Reshaping the Federal Entrapment Defense: Jacobson v. United States

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JACOBSON v. UNITED STATES

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Abstract: In Jacobson v. United States, the Supreme Court narrowed the types of evidence that the prosecution may rely on to show that a defendant was predisposed to commit a crime in cases where the defendant raises the entrapment defense. This Note examines the development of the entrapment doctrine and the doctrine's focus on the jury's role as the arbiter of the defendant's guilt or innocence. The Note argues that the Supreme Court strayed from its previous analysis of the defense by broadening the scenarios in which judges may find entrapment as a matter of law. Judicial activism in the context of entrapment is undesirable because the defense is intended to free persons who the community— as represented by the jury—determines to be innocent, rather than a tool which judges may use to control police conduct.

Despite a lack of evidence that Keith Jacobson had been engaging in the crime of receiving child pornography through the mails, the United States government targeted him as a suspect and made him the object of a lengthy undercover investigation.1 Prosecuted after accepting the Postal Service's offer to sell him a pornographic magazine featuring children, Jacobson was convicted by a jury who rejected his entrapment defense.2 Jacobson appealed on grounds that he had been entrapped as a matter of law. The Supreme Court agreed and reversed his conviction, holding that the prosecution cannot prove predisposition3 to commit a crime with evidence of legal activity alone, or with evidence gathered during the undercover investigation that relates to the suspect's private fantasies.4 The Court reasoned that these types of evidence do not show predisposition to commit illegal acts beyond a reasonable doubt.5

By finding entrapment as a matter of law, the Jacobson Court departed from precedent. Previous Supreme Court cases provide that judges may find entrapment as a matter of law only when the absence of predisposition is patently clear, or government conduct is so egregious that it completely dominates the will of a person who is, at most, slightly predisposed to commit the criminal act.6 This Note argues that the entrapment doctrine was originally designed to allow the fact-finder to exculpate a defendant who, after an intensive inquiry, it finds

2. Id. at 1540.
3. See infra notes 41–42 and accompanying text for a discussion of the term "predisposition."
5. Id.
to have had no, or virtually no, inclination to commit the act charged, and committed the act only because of his contact with law enforcement. By finding entrapment as a matter of law in Jacobson's case, the Court changes the doctrine by setting a precedent of greater judicial intervention in entrapment cases. Judicial encroachment is undesirable because the jury, in the absence of legislation, is the appropriate body to monitor behavioral standards and police procedures.

I. THE DEVELOPMENT OF THE ENTRAPMENT DEFENSE AND JACOBSON v. UNITED STATES

Entrapment, a young criminal defense, emerged in American jurisprudence when the police began to employ complex deceptive techniques to apprehend violators of vice law. Proponents of the entrapment doctrine have generally divided into two camps. One favors judicial deterrence of illicit police behavior by refusing to convict its objects. The other views entrapment as a device which allows the fact finder to exculpate persons who were lured into crime by the government or its agents. The Supreme Court adopted the latter approach, with its emphasis on the jury's role, and developed unusual procedural and evidentiary rules to accomodate it.

A. The Origins of the Federal Entrapment Doctrine

The defense of entrapment is a twentieth century innovation in American jurisprudence. When the defense was first asserted, in the late 1800s, most courts rejected it on grounds that the government's encouragement of the criminal act was irrelevant to the wrong of its commission. The notion that government induction of crime undermines public policy slowly made headway in state courts in the first decade of this century. Not until 1915, however, with the case of Woo Wai v. United States, did the doctrine of entrapment surface in

7. The use of entrapment techniques is limited to vice crimes and nonviolent felonies because government officials could themselves become liable for encouraging the commission of crimes with tangible victims. See Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976) (government officials' immunity does not extend to violations of criminal law).
8. See infra notes 45-48 and accompanying text.
9. See infra notes 41-47 and accompanying text.
10. See infra notes 20-25 and accompanying text.
11. George Fletcher, Rethinking Criminal Law § 7.3.2, at 541-42 (1978) (No other common law legal system has developed an entrapment defense.).
13. A brief history of early entrapment cases can be found in N.L.A. Barlow, Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment?, 41 Mod. L. Rev. 266, 268-70 (1978).
14. 223 F. 412 (9th Cir. 1915).
a federal opinion. In that case, immigration authorities convinced defendant Woo Wai to propose, to suspect officials, an illegal plan to sneak undocumented Chinese into the United States. After gathering the desired evidence of corruption, the police charged Woo Wai with conspiracy. The court reversed Woo Wai’s conviction in part because “a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes.” Courts relied upon these words in the following decade and a half as a means of allowing juries to free the victims of unscrupulous law enforcement methods that arose with the enactment of sumptuary legislation such as Prohibition.

I. Sorrells v. United States

Few Supreme Court decisions have focused on the entrapment defense. The first, Sorrells v. United States, concerned a man indicted for possession and sale of whiskey in violation of the National Prohibition Act after succumbing to the entreaties of an undercover agent. The Supreme Court reversed the judgment and remanded for

15. Id. at 413.
16. Id. at 412.
17. Id. at 415.
18. One reason deceptive police ploys are commonly used in vice enforcement is that such legislation often is viewed ambivalently by the public. The police, lacking complainants, resort to infiltrating the criminal underworld. See Richard C. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 YALE L.J. 1091, 1093 (1951).
19. Jacobson v. United States, 112 S. Ct. 1535 (1992); Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). Russell and Hampton are not discussed in this Note because the defendants in both cases were concededly predisposed to commit the narcotics offenses for which they were convicted. Russell asserted that there had been an “intolerable degree of governmental participation” in the crime, constituting a violation of his constitutional rights. Russell, 411 U.S. at 424 (quoting Russell v. United States, 459 F.2d 671, 673 (9th Cir. 1972)). The Court held that while some degree of governmental involvement may be so shocking that it violates due process, it had not been reached in this case. Id. at 432. The plurality opinion of Hampton suggests, in dicta, that a due process claim may never be available to a predisposed defendant. Hampton, 425 U.S. at 488–89. Although Russell and Hampton do not address the predisposition issue, these cases do underline the reluctance of the Court to vary from the predisposition formula advanced in Sorrells.
21. The agent used his and defendant Sorrells’ common World War I experiences to forge a bond of friendship which the agent then exploited by begging Sorrells to provide him with alcohol. At first, Sorrells resisted, declaring that he “did not fool with whiskey.” But after several requests, he succumbed and was arrested. At his trial, the government presented three witnesses who testified that Sorrells had a reputation as a rumrunner; however, there was no hard evidence other than the transaction at issue to support this contention. The trial court refused to allow entrapment instructions. Id. at 438–41.
proceedings to include an entrapment instruction to the jury. The Court held that the jury, if so instructed, may have found that Sorrells had no intention to commit a crime and did so only upon the instigation of government agents.

The Supreme Court's disposition of Sorrells revealed a sharp dispute regarding the correct rationale behind the entrapment doctrine. Chief Justice Hughes, writing for the majority of five, ruled that the entrapment defense is available when government officials provoke otherwise law-abiding persons to commit crime. Hughes reasoned that Congress could not have intended that its statutes be wielded against those who are not morally culpable. He further stated that when the government induces a crime, inquiry must center on the actor's character. Evidence that the criminal intent originated in the defendant, independent of government provocation, will tend to indicate guilt. In his concurring opinion, Justice Roberts argued that the doctrine is less a defense than a method by which courts may protect the purity of the legal machinery by refusing to sanction treacherous law enforcement practices. Roberts would have found entrapment as a matter of law.

2. Sherman v. United States

The second Supreme Court decision to focus on entrapment concerned "Dopey" Sherman, convicted of selling narcotics to a stool pigeon. The defendant met the informant at a doctor's office, where both were undergoing treatment for drug addiction. The informant established a friendship with Sherman, based in large part on their common troubles with morphine. He then started to hound Sherman to supply him with narcotics, claiming intense suffering. At

22. Id. at 452. Note that Sorrells was decided on December 19, 1932, and Congress passed the Twenty-sixth Amendment, repealing Prohibition, on February 20, 1933. It was a propitious moment to argue entrapment for the sale of liquor.

23. Id. at 448. Note that the Court did not state that the entrapment defense has a constitutional dimension. It is instead grounded in statutory construction and a short common law history. See, e.g., Roger Park, The Entrapment Controversy, 60 MINN. L. REV. 163, 246-47 (1976).

24. Sorrells, 287 U.S. at 451 ("[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.").

25. Id. at 451-52.

26. Id. at 457 (Roberts, J., concurring).

27. Id. at 459.


29. Id. at 371.

30. Id.

31. Id.
first, Sherman refused to help him, but finally did supply the drug and reverted to addiction alongside his betrayer. The jury received entrapment instructions, but returned a verdict of guilty.

The Supreme Court, again divided by theory but united in judgment, held that the police had entrapped Sherman as a matter of law and reversed the conviction. The Court’s opinion, delivered by Chief Justice Warren, concentrated on the defendant’s lack of predisposition. Warren noted that Sherman’s strong resistance to the informant’s entreaties revealed that the defendant had no propensity to commit the crime. Justice Frankfurter, in concurrence, adopted the Sorrells minority analysis and argued that the conviction should be overturned simply because the courts cannot countenance unscrupulous police methods.

B. Entrapment Doctrine in Theory and Practice

Commentators have labeled the divergent reasoning of the Sorrells majority and concurring minority respectively “subjective” and “objective.” While this dispute no longer divides the Court, understanding the difference in approach is essential to grasping the nature of the entrapment doctrine. The “subjective” camp places the determination of the defendant’s guilt or innocence in the jury’s hands. The “objective” theorists, however, leave it to the judge to decide whether the law enforcement methods employed were so egregious that the defendant must be released as a matter of public policy.

1. Subjective and Objective Approaches

The Sorrells majority’s subjective approach examines the origins of the criminal intent. The function of the trier of fact is critical as it must decide whether the defendant possessed the intent to commit the crime irrespective of government activity. The Sorrells and Sherman

32. Id. at 373.
33. Id. at 372.
34. Id. at 369, 378.
35. Id. at 372, 376.
36. Id. at 373.
37. Id. at 384.
40. Sorrells v. United States, 287 U.S. 435, 445 (1932) (“When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.”) (quoting Newman v. United States, 299 F. 128, 131 (4th Cir. 1924)).
Courts used the term of art 'predisposition' to refer to the mens rea of the defendant in the context of entrapment cases.

Predisposition does not refer to the intent to commit the precise crime for which the defendant asserting entrapment has been indicted, but rather the intention to commit a similar act. The state of mind, as opposed to any overt actions, of the defendant is at issue. The trier of fact scrutinizes the defendant's activities in order to determine whether the police captured a hapless criminal or corrupted a helpless innocent. If the trier of fact finds that the defendant was already engaged in a criminal course of conduct, even an extremely tempting inducement or high degree of police involvement does not create the crime. Thus, the subjective entrapment doctrine affords no protection to a person predisposed to criminal activity.

In contrast, the objective theory focuses on the probable effect that the police inducement would have on a hypothetical noncriminal person. If the defendant succumbs to an inducement so tempting that it would corrupt a person who would not normally engage in the criminal activity, he is entitled to the defense, regardless of any pre-existing mens rea. The court sets the accused free as a matter of public policy if government agents employed improper inducement, even where the prosecution advances irrefutable evidence of a previous course of

41. Donnelly, supra note 18, at 1091, 1107-08.
42. United States v. Ortiz, 804 F.2d 1161, 1165 (10th Cir. 1986).
43. See, e.g., Sherman v. United States, 356 U.S. 369, 372 (1958) ("[A] line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."); Sorrells, 287 U.S. at 451 (The accused must face an "appropriate and searching inquiry into his own conduct and predisposition . . . ").
44. See United States v. Russell, 411 U.S. 423, 434 (1973) ("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.").
45. Note that the hypothetical person is not the reasonable man of tort law, or even a simply average person. If the hypothetical person were so defined, Sherman would not have escaped conviction under the test, for it cannot be asserted that the average person would be induced to sell narcotics upon the blandishments of an addict. Sorrells, however, may represent a fact pattern which would ensnare many average folks. A more extensive discussion of the hypothetical person posited by the objective entrapment theory may be found in Park, supra note 23, at 171-75.
46. Sherman, 356 U.S. at 384 (Frankfurter, J., concurring) (The objective approach "shifts attention . . . to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime.").
criminal activity. The decision is vested in the judiciary, which can create standards for police action.

2. Jury's Role Under Entrapment Doctrine

Under the subjective approach adopted by the Supreme Court, the trier of fact, rather than the judge, plays the pivotal role in determining the defendant's legal fate. Where the judge finds evidence sufficient to constitute a triable issue of entrapment, the jury must decide whether or not there is a reasonable doubt that the defendant was ready and willing to commit the offense charged. The inquiry focuses on the moral status of the accused, rather than the nature of the police conduct.

The prosecution enjoys unusually broad latitude in the types of evidence it may present to the jury in order to expose the state of mind of the defendant. For example, the usual rule of evidence prohibiting the prosecution from introducing evidence of bad character until the accused forwards evidence of his good character does not apply when predisposition is at issue. Courts also freely admit hearsay and prior crimes. Some commentators have roundly criticized these practices, especially the admission of otherwise impermissible hearsay. However, they fill in the evidentiary gap that is left by the jury's incapacity to focus solely on the charged act itself when measuring predisposition.

47. Sorrells, 287 U.S. at 456–57 (Roberts, J., concurring).
48. Sherman, 356 U.S. at 385 (Frankfurter, J., concurring); see also McNabb v. United States, 318 U.S. 332, 340 (1943) (representing the efflorescence of the notion that the judiciary should monitor police behavior, with its mandate that “Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence”); Nardone v. United States, 308 U.S. 338, 341-42 (1939).
49. Sherman, 356 U.S. at 377 (“The issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.”).
50. The judge may find that entrapment is a genuine issue where the defendant asserts governmental inducement and can point to evidence “from which a reasonable juror could derive a reasonable doubt as to the origin of criminal intent.” United States v. Nations, 764 F.2d 1073, 1080 (5th Cir. 1985). The inducement must be of a nature that might tempt a law-abiding citizen to commit a crime and the evidence must be more than “flimsy or insubstantial.” Id.; see also United States v. Ortiz, 804 F.2d 1161, 1165 (10th Cir. 1986). Once the defendant meets this burden, the government must prove that the defendant was predisposed, i.e. possessed the requisite criminal intent. United States v. Johnson, 590 F.2d 250 (7th Cir.), reh’g en banc, 605 F.2d 1025 (1979), cert. denied, 444 U.S. 1033 (1980).
52. See supra notes 41–43 and accompanying text.
54. Id. at 247–55.
C. Jacobson v. United States

Government agents arrested Keith Jacobson for knowingly receiving child pornography transported in interstate commerce following an extended period of investigation by government agencies.\(^{55}\) Jacobson first came to the attention of postal authorities when they discovered his name on a customer mailing list of a California adult bookstore.\(^{56}\) The bookstore's records indicated that Jacobson had ordered two magazines, delivered in February 1984, entitled \textit{Bare Boys I} and \textit{Bare Boys II}.\(^{57}\) The magazines featured photographs of naked preadolescent and teenage boys and written text promoting nudism.\(^{58}\) The receipt of this literature was legal.\(^{59}\)

In January 1985, a postal inspector mailed Jacobson a letter from the “American Hedonist Society.”\(^{60}\) Postal authorities created this fictional organization which purported to advocate the “right to seek pleasure without restrictions being placed on us by outdated puritan morality.”\(^{61}\) Jacobson enrolled in the society by sending a fee and membership application with his responses to a sexual attitude survey provided him by the fictitious society.\(^{62}\) He indicated that he “enjoy[ed]” sexual materials relating to pre-teen sex but nonetheless

\(^{55}\) Jacobson was indicted for violating 18 U.S.C. § 2252(a)(2) (1986), which provides, in part, for the punishment of any person who “knowingly receives, or distributes any visual depiction that has been transported . . . in interstate or foreign commerce . . . if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct.” 18 U.S.C. § 2256 (1986) defines that “[f]or the purposes of this chapter, the term—(1) ‘minor’ means any person under the age of eighteen years; [and the term] (2) ‘sexually explicit conduct’ means actual or simulated—(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person . . . .”


\(^{57}\) Id.

\(^{58}\) The characterization of these magazines has been a matter of no little controversy. Defense counsel describes them as “depicting boys in their teens and early twenties in outdoor settings . . . not child pornography.” Petition for a Writ of Certiorari at 5–6, \textit{Jacobson} (No. 90-1124). The prosecution, however, points out that they “consisted almost entirely of photographs of nude pre-teen and teenage boys in poses that focused on their genitalia . . . . The only advertisement in the magazines was one for two other series of magazines published by the same outfit: a five-issue series entitled \textit{Nudist Angels} . . . [which] feature[d] young girls, and a two-issue series entitled \textit{Nudist Children}.” Brief for the United States at 3, \textit{Jacobson} (No. 90-1124).

\(^{59}\) \textit{Jacobson}, 112 S. Ct. at 1538.

\(^{60}\) Id.

\(^{61}\) Id. At the same time he revealed his interest in teenage sex, he also requested confidentiality from the organization. Id.

\(^{62}\) Id.
opposed pedophilia.63 In exchange, the society was to send Jacobson quarterly newsletters.64

This approach was only the first of approximately ten that the government made over the course of twenty-six months.65 Jacobson received materials from five different fictitious organizations, companies, and personalities, at least four of which promoted the legalization of child pornography.66 Jacobson responded positively to several of the mailings. After the second contact, from “Midlands Data Research,” which encouraged inquiries from persons who “believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite [sic] age,” Jacobson wrote back requesting more information and stating his interest in teenage sexuality.67 At later times during the lengthy correspondence between the government and Jacobson, Jacobson offered that he had an above average interest in “preteen sex-homosexual [sic],” enjoyed “male-male” pornography, and “like[d] good looking young guys (in their late teens and early 20s [sic]) doing their thing together.”68 On a few occasions, however, Jacobson failed to respond to the government’s solicitations.69

In March 1987, the Customs Service, after receiving Jacobson’s name from the Postal Service, sent him an advertisement for photographs of young boys having sex.70 This was Jacobson’s eighth mailing from the government, but the first to tender illegal materials.71 Jacobson placed an order which was never filled.72 Shortly thereafter, the Postal Service sent him a letter from another sham organization called the “Far Eastern Trading Company, Ltd.” which decried international censorship and boasted that it had developed a method to import pornography into the United States without Customs Service interference.73 Jacobson wrote back for a catalogue and ordered Boys Who Love Boys, a publication advertised as containing photographs of “eleven-year-old and fourteen-year-old boys get[ting] it on in every

63. Id.
64. Petition for a Writ of Certiorari at 7 Jacobson (No. 90-1124).
65. Because it is unclear from the record whether the “American Hedonist Society” newsletters were actually sent, and what their content was, the count of approximately ten contacts does not include the newsletters.
67. Id. at 1538.
68. Id. at 1538–39.
69. Id. at 1538–40.
70. Id. at 1539.
71. Id. at 1544 (O’Connor, J., dissenting).
72. Id. at 1539.
73. Id.
way possible. Oral, anal sex and heavy masturbation.  

He was arrested upon a controlled delivery of this item. A search incident to the arrest uncovered only the Bare Boys magazines and the mailings that the government had sent Jacobson. 

At trial, Jacobson asserted the defense of entrapment, arguing that the government had induced him to order the child pornography. The prosecution rebutted the claim by offering Jacobson's original purchase of Bare Boys I and Bare Boys II and his responses to the Postal Service's sham organizations as evidence that he was predisposed to commit the crime. Jacobson, however, testified that he ordered Boys Who Love Boys only because he was curious to see what "all the trouble and the hysteria over pornography" was about, a curiosity he declared was stoked by the government's persistent stream of hedonist propaganda. The jury found Jacobson guilty and the trial court sentenced Jacobson to two years probation and 250 hours of community service. A court of appeals panel reversed the verdict, but a divided Eighth Circuit Court of Appeals, sitting en banc, affirmed the conviction. 

Jacobson's petition for a writ of certiorari presented the Supreme Court with several questions relating to both the procedural and substantive aspects of the entrapment defense. These questions included whether the government can rely on responses to deceptive surveys obtained in the course of an undercover investigation to prove predisposition, and whether entrapment has occurred as a matter of law where the government violated its own guidelines in the process of subjecting the suspect to several lengthy stings. 

The Court held that the prosecution must prove that the defendant was predisposed to break the law before the government officials estab-

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74. Id. at 1544 (O'Connor, J., dissenting).
75. Id. at 1540.
76. Id.
77. Id.
78. Id. at 1541.
79. Id. at 1540.
81. Id. at 999.
83. Petitioner submitted two constitutional questions: the first asking whether the law requires some level of suspicion before subjecting a suspect to an extended undercover operation, the second whether the government's conduct in this case was so outrageous that it violated the Due Process Clause of the Fifth Amendment. The Supreme Court's decision did not reach either of these questions. Petition for a Writ of Certiorari at i Jacobson (No. 90-1124).
84. Id.
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lished contact. Therefore, evidence based on interactions between law enforcement officials and suspects during the course of an undercover investigation cannot, by itself, prove predisposition beyond a reasonable doubt where it only reveals "personal inclinations" to engage in illegal acts. Instead, police must gather evidence of predisposition to commit precisely the crime charged that predates the investigation. Furthermore, the nature of the evidence in this case—the purchase of legal magazines before the investigation, and the defendant's admissions of an interest in viewing sexually explicit photographs of young boys—failed to show the requisite specific intent to commit the illegal act of receiving child pornography through the mails. Finally, the Court considered the government's use of free speech themes in its efforts to ensnare Jacobson, a tactic which inappropriately pressured him to order illicit materials as a censorship-fighting gesture. No rational jury, it concluded, could have found petitioner predisposed beyond a reasonable doubt. The Court therefore reversed the judgment.

II. IMPLICATIONS AND RAMIFICATIONS OF THE JACOBSON DECISION

The Supreme Court's holding that the prosecution must prove predisposition to commit the exact type of offense charged creates an unreasonable burden. Absent this novel requirement, the jury in Jacobson had a rational basis for finding the defendant predisposed to receive child pornography through the mails. By rejecting the jury verdict, the Court encourages judicial activism in the context of entrapment that is both inconsistent with its previous decisions and undesirable.

A. The Prosecution Should Not Be Required to Prove Specific Predisposition to Commit the Type of Crime Charged

By holding, as a matter of law, that the evidence failed to support an inference that Jacobson was predisposed beyond a reasonable doubt to commit the crime of receiving child pornography through the mails, the Court saddles the prosecution with an inappropriately high burden of proof. By distinguishing the "predisposition to view photographs of

86. Id. at 1542.
87. Id.
88. Id.
89. Id.
90. Id. at 1543.
91. Id.
preteen sex" from the predisposition to "commit the crime of receiving child pornography through the mails," the Court prevents the prosecution from presenting the jury with relevant evidence of predisposition.

The Court's reasoning subverts the established entrapment doctrine because the normal rules of evidence are suspended when predisposition is at issue. The jury is entitled to examine conduct and previous charges that do not share all of the elements of the crime at bar in its effort to determine whether the accused was "ready and willing." The Court's ruling renders this latitude irrelevant by sharply reducing the types of evidence the prosecution can advance. Now the guilty may more easily shield themselves with this defense, originally intended to acquit "person[s] otherwise innocent" whom the government lures into crime.

**B. A Rational Jury Could Find Jacobson Predisposed Beyond a Reasonable Doubt Based on the Evidence Presented**

The prosecution adduced sufficient evidence to prove that Jacobson was predisposed, beyond a reasonable doubt, to commit the crime of receiving child pornography. While the Court held that neither type of evidence presented could, in itself, prove predisposition, the Court failed to consider the cumulative weight of the evidence. A further factor upon which the jury could have relied was Jacobson's easy capitulation to a very low level of governmental pressure.

1. **Both Types of Evidence Dismissed by the Court as Individually Insufficient Should Have Been Considered in Combination**

The fact that Jacobson ordered two publications arguably designed to appeal to the prurient interests of pedophiles, and that he described

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92. *Id.*
93. See supra text accompanying notes 53–54.
95. Cf. United States v. Becker, 62 F.2d 1007, 1009 (1933) ("One who distributes obscene pamphlets locally is not morally averse to sending them to another state . . . . The [entrapment] doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent . . . persons into lapses which they might otherwise resist. Such an emotion is out of place, if they are already embarked in conduct morally indistinguishable, and of the same kind.").
98. The prosecution presented two categories of evidence: Jacobson's activities prior to the investigation (ordering the *Bare Boys* magazines), and his activities during the investigation (suspect responses to the surveys and act of ordering the pornography). See supra notes 60–80 and accompanying text.
himself as interested in sex with children should have been considered together when weighing the prosecution's proof of predisposition. Referring to Jacobson's mail order of *Bare Boys I* and *Bare Boys II*, the Court stated that "[e]vidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal." Similarly, the Court held that Jacobson's suspect replies to the Postal Inspector's surveys by themselves did not carry the government's burden.

By failing to combine the two types of evidence, the Jacobson majority did not consider the total impact of the prosecution's evidence on a jury. Jacobson's purchase of magazines featuring only naked boys supports a fair inference of his interest in viewing sexually oriented photographs of children before the investigation began. Permitting the magazines to be used against Jacobson is consistent with the Sorrells admonishment that a defendant asserting entrapment "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition." Such an inquiry may include an examination of noncriminal activity where relevant.

Jacobson's responses to questionnaires which the government sent him further backs an inference that Jacobson was predisposed. Jacobson described himself as "enjoy[ing]" pre-teen sex pornographic materials to the investigation's first inquiry, "interested in teenage sexuality" to the second, and as having an above average interest in "preteen sex-homosexual" to the third. These statements buttress the conclusion that prior to the government's investigation, Jacobson had a penchant for viewing the type of illicit materials he was convicted of receiving. Thus, the Court should not have discounted this

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100. Id. at 1542-43.
101. Although the defense presented unrebutted testimony by Jacobson that he did not derive sexual pleasure from the magazines, the jury was not obligated to believe it. See Masciale v. United States, 356 U.S. 386, 388 (1958) (jury entitled to disbelieve unrebutted testimony by defendant in entrapment case).
relevant information merely because it was gathered in the course of the investigation.105

2. The Pressure Exerted by the Government to Buy Child Pornography Was So Faint that Jacobson's Capitulation Supports an Inference of Predisposition

The investigatory procedures were neither intrusive nor compelling. Therefore, the Court should have permitted consideration of Jacobson's two orders of child pornography from the government's catalogues as evidence of his predisposition at the outset of the investigation. The opinion states that the literature the government sent to Jacobson may have piqued Jacobson's interest in the contraband and did "exert . . . substantial pressure" on him to obtain it by questioning the constitutionality of legislation banning child pornography.106 As the opinion acknowledged, however, this effect amounted only to an "arguable inference."107 The Court should not have used this inference as a basis for nullifying the jury's verdict because a rational jury could legitimately interpret the facts differently.108

A jury could have reasoned that the government's method of interacting with Jacobson during the investigation was non-intrusive. The authorities never dealt with Jacobson in person but instead through the mails. Nor did the government make direct offers to sell illicit materials. Jacobson solicited the offers by remitting, variously, a membership fee, surveys indicating an interest in child pornography, and requests for further information and brochures advertising child pornography.109 Including the responses to Jacobson's expressions of interest, the government contacted Jacobson fewer than one dozen times over the course of twenty six months.110 Jacobson had the option of simply ignoring the sporadic mailings, rather than encouraging continued contact.

The jury could also have construed the free speech content of the government's mailings as not applying inappropriate pressure on the defendant. Although the fictitious organizations did decry the

105. Park, supra note 23, at 200 ("Predisposition may also be shown by testimony about the target's actions during negotiations leading to the offense charged."); see also Sherman v. United States, 356 U.S. 369 (1958); United States v. Myers, 527 F. Supp. 1206 (E.D.N.Y. 1981), aff'd, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983) (ready compliance with an illegal offer alone can be considered proof of predisposition).
107. Id.
108. Id. at 1546 (O'Connor, J., dissenting).
109. See supra notes 62–74 and accompanying text.
110. See supra note 65 and accompanying text.
criminalization of some forms of pornography, that very message signaled the illegality of the material. That Jacobson was aware he was committing an illegal act was not disputed. As the opinion states, "there is a common understanding that most people obey the law even when they disapprove of it." If we analogize this fact pattern to a bribery sting, it is fantastic to suggest that a defendant could support an entrapment claim by avowing that the undercover agent avouched, "Bribery is illegal—but it really shouldn’t be."

The tactics employed in this case are easily distinguishable from those described in the only other Supreme Court decision finding entrapment as a matter of law. In Sherman, the informant befriended the accused, repeatedly requested the narcotics in person, and whined about physical suffering in order to overcome the defendant’s initial resistance. Sherman was recovering from drug addiction, which is at least partially a physical condition. The Court no doubt considered this factor when it condemned law enforcement for its "play... on the weaknesses of an innocent party." Jacobson has no similar disability. He may be weak, but his weakness is in his character alone. A successful entrapment defense will free a person of deficient character whom the jury nonetheless finds innocent; it does not follow that a defendant should be able to rely upon the deficiency itself to show innocence.

**C. By Overturning Jacobson’s Conviction, the Supreme Court Reshapes the Role of the Jury in Entrapment Decisions in a Manner Inconsistent with Entrapment Doctrine**

By overturning Jacobson’s conviction, the Court narrows the scope of the jury’s powers in entrapment cases. This outcome runs afoul of the weight of authority, which ascribes tremendous importance to the jury’s role. It also undermines the strong policies advanced by com-

111. Petition for a Writ of Certiorari at 4–14, Jacobson (No. 90-1124).
113. See supra notes 29–33 and accompanying text.
115. See Fletcher, supra note 11, § 6.8, at 509–14. Criminal accountability is found when the actor could have been fairly expected to avoid the action. This subjective inquiry does not encompass mere personal weakness unless it rises to the level of an excuse such as duress, necessity, and insanity. Greed for example, is fair game for the government. See also United States v. Williams, 705 F.2d 603, 620 (2d Cir.), cert. denied, 464 U.S. 1007 (1983) (unrealistically high bribe consisting of a loan totaling $100 million dollars for a mining venture company, from which defendant anticipated netting $15 million in profits, did not constitute entrapment where defendant was predisposed).
munity involvement, as represented by the jury, in the highly discretion-ary matter of acquitting due to entrapment.

1. The Court Failed to Abide by Stare Decisis

The Jacobson Court ruled that a rational jury could not have found Jacobson entrapped despite the fact that a rational jury could have so found. With this holding, the Court departs from the letter and spirit of its own precedents. Sorrells rejects the view that the entrapment defense frees the guilty whenever the court is sufficiently shocked by police behavior.\textsuperscript{116} "Clemency is the function of the Executive," not the judiciary.\textsuperscript{117} Therefore, the defendant's guilt or innocence must be determined. In a jury trial this is the job of the jury.\textsuperscript{118}

In \textit{United States v. Russell},\textsuperscript{119} the Court was reluctant to find entrapment as a matter of law for another reason: government involvement in procuring crime violates no independent right of the object of the trap.\textsuperscript{120} The judge has no equitable duty to order acquittal unless the accused is untainted by any sign of predisposition. Indeed, appellate courts have respected the virtual sanctity of the jury verdict by following the rule that one can successfully assert entrapment as a matter of law only where the absence of predisposition is "patently clear."\textsuperscript{121} This rule is consistent with the standard of review establishing that the judgment must stand if any reasonable juror considering the evidence in the light most favorable to the government could conclude that the defendant was predisposed.\textsuperscript{122} In Jacobson, the Court disregards its previous decisions and expands the discretionary powers of the judiciary in adjudicating entrapment cases.

2. Entrapment Decisions Are Most Appropriately Rendered by Juries

Entrapment verdicts are best left in the hands of the jury because the jurors' function is not only to ensure a fair trial but also to establish community standards and legitimize legal proceedings by involv-
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ing the citizenry.\textsuperscript{123} Entrapment is a portmanteau doctrine that allows the finder of fact to weigh both the accused's culpability and the officials' duplicity.

Drawing the line between predisposition and lack of predisposition involves exercising values that, paradoxically, are both fundamental to our notions of criminality and unknowable. Entrapment doctrine presumes that it is reasonable to judge people less blameworthy if they have fallen under the influence of undercover agents. But blameworthiness in the abstract is a highly elastic concept that varies from time to time and place to place. Absent legislative mandate, the jury is the most appropriate body to apply standards of justice that reflect community expectations.\textsuperscript{124}

Jury decisions are based on many variables, including the nature of the crime involved. Typically, the public is less concerned about enforcing 'victimless' vice crimes than it is with other crimes, due to the natural desire to punish in proportion to damage done.\textsuperscript{125} Standards of behavior are much stricter where transgressions may result in actual harm.\textsuperscript{126} Juries will inevitably apply these values to the conduct of defendants claiming entrapment. By finding Jacobson entrapped as a matter of law, the Supreme Court suggests that human morality is so ductile that a low level of pressure can entice a law-abiding citizen into purchasing child pornography. A reasonable jury may not share this view.\textsuperscript{127}

The jury assessing an entrapment claim will also consider the nature of the contrivances that law enforcement officials employ. Community standards of acceptable police conduct naturally vary.\textsuperscript{128} Where the rights of individuals are not at stake, allowing the community a large measure of influence in this area is desirable. The \textit{Jacobson} Court found the tactics used by the postal authorities unacceptable.\textsuperscript{129}

\textsuperscript{124} For the disadvantages of having judges make the decisions in this area, see \textit{infra} part II.D.
\textsuperscript{127} The defense is of course free to present testimony that the defendant's moral agency was severely burdened by the government's actions. See \textit{United States v. Barker}, 514 F.2d 208, 236 (D.C. Cir.), \textit{cert. denied}, 95 S. Ct. 666 (1975) ("[T]he criminal law should be opened up to new behavioral information to better approximate, in limited situations, the ideal that the law punishes only the free choice to do wrong.").
A jury could well have decided otherwise by reasoning that persons not predisposed to the crime would not have succumbed, and that the utility of apprehending persons who receive child pornography through the mails warranted the deception.

D. Judge-created Law in Entrapment Cases is Undesirable

The Jacobson decision fails to give law enforcement officials clear guidance in distinguishing acceptable from unacceptable police practices. The decision represents the danger of judge-created law in areas void of constitutional mandate. The slow supplantation of juror discretion in entrapment cases may cause Congress to at last address the entrapment issue by enacting a federal entrapment statute.

I. The Jacobson Decision Fails to Provide Clear Guidance to Police Agencies

The holding in Jacobson that the defendant’s predisposition cannot be proven with evidence previously considered acceptable in entrapment doctrine will be a source of considerable confusion for law enforcement officials. The Court does not hold, as the dissent asserts, that the government must obtain enough evidence of the suspect’s predisposition before it initiates contact with him. Instead, the prosecution can adduce the evidence of predisposition any time before trial. A dilemma is thus created for law enforcement, which will be compelled to decide whether or not to undertake costly undercover operations when adequate proof of predisposition is lacking at the outset of the investigation.

The practical effect of Jacobson will be to strongly discourage lengthy sting operations unless evidence of predisposition is available before the onset of undercover activities. By limiting the use of evidence gathered as a result of the suspect’s interactions with undercover agents during the course of investigation, Jacobson will make such investigations costlier for the police because the rule will bar them from prosecuting a greater percentage of the people they ensnare. In a borderline case such as Jacobson’s, this may not seem to be an entirely undesirable result. This style of investigation, however,

130. See supra, notes 101–07 and accompanying text.
131. Kalven & Zeisel, supra note 126, at 318–23 (jury will judge when police methods have been unacceptable, and it is likely to refuse to convict in those circumstances).
132. See supra notes 54–55, 87–88, 93–96 and accompanying text.
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has managed to capture major offenders.\textsuperscript{134} Therefore, whether the benefit of deterring the police from employing these methods would outweigh the detriment of permitting criminals to go undetected is unclear.

Law enforcement officials may choose to accept the greater risk that an expensive and drawn out investigation will produce a nonconvictable suspect, particularly where the crime involved is nefarious.\textsuperscript{135} Since a defendant in Jacobson’s shoes is arguably guilty,\textsuperscript{136} the Jacobson opinion in such a scenario would have the effect of freeing the culpable after a large expenditure of public monies. An unnecessary gulf could emerge between what appears to be the Court’s condemnation of these techniques and actual police practice. This type of conflict makes the legal system appear inconsistent and unfair.

By castigating the Postal Inspector’s use of free speech propaganda, the Court inappropriately focuses on the inducement half of the entrapment formula. While it is necessary to measure predisposition by referring to the method of inducement, the Court’s strong language may suggest to law enforcement and the judiciary (and most certainly defense counsel) that communications with suspected criminals during undercover investigations must adhere strictly to the business of violating the law. Such restrictions cramp law enforcement techniques unnecessarily.

The Court’s angry reaction to the Jacobson investigation probably stems from reaction to the apparently huge amount of effort and money expended to apprehend a person that a rational jury could have acquitted. By reversing Jacobson’s conviction, the Court tacitly expressed its disapproval over the perceived misallocation of police resources. Because the Court was unwilling to expressly depart from previous binding decisions, it mutated the predisposition test, narrowed the type of evidence available to the prosecution, and censured the type of inducement implemented to achieve the desired result.\textsuperscript{137}

\begin{footnotes}
\item[134] E.g., United States v. Thoma, 726 F.2d 1191 (7th Cir.), \textit{cert denied}, 467 U.S. 1228 (1984). In \textit{Thoma}, the defendant was targeted for an investigation of prohibited mailings of child pornography without any evidence that he was in fact engaging in that activity. A search of his house turned up video equipment and photographs of children engaged in sexual activity. \textit{Id.} at 1195; see H.R. REP. NO. 536, 98th Cong., 2d Sess. 12 (1984), \textit{reprinted in} 1984 U.S.C.C.A.N. 492, 503, 507 (highly deceptive methods are required to investigate violations of laws limiting the distribution of child pornography).
\item[136] See supra part II.B.
\item[137] See supra parts II.A, II.B.
\end{footnotes}
Unfortunately, courts will inevitably apply the holdings derived from this particular set of facts to very different cases, with the possible effect of acquitting defendants who ought to be convicted. The Court, unwilling to lay down a clear rule or adhere to the spirit of the earlier decisions, has confused the issues and failed to provide lower courts with the solid theoretical and practical foundation required to provide guidance.

2. The Jacobson Decision Will Erode the Flexible Nature of the Entrapment Defense

By deviating from the original formulation of entrapment, the Jacobson opinion undermines the inherent flexibility of the defense. The focus on predisposition was designed to prevent judges from laying down police policy. The entrapment defense was "not intended to give the federal judiciary a 'chancellor's foot' veto" over law enforcement practices of which it does not approve. As lower court and appellate court judges subsume the decision into their understanding of entrapment law, they will use it to acquit persons caught by methods of which they reprove. Each decision will create fertile precedent for further judicial activism, forcing the slow erosion of the subjective nature of the defense. Jacobson introduces objective entrapment theory through the back door.

In Sorrells, the Court entrusted the jury with the duty to judge those cases in which the police have not coerced the defendant into committing crime and the defendant was not already engaged in illegal conduct at the time of the initial government contact. This broad middle ground will contract as the judiciary’s decisional authority increases. An advantage of jury verdicts is that the reasoning jurors use cannot be the basis of subsequent decisions. The incursion of judges, whose decisions do create binding precedent, into the jury’s territory, may have unforeseen and unfortunate consequences. If dissatisfied by the entrapment doctrine as sculpted by judges, Congress

140. Id.
141. Of course, a strong showing of predisposition will still prevent unjustified dismissals of very serious crimes.
142. See supra, part I.B.1 (description of subjective and objective doctrines).
144. Leon Green, Judge and Jury 352 (1930).
may respond at last to the suggestion that it settle the issue by enacting a federal entrapment statute.¹⁴⁵

III. CONCLUSION

The Supreme Court did not correctly decide the issues presented in *Jacobson v. United States*. The Court erroneously held that a rational jury could not have found Jacobson predisposed beyond a reasonable doubt. By considering both types of evidence the prosecution offered independently, the Court failed to measure the cumulative impact of the evidence on the jury. The pressure the police applied on Jacobson to buy child pornography was so mild and infrequent that a jury could make a valid inference of predisposition. Furthermore, in holding that legal actions undertaken before the investigation and evidence of desire to engage in illegal activity gathered during investigation cannot prove the prerequisite intent to break the law, the Court inappropriately advanced a specific predisposition test that increases the prosecution's burden of proof.

By overturning Jacobson’s conviction, the Court abridges the role of the jury in entrapment doctrine. Not only does the Court violate the spirit and the policies of previous entrapment decisions, it opens the door to judge-made law in this area. This development is undesirable because juries, as representatives of the community, are best equipped to hand down decisions about acceptable citizen and police behavior where constitutional rights are not at stake.