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Entrapment: Sorrells to Russell

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ENTRAPMENT: *SORRELLS* TO *RUSSELL*

I. Introduction

Richard Russell was found guilty by a jury in the United States District Court in the state of Washington on three counts of having unlawfully manufactured and processed methamphetamine and of having unlawfully sold and delivered that drug in violation of a federal statute. Russell based his defense on entrapment: a federal agent induced him into perpetrating the offense by supplying him with an essential, though not illegal, ingredient in the manufacturing of the drug. After consideration of Russell's appeal, the United States Court of Appeals for the Ninth Circuit reversed the conviction, concluding as a matter of law that a "defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise,"[1] regardless of whether or not the accused had the predisposition to commit the crime. The United States Supreme Court granted the Government's petition for a writ of certiorari and reversed the court of appeals. The Court held in *United States v. Russell* that it is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.[2]

The United States Supreme Court's decision in Russell has added some clarity to the furthering development of the defense of entrapment, but many areas still need to have attention focused upon them. Those utilizing the defense will still search for adequate guidelines upon which to base their entrapment strategy. It is for the purpose of clarifying what the Supreme Court said and what it did not say in *Russell,* with regard to entrapment, that this note is written.

The consideration of the defense of entrapment was late in appearing within the American criminal justice system. In 1864 a judge was prompted to remark that "this plea has never . . . availed to shield crime . . . and it is safe to say that it never will."[3] This extreme position began to deteriorate shortly thereafter. In 1878[4] the defense of entrapment was given consideration for the first time by a federal court;[5] it was not until 1915, thirty-seven years later,[6] that a federal court gave successful recognition to the doctrine.[7] The United States Supreme Court first applied[8] it in *Sorrells v. United States.*[9] Prior to *Sorrells,* Supreme Court consideration of the defense had occurred in two cases:[10] *Casey v. United States*[11] and *Grimm v. United States.*[12] In each instance, however, the Court failed to find government inducement.

For practical purposes, the courts have attempted to break down the

1 United States v. Russell, 459 F.2d 671, 673 (9th Cir. 1972).
2 411 U.S. 423 (1973).
3 Board of Comm'rs of Excise v. Backus, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864).
4 United States v. Whittier, 28 F. Cas. 591 (E.D. Mo. 1878).
5 Note, *Entrapment,* 45 TEXAS L. REV. 578, 579 (1967).
6 Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).
7 Note, *supra* note 5, at 579.
8 *Id.*
9 287 U.S. 435 (1932).
10 Note, *supra* note 5, at 579.
11 276 U.S. 413 (1928).
12 156 U.S. 604 (1895).

defense into four distinct elements.[13] The four essentials of the defense are: (1) a governmental instigation resulting in the commission of a crime, (2) actual inducements by government agents, (3) establishment of causation between the government's inducements and the defendant's actions, and (4) lack of criminal design by the defendant with regard to commission of the instant crime.[14] As will be seen, however, it is much easier to categorize the defense than it is to apply it.

The Supreme Court prior to *Russell* failed to adequately define the scope of its application. Consequently the lower courts were confused concerning proper instructions for the jury.[15] Before the *Russell* case, the Supreme Court last examined the doctrine in *Lopez v. United States,*[16] but failed to establish any consistent guidelines for the lower courts in the application of the defense.[17] As evidence of this problem, various justifications for the defense arouse:[18] estoppel as a result of government misconduct,[19] due process,[20] and judicial and public policy considerations.[21] In order to clarify the defense, then, the Court decided to accept the Government's petition in *Russell* for a writ of certiorari.

II. Functional Approaches: Innocence v. Objective

In first giving recognition to entrapment in *Sorrells,* the Supreme Court failed to prescribe adequate guidelines for establishing the predisposition of the defendant; furthermore, it made no attempt to determine guiding criteria for the amount of inducement which would be permissible.[22] As a result the lower courts have been applying the defense of entrapment in relation to the differing approaches. The majority approach was the innocence approach—there must be no predisposition on the part of the defendant to commit the crime.[23] The majority requires that all four components of the defense be established for it to be successful.[24] The minority followed the objective approach—police misconduct is the only real issue.[25] To the minority, the fourth component is unimportant; what is important, however, is the conduct of the police.

The decision in *Russell* reflects the continuing struggle between the proponents of these two concepts. The court of appeals, in reversing the district court conviction, held that whenever the court determines that there has been

13 *E.g.,* State v. Thurston, 100 Ariz. 297, 413 P.2d 764 (1966).
14 Many courts summarily refer to the four elements of the defense as the accused's predisposition.
15 Orfield, *The Defense of Entrapment in the Federal Courts,* 1967 DUKE L.J. 39, 43.
16 373 U.S. 427 (1963).
17 *See, e.g.,* United States v. Chisum, 312 F. Supp. 1307, 1310 (C.D. Cal. 1970).
18 As subsequently explained, the justifications derive from three broad areas: constitutional, legislative, and policy considerations.
19 *E.g.,* Casey v. United States, 276 U.S. 413, 425 (1928) (dissenting opinion).
20 *E.g.,* Raley v. Ohio, 360 U.S. 423 (1959).
21 *E.g.,* Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring opinion).
22 Note, *Entrapment: An Analysis of Disagreement,* 45 B.U. L. REV. 542, 552 (1965).
23 Sorrells v. United States, 287 U.S. 435, 445 (1932).
24 Sherman v. United States, 356 U.S. 369, 372-75 (1958); Hastings v. Thurston, 100 Ariz. 297, 413 P.2d 764, 766 (1966).
25 The proposed new FEDERAL CRIMINAL CODE (1971), Final Report of the National Commission on Reform of Federal Criminal Laws, § 702, and the American Law Institute's MODEL PENAL CODE, § 2.13 (Proposed Official Draft, 1962), recommend adoption of the objective approach.

"an intolerable degree of governmental participation in the criminal enterprise, the criminal prosecution must be dismissed"[26]—application by the appeals court of the objective theory.

The application of the objective approach by the appeals court was based on alternative theories.[27] The first theory, ignoring the accused's predisposition altogether, is based upon lower court decisions that sustain entrapment whenever the government has supplied the defendant with contraband.[28] The second theory, based upon a recent decision of the Ninth Circuit,[29] allows the defense whenever the government is overly active in the criminal enterprise. Both theories were based upon considerations for due process.

Mr. Justice Rehnquist, in reversing the court of appeals, reaffirmed the *Sorrells* majority and the innocence approach.[30] Justice Rehnquist asserted that the successful reliance upon the defense must relate to the finding that the accused had no prior intent to commit the instant crime.[31] He held that it is "only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."[32] The entrapment defense, then, is available only to those who would not have committed the crime but for the inducements of the Government. Thus, the innocence approach is concerned with the overall make-up of the accused in each case; if he did not have the predisposition to commit the crime and the criminal enterprise was not attributable to him, then entrapment is a successful defense to government inducement.[33] If these elements are present, and the accused consequently commits a crime due to governmental instigation, the Government will not be successful in its prosecution.

Not all are in agreement, however, with the innocence approach and with Mr. Justice Rehnquist. A sharply divided Court[34] indicates the continuing controversy over the issue. Mr. Justice Douglas's dissent,[35] which was joined by Mr. Justice Brennan, stated that his view concurred with Mr. Justice Brandeis's dissent in *Casey v. United States*;[36] with Mr. Justice Frankfurter, concurring in *Sherman v. United States*;[37] and with Mr. Justice Roberts, concurring in *Sorrells*

26 459 F.2d at 673.
27 411 U.S. at 427.
28 *E.g.*, United States v. Bueno, 447 F.2d 903 (5th Cir. 1971). *See* note 40 *infra* drawing the distinction between the supplying of legal and illegal material by the government agent.
29 Greene v. United States, 454 F.2d 783 (9th Cir. 1971). In *Greene*, the defendants had the predisposition to commit the crime (the manufacturing and selling of illegal whiskey), but the convictions were still reversed. The factors that the Court considered in reversing the conviction were (1) who initiated the contact between the agent and the defendant; (2) what was the time period of the agent-defendant relationship; (3) what was the nature of the role of the agent; and (4) who were the defendant's customers aside from the Government. In so considering these elements, the Court realized that the defense was genuinely distinct from entrapment because the predisposition to commit the crime was present.
30 411 U.S. at 436. As Mr. Justice Rehnquist said, "The Court of Appeals was wrong, we believe, when it sought to broaden the principle laid down in *Sorrells* and *Sherman*."
31 *Id.* at 429.
32 *Id.* at 436.
33 287 U.S. at 451.
34 The district court conviction was upheld by the Supreme Court on a five-to-four division, with Justices Douglas, Brennan, Stewart and Marshall dissenting.
35 411 U.S. at 436.
36 276 U.S. 413, 421 (1928).
37 356 U.S. 369, 378 (1958).

v. United States.[38] Those opinions all expressed the objective approach to entrapment with its emphasis upon police misconduct. As Mr. Justice Roberts said in *Sorrells*:

> The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy.[39]

Mr. Justice Douglas obviously felt that the governmental participation in *Russell* exceeded the bounds of proper police conduct.[40]

Mr. Justice Stewart, with whom Mr. Justice Brennan and Mr. Justice Marshall joined, also disagreed with Mr. Justice Rehnquist. Mr. Justice Stewart asserted that the question was not one of the accused's predisposition, but rather one of the government's instigation.[41]

However, as evidenced by Mr. Justice Rehnquist's majority opinion, the innocence approach is now the prevailing view. The defense is successful only if the criminal act comes as a result of the creative activity of the government's agents.[42] As a result of the Court's decision in *Russell,* the courts, when the defense of entrapment is raised, must make two basic inquiries: did the government official induce the commission of the crime, and if so, was the accused predisposed to commit the crime regardless of the governmental inducement?[43] If the former element is present, but the latter is not, then the defense of entrapment

38 287 U.S. at 453.

39 *Id.* at 459.

40 It is interesting to note that in the cases cited by Mr. Justice Douglas, the Government had supplied the defendants with illegal contraband. Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); and United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970). In citing the *Chisum* case, Mr. Justice Douglas referred to Judge Ferguson's conclusion: "When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it." 411 U.S. at 438. However, Mr. Justice Douglas failed to note the fact that in the *Russell* case, the material given by the Government agent to the defendant was not illegal.

Mr. Justice Rehnquist dealt with this issue in his majority opinion, noting that:

> Shapiro's contribution of propanone to the criminal enterprise already in process was scarcely objectionable. The chemical is by itself a harmless substance and its possession is legal. While the Government may have been seeking to make it more difficult for drug rings, such as that of which respondent was a member, to obtain the chemical, the evidence . . . shows that it nonetheless was obtainable.

411 U.S. at 432. Justice Rehnquist, then, implicitly disallowed the defense of entrapment unless the material supplied was illegal or near impossible to obtain.

Mr. Justice Stewart, however, clarified how difficult it was to obtain the chemical supplied by the Government. As he explained ". . . the chemical ingredient was available only to licensed persons, and the Government itself had requested suppliers not to sell that ingredient even to people with a license." 411 U.S. at 449. So it appears, then, that this particular chemical, though not illegal to possess, was all but impossible to obtain.

It may be that *Russell* will ultimately be distinguished on the grounds that when the Government agents supply an ingredient which is illegal or which is completely unobtainable, this will constitute entrapment by law, for as Mr. Justice Stewart said, "It cannot be doubted that if phenyl-2-propanone had been unobtainable from other sources, the agent's undercover offer . . . would be precisely the type of governmental conduct that constitutes entrapment under any definition." 411 U.S. at 448. But, if the material supplied is not illegal, even though it is extremely difficult to obtain, the innocence test will then have to be applied to determine if the defense of entrapment can be sustained.

41 411 U.S. at 441.

42 287 U.S. at 451.

43 Note, *The Defense of Entrapment,* 73 HARV. L. REV. 1333, 1335 (1960).

will be sustained. Any other combination of these elements will result in failure of the defense.

III. Functional Problems

The innocence approach has major functional disadvantages that the majority opinion in *Russell* failed to consider. One of the functional problems, alluded to earlier, is determining the criteria by which the accused's "predisposition" is measured. In *United States v. Sherman,* Judge Learned Hand stipulated burden of proof requirements that the defense and prosecution had to meet. In raising the defense, the accused must show there was governmental inducement; once inducement is shown, the prosecution must produce evidence indicating that regardless of inducement, the defendant was predisposed to commit the crime.[44] The prosecution has three methods of proving predisposition: (1) evidence indicating that the accused has perpetrated similar crimes in the past; (2) direct proof that the accused was already predisposed to commit the crime of which he stands charged; and (3) ready testimony that the defendant was anything but reluctant to participate in the government's offer of criminal activity.[45] These methods, however, have failed to provide the consistent results which the courts have been seeking.[46] The majority in *Russell* failed to establish new guidelines, and therefore the lower courts must still attempt to work within the confusing and obscure distinctions of *Sorrells* and *Sherman.*

The prosecution, in attempting to place the defendant within one of these categories, is permitted to produce direct and hearsay evidence concerning the accused's criminal history (criminal activity for which he was convicted and for which he was not convicted) and general character.[47] For the most part, courts have been willing recipients of evidence concerning criminal activity which is either unrelated in nature to the instant crime or quite remote in time.[48] Mr. Justice Stewart, dissenting in *Russell,* warned of the consequences of this evidence in that it is unreliable as well as prejudicial.[49] Mr. Justice Rehnquist's silence on this point could be interpreted as tacit approval.

The second functional flaw is now apparent—in admitting the direct and hearsay evidence concerning the accused and his prior activity into the court proceedings, the jury may have an extremely difficult task in considering this evidence solely in relation to the entrapment issue of predisposition. The jury may be prejudiced toward the accused when it must then decide the substantive charges against him in supposed ignorance of the hearsay evidence.[50] To a great degree, this does not provide adequate protection to the accused because the jury may often decide the case by comparing police instigation against the defendant's prior activities which have been admitted into evidence through relaxation of

44 200 F.2d 880, 882-83 (2d Cir. 1952).
45 United States v. Becker, 62 F.2d 1007, 1008 (2d Cir. 1933).
46 Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs,* 60 YALE L.J. 1091, 1104 (1951).
47 Heath v. United States, 169 F.2d 1007, 1010 (10th Cir. 1948).
48 Trice v. United States, 211 F.2d 513, 516 (9th Cir. 1954).
49 411 U.S. at 443.
50 Note, *supra* note 22, at 556.

evidentiary requirements; therefore, the more suspect the accused's past, the greater is the inducement which the police can safely utilize.[51] As such, it is conceivable that if two suspects are induced to commit the same crime under similar circumstances, one will go free because he was entrapped and the other will go to jail because of prior activities that have no relationship whatsoever to the instant crime.[52]

A third functional area with which the majority in *Russell* failed to concern itself in considering the defense of entrapment involves the question of whether the police must have probable cause or reasonable suspicion in order to commence inducement,[53] and if so, the related question of whether prior judicial involvement will be required to see that those standards have been met.[54]

The federal courts have not generally insisted upon probable cause before initiating inducement.[55] Some hold that it is not a condition precedent to inducement,[56] while others indicate that where there is evidence presented by the accused that indicates governmental inducement, the burden is then shifted to the police to prove that they had reasonable cause to suspect the defendant.[57] It has also been held that prior suspicion need not be harbored by the police before initiating inducement.[58] In routine police undercover work where they merely offer the defendant an "opportunity" to commit the crime, *e.g.*, the sale of illegal drugs, the courts for the most part do not require the police to have prior suspicions.[59]

When probable cause has been held to be a prerequisite to inducement, rumors, complaints, and suspicions have been held to be admissible to establish this requirement.[60] The evidence to establish probable cause for inducement is not to be considered by the jury as tending to establish the guilt of the accused to commit that specific crime, but rather only to justify governmental inducement. However, such information may adversely affect the jury's attitude toward the defendant.[61]

As indicated, the courts are not in complete agreement as to what constitutes "probable cause" and whether probable cause is necessary to initiate inducement. The majority in *Russell* did not enlighten the lower courts on this matter. They will no doubt continue to be inconsistent in their application of this requirement.

51 *Id.*
52 *Id.* at 557.
53 The general view seems to be that if the government had reasonable suspicion before inducement, its activities will be upheld. *E.g.*, Rylves v. United States, 183 F.2d 944, 945 (10th Cir. 1950).
54 Rotenberg, *The Police Detection Practice of Encouragement: Lewis v. United States and Beyond*, 4 HOUS. L. REV. 609, 617 (1967).
55 The courts have made a distinction in this area between reasonable cause and probable cause. Generally, reasonable cause is analogous to reasonable suspicion. Reasonable cause requirements are less demanding than the requirements of probable cause.
56 *See* Trice v. United States, 211 F.2d 513, 519 (9th Cir. 1954).
57 *See, e.g.*, Rylves v. United States, 183 F.2d 944, 945 (10th Cir. 1950).
58 *E.g.*, Swallum v. United States, 39 F.2d 390, 393 (8th Cir. 1930).
59 Note, *supra* note 22, at 555.
60 *Id.* at 554-55.
61 At this stage in the trial, hearsay evidence may be extremely damaging. Not only will the jury use this evidence to determine probable cause, but it can also reflect upon it when determining the defendant's predisposition to commit the crime and then reconsider it once again when deciding the substantial charges against the accused.

If in the future the Supreme Court reaches the issue of probable cause, the question of whether or not prior judicial involvement will be necessary before inducement can be initiated will be an important question.[62] Proponents of individual rights will argue that the "right to privacy" can only be protected from the police in this area by prior judicial involvement.[63] Possibly, a "warrant to encourage" may be required before the police can initiate the process.[64] The technical difficulties in obtaining such a warrant are minimal. For example, in *Russell* the defendants were under suspicion for months; there was certainly sufficient time for the government to submit its evidence to a judicial officer before any further inducements were offered. With that requirement, individual rights would be more adequately protected.

The courts are divided upon the functional test to be applied—whether it is based upon the innocence or objective approach and the requisite conduct necessary for inducement to be initiated. However, the courts have also found themselves divided over the theoretical basis for the defense, *i.e.,* where the defendant legally obtains the right to even raise the defense.

IV. *Theoretical Basis*

There appear to be three basic areas of theoretical justification for the defendant's right to raise the defense: (1) legislative policy, (2) judicial policy, or (3) constitutional requirements. The majority in *Sorrells* favored legislative policy, basing their view on the presumption that Congress meant that criminal statutes are violated only when individuals act of their own will. As the majority stated:

> 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.[65]

In *Russell,* Mr. Justice Rehnquist also based the defense upon congressional intent in asserting that it is not the role of the courts to dismiss prosecutions for what it considers to be overinvolvement by government agents in the criminal enterprise.[66] Rather, the Justice felt that it was not the intent of Congress to have individuals prosecuted for crimes that they otherwise would not have committed but for the governmental inducement.[67]

62 As the situation now exists, the wrongs that are committed in the process of "entrapping" the accused cannot be rectified until late in the trial stage due to the lack of prior judicial involvement and the failure of the courts to stipulate proper police conduct for inducement.

63 That there is a constitutional right of privacy against certain types of governmental intrusions is now no longer a matter of dispute. Katz v. United States, 389 U.S. 347 (1967).

64 Rotenberg, *The Police Detection Practice of Encouragement: Lewis v. United States and Beyond,* 4 HOUS. L. REV. 609, 620 (1967).

65 287 U.S. at 448.

66 411 U.S. at 435.

67 *Id.*

The minority in *Sorrells* and in *Russell* disagreed with Mr. Justice Rehnquist. As Mr. Justice Roberts's concurring opinion in *Sorrells* stated:

> A new method of rationalizing the defense is now asserted. This is to construe the act creating the offense by reading in a condition or proviso that if the offender shall have been entrapped into crime the law shall not apply to him. So, it is said, the true intent of the legislature will be effectuated. This seems a strained and unwarranted construction of the statute; and amounts, in fact, to judicial amendment. It is not merely broad construction, but addition of an element not contained in the legislation.[68]

In particular, he could find no guideline as to when a particular statute should preclude the defense.[69]

Aside from Mr. Justice Roberts's criticism, the legislative theory has been criticized by proponents of the objective approach on one major ground: by basing the defense on legislative intent, Congress is being invested with the power to control the defense.[70] Although not admitting such, Mr. Justices Rehnquist and Roberts, for different reasons, may have been more concerned with congressional control than with theoretical arguments about the basis of the defense.

As indicated above, Mr. Justice Roberts was opposed to the legislative policy basis for the defense. He maintained that judicial policy was the basis of the defense. Justice Roberts believed that it was the Court's duty to check the cleanliness of the government's hands. As he said:

> The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belong 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.[71]

Continuing this theme in *Russell,* Mr. Justice Stewart, quoting Mr. Justice Brandeis in *Casey v. United States,*[72] said that: " 'This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts.' "[73]

Mr. Justice Roberts's reasoning also includes one major weakness. In entrapment controversies, what is at issue is not the admittance or rejection of evidence by a judge, but the power to completely release a defendant who has, technically at least, committed a crime.[74] Such power to pardon has been held

68 287 U.S. at 455-56.
69 *Id.* at 455. Certain mala in se crimes have been held not to allow the defense of entrapment. Roberts feared that this policy would be blurred if the majority's theoretical basis was adopted.
70 Comment, *Entrapment: Instigation Not Investigation,* 26 LA. L. REV. 848, 850 (1966).
71 287 U.S. at 457.
72 276 U.S. 413, 425 (1928).
73 411 U.S. at 442-43.
74 It is not completely clear that an entrapped individual has willfully and intentionally committed a crime.

by the Court to belong only to the executive.[75] What the proponents of the objective approach may be attempting to deny to Congress—control over entrapment—may also be outside the province of the judiciary.

The third possible theoretical justification for entrapment rests upon constitutional grounds. Various constitutional guarantees have been advanced as a basis for the defense.[76] The major constitutional arguments for entrapment rest upon due process[77] and illegal search and seizure.[78] It has generally been conceded, however, that the defense of entrapment exists without any substantial basis in the Constitution.[79]

The majority opinion in *Russell* hedged somewhat on the constitutional issue. Although basing the defense on congressional intent, Mr. Justice Rehnquist stated:

> [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . . .[80]

But, in retreating to his previous deference to legislative intent, the Justice then said: "Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable."[81]

If the defense is ultimately held to rest upon constitutional considerations, then the flexible control by either the courts or the legislatures will be lost.[82] The Supreme Court, however, by utilizing the various constitutional provisions applicable to the defense, could still maintain some control over entrapment.[83] It appears, however, that Congress will ultimately shape the outlines of this defense.

V. Procedure

The final controversy concerning entrapment revolves around the respective functions of the judge and the jury. This issue is also divided along the lines of the supporters of the innocence as opposed to the objective approach. The majority in *Sorrells* held that the question of entrapment should be decided by

75 Ex parte United States, 242 U.S. 27, 42 (1916). Releasement power must not be confused with the judge's power to accept or exclude challenged evidence in a criminal proceeding. In the former instance, the accused has admitted at least the technical commission of a crime. Therefore, the question is not as to the admission of evidence to prove substantive criminal charges, but rather the power of a judge to release from prosecution altogether an individual who has committed a crime. In effect, this judicial releasement power is equivalent to executive pardoning. No such power has ever been recognized to rest in the judicial branch.

76 *See, e.g.*, Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 883-84 (1963); Note, *The Serpent Beguiled Me and I Did Eat — The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965).

77 *E.g.*, Accardi v. United States, 257 F.2d 168, 172 (5th Cir. 1958).

78 Note, *The Serpent Beguiled Me and I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942, 951 (1965).

79 Orfield, *supra* note 15, at 54.

80 411 U.S. at 431-32.

81 *Id.* at 433.

82 Comment, *supra* note 70, at 849.

83 Rotenberg, *supra* note 64, at 625.

the jury when considering the defendant's guilt or innocence.[84] Mr. Justice Rehnquist has upheld the role of the jury in the process. Apparently the majority feel that the protection of one's peers in deciding the question of entrapment along with that of guilt or innocence overrides the ill effects that prejudicial evidence may have upon that decision.

The minority, however, felt that the question of entrapment is one for the judge. This assertion is based upon the conclusion that the defense of entrapment is really distinct from the issue of guilt or innocence of having committed the instant crime.[85] The minority obviously believed that the issue is one of police misconduct—one that the judge should determine as to whether the accused should be tried in his courtroom. Therefore, no issue for the jury is presented.

VI. Conclusion

Overall, the Supreme Court's decision in *Russell* has clarified the defense. The justices in the *Russell* majority have reaffirmed the innocence approach thereby directing lower courts to refrain from applying the objective test. They have indicated that the courts are to apply a two-pronged test to determine if an entrapment defense will succeed. They have determined that the theoretical basis of the defense rests upon legislative policy thereby opening the door for congressional regulation. In addition, they have indicated that the question of entrapment is one basically for the jury to determine in considering all the facts of the case.

Major functional problems, however, continue to go unresolved. Where are the guidelines to aid the lower courts in determining the related question of predisposition and inducement? What safeguards exist to protect the accused from a prejudicial jury? What standards of probable cause, if any, must be met by the government in order to initiate the inducement? These questions must be now grappled with by the lower courts without sufficient direction from the Supreme Court. It may ultimately be that these unresolved questions will be the deciding battleground between the proponents of the differing viewpoints concerning the defense of entrapment.

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84 Note, *supra* note 22, at 547.
85 *Id.*