See note 74 *infra*. Although juries have been thought to be particularly competent in assessing the veracity of a defendant's or an informer's conflicting testimony as to the actual conduct of the government in a given case, it is likely that the past character of the defendant will tinge the jury's judgment. See, e.g., *United States v. Harrell*, 458 F.2d 655 (5th Cir.), *cert. denied*, 409 U.S. 846 (1972); *United States v. Riley*, 363 F.2d 955 (2d Cir. 1966).

A field study has revealed that concern for the prejudicial effect of a prior record on a jury is well founded.

The jury's broad rule of thumb here, presumably, is that as a matter of human experience it is especially unlikely that a person with no prior record will commit a serious crime, and that this is relevant to evaluating his testimony when he denies

submission of the defense to the jury has generated substantial confusion in the courts. The various circuits have shuffled and reshuffled the burden of proof and statements of the issues in an attempt to simplify the law for adequate jury consideration.⁴³ By

his guilt on the stand. As to him, the presumption of innocence has special force. In contrast, defendants with records . . . evoke a different jury calculus of probabilities

H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 179 (1966); cf. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO TRIAL BY JURY* § 4.4, Comment (Tentative Draft 1968). See also H. KALVEN, JR. & H. ZEISEL, *supra*, at 121-33.

It might be argued that problematic government conduct would also have a psychological impact on the jury, counterbalancing the effect of the defendant's record. However, one example of a situation in which possible jury prejudice may have exonerated questionable law-enforcement activities is *United States v. Silver*, 457 F.2d 1217 (3d Cir. 1972). The defendant in *Silver* claimed entrapment and took the stand to testify.

He said he made these [illegal drug] sales only because the two informers had importuned him to do so, and had described agents Cassidy and Miller as members of the "Mafia" who would kill them [the two informers], Silver, his girlfriend co-defendant D'Angelo, his pet goat, rooster, three dogs and three cats, should Silver fail to sell the agents cocaine.

Id. at 1218. Although the court overturned Silver's conviction on the basis of improper jury instructions relating to the consequences of probable cause of the government to solicit him, the jury, when left to consider the credibility of the defendant with regard to predisposition, convicted him in the face of a seemingly clear pattern of reprehensible government conduct.

One commentator succinctly states the problem as follows:

However bad a person may be, however guilty of crime, it is nevertheless a principle of our system of criminal law administration that conviction and punishment must be for some specific act or crime proved against an accused by competent evidence compelling an inference of guilt as to the specific act, and not for a general criminal depravity or wickedness. The admission of this kind of evidence invariably prejudices the jury against the accused and diverts their attention from an impartial consideration of the evidence of the particular crime charged. It is difficult to justify the injection into a trial . . . [of] hearsay complaints or [an] officer's suspicions about other offenses. And even if proved, prior transgressions do not compel a logical inference that the defendant did in fact commit the particular offense.

Donnelly, *supra* notes 5, at 1108.

In *United States v. Morrison*, 348 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965), the court expressed fears as to potential jury prejudice.

Because defendants may be seriously prejudiced by the introduction, even though proper, of evidence bearing on their past criminal offenses, careful instructions are appropriate to limit the degree of the prejudice. The principal danger, however, is that the government will introduce the evidence and that the jury will take it as proof of guilt.

Id. at 1005.

⁴³ A good example of this process comes from the First Circuit. In *Gorin v. United States*, 313 F.2d 641 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963), the court held that a defendant must prove by a preponderance of the evidence that he was induced to commit the offense. The burden then shifts to the prosecution to prove beyond a reasonable doubt that the defendant was predisposed to commit the offense. In *Waker v. United States*, 344 F.2d 795 (1st Cir. 1965), the court noted:

We have concluded that although, strictly, an element of the offense is not involved, it would be unduly confusing to instruct the jury that the government's burden is any the less on this issue than it is on other parts of its case.

Id. at 796 n.3.

A year later, in *Sagansky v. United States*, 358 F.2d 195 (1st Cir.), *cert. denied*, 385 U.S. 816 (1966), the court again grappled with the problem of the burden of proof.

leaving the decision to the court as a matter of law, the minority approach would resolve most of these difficulties.⁴⁴

Justice Frankfurter, concurring in *Sherman*, felt that the *Sorrells* majority was posing a "false choice" when it declared that either the defendant's conduct must fall outside of the statute or he must be convicted.⁴⁵ The concurring opinions found the defendant guilty within the terms of the statute, but absolved him of liability in response to the courts' duty to control police conduct while overseeing the fair administration of justice.⁴⁶ In the same vein, Justice Roberts had written:

However, since our decision in *Gorin*, we have noticed and commented upon the confusion apt to be generated in a jury's mind by having to apply two measures of the burden of proof in the same case. . . . Upon further consideration, we think that this difficulty calls for resolution. The solution that we propose is to reduce the burden which we have previously placed on the defendant from a burden of persuasion to a mere burden of coming forward with evidence. This we do, not because our view of the doctrine of entrapment has changed, but in order to simplify the problems of the jury and, possibly, of the charging judge.

Id. at 202-03. Compare *United States v. Riley*, 363 F.2d 955 (2d Cir. 1966). See Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 68-71 (discusses problem and reviews varying solutions of different courts of appeals).

⁴⁴ A decision as a matter of law is also consistent with the minority emphasis on judicial responsibility for policing the purity of the courts. See notes 45-47 and accompanying text *infra*. The Model Penal Code, adopting the minority approach provides:

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962).

This approach seems to be a sensible way to allocate the burden of proof. The need for government proof of predisposition beyond a reasonable doubt (see note 43 *supra*) is ended with the elimination of jury consideration and the substitution of an "average" man standard. A preponderance of the evidence test, rather than proof beyond a reasonable doubt, seems sufficient when government conduct rather than the defendant's guilt becomes the focus of attention.

⁴⁵ 356 U.S. at 381.

⁴⁶ Justice Frankfurter clearly articulated the importance of the distinctions between the majority and minority approaches in *Sherman*.

It might be thought that it is largely an academic question whether the court's finding a bar to conviction derives from the statute or from a supervisory jurisdiction over the administration of criminal justice; under either theory substantially the same considerations will determine whether the defense of entrapment is sustained. But to look to a statute for guidance in the application of a policy not remotely within the contemplation of Congress at the time of its enactment is to distort analysis. It is to run the risk, furthermore, that the court will shirk the responsibility that is necessarily in its keeping, if Congress is truly silent, to accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals. The reasons that actually underlie the defense of entrapment can too easily be lost sight of in the pursuit of a wholly fictitious congressional intent.

Id. at 381 (Frankfurter, J., concurring).

It seems clear that the federal courts may have some powers, short of constitutional ones, to police the purity of the system. Those powers were articulated in *McNabb v. United States*, 318 U.S. 332, 343-47 (1943).

The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law.⁴⁷

The concurring justices noted that defendants in entrapment cases fall directly within the wording of criminal statutes because they perform all of the essential acts of the crime. Once induced to participate, defendants knowingly do so, thus satisfying the mens rea requirement of the criminal law.⁴⁸ Under the majority approach, moreover, it seems clear that a legislature could expressly abolish the defense if it chose to do so;⁴⁹ however, under the

The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. . . .

. . . .

. . . .

. . . We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here.

Without reaching the level of constitutional protections, individuals are protected by the power of the courts to police law enforcement activities. This power rests in the judiciary's function of ratifying the activities of law enforcement agencies. If the court imposes punishment on one convicted of a crime, it in effect ratifies the earlier activities of the policeman in detecting what appeared to be a crime. But the courts should not allow themselves to be used as instruments to ratify the wrongs of other governmental bodies, or justice and respect for the law will suffer.

⁴⁷ *Sorrells v. United States*, 287 U.S. 435, 457 (1932).

⁴⁸ *Id.* at 456-57. Logically the majority's rationale could extend to innocent persons lured into crime by third parties unrelated to the government, circumstances under which the defense has never been held to apply. See *Gonzales v. United States*, 251 F.2d 298, 299 (9th Cir. 1958); *Henderson v. United States*, 237 F.2d 169, 175 (5th Cir. 1956). See generally Note, *Entrapment: An Analysis of Disagreement*, *supra* note 5, at 560-65.

Under the minority approach, the defendant is freed only because of abhorrent police practices, not because he is any less guilty of a crime than would be a compatriot lured into the activity by third persons.

Compare Mikell, *supra* note 9, at 264, with Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942, 946 (1965). See generally PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 218 (1967).

⁴⁹ To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts. Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system. The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes. We conceive it to be our duty to construe the statute here in question reasonably, and we hold that it is beyond our prerogative to give the statute an unreasonable construction, *confessedly contrary to public policy*, and then to decline to enforce it.

Sorrells v. United States, 287 U.S. 435, 450 (1932) (emphasis added).

The Court in *Sorrells* relied on "public policy" to determine the reasonableness of a

minority approach the defense exists to rectify police practices which cannot be tolerated.

The Court, in *Sherman*, did not foreclose the possibility that the minority view might at some time be reconsidered as the doctrinal foundation of entrapment.⁵⁰ By 1973, most circuits had at least implicitly embraced the minority approach in cases of truly reprehensible police conduct.⁵¹ A succinct formulation of the objective approach, which the Court could adopt, had been enunciated by Judge Traynor: "[T]he line must be drawn between methods likely to persuade those unwilling to commit an offense from methods likely to persuade only those who are ready to do so."⁵² The stage was thus set for reconsideration of the defense.

III

United States v. Russell

In 1973, the Supreme Court agreed to reconsider the entrapment issue in *United States v. Russell*,⁵³ a case involving a defendant with an admitted predisposition toward criminal activity.⁵⁴ In *Russell*, a government agent visited the defendant's home claiming to represent an organization interested in controlling the illegal manufacture and distribution of methamphetamine ("speed"). The agent offered to supply Russell and his codefendants with an essential and difficult to obtain ingredient⁵⁵ in the drug's manufacture, phenyl-two-propanone, in return for one-half of the drug

statutory construction. If the legislature clearly worded a statute so as to preclude such a construction, the Court would, in its sense of justice, be driven to find a new vehicle by which to uphold the public policy. Cf. Comment, *Due Process of Law and the Entrapment Defense*, 1964 U. ILL. L.F. 821, 822-23.

⁵⁰ Chief Justice Warren wrote:

It has been suggested that in overturning this conviction we should reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells*. . . . To do so would be to decide the case on grounds rejected by the majority in *Sorrells* and, so far as the record shows, not raised here or below by the parties.

356 U.S. at 376.

In a later case, the Supreme Court did look at police conduct as well as the overwhelming evidence of predisposition. *Lopez v. United States*, 373 U.S. 427, 434-35 (1963). Unfortunately, in *Lopez* the Court blindly quoted *Sherman* and did not carefully articulate the rationale of its decision.

⁵¹ See notes 75-81 *infra*.

⁵² *People v. Moran*, 1 Cal. 3d 755, 765, 463 P.2d 763, 769, 83 Cal. Rptr. 411, 417 (1970)

(Traynor, J., dissenting).

⁵³ 411 U.S. 423 (1973).

⁵⁴ *Id.* at 425.

⁵⁵ *Id.* at 426.

produced. The offer was conditioned upon the agent being given a sample of the drug and being taken to the laboratory where it was already being produced in a small ongoing operation.⁵⁶ After the conditions were satisfied, a business arrangement was consummated with the agent actually supplying the chemical and, in return, receiving half the final product. When the defendants were finally arrested, a search of the laboratory revealed phenyl-two-propanone acquired from nongovernment sources, demonstrating that the defendants were able to and did acquire the chemical from sources other than the agent during the period of their agreement.⁵⁷

The circuit court, on these facts, reversed the district court and found that Russell had been entrapped.⁵⁸ The sole basis for the reversal was that the government had supplied an essential element in the drug's manufacture.⁵⁹ As a matter of law, the circuit court concluded that "a defense to a criminal charge may be founded upon an intolerable degree of government participation in the criminal enterprise."⁶⁰

⁵⁶ *Id.* at 425.

⁵⁷ *Id.* at 426. Justice Rehnquist pointed out that the government agent saw an empty phenyl-two-propanone bottle on his first visit to the laboratory where Russell worked. He further noted that when the laboratory was searched after the defendant's arrest, two more bottles of the chemical (not supplied by the agent) were confiscated. *Id.*

⁵⁸ *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973). The opinion of the district court is not officially reported.

⁵⁹ *Id.* at 672. The court of appeals's interpretation of the facts differed from that of the Supreme Court. Judge Ely, writing for the court of appeals, was of the opinion that the phenyl-two-propanone was more difficult to obtain than Justice Rehnquist had portrayed it. Judge Ely summarized: "Thus, there could not have been the manufacture, delivery, or sale of the illegal drug had it not been for the Government's supply of one of the essential ingredients." *Id.* Judge Ely may have thus portrayed the facts in an attempt to cast his opinion, which was a departure from the traditional majority approach, in a more favorable light.

Justice Stewart, writing for the *Russell* dissenters, also dealt with the Rehnquist finding that the defendant could have obtained the phenyl-two-propanone without government intervention. He first noted that the hard-to-obtain chemical used in the batch of methamphetamine for which the defendant was actually arrested was supplied by the government. 411 U.S. at 447. The dissent then questioned why the agent did not simply purchase the drugs after their manufacture, rather than supplying the vital ingredient, if the chemical could have been so easily procured. *Id.* at 448-49. With this doubt in mind, Justice Stewart found entrapment as a matter of law because the government had solved Russell's practical production problems. *Id.* at 449.

⁶⁰ 459 F.2d at 673. The court of appeals advanced two alternative theories for relieving the defendant of liability—a government involvement test found within the traditional entrapment framework and a creative activity test derived from outside of entrapment doctrine. Under the first test, the court concluded that, regardless of the significance of predisposition, a defense could be founded upon an "intolerable degree of governmental

Admittedly predisposed toward commission of the offense, Russell, by definition, could not come within the majority entrapment doctrine. Therefore, he argued that the Supreme Court should redefine the entrapment doctrine enunciated in *Sorrells* and *Sherman*. His principal argument, not previously raised in the Supreme Court, was that entrapment should rest on constitutional

participation in the criminal enterprise." *Id.* Judge Ely attempted to tie the case to traditional entrapment notions by finding the facts to be indistinguishable from those in *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), and those in *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970). In both of these prior cases, the government had supplied the defendant with the contraband for which he was arrested. 447 F.2d at 904-05; 312 F. Supp. at 1308-09. Relying, without comment, upon the *Bueno* and *Chisum* reasoning, Judge Ely somewhat broadened traditional doctrine to find entrapment based on a test of whether the defendant would have been "powerless to 'commit' the charged offenses without the Government's pervasive intervention." 459 F.2d at 673.

The foundations of this theory are somewhat unclear. The *Bueno* opinion did not greatly clarify the problem because Judge Roney merely noted that the entrapment doctrine had undergone such "maturation" that it could include government supply of contraband. 447 F.2d at 906. This holding is consistent with the *Sorrells* statement that the government cannot punish for offenses which are the "product of the creative activity of its own officials." 287 U.S. at 451. But the *Bueno* holding ignores the other half of the creative activity test, that the person induced be "otherwise innocent," *i.e.*, not predisposed. *Id.*

Judge Ferguson's opinion in *Chisum* is somewhat more helpful. The opinion found it unnecessary to choose the Frankfurter approach, in part because of Chief Justice Warren's statement that the law enforcement function "does not include the manufacturing of crime." 312 F. Supp. at 1311. Judge Ferguson's basic thrust, however, was that a high degree of government involvement in a crime gives the defendant a due process defense. For a further discussion of this due process defense, see notes 87-100 *infra*. However, the *Chisum* approach, like that in *Bueno*, cannot be fully reconciled with the traditional majority doctrine because it avoids predisposition.

Perhaps because of the problems of fitting the government involvement test within the traditional majority framework, which requires looking to predisposition, Judge Ely advanced the second *Russell* theory. It was based upon the opinion in *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), a case in which a government agent initiated, encouraged, aided, and sometimes directed a whiskey bootlegging scheme. *Id.* at 784-86. As in *Russell*, the defendants were clearly predisposed to commit the crime. *Id.* at 786. The *Greene* court theorized that since the usual defense was unavailable, a special one would have to be adopted. The new defense rested on the unwillingness of the court to allow "the Government . . . [to] involve itself so directly and continuously and over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators." *Id.* at 787. The decision then stated that the same objections that underlay the entrapment defense were operative in the case at bar, and the defendant had to be freed. *Id.*

Judge Ely, in *Russell*, found the government conduct to be "equally repugnant, if not more so" than the conduct in *Greene*. 459 F.2d at 674. In the *Russell* summary, the court of appeals drifted still further from the majority approach, opening the door even wider for Supreme Court consideration of the case. The opinion first conceded that the only difference between its alternative theories was "the label affixed to the result." *Id.* Either thesis would be appropriate because both were premised on the same concepts of fundamental due process and reluctance of the judiciary to countenance "overzealous law enforcement." *Id.* These two concepts are the very ones to which the Supreme Court had earlier refused to grant credence.

grounds.⁶¹ As an alternative, he urged that the *Sherman-Sorrells* minority approach be accepted.⁶²

In urging a constitutional basis for the defense, Russell argued that the government's involvement in the manufacture of the drug was so great that it would violate the principles of due process to prosecute him for its manufacture.⁶³ He suggested adoption of a rule absolutely precluding prosecution whenever it was shown that the criminal conduct "would not have been possible had not an undercover agent 'supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels.'"⁶⁴ Justice Rehnquist, writing for the five-man majority,⁶⁵ disposed of this argument by noting that, aside from other difficulties,⁶⁶ Russell could not fit within the confines of his own proposed test because the phenyl-two-

⁶¹ 411 U.S. at 430. Some commentators have argued for constitutionalization of the defense. See Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, *supra* note 5, at 67; Comment, *supra* note 49, at 821-27; Comment, *The Defense of Entrapment: Next Move—Due Process?*, 1971 UTAH L. REV. 266, 272.

Professor Lester Orfield has argued that the statutory construction sanctioned by the majority view carries within itself some constitutional overtones:

In construing a statute as not encompassing acts committed as a result of entrapment as the Court did in *Sorrells* and *Sherman*, it is arguable that the Court was employing an established rule of statutory construction; namely, statutes are to be construed so as to avoid running afoul of constitutional safeguards. *E.g.*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Thus it is possible that constitutional guarantees chart the permissible limits, albeit amorphous, of government conduct amounting to entrapment.

Orfield, *supra* note 43, at 56 n.104.

⁶² 411 U.S. at 432-33.

⁶³ *Id.* at 430.

⁶⁴ *Id.* at 431.

⁶⁵ Five justices joined in the decision while four dissented. Agreeing with Justice Rehnquist were Chief Justice Burger and Justices White, Blackmun, and Powell. Dissenting were Justices Douglas, Brennan, Stewart, and Marshall.

⁶⁶ Justice Rehnquist noted that a strict exclusionary rule, similar to the ones used in cases of faulty confessions and illegal searches and seizures, would be inapplicable to entrapment activity because in the latter no independent constitutional right or federal statute is involved. He further indicated his disapproval of an attempt to embody the entrapment doctrine itself in a fixed constitutional rule in order to provide an independent right. 411 U.S. at 430-31.

Some commentators have argued that an analogy can be made between entrapment and unlawful searches and seizures, thus placing defendants within the protection of the fourth amendment. See Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, *supra* note 5, at 73-76. However, the analogy between gathering evidence and gathering information on or promoting criminal acts of defendants seems strained. Moreover, fourth amendment protections have heretofore been extended only to physical zones, and it seems unnecessary that the Supreme Court should strain to expand its analysis, if at all, when a due process claim is more readily available. See Note, *supra* note 5, at 73-76.

propanone had in fact been obtained from sources other than the agent.⁶⁷

Having refused to accept a defense of entrapment based upon constitutional grounds, Justice Rehnquist addressed himself to the respondent's alternative argument and specifically rejected the police-conduct approach to entrapment.⁶⁸ He first acknowledged the theoretical and practical criticisms of the old approach, but dismissed them perfunctorily saying that "[a]rguments such as these, while not devoid of appeal, have been twice previously made to this Court and twice rejected by it"⁶⁹ The opinion went on to reaffirm the congressional intent theory,⁷⁰ noting that Congress might address itself to the question at any time it so desired.⁷¹ Justice Rehnquist finally restated Chief Justice Warren's fear in *Sherman* that the government might never obtain convictions under the police-conduct approach.⁷²

The dissent, while not addressing itself to Russell's constitutional arguments,⁷³ did argue strenuously for the adoption of the

⁶⁷ See, e.g., note 59 and accompanying text *supra*.

⁶⁸ 411 U.S. at 431-32.

⁶⁹ *Id.* at 433-34. Some confusion in terminology has been added by *United States v. Russell*. Justice Rehnquist, writing for the majority, criticized the court of appeals's "police participation" test as introducing "an unmanageably subjective standard which is contrary to the holdings of this Court in *Sorrells* and *Sherman*." *Id.* at 435 (emphasis added). Justice Rehnquist's remark seems directly contrary to traditional definitions of "subjective" and "objective" in this area. See note 33 *supra*. However, Justice Rehnquist's label is explicable if it is assumed that he was considering the *application* of the tests rather than the results of a particular case. Under his approach, the majority test is an objective, mechanical one in which chiefly predisposition need be questioned. On the other hand, Justice Rehnquist characterized the minority view as subjective because it allows the court to strike down conduct which the *court* feels is wrong. Traditionally, however, the majority approach has been thought of as subjective because it focuses on the predisposition of the defendant, and when applied, it leads to different results, in cases involving identical police conduct. Under the minority view, the subjective element of the defendant's predisposition is not injected into the analysis, and cases involving the same type of police conduct would be decided the same.

⁷⁰ 411 U.S. at 433.

⁷¹ *Id.* See note 45 and accompanying text *supra*.

⁷² 411 U.S. at 434. *But see* note 35 *supra*.

Justice Rehnquist's predilections are clear from *Russell*'s dictum.

Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself 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.

411 U.S. at 434.

⁷³ Presumably, the dissenters believed that they offered a preferable alternative to constitutionalizing the defense in the form of the police-conduct approach. The limited

police-conduct approach to entrapment.⁷⁴ Nevertheless, the possibility, left open in *Sherman*, that the police-conduct theory might in the future be adopted by the Supreme Court was clearly foreclosed by *Russell*.

IV

THE AFTERMATH—REMAINING QUESTIONS AND ALTERNATIVES

Before the *Russell* decision, the courts of appeals had experienced difficulty in reconciling the majority approach with their sense of justice in cases of particularly reprehensible police conduct coupled with a predisposed defendant.⁷⁵ The solutions devised varied from circuit to circuit. They included: (1) adopting outright

constitutional approach as portrayed in the *Russell* majority dictum would have many of the same disadvantages of the old majority view. See note 99 and accompanying text *infra*.

One commentator has noted that due process avoids "major infirmities associated with application of the older tests." 43 U. COLO. L. REV. 127, 132 (1971). However, the infirmities mentioned included distraction from a proper examination of police behavior caused by admission of evidence concerning predisposition, unequal results from identical police behavior, and logical inconsistencies in the statutory intent rationale. *Id.* at 132-33. These infirmities are merely those commonly associated with the majority view. No satisfactory rationale is given for preferring due process over the minority approach which also eliminates the aforementioned infirmities.

The preceding observations came in the context of an argument that *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970), relied on the due process clause. A serious problem arises, however, with reliance on the *Chisum* decision as a mandate for due process analysis. The decision cited *Raley v. Ohio*, 360 U.S. 423 (1959), as a Supreme Court decision placing entrapment within the due process clause. However, the *Raley* fact pattern was different from those in which entrapment is normally thought to occur. *Raley* held that conviction of a person for refusing to answer questions before an Ohio Un-American Activities Commission, when the Commission led the person to believe he could permissibly invoke the right against self-incrimination, violated due process. *Id.* The *Chisum* court provided no rationale for due process which differs from traditional concepts followed by the Supreme Court and courts of appeals as they apply the majority and minority tests.

⁷⁴ 411 U.S. at 440-50. Justice Stewart, writing for the *Russell* dissenters, followed closely the Roberts and Frankfurter lines of reasoning from *Sorrells* and *Sherman*. *Id.* Justice Stewart did, however, discuss the evidentiary problems involved in the old majority approach.

Moreover, a test that makes the entrapment defense depend on . . . predisposition permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor—all of which would be inadmissible in any other context—in order to prove the defendant's predisposition. It allows the prosecution . . . to rely on the defendant's bad reputation or past criminal activities, including even rumored activities of which the prosecution may have insufficient evidence to obtain an indictment. . . . This sort of evidence is not only unreliable, as the hearsay rule recognizes; but it is also highly prejudicial, especially if the matter is submitted to the jury, for, despite instructions to the contrary, the jury may well consider such evidence as probative not simply of the defendant's predisposition, but of his guilt of the offense with which he stands charged.

Id. at 443. See note 42 and accompanying text *supra*.

⁷⁵ See, e.g., *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973); notes 76-81 and accompanying text *infra*.

the minority approach,⁷⁶ (2) interpreting the majority view to allow application of an alternative test, either predisposition or police conduct,⁷⁷ (3) distinguishing between predisposition at different points in time during a criminal enterprise,⁷⁸ (4) adopting a constitutional basis for the defense,⁷⁹ (5) creating a new defense outside the entrapment framework,⁸⁰ and (6) defining predisposition away in cases of extreme police conduct.⁸¹

⁷⁶ See *United States v. McGrath*, 468 F.2d 1027, 1030-31 (7th Cir. 1972), *vacated*, 412 U.S. 936 (1973); *Williamson v. United States*, 311 F.2d 441, 444 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965). The future use of the minority approach is clearly foreclosed by *Russell*.

⁷⁷ See *United States v. Grimes*, 438 F.2d 391, 393-94 (6th Cir.), *cert. denied*, 402 U.S. 989 (1971); *United States v. Morrison*, 348 F.2d 1003, 1004 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965); *Waker v. United States*, 344 F.2d 795, 796 (1st Cir. 1965); *Whiting v. United States*, 321 F.2d 72, 76 (1st Cir.), *cert. denied*, 375 U.S. 884 (1963); *Walker v. United States*, 285 F.2d 52, 56 (5th Cir. 1960); *Accardi v. United States*, 257 F.2d 168, 172 (5th Cir.), *cert. denied*, 358 U.S. 883 (1958); *Wall v. United States*, 65 F.2d 993, 994 (5th Cir. 1933). The courts writing these opinions were in effect taking the minority approach which allows police conduct as an independent test because the majority approach requires conviction of a predisposed defendant. *Russell* stands as a clear warning to the lower courts not to use an alternative test.

⁷⁸ See *United States v. Klosterman*, 248 F.2d 191, 195 (3d Cir. 1957). The court found the defendant entrapped after he formulated a detailed plan for criminal activity, but abandoned it of his own accord. After repeated urging by government agents, the plan was subsequently carried through. It would appear that *Russell* does not expressly negate the possibility of using this approach.

⁷⁹ See *United States v. Russell*, 459 F.2d 671, 674 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973); *United States v. Chisum*, 312 F. Supp. 1307, 1313 (C.D. Cal. 1970). These courts suggested analogies to search and seizure cases, as well as due process, as the proper foundation for the defense. Due process was specifically found not to be the basis of entrapment defenses by the *Russell* court. See notes 84-98 and accompanying text *infra*.

⁸⁰ See *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971). For a complete discussion of the case, see note 60 *supra*.

The problem with this approach is that it in fact constitutes entrapment as it has been traditionally known with only a new label to distinguish it. The lower court in *Russell* had argued for such a defense as an alternative to its use of the minority entrapment approach. See note 60 *supra*. By reversing the circuit court, the Supreme Court gave a strong warning of its disapproval of such tactics.

⁸¹ See *Kadis v. United States*, 373 F.2d 370, 373 (1st Cir. 1967). See also *United States v. Bueno*, 447 F.2d 903, 906 (5th Cir. 1971). For a further discussion of the *Bueno* opinion, see note 60 *supra*. These courts refused to even discuss the issue of predisposition finding that extreme police conduct creates a reasonable doubt that the defendant was ready and willing to commit the crime when approached.

At the other end of the spectrum, it is argued that extreme forms of inducement are socially offensive. . . . We see no purpose in debating the wisdom of such a principle, for there is a more ready answer. Extreme police tactics . . . will mean that as a matter of law the government cannot be found to have sustained its burden of proving that it did not corrupt an innocent or unwilling man No situation suggests itself in which such police behavior, if conceded or found, would not necessarily create a reasonable doubt that the defendant was ready and willing to commit the crime when he was approached.

Kadis v. United States, 373 F.2d 370, 373 (1st Cir. 1967).

The future use of this solution has the inherent weakness of failure to even consider predisposition, when the *Russell* opinion ordains that a predisposition test be followed.

The court, in *Russell*, noted that several federal court decisions had gone beyond the entrapment doctrine enunciated in *Sorrells* and *Sherman*.⁸² The *Russell* majority warned the lower courts against using the entrapment defense as a "chancellor's foot" veto to strike down what they considered to be objectionable law enforcement practices.⁸³ Instead, the court directed that entrapment, as defined in *Sorrells* and *Sherman*, be used as a relatively limited defense.⁸⁴

It is rooted not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement," but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense, but was induced to commit them by the government.⁸⁵

Although an admission or finding of predisposition is now clearly fatal to a claim of entrapment,⁸⁶ the Court in *Russell* indicated to the lower federal courts a possible means of barring prosecution of a predisposed defendant. While refusing to rest entrapment on constitutional grounds, the *Russell* majority, in dictum, did recognize the possibility of some day being faced with a predisposed defendant whose arrest resulted, not in entrapment, but in a violation of the due process clause.⁸⁷ Such a situation would occur if the government's conduct rises above "overzealous law enforcement" to a level which is so outrageous that it shocks the conscience.⁸⁸

Russell, while using such traditional due process language as "shocking to the universal sense of justice" and violative of "fundamental fairness,"⁸⁹ did proffer some concrete guidelines as to the type of police conduct which would be objectionable. The opinion points to three elements which should be weighed in determining whether due process has been violated in obtaining the conviction of a predisposed defendant: (1) the stage of the criminal activity, *i.e.*, whether or not it was already in process, (2)

However, in cases of extreme police conduct, the same result may now be reached under a due process standard. See notes 87-88 and accompanying text *infra*.

⁸² 411 U.S. at 435.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 436.

⁸⁷ *Id.* at 431-32.

⁸⁸ *Id.* at 432.

⁸⁹ *Id.*

the element supplied by the government, and (3) the extent of government involvement.⁹⁰

Of the three, the first element appears to carry the most weight. The agent's contribution of propanone in *Russell* was termed "scarcely objectionable" on the ground that the criminal enterprise was already in progress.⁹¹ Furthermore, speaking generally of infiltration into drug rings, the court noted that "[t]he illicit manufacture of drugs is *not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise.*"⁹² Therefore, one may assume that many forms of police conduct which would be objectionable if carried on in connection with a predisposed individual not yet engaged in crime could pass constitutional muster in the presence of an ongoing criminal activity.

The element, if any, supplied by the government also is important. In *Russell*, it was pointed out that propanone, by itself, was a harmless substance whose possession was legal.⁹³ In addition, although difficult to obtain, it was nevertheless obtainable.⁹⁴ The definite impression left is that supplying some element which is dangerous, illegal, and most important, nearly impossible to obtain may be grounds for barring prosecution. However, the element supplied must be considered in conjunction with whether the criminal activity is an ongoing enterprise or an isolated incident. In its drug ring example, the Court made it clear that "the supply of some item of value that the drug ring requires must, as a general rule, also be permissible."⁹⁵ Although the element supplied to an ongoing enterprise, by definition, could not be impossible to obtain, once again, greater leeway seems permissible when the criminal activity is already in progress.

The final element, the extent of government involvement, also appears to be an important focal point for purposes of due process. In *Russell* it was pointed out that the agent, aside from one minor incident, did not participate or direct any of the work in the manufacture of the drug.⁹⁶ Even in his drug ring example, Justice Rehnquist referred to "limited" participation of government agents.⁹⁷ The Court also quoted with approval the *Sherman* phrase,

⁹⁰ See notes 91-98 and accompanying text *infra*.

⁹¹ 411 U.S. at 432.

⁹² *Id.* (emphasis added).

⁹³ *Id.*

⁹⁴ See note 57 and accompanying text *supra*.

⁹⁵ 411 U.S. at 432.

⁹⁶ *Id.* at 426 n.3.

⁹⁷ *Id.* at 432. The Rehnquist "limited participation" requirement seems to provide a

"[m]anifestly, [the law enforcement] function does not include the manufacturing of crime."⁹⁸ A due process defense would thus appear available when government agents take an all-pervasive part in participating in or in guiding a criminal enterprise. Again, in the case of an ongoing, organized operation, law enforcement officials are not likely to "manufacture" the crime, but in the case of an individual incident, government conduct is more likely to extend beyond permissible bounds.

Although the majority entrapment-due process approach is an improvement over a strict predisposition standard, in that prosecution may still be barred in cases of extremely objectionable police conduct even when coupled with predisposed defendants, the improvement is minimal.⁹⁹ Although the new entrapment-due process approach may reach the same result as the police-conduct entrapment approach in the face of especially shocking police conduct, the vast majority of objectionable police conduct used to ensnare a predisposed defendant probably cannot rise to a level which would violate due process. Thus, most defendants will still have to show lack of predisposition to make out the defense. The Court's view of entrapment remains antithetical to the philosophy expressed by Justice Frankfurter:

No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the

defense in cases in which the government supplies an otherwise unavailable ingredient or is deeply involved in the perpetration of the crime—cases in which lower courts have found police activity to be unconscionable. *Cf.* *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), *vacated*, 412 U.S. 936 (1973); *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971); *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967); *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965); *Walker v. United States*, 285 F.2d 52 (5th Cir. 1960); *United States v. Klosterman*, 248 F.2d 191 (3d Cir. 1957).

⁹⁸ 411 U.S. at 434.

⁹⁹ The due process test could also lead to inequalities under the law not present in the minority test because due process would seemingly consider the police conduct in the context of predisposition. Thus, the individual's prior conduct, unrelated to the crime at hand, may well determine the degree of police conduct allowed. Moreover, in all but the small number of especially objectionable cases in which due process may be used, the old majority approach with its jury prejudice and theoretical inconsistency still prevails. Finally, the very limited use of due process as outlined by the *Russell* opinion will lack the degree of predictability of the Frankfurter minority approach. Although more guidelines on the outer limits of police behavior will be available through precedent than were available under the old majority view standing alone, the limited nature of the defense will limit the scope of guidelines.

estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.¹⁰⁰

In declining to overturn long-standing precedent, the *Russell* majority specifically noted the possibility of congressional action.¹⁰¹ Specific legislation has been proposed by the American Law Institute in section 2.13 of the Model Penal Code¹⁰² and by the National Commission on Reform of Federal Criminal Laws in section 702 of the Proposed New Federal Criminal Code.¹⁰³ Both proposed statutes opt for the police-conduct approach to the entrapment defense.¹⁰⁴ The Proposed Federal Code explicitly enunciates an objective "law-abiding persons" standard against which law enforcement activities are to be measured. The Model Penal Code also employs a "persons" standard rather than testing conduct against a particular defendant. The strengths of the Model Code are its explicit requirement that the defense be decided as a matter of law and its clarification of the placement of the burden of

¹⁰⁰ *Sherman v. United States*, 356 U.S. 369, 382-83 (1958) (Frankfurter, J., concurring).

¹⁰¹ 411 U.S. at 433.

¹⁰² MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962).

¹⁰³ NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE 58 (1971).

¹⁰⁴ The Model Penal Code formulates the entrapment defense as follows:
Section 2.13 Entrapment.

(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 encourages another person to engage in conduct constituting such offense by either:

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

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

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

MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962). The proposed Federal Criminal Code 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, *supra* note 103, at 58.

proof,¹⁰⁵ as well as its greater specificity of proscribed conduct.¹⁰⁶ Either code would be a viable alternative which would eliminate the weaknesses in the *Sorrells-Sherman-Russell* majority approach by adopting the *Sorrells-Sherman* concurring and the *Russell* dissenting views. In view of the obvious reluctance of the Supreme Court to overturn its prior decisions, the time has arrived for appropriate congressional action.¹⁰⁷

CONCLUSION

The *Russell* opinion embodies the same infirmities found in the *Sherman* and *Sorrells* majority opinions.¹⁰⁸ The theoretical foundation for the majority approach is illogical and open to inconsistencies in the event of congressional action.¹⁰⁹ Moreover, practical concerns¹¹⁰ and problems of equality under the law¹¹¹ militate against acceptance of the traditional entrapment framework. The due process safeguard left open by the *Russell* majority has only limited applicability.¹¹² Viable legislative alternatives, embodying the minority, police-conduct approach to entrapment have been proposed,¹¹³ and their enactment is required in order to correct the injustices which the majority approach entails.

Mr. Justice Holmes, several years before the Supreme Court decided *Sorrells*, provided a thought which should be the touchstone of courts and legislatures considering the entrapment defense. "I think it a less evil that some criminals should escape than that the Government should play an ignoble part."¹¹⁴

Beth Ela

¹⁰⁵ For the text of the Model Penal Code relating to jury submission and burden of proof, see note 44 *supra*. The Comment to § 702 of the Proposed Federal Criminal Code notes that entrapment as a bar to prosecution is removed from jury consideration. As an affirmative defense, entrapment would have to be established by the defendant by a preponderance of the evidence. NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 103, at 58.

¹⁰⁶ See note 104 *supra*.

¹⁰⁷ Two bills are currently pending before Congress which contemplate statutory formulations of the defense. S. 1, 93d Cong., 1st Sess. (1973); H.R. 6046, 93d Cong., 1st Sess. (1973).

¹⁰⁸ See note 99 and accompanying text *supra*.

¹⁰⁹ See notes 45-49 and accompanying text *supra*.

¹¹⁰ See notes 40-44 and accompanying text *supra*.

¹¹¹ See notes 31-39 and accompanying text *supra*.

¹¹² See note 99 and accompanying text *supra*.

¹¹³ See notes 102-07 and accompanying text *supra*.

¹¹⁴ *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).