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ELEVATION OF ENTRAPMENT TO A CONSTITUTIONAL DEFENSE

The issue of entrapment arises initially as a defense when a person is accused of committing a criminal act in which government agents solicited, and perhaps actively participated in, the conduct for which the defendant stands accused. Classic entrapment situations occur when law enforcement officers, through agents or informers, solicit an illegal transaction, such as the sale of contraband.¹ The evidence thereby obtained is used to support the prosecution of the individual accepting the solicitation. Solicitation is an important technique of law enforcement because evidence of illegal transactions is often impossible to obtain² by other methods.³ Certain uses of solicitation brought to the attention of the federal courts early in this century demonstrated the need for judicial limitation by prescribed standards.⁴ These cases involved factual settings where officials, eager to obtain a person's conviction for a particular substantive offense, seemingly "set him up" for prosecution by inducing him to participate in an illegal transaction when it was questionable whether the accused would have taken part if unsolicited. When directing their solicitation to this end, it is doubtful that enforcement officers are acting within the limits of their legitimate functions. Moreover, there is a real possibility that the government might attempt systematically to induce criminal conduct in a politically or socially unpopular individual or group so as to hamper their activities through prosecution or conviction.⁵ These situa-

¹ For example, a government informer solicited the sale of bootleg whiskey and on the basis of this evidence the seller was prosecuted for the illegal sale of liquor. *United States v. Eddings*, 478 F.2d 67 (6th Cir. 1973). In another case, government agents solicited the sale of obscene matter through the mails by a known suspect and the seller was then prosecuted under the postal laws. *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933).

² Transactions in contraband goods, such as alcohol, narcotics, and counterfeit currency, and other proscribed transactions, such as bribery or prostitution, are normally "invisible" in the sense that no one is likely to know of their occurrence except those who are direct participants. In these crimes there is no innocent victim as a complaining witness or detached third party able to provide evidence. Participants in such transactions have no incentive to produce self-implicative evidence.

³ See generally Rotenburg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963).

⁴ See *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915) (An immigration official suspected the defendant and others of unlawfully importing Chinese women into the United States. He persuaded the defendant to bring certain Chinese women from Mexico to the United States so that the defendant could be threatened with prosecution for this illegal act and thereby be persuaded to serve as an informer.); *United States v. Healey*, 202 F. 349 (D. Mont. 1913) (An American Indian, acting as an agent for the government, disguised himself as a Caucasian and purchased liquor from the defendant's liquor store. The defendant was then prosecuted for selling liquor to an Indian.).

⁵ See, e.g., *United States v. Anderson*, Criminal No. 602-71 (D.N.J. May 20, 1973). Defendants were members of a group of anti-Vietnam war activists who had planned to break into an office of the Selective Service System and destroy draft board records.

tions present considerable legal ambiguity with regard to the policy objectives the entrapment doctrine has been designed to promote, the elements of the defense as determined by these objectives, and the language employed to describe the elements. It is not surprising, therefore, that a sizable volume of judicial opinion and legal literature discusses the possible recognition of a bar to criminal conviction on the ground that the alleged criminal conduct was induced by the police.⁶

The orthodox entrapment doctrine expressed in the great majority of federal cases⁷ posits that if the alleged illegal conduct was induced by the solicitation or other direct participation of law enforcement agents, and if the accused was not predisposed to commit the crime charged when the inducement took place, then the defendant should not be convicted. The

but gave up the plan for want of technical expertise. A paid FBI informer joined the group, urged them to proceed with the idea, and provided them with a strategy, tools and equipment, schematic diagrams of the draft board offices, a vehicle, groceries, and technical training. Expenses were born by the FBI. With this assistance the defendants executed the plan and were caught in the act by FBI agents who were lying in wait. The defendants were prosecuted for conspiracy to break and enter the building and destroy the records.

The writer wishes to acknowledge the kind assistance of Mr. David Kairys of the Philadelphia Bar and Mr. John J. Barry, Assistant United States Attorney for the District of New Jersey, for helpful information concerning this case and the theories of entrapment argued during its course.

⁶ See, e.g., *Osborn v. United States*, 385 U.S. 323 (1966); *Lopez v. United States*, 373 U.S. 427 (1963); *Masciale v. United States*, 356 U.S. 386 (1958); *Casey v. United States*, 276 U.S. 413 (1928); *United States v. Workopich*, 479 F.2d 1142 (5th Cir. 1973); *United States v. Tatar*, 439 F.2d 1300 (9th Cir. 1971), *cert. denied*, 404 U.S. 866 (1971); *United States v. Walton*, 411 F.2d 283 (9th Cir. 1969); *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966); *Polski v. United States*, 33 F.2d 686 (8th Cir. 1929); *Newman v. United States*, 299 F. 128 (4th Cir. 1924); *Ritter v. United States*, 293 F. 187 (9th Cir. 1923); *Butts v. United States*, 273 F. 35 (8th Cir. 1921). See also Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 29 J. CRIM. L.C. & P.S. 447 (1959); Groot, *The Serpent Beguiled Me and I (Without Scierter) Did Eat—Denial of Crime and the Entrapment Defense*, 1973 U. ILL. L.F. 254; Rotenberg, *The Police Detection Practice of Encouragement: Lewis v. United States and Beyond*, 4 HOUSTON L. REV. 609 (1967); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959); Comment, *Clearing the Path for an Entrapment Defense*, 61 KY. L.J. 833 (1973); Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63 (1967); Current Development, *The Defense of Entrapment and the Due Process Analysis*, 43 COLO. L. REV. 127 (1971); Comment, *Entrapment: A Critical Discussion*, 73 MO. L. REV. 633 (1972); Comment, *Entrapment in the Federal Courts*, 1 U.S.F.L. REV. 177 (1966); Comment, *Present and Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 COLO. L. REV. 261 (1969).

⁷ See, e.g., *Pierce v. United States*, 414 F.2d 163 (5th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969); *United States v. Pugliese*, 346 F.2d 861 (2d Cir. 1965); *United States ex rel. Hall v. Illinois*, 329 F.2d 354 (7th Cir. 1964); *Gorin v. United States*, 313 F.2d 641 (1st Cir. 1963); *United States v. Kros*, 296 F. Supp. 972 (E.D. Pa. 1969).

The exceptions to the orthodox doctrine in the lower courts are found in: *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973); *United States v. Arceneaux*, 437 F.2d 924 (9th Cir. 1971); *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967); *United States v. Morrison*, 349 F.2d 1003 (2d Cir. 1965), *cert. denied*, 382 U.S. 905 (1965); *Whiting v. United States*, 321 F.2d 72 (1st Cir. 1963); *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1963); *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957); *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970).

majority policy goal is defendant-oriented in that the court focuses on the defendant's conduct and mental state rather than the conduct of enforcement officials in inducing the criminal act. The defense is designed to prevent conviction of the "unwary innocent" seduced to crime by a government solicitor, while preserving police solicitation or encouragement practices directed at the "unwary criminal."⁸

In recent years, however, a minority of courts considering the entrapment issue have departed from the orthodox, or "subjective,"⁹ rule. They take the position that the entrapment doctrine is primarily concerned with prevention of improper law enforcement practices. Under this view, the focus of the entrapment defense should be the overreaching conduct of the government. This "objective"¹⁰ test differs from the orthodox doctrine in that a defendant who was predisposed to commit the crime would not necessarily be precluded from successful assertion of the defense by reason of his predisposition. The objective test is designed to place a judicial standard of limitation on acceptable law enforcement conduct. In effectuating this policy goal, the test does not discriminate between the innocence or criminality of the defendant's mental state as an element apart from the inducement of the accused by law enforcement officials to conduct legislatively defined as criminal.¹¹

The divergent policy objectives of the majority and minority views are important to commentators dealing with the theory of criminal law, defendants seeking to develop entrapment arguments, and law enforcement officers charged with the difficult duty of preventing and imposing sanctions on "invisible"¹² illegal activities, while remaining within the limits of acceptable law enforcement practice. The entrapment issue brings into focus a variety of concerns which society itself must resolve as it defines the permissible role and functions of its law enforcement institutions. As courts have attempted to confront these concerns, there has been a natural tendency to seek general rules applicable in diverse situations. Yet, inevitably, fact situations arise in which the equities of the case defy black

⁸ These terms were coined by Chief Justice Warren in *Sherman v. United States*, 356 U.S. 369, 372-73 (1958), citing *Sorrells v. United States*, 287 U.S. 435, 451 (1932) for the underlying rationale. The distinction focuses on whether or not the defendant was disposed to commit the alleged offense at the time the police induced him to do so.

⁹ The rule is subjective in the sense that it focuses on the mental state of the defendant at the time he was induced to engage in criminal conduct, rather than on the objective circumstances of his behavior or that of the authorities. The distinction is described in these terms by Justice Stewart, dissenting in *United States v. Russell*, 411 U.S. 423, 440 (1973). See also Rotenberg, *supra* note 3, at 897-99; Note, *Entrapment*, 73 HARV. L. REV. 1333 (1958). A typical case in which this version of the entrapment doctrine was applied is *United States v. Kros*, 296 F. Supp. 972 (E. D. Pa. 1969), described in note 29 *infra*.

¹⁰ The "objectivity" of the minority test is in its focus on the conduct of law enforcement officers in soliciting the criminal behavior of the accused, rather than on the latter's criminal disposition. See *United States v. Russell*, 411 U.S. 423, 440-41 (1973) (Stewart, J., dissenting); Rotenberg, *supra* note 3, at 899-900.

¹¹ A case illustrating the minority view is *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971). See text accompanying note 57 *infra*.

¹² See note 2 *supra*.

letter application of the rule. Therefore, the law of entrapment has developed in an emphatically case-by-case manner. While past decisions appear rather unpredictable, the search for generality continues.

A recent manifestation of this search is the case of *Russell v. United States*,¹³ which first presented the United States Supreme Court with the opportunity to resolve the question of whether predisposition of the accused is an essential and determinative element when the entrapment defense is raised. A five-to-four majority of the Court concluded that it was. But in spite of the majority's efforts to establish the predisposition concept as dispositive of the defense, the opinion rested on elements of both the subjective and objective views. Aside from the predisposition issue, the Court conceded that excessive police conduct may be restrained, in a proper case, through court refusal to allow convictions that do not comport with due process principles. In suggesting that the entrapment doctrine has constitutional dimensions, the Court implied that the *Russell* decision will be significant not only with respect to the elements of the entrapment defense, but also with regard to its impact on the role of the defense in the state courts, where most criminal prosecutions take place.¹⁴ It is thus of general importance to inquire what the due process standard will be when the proper case arises. This article responds to this question by examining the treatment of federal case law employing the objective entrapment test, with a view to suggesting some features of a due process standard that, after *Russell*, may be imposed upon federal and state courts faced with an entrapment situation.

I. THE ROOTS OF AMBIGUITY

A. *Sorrells v. United States*

Ambiguity concerning the policy goals of the entrapment doctrine in the federal courts is rooted in the leading case of *Sorrells v. United States*,¹⁵ in which the Supreme Court first defined and applied entrapment principles. Chief Justice Hughes, writing for the Court, suggested that a defense of entrapment is presented

when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.¹⁶

¹³ 411 U.S. 423 (1973).

¹⁴ Unlike federal substantive and procedural law, constitutional principles of due process are binding on the states through the fourteenth amendment.

¹⁵ 287 U.S. 435 (1932). The defendant in the case was persuaded to sell bootleg whisky to a government agent, who had been defendant's comrade in arms during the First World War. The defendant's reluctance to engage in the transaction was overcome by appeals to previous friendship. The evidence thus obtained was then used to convict the defendant for violation of federal liquor laws.

¹⁶ *Id.* at 442.

The defense was designed to protect defendants who would not have committed an offense if the idea of doing so had not been engendered by the government, acting through its agents.¹⁷ Thus, in the words of Chief Justice Hughes:

The defense is available, not in the view that the accused, though guilty, may go free, but that the Government can not be permitted to contend that he is guilty of a crime where the Government officials are instigators of his conduct.¹⁸

The opinion indicated that the entrapment doctrine was neither judicially imposed nor based on a constitutional mandate. Rather, the doctrine was developed because, according to the Court, Congress could not have intended that the accused be found guilty where the government instigated his criminal behavior.¹⁹ However, the Chief Justice's view implied that the defense was not available to persons already disposed to perpetrate a crime, who were merely taking advantage of the opportunity presented by government agents in order to carry out their predisposition.²⁰

In a separate opinion, joined by Justices Brandeis and Stone, Justice Roberts adopted a broader view of the doctrine that implied a different policy focus. He observed that the majority rationale, based on a congressional intent judicially inferred to avoid an absurd result,²¹

¹⁷ See note 20 *infra*. See also Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 *YALE L.J.* 1091, 1100-01 (1951); Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Basis of the Entrapment Defense*, 74 *YALE L.J.* 942, 943-44 (1965).

¹⁸ 287 U.S. at 452.

¹⁹ The Court observed:

Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned.

Id. at 446.

We are unable to conclude that it was the intention of the Congress in enacting this statute that its process of detection and enforcement should be abused by the instigation of 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.

²⁰ The majority stated:

The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. . . . [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 on that issue.

Id. at 451.

²¹ To justify judicial reliance on an unexpressed intent of Congress, Chief Justice Hughes had noted:

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.

Id. at 450. See note 19 *supra*.

amounted to an unnecessary judicial artifice.²² While the Hughes theory, adopted by the majority, implied that Congress could nullify the entrapment doctrine by statutory expression of its intent to do so, Mr. Justice Roberts felt strongly that

[t]he 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. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.²³

Thus, those justices joining in the separate opinion posited that the relevant question was not whether the accused was somehow “innocent,”²⁴ but whether law enforcement officials had exceeded appropriate bounds in accomplishing their objectives. The doctrine of entrapment was viewed as analogous to the equitable and legal principles from which a court derives authority to refuse to enforce an illegal scheme or a transaction otherwise in violation of public policy.²⁵ When government conduct is sufficiently “revolting,” in that it amounts to planning and implementing a crime in order to obtain a conviction, the courts will not grant the government the fruits of its efforts.²⁶

Under Justice Roberts’ rationale, the predisposition of the defendant still had some relevance to the determination of the propriety of police conduct. This followed from the minority’s definition of entrapment as the “conception and planning of an offense by an officer, and his procurement of its commission by *one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.*”²⁷ But the minority’s reference to the quasi-equitable judicial power to promote the principles of justice suggested that the entrapment doctrine is only another means of controlling law enforcement practices. This analysis suggests that despite the defendant’s predisposition, the bounds of propriety might be exceeded in a particular situation. Therefore, the minority believed a

²² Specifically, Justice Roberts stated, “It is merely to adopt a form of words to justify action which ought to be based on the inherent right of the court not to be made the instrument of wrong.” *Id.* at 456.

²³ *Id.* at 457.

²⁴ Since, by hypothesis, the defendant had committed the proscribed conduct, the Justice felt it would be absurd to conclude that he was innocent. *Id.* at 456.

²⁵ *Id.* at 455.

²⁶ As Justice Roberts recognized:

There is common agreement that where a law enforcement officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal.

Id. at 454-55.

²⁷ *Id.* at 453-54 (emphasis added).

court should scrutinize law enforcement conduct in any case where government inducement was a *sine qua non* of the particular offense.

Minority arguments notwithstanding, the majority opinion in *Sorrells* was followed by the lower federal courts as the definitive statement of the entrapment defense. It was generally assumed that a defendant's predisposition would negate any entrapment defense. The decisions, therefore, turned on such matters as allocation of the burden of proof, methods of proving predisposition and government inducement, and standards for determining the sufficiency of evidence presented by the parties.²⁸ A federal court applying the entrapment doctrine after *Sorrells* had to find that the accused was not predisposed to commit the crime at the time of his inducement by the government.²⁹

B. *Sherman v. United States*

The Supreme Court had occasion to reconsider the major policy issues posed by the entrapment defense in *Sherman v. United States*.³⁰ But Chief Justice Hughes' view in *Sorrells* was accepted by the majority in *Sherman* in refusing to reassess the doctrine in terms of Justice Roberts' analysis.³¹ The Court found that the appellant had been entrapped as a matter of law, since he was not predisposed to commit the crime charged. As previously noted,³² the Roberts view, though focusing on government

²⁸ See, e.g., *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933); *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933).

²⁹ See, e.g., *United States v. Kros*, 296 F. Supp. 972 (E.D. Pa. 1969). Defendant subscribed to a magazine, known as "Swinger's Life," which offered its subscribers a page of advertising on which they could indicate their particular social tastes and solicit those of like interests. Agents of the Post Office Department, suspecting the nature of matter that might ultimately be sent through the mails in response to the solicitations, advertised in the name of a fictitious couple, suggesting their interest in obtaining photographs, among other things. Defendant eventually mailed, in response to the couple's order, two reels of film which were "obscene, lewd and vile." He was indicted for sending nonmailable matter through the mails. The court dismissed the indictment because of entrapment, finding that defendant was not predisposed to violate the postal laws prior to the agents' inducement.

³⁰ 356 U.S. 369 (1958). Appellant was undergoing treatment by a private physician for addiction to narcotics. He met a fellow narcotics patient, who was also a government informer, in the physician's waiting room and at a pharmacy where they both obtained prescriptions. As the acquaintance developed, the informant repeatedly asked whether appellant knew of a source of drugs. Appellant, believing the informant was in distress and not responding to treatment, eventually obtained narcotics on his behalf. The informant passed information of the transactions to the Bureau of Narcotics, and appellant was convicted for the illegal sale of narcotics.

³¹ The majority opinion stated:

It has been suggested that in overturning this opinion we should reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells v. United States*. . . . To do so would be to decide the case on grounds rejected in *Sorrells* and . . . not raised here or below by the parties before us. . . .

To dispose of this case on the ground suggested would entail both overruling a leading decision of this Court and brushing aside the possibility that we would be creating more problems than we would supposedly be solving.

Id. at 376-78.

³² See note 27 and accompanying text *supra*.

conduct, implied that the defendant's predisposition might be relevant in determining the propriety of that conduct. The majority opinion in *Sherman* was similarly tinged with the relationship between defendant's predisposition and the permissibility of police conduct:

The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.³³

A reference to police conduct was implied in Chief Justice Warren's statement of the issue.³⁴ But the majority stopped short of resting the entrapment doctrine on the need to limit law enforcement conduct to acceptable practices; what was permissible depended on the defendant's state of mind. There was again a strong minority view.

In a concurring opinion joined by Justices Douglas, Harlan, and Brennan, Justice Frankfurter repeated Justice Roberts' attack on the majority's reasoning in *Sorrells*:

In these cases raising claims of entrapment, the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged.³⁵

Justice Frankfurter suggested that, when particular conduct is legislatively proscribed, no legislative intent should be inferred beyond the prohibition of exactly that conduct. There is no reasonable basis, he argued, for concluding that Congress tacitly intended that a non-"predisposed" actor be found innocent when he engaged in the prohibited conduct. Furthermore, the minority expressed serious concern about the due process implications of focusing on the defendant's predisposition. If the presence or absence of predisposition in the defendant is crucial to the success of his entrapment defense, evidence must be adduced which will permit the trier of fact to establish through inference the defendant's state of mind prior to the commission of the criminal act. This inquiry leads to examination of evidence reflecting the defendant's reputation, past criminal activities, and prior inclination to commit crime. These matters are not directly related to the elements of the crime in issue. As Justice Frankfurter observed, "The danger of prejudice in such a situa-

³³ 346 U.S. at 372.

³⁴ Chief Justice Warren framed the issue as whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade.

Id. at 371.

³⁵ *Id.* at 379. See also the majority opinion in *Sherman v. United States*: 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 373.

tion, . . . , is evident."³⁶ The implication of the majority view is that, of two defendants, one with no past record of criminal disposition and one with such a history, the latter will be vulnerable to law enforcement practices tending to cause criminal conduct which would be intolerable if applied to the former.³⁷ The *Sherman* minority argued that to allow such a discrepancy in outcome is to lose sight of the social end to be achieved by the entrapment defense. Certain police conduct is not permissible, and that impermissible quality remains regardless of the inclinations of the charged defendant.³⁸

The minority wanted the Court to rest the entrapment defense on the underlying objective of preventing improper police conduct, thereby allowing the courts to administer standards of equity in each case.³⁹ The new policy would minimize reliance on the elusive predisposition element, plagued as it is with the perils of denial of due process and unequal treatment of defendants in like circumstances. The Frankfurter test would shift the focus from the state of mind of the individual defendant to the conduct of the police:

[I]n holding out inducements they should act in such a manner as is likely to induce to the commission of crime only [those ready and willing to commit crime] and *not others who would normally avoid crime and through self-struggle resist ordinary temptations*. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime.⁴⁰

Justice Frankfurter's sound and vigorous argument notwithstanding, the majority opinion in *Sherman v. United States* reiterated the dominant

³⁶ *Id.* at 382.

³⁷ *Id.* The concerns, both logical and procedural, expressed by Justices Roberts and Frankfurter are shared by many commentators. See generally Donnelly, note 17 *supra*; Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942), in which it is suggested that the proper way to control overreaching law enforcement conduct is to prosecute police officials for the substantive crimes in which they become involved. This course was actually taken in *Reigan v. People*, 120 Colo. 472, 210 P.2d 991 (1949), but it seems never to have been adopted by the federal courts. See also G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 263 (2d ed. 1961); Rotenburg, *supra* note 6, at 883-89; Note, *supra* note 17; Comment, *Due Process of Law and the Entrapment Defense*, 1964 U. ILL. L.F. 821.

³⁸ In Justice Frankfurter's words:

No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.

356 U.S. 369, 382-83.

³⁹ As the minority indicated:

The crucial question, not easy of answer, to which the court must direct itself, is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.

Id. at 382.

⁴⁰ *Id.* at 384 (emphasis added).

view:⁴¹ government inducement of defendants to criminal acts should not be limited except in cases where it could be shown that the particular defendant was not predisposed to crime. This predisposition rule continued to be followed in the overwhelming majority of lower federal court decisions.⁴² Having found sufficient evidence to infer predisposition, the courts generally avoided further inquiry into the propriety of government law enforcement conduct.

C. Federal Cases after *Sherman*

Reference to selected progeny of the *Sorrells* and *Sherman* cases will demonstrate the calculus of entrapment rules in practice. In *United States ex rel. Toler v. Pate*,⁴³ it was enough to support the trial court's inference of predisposition that the defendant readily accepted a cash offer to purchase narcotics and seemed to have an available supply, in spite of his lack of prior record or previous grounds for suspicion.⁴⁴ In *United States v. Walton*,⁴⁵ the defendant sold heroin to a government agent who had merely presented opportunities for commission of the offense without engaging in persuasion. There was also evidence that the defendant was engaged in the narcotics trade. Under these circumstances, no entrapment was found. On the other hand, in *Carbajal-Portillo v. United States*,⁴⁶ an unemployed and destitute Mexican citizen desiring to feed his wife and family, was persuaded to travel a thousand miles from his home near Mazatlan to sell a quantity of heroin to a United States government agent in Mexicali, a Mexican city near the California border. The agent persuaded him to cross the border and sell the heroin in Calexico, California instead, where he was arrested for the importation and sale of narcotics. The court of appeals astutely found that the defendant, though doubtless predisposed to sell heroin in violation of Mexican law, was not predisposed to import or sell it in the United States.

A tempting conclusion from these cases⁴⁷ is that, when the *Sorrells* and *Sherman* majority tests are applied, there is an inverse relationship be-

⁴¹ The prevailing rule had been adopted in *Sorrells* and in previous lower court decisions with the exception of *Wall v. United States*, 65 F.2d. 993 (5th Cir. 1933) and *Banks v. United States*, 249 F.2d. (9th Cir. 1957).

⁴² See note 7 *supra*.

⁴³ 332 F.2d 425 (7th Cir. 1964).

⁴⁴ A concurring opinion argued that the entrapment defense should be recognized on due process grounds, since defendant produced evidence showing that the sale was prompted by his sympathy for what he took to be a dying addict.

The spectacle of the police hounding a man, not shown to have had any connection with the narcotics trade, for more than two months, with appeals to sympathy and friendship, to obtain the commission of a crime seemed to me to be a monstrous offense against the ordered concepts of our constitutional society.

Id. at 427-28. The opinion noted, however, that defendant had an adequate opportunity to raise this defense in the state courts and failed to do so. Thus it was not properly raised in the federal courts in a habeas corpus petition.

⁴⁵ 411 F.2d 283 (9th Cir. 1969).

⁴⁶ 396 F.2d. 944 (9th Cir. 1968).

⁴⁷ *Cf.* fact situations in *United States v. Kros*, 296 F. Supp. 972 (E.D. Pa. 1969), discussed in note 29 *supra*; *Sorrells v. United States*, 287 U.S. 435 (1932), discussed in note 15 *supra*; *Sherman v. United States*, 356 U.S. 369 (1958), discussed in note 30 *supra*.

tween a finding of predisposition and the unconscionability of police conduct. A court faced with police conduct that is especially reprehensible seems less likely to find criminal predisposition in the defendant.⁴⁸ Conversely, the *Pate* and *Walton* decisions suggest that clear evidence of the defendant's predisposition will result in less rigorous judicial scrutiny of police conduct. This hypothesis might be called into question by a case such as *Pierce v. United States*,⁴⁹ in which predisposition was found when a government agent initially contacted the defendant, persistently solicited the sale of counterfeit Federal Reserve notes, and ultimately persuaded the defendant to sell, but only after raising the offering price. Bidding for a commodity like counterfeit currency may not, however, be as unconscionable an inducement to criminality as an appeal to the physical and emotional factors associated with drug addiction, intimate friendship, or poverty. These cases indicate that, even in cases adopting the orthodox view of the requisites of an entrapment defense, there is an analytical blurring of the doctrines relating to the predisposition of the defendant and the legitimacy of certain law enforcement conduct. Some federal courts were unable to insulate themselves from the ambiguities inherent in the predisposition concept and explored new dimensions of the entrapment doctrine in search for sound alternatives.

II. THE DEVELOPING FOCUS ON GOVERNMENT CONDUCT

In spite of the general post-*Sherman* focus on defendant predisposition,⁵⁰ a marked departure from the norm has occurred in a minority of federal cases that have allowed an entrapment defense despite the defendant's predisposition.⁵¹ Courts in these cases have scrutinized police conduct in light of concerns similar to those bearing on due process questions. Applied in this manner, the entrapment defense functions primarily as a curb on improper law enforcement practices. The plight of the entrapped defendant, whether predisposed or not, is regarded as potentially illustrative of the abuse of law enforcement power. Therefore, a court presented with a defendant whose criminal conduct was induced by government enticement should first examine the quality of police conduct. In this sense the standard is objective, since it is not concerned with the defendant's state of mind. The use of this approach was advocated by the separate opinions of Justices Roberts and Frankfurter in *Sorrells* and *Sherman* respectively and encouraged by the close division of the Supreme Court in those cases. Eleven cases have adopted the minority view. As these cases are examined, it appears that they differ in their assumptions regarding the sources of judicial authority to limit law enforcement activity and the standards to be applied in testing the permissibility of that conduct.

⁴⁸ See *Carbajal-Portillo v. United States*, 396 F.2d 944 (9th Cir. 1968).

⁴⁹ 414 F.2d 163 (5th Cir. 1969).

⁵⁰ See note 7 and accompanying text *supra*.

⁵¹ Two of these minority view cases actually predate *Sherman*. See *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933), discussed in text accompanying note 66 *infra* and *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957), discussed in text accompanying note 61 *infra*.

The cases comprising this minority may be broadly categorized according to two separate analytical approaches. In cases in the larger group, which are herein termed "single test" cases, the courts conclude at the outset that the conceptual perplexities and due process ambiguities of the subjective entrapment test⁵² preclude their examining the predisposition element and, therefore, test government conduct alone. In the second and smaller group, "double test" cases, courts share the assumption that the entrapment defense, properly understood, is negated by the predisposition of the defendant. But these courts then independently scrutinize the police conduct; if that conduct is found to be violative of limiting standards, then the defendant is acquitted in spite of his predisposition.

A. Single Test Cases

The single test group of cases is examined first. Cases in this group may be divided into two sub-groups, one of which rests the entrapment doctrine on violation of the court's sensibilities, while the other bases the analysis on principles of due process. There is also a third sub-group, herein designated "tentative" because the courts appear to be applying a single test, but do not unequivocally state whether the defendant's predisposition is relevant to the availability of the entrapment defense.

1. *Appeal to Court's Sensibilities*—There are three single test entrapment cases which rest the defense on an appeal to the court's sensibilities. *Williamson v. United States*⁵³ involved a defendant induced by an informer who was paid a fee partially contingent on his success in catching certain big liquor law violators. The conviction was reversed and remanded for further evidence to support prior suspicion of his criminal activity. Without such evidence, the contingent fee arrangement would be too easily subject to abuse.⁵⁴ The Court of Appeals for the Ninth Circuit

⁵² See note 9 *supra*.

⁵³ 311 F.2d 441 (5th Cir. 1962).

⁵⁴ The court explained:

Without some such justification or explanation, we cannot sanction a contingent fee arrangement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a "frame-up" or to cause an informer to induce or persuade persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration.

Id. at 444 (footnote omitted).

A concurring opinion would have recognized a separate, nonentrapment basis for acquittal:

I do not think . . . that this is an aspect of entrapment. Its kinship to entrapment is not that the act of a Government representative induced the commission of a crime. Rather, it is that the means used to "make" the case are essentially revolting to an ordered society.

....

What we hold is that, recognized as is the role of the informer in the enforcement of criminal laws, there comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive whether the method used is refined or crude, subtle or spectacular.

Id. at 445.

employed the same approach in *United States v. Arceneaux*,⁵⁵ concluding, after surveying the dichotomous opinions in both *Sorrells* and *Sherman*, that "it is the unbecoming conduct of the Government which calls the defense of entrapment into play."⁵⁶ Government conduct was scrutinized without reference to the defendant's predisposition or corruptibility. The court did not find it unbecoming that one of the alleged fellow bank robbers had in the past been an informer and was in contact with the FBI as an informer while the crime was being planned. The informer had taken no active or organizing responsibility in the execution of the criminal plan, and the court found no entrapment.

In *United States v. Bueno*,⁵⁷ the appellant had been convicted for narcotics violations based on evidence that he had accepted heroin from a government agent in Mexico, who had smuggled other heroin into the United States where he provided it to the appellant. The appellant then allegedly sold the heroin to another agent. The Court of Appeals for the Fifth Circuit acknowledged that the defendant had willingly taken part in the transaction, but held that his willingness was of no importance to the entrapment defense. Evidence of willingness was held merely to negate a defense that defendant lacked a criminal motive. But the issue raised by the entrapment defense, according to the court, was not *why* the defendant took part in criminal conduct, but *what* that conduct was from the perspective of government participation.⁵⁸ "The story takes on the element of the government buying heroin from itself, through an intermediary, the defendant, and then charging him with crime."⁵⁹ This transaction was held to exceed the "bounds of reason" set by the same court in *Williamson v. United States*.⁶⁰

2. *Due Process*—The second group, composed of two cases, also adhere to a single objective test for entrapment, but rest the test explicitly on fifth amendment due process grounds. Prior to the decision in *Sherman*, the Ninth Circuit had held in *Banks v. United States*,⁶¹ without elaboration, that entrapment would be found according to due process principles when a defendant was supplied with \$70 to procure narcotics for an agent's "suffering friend," and defendant did so at no profit to himself.⁶² In *United States v. Chisum*,⁶³ the District Court for the Central District of California reached the same result after an especially searching and scholarly analysis of the theories and rationales previously offered to

⁵⁵ 437 F.2d 924 (9th Cir. 1971).

⁵⁶ *Id.* at 925.

⁵⁷ 447 F.2d 903 (5th Cir. 1971).

⁵⁸ *Id.* at 906.

⁵⁹ *Id.* at 905.

⁶⁰ 311 F.2d 441 (5th Cir. 1962). See text accompanying note 53 *supra*.

⁶¹ 249 F.2d 672 (9th Cir. 1957).

⁶² *Id.* at 673. There was evidence that the defendant "had no idea of purchasing any drug until urged by a Federal government agent." *Id.* The court made no mention of "predisposition," and it can not be reported whether its absence was, or was not, an element of the due process argument.

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

support the entrapment defense.⁶⁴ The court concluded that the gravamen of the defense is the crime prevention function of the police and the proper use of government power. Therefore, the defense must prevent law enforcement activities which tend to manufacture disobedience in order to punish it, because such procedures are thoroughly repugnant to constitutional principles. In fact, "[e]ntrapment is indistinguishable from other law enforcement practices which the courts have held to violate due process. Entrapment is an affront to the basic concepts of justice."⁶⁵ Thus, the defense was held available in a case where the defendant actually solicited a police informant to sell counterfeit bills and the police merely took him up on the proposition by supplying the bills which he then sold.

3. *Tentative*—The two cases that together have been characterized as "tentative" share a common focus on the single test of government conduct, but express the entrapment defense in terms which raise the question of whether they have really departed from the notion of predisposition. The first of these was *Wall v. United States*,⁶⁶ decided by the Fifth Circuit Court of Appeals shortly after the Supreme Court handed down its decision in *Sorrells*. The defendant appealed from his conviction for conspiring to sell narcotics. He argued that his ex-mistress, a government informer known by the defendant to be an addict, induced him to help her obtain morphine by feigning severe withdrawal symptoms, and that this was his sole connection with the alleged conspiracy. Citing *Sorrells*, the court held that if the government agents who initiated contact between the defendant and the informer had suspected that the defendant was illegally dealing in narcotics, then the conviction would be sustained, "although the device employed was exceedingly indecent and beneath the dignity of the United States. . . ."⁶⁷ On the other hand, if the government, without prior suspicion, had taken advantage of the defendant's sympathies for the plight of his ex-mistress, and the defendant was not otherwise interested in making the sale, then this government activity would constitute an entrapment.⁶⁸ The case was remanded to determine the government's prior suspicion of the defendant.

Finally, in *Kadis v. United States*,⁶⁹ the First Circuit applied a single test which examined whether the government was guilty of corrupting conduct. The court expounded the predisposition doctrine and then rejected it in favor of a single issue, "the ultimate question of entrap-

⁶⁴ The court discerned five different rationales in the cases and commentaries including: estoppel of the government to prosecute the criminal it created; a public policy argument that the police serve no proper function in instigating criminal acts; a theory of innocence of the entrapped defendant based on the implied intent of Congress; a theory of judicial discretion to protect the integrity of the courts; and a constitutional theory of due process. *Id.* at 1310.

⁶⁵ *Id.* at 1312.

⁶⁶ 65 F.2d 993 (5th Cir. 1933).

⁶⁷ *Id.* at 994.

⁶⁸ *Id.* The court failed to mention the term "predisposition" and it is thus questionable whether that concept would be equated with "grounds of prior suspicion."

⁶⁹ 373 F.2d 370 (1st Cir. 1967).

ment."⁷⁰ That issue was resolved by judging whether the government's conduct corrupted the defendant in the particular case. The court argued that the issue had nothing to do with the defendant's predisposition, in the sense of past record of criminal conduct or criminal proclivities, but instead amounted to an assessment of his readiness to engage in the specific conduct for which he was charged seen against the nature and extent of the police inducement. The distinction seems exceptionally subtle and defines acceptable police conduct, other than that which might be described as offensive per se,⁷¹ with reference to the defendant's state of mind. Although the standard may be relative, by placing the burden of proof as to the noncorruptibility of the inducement on the police officials, the test implied that the character of the police conduct is ultimately to be judged.⁷²

In summary, the single test cases taking the minority objective view of the entrapment issue identified two conceptual sources of legal authority for judicial review of law enforcement conduct constituting inducement. One source is the court's role as protector of the integrity of the criminal justice system. This equity function was clearly discerned by Justice Roberts in *Sorrells*. That rationale manifested itself in judicial recognition of the offensive nature of particular enticement conduct,⁷³ the more general assessment of the potential for abuse of an investigative process by "frame-up,"⁷⁴ the overall quantum of criminal creativity engaged in by the government,⁷⁵ and the tendency of law enforcement conduct to corrupt.⁷⁶ A second foundation of authority is the due process clause, which provided the standards applied in *Banks* and *Chisum*. Due process of law precludes police conduct that tends to manufacture crime.

B. Double Test Cases

In the double test group of minority view entrapment cases, the courts, while focusing on government conduct as ultimately determinative, still accept the idea that the entrapment defense, properly construed, is available only to the nonpredisposed defendant. However, a finding of predisposition is not dispositive, for government conduct is to be examined

⁷⁰ *Id* at 374.

⁷¹ See *Whiting v. United States*, 321 F.2d 72, 76 (1st Cir. 1963), discussed in text accompanying note 89 *infra*.

⁷² Neither *Wall* nor *Kadis* directly stated the test of offensiveness of government conduct in terms of the general proposition proposed by Justice Frankfurter in *Sherman*, as to whether the inducement would appeal only to those "ready and willing to commit crime." *Sherman v. United States* 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring in result).

⁷³ See *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967), discussed in text accompanying note 69 *supra*.

⁷⁴ See *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962), discussed in text accompanying note 53 *supra* and *United States v. Bueno*, 447 F. 2d 903 (5th Cir. 1971), discussed in text accompanying note 57 *supra*.

⁷⁵ See *United States v. Arceneaux*, 437 F.2d 924 (9th Cir. 1971), discussed in text accompanying note 55 *supra*.

⁷⁶ See *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967), discussed in text accompanying note 69 *supra*.

in its own right, regardless of the result of the predisposition test. A two-step analytic process seems to be used in dealing with the defendant's entrapment claim. The initial inquiry is whether the defendant was predisposed to commit the crime. If he were not predisposed, he would be acquitted.⁷⁷ Even if he were found to be predisposed, however, the propriety of the law enforcement conduct could be separately attacked, since it might nevertheless preclude the defendant's conviction.

The first case clearly recognizing the alternative "overreaching conduct" defense was *United States v. Morrison*,⁷⁸ in which the court adopted a standard for police conduct with attributes similar to the standards in both *Whiting v. United States*⁷⁹ and *Accardi v. United States*.⁸⁰ The question was "whether, in exposing the defendant's criminality, government agents have acted in an offensive manner or lived up to reasonably decent civilized standards for the proper use of government power."⁸¹ This was an alternative standard applicable when the defendant had been found to be predisposed.⁸² In *Greene v. United States*,⁸³ a federal court adopted the overreaching conduct analysis in a case where a federal revenue agent had induced defendants to manufacture bootleg whiskey, by offering to help them obtain a distillery site, still, and operator, and by furnishing them with 2000 pounds of sugar as raw materials for the process. Defendants readily acquiesced and had a past history of convictions for similar criminal conduct. The court focused on the government's level of "creativity"⁸⁴ in the inducement to criminal conduct. Application of this test resulted in the defendants' acquittal, though the court acknowledged that a "typical" entrapment defense could not be sustained in the face of evidence of predisposition.⁸⁵

The opinion in *Accardi v. United States*⁸⁶ suggested that government conduct is overreaching when it is so inappropriate that it must be judicially deterred. The test of overreaching, as articulated by the court, was whether government agents had manifested "guile and low cunning" exerted for the purpose of enticing into crime "an unwary innocent who would otherwise have struggled within himself and resisted temptation."⁸⁷

⁷⁷ Such a situation would constitute the classic entrapment.

⁷⁸ 348 F.2d 1003 (2d Cir. 1965).

⁷⁹ 321 F.2d 72 (1st Cir. 1963), discussed in text accompanying note 89 *infra*.

⁸⁰ 257 F.2d 168 (5th Cir. 1958), discussed in text accompanying note 86 *infra*.

⁸¹ 348 F.2d at 1004.

⁸² *Id.*

⁸³ 454 F.2d 783 (9th Cir. 1971).

⁸⁴ *Id.* at 786.

[W]hen the government permits itself to become enmeshed in criminal activity, from beginning to end, . . . the same underlying objections which render entrapment repugnant to American criminal justice are operative. Under these circumstances, the Government's conduct rises to a level of "creative activity" . . . substantially more intense and aggressive than the level of such activity charged against the Government in numerous entrapment cases we have examined.

Id. at 787.

⁸⁵ *Id.* at 787.

⁸⁶ 257 F.2d 168 (5th Cir. 1958).

⁸⁷ *Id.* at 173. This obscure set of epithets was generated by both majority and minority opinions in the *Sherman* case.

This language may raise the image of predisposition, depending on whether the test involves the specific defendant as an unwary innocent or, in the manner of Justice Frankfurter's approach, unwary innocents generally. The verbal formulation offered in the case, however, seems to imply that government conduct is being judged, even if it is relative, in some sense, to the defendant's state of mind. In any event, it is clear that the latter does not dispose of the case.⁸⁸

The double test approach also has its "tentative" case. In *Whiting v. United States*,⁸⁹ a government agent gained entry to the defendant's apartment by representing himself as a friend of the defendant's wife. Defendant first raised the subject of drugs, and the agent then proceeded to solicit their sale. Defendant testified that the agent appealed to his sympathy for the agent's addicted girlfriend, who was said to be suffering from withdrawal symptoms; this the government denied. The test defined by the First Circuit Court of Appeals was that, once the defendant showed he was induced by the government to commit crime, the government bore the burden of proving "that it [had] engaged in no conduct that was shocking or offensive per se, and that the defendant was not, in fact, corrupted by the inducement."⁹⁰ In finding the government's conduct not offensive per se, the court held that there was sufficient testimony from which the jury could have rejected defendant's assertion that he had been corrupted. By asking whether the defendant was "corrupted by the inducement," the court was again writing in predisposition terms. But if a predisposition test is involved, it is combined with the question of whether the government conduct is offensive per se. The objective element is thus a part, at least, of the court's approach.

Both groups of minority cases, whether viewing entrapment solely as a question of inappropriate police conduct or accepting the orthodox entrapment doctrine while imposing an alternative standard on official conduct, employ a variety of often colorful terms to describe official conduct which is so objectionable that it must be deterred by judicial proscription. Such conduct has been described as government overreaching,⁹¹ government conduct shocking and offensive per se,⁹² government creativity⁹³ in the inducement of criminal conduct, and the inducement to crime.⁹⁴ It is pointless to attempt a systematic restatement of this terminology in hopes of discerning a technically meaningful set of legal con-

⁸⁸ *Id.* at 172-73. By way of historical contrast, the doctrine in the Fifth Circuit later developed along lines suggested in *Williamson* and *Bueno* (discussed in text accompanying notes 53 and 57 *supra*) ultimately incorporating the overreaching conduct analysis into the entrapment defense itself.

⁸⁹ 321 F.2d 72 (1st Cir. 1963).

⁹⁰ *Id.* at 76 (footnotes omitted).

⁹¹ *Accardi v. United States*, 257 F.2d 168, 173 (5th Cir. 1958). See note 87 and accompanying text *supra*.

⁹² *Whiting v. United States*, 321 F.2d 72, 76 (1st Cir. 1963). See note 89 and accompanying text *supra*.

⁹³ *Sorrells v. United States*, 287 U.S. 435, 451 (1932) (see note 20 *supra*); *Greene v. United States*, 454 F.2d 783, 786 (9th Cir. 1971) (see note 84 *supra*).

⁹⁴ *Sorrells v. United States*, 287 U.S. at 442, 451. See text accompanying notes 16-18 *supra*.

cepts. The courts appear to have been struggling to describe general legal principles of ethical, socially acceptable police conduct, while avoiding the prohibition of particular practices.⁹⁵ Although the language seems cryptic, it indicates that some courts are willing to abandon their doctrinal preoccupation with the defendant's predisposition in order to ensure the application of a limiting standard with respect to certain types of police conduct. The increasing number of schismatic entrapment opinions led the Supreme Court to reexamine the significance of predisposition.

III. A SYNTHESIS OF POLICY GOALS: UNITED STATES V. RUSSELL

In light of the divergent views expressed by majority and dissent in the *Sorrells* and *Sherman* cases and their progeny, the Supreme Court chose to reconsider the policy issues raised by the entrapment doctrine in *United States v. Russell*.⁹⁶ Two major issues were considered: first, whether a finding of predisposition is dispositive of the entrapment defense; and second, if predisposition has been established, whether there remains an alternative basis for judicially limiting police inducement of criminal conduct. The defendant in *Russell* was convicted of illegally manufacturing, processing, and selling a depressant or stimulant drug. He had been approached by a special agent of the Federal Bureau of Narcotics and Dangerous Drugs, who claimed to represent an organization seeking to control the illicit manufacture and distribution of methamphetamine on the Pacific coast. The manufacture of methamphetamine⁹⁷ requires as an essential ingredient a substance known as phenyl-2-propanone. At the time of defendant's alleged violation, phenyl-2-propanone was legal to manufacture, sell, and possess, but its purchase required a manufacturer's license. Its only use was as an ingredient for the manufacture of methamphetamine. At the request of the Bureau of Narcotics and Dangerous Drugs, most suppliers had agreed voluntarily to discontinue its sale. The ingredient was therefore extremely difficult to obtain, legally or illegally. Shapiro, the agent who approached the defendant, offered to supply him with phenyl-2-propanone in return for half of the methamphetamine to be produced from the propanone by the defendant. Shapiro, in fact, furnished one hundred grams of propanone, received half the product, and purchased part of the remaining half for \$60. About a month later, Shapiro returned to the premises where the manufacture had taken place and asked defendant's accomplice whether they could continue the arrangement. The accomplice said he had obtained two additional bottles of propanone, but would be interested in further transactions with Shapiro when they were depleted. The accomplice then provided Shapiro with more methamphetamine. Three days later Shapiro returned with a search warrant and seized an empty 500

⁹⁵ Practices which might be proscribed include soliciting the purchase of contraband from a suspect and appealing to a suspect's known weakness for using drugs, or to his sympathies for an intimate friend.

⁹⁶ 411 U.S. 423 (1973).

⁹⁷ This drug is described in the vernacular as "speed."

gram propanone bottle and a 100 gram bottle partially filled with the chemical, neither bottle being the one the agent had earlier provided.

The Court of Appeals for the Ninth Circuit overturned defendant's conviction,⁹⁸ taking the view that reversal was mandated regardless of whether one characterized overreaching government conduct as the gravamen of the entrapment defense⁹⁹ or as an alternative defense.¹⁰⁰ The "hopefully unique"¹⁰¹ conduct of agent Shapiro was repugnant to the criminal justice system, violated fundamental concepts of due process, and amounted to the kind of overzealous law enforcement conduct which Justice Frankfurter had sought to prevent in *Sherman*.¹⁰² It was a matter of creating crime in order to punish it, an activity which cannot be judicially tolerated regardless of the defendant's predisposition.

The Supreme Court, in a five-to-four decision, reversed the court of appeals. Writing for the majority, Justice Rehnquist noted the recurring conflict, first engendered by the Hughes-Roberts dichotomy in *Sorrells*,¹⁰³ as to whether the proper focus of an entrapment inquiry is the predisposition of the defendant or the government instigation of the crime. He concluded that, while the majority views in *Sorrells* and *Sherman* had been subject to criticism for their logical and procedural shortcomings,¹⁰⁴ those cases had themselves conclusively responded to the criticisms.¹⁰⁵ Furthermore, the arguments supporting the minority view were found subject to "at least equally cogent criticism."¹⁰⁶ Such criticism is exemplified by Judge Learned Hand's oft-cited concern¹⁰⁷ about the extreme difficulty of obtaining evidence of secret transactions without techniques of police enticement, and the undesirability of granting immunity from

⁹⁸ *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973).

⁹⁹ See *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), discussed in text accompanying note 57 *supra*, and *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970), discussed in text accompanying note 63 *supra*.

¹⁰⁰ See *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), discussed in text accompanying note 83 *supra*.

¹⁰¹ 459 F.2d at 674.

¹⁰² *Id.* at 673-74.

¹⁰³ See part II *supra*.

¹⁰⁴ These shortcomings consist of the argument from implied congressional intent that the nonpredisposed defendant induced to crime by the government was "innocent" in spite of his conduct, and the question of whether an accused's predisposition can be "factually established with the requisite degree of certainty." 411 U.S. at 433.

¹⁰⁵ *Id.* at 434. This contention by Justice Rehnquist is not self-evident, especially in the case of *Sorrells*, since the majority in that case did not meet the arguments against the predisposition doctrine directly. These arguments reached full development only after *Sorrells*. In *Sherman*, the majority refused to reassess the entrapment doctrine in light of predisposition difficulties because the question had been neither briefed nor argued by the parties. 356 U.S. at 376-77.

¹⁰⁶ 411 U.S. at 434.

¹⁰⁷ Addressing the issue of police enticement, Judge Hand stated:

Indeed, it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offences which consist of transactions that are carried out in secret.

Judge Learned Hand in *United States v. Sherman*, 200 F.2d 880, 882, *cited in Sherman v. United States*, 356 U.S. at 377 n.7, *cited by* Justice Rehnquist in *United States v. Russell*, 411 U.S. (2d Cir. 1952) 423, 434 (1973).

prosecution to one who has planned and conceived a crime "simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed."¹⁰⁸ Justice Rehnquist was quick to point out that entrapment is, as the previous leading cases had established, a "relatively limited defense."¹⁰⁹ The defense is not designed to curb excessive government conduct, but to carry out the intent of Congress as Chief Justice Hughes had described it.¹¹⁰

The Court next examined the independent defense accepted in *Greene*, which the court of appeals in *Russell* had suggested was essentially the same as the entrapment defense because both were "based on fundamental concepts of due process and [evinced] the reluctance of the judiciary to countenance 'overzealous law enforcement.'"¹¹¹ The defendant had argued in *Russell* that the due process principles to be applied in the entrapment case were analogous to those in cases developing the exclusionary rules regarding illegally seized evidence and involuntary confessions.¹¹² Justice Rehnquist distinguished such opinions from the instant case, stating "the principal reason behind the adoption of the exclusionary rule was the Government's failure to observe its own laws."¹¹³ In *Russell*, the Court found neither a violation of an independent constitutional right of the defendant, nor any action by agent Shapiro that could constitute a violation of federal law.¹¹⁴ The majority rejected the argument that a constitutional rule should preclude defendant's conviction because Shapiro had supplied an unavailable essential means to the commission of the crime. The Court acknowledged that even if the difficulties of embodying due process of law in fixed rules could be surmounted by holding, for example, that government provision of a non-available, essential element to the production of a contraband product constitutes a per se denial of due process, the facts of this case would preclude application of such a rule to the defendant.¹¹⁵ For in *Russell*, the bottles of propanone seized by Shapiro pursuant to his warrant established that the defendant had a source of the chemical independent of the government.¹¹⁶ Thus, Shapiro merely provided the chemical to an enterprise already in progress. "The law enforcement conduct here stops far short of violating that fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment."¹¹⁷ Despite the holding in the case, the Court conceded

¹⁰⁸ 411 U.S. at 434.

¹⁰⁹ *Id.* at 435.

¹¹⁰ *Id.*

¹¹¹ 459 F.2d at 679, cited in *United States v. Russell*, 411 U.S. 423, 428 (1973).

¹¹² 411 U.S. at 430. See *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹³ 411 U.S. at 430, citing *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

¹¹⁴ 411 U.S. at 430.

¹¹⁵ *Id.* at 431.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 432, citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960).

that

we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, *cf. Rochin v. California*, 342 U.S. 165 (1952).¹¹⁸

Russell evidently was not that case.

In dissent Justice Douglas, with Justice Brennan concurring, found the legal availability of phenyl-2-propanone to be irrelevant because the mere provision of that substance to the defendant for the purpose of creating a crime was official conduct which would in itself sustain the defense.¹¹⁹ Justice Stewart, also dissenting, with Justices Brennan and Marshall, relied on the objective view rejected by the majority and suggested that because the propanone was scarce, the government had to provide it to the accused in order to be certain of obtaining purchased contraband as evidence. This activity, he argued, constituted government promotion of crime,¹²⁰ which courts should prevent by invoking their power to preserve the federal institutions of criminal justice.¹²¹

Thus, while the majority opinion in *Russell* definitely established the relationship between the defendant's predisposition and the availability of the entrapment defense, four justices in dissent rejected the notion that the existence of predisposition is dispositive and focused instead on the conduct of government actors. The majority itself suggested that under certain circumstances, though undefined, the conduct of government officials might be such as to require the defendant's acquittal without reference to his predisposition.

IV. ENTRAPMENT AS A CONSTITUTIONAL DEFENSE

In resolving the question of whether lack of criminal predisposition is a fundamental prerequisite to assertion of the entrapment defense, the *Russell* Court seems clearly to have raised entrapment to constitutional stature. This proposition may be supported in spite of the majority's assertion that it is a defense of a limited nature,¹²² because the Court specifically observed in *Russell* that principles of due process might preclude conviction of an entrapped defendant in a proper case.¹²³ The context of this observation suggests that the Court was referring to due process principles which bear on the authorities' inducement of the defendant, and not merely restating the general proposition that all defendants enjoy the benefits of due process. Therefore, it no longer seems pertinent to argue that the entrapment defense is a *sui generis* phenomenon resting on the

¹¹⁸ 411 U.S. at 431-32.

¹¹⁹ *Id.* at 436-39.

¹²⁰ *Id.* at 446-50.

¹²¹ *Id.* at 445.

¹²² The defense is arguably limited because it is based on the congressional intent perceived by Chief Justice Hughes in *Sorrells*. See note 19 and accompanying text *supra*.

¹²³ 411 U.S. at 431-32. See text accompanying note 117 *supra*.

implied intent of the legislature and a nonconstitutional concern about the propriety of allowing crime prevention institutions to create crime. After *Russell*, the inquiry in an entrapment case is no longer limited to the peculiar logical inconsistencies and policy dilemmas raised when police contribute to conduct which they then prosecute as criminal. The predisposed defendant, denied resort to the conventional entrapment defense, now has available a second attack, though conceivably a difficult constitutional one, on the particular government action which induced him to criminal conduct.

A. Moribund Due Process Claims

Before exploring the content of this due process standard, it might be well to consider what it does not seem to contain. The majority opinion in *Russell* appears to deny the validity of two significant due process theories that have been put forth in support of the entrapment defense. The first of these analogizes entrapment cases to cases limiting legislative power to abolish the *mens rea* requirement of criminal culpability.¹²⁴ Under the *Russell* standard, *mens rea* is established when the accused is shown to be criminally predisposed. Retention of the predisposition element as dispositive of the entrapment defense precludes attacking inducement on this due process ground.

A second argument concludes that due process principles are violated when the police are intent on inducing a criminal violation for the purpose of prosecution. This argument first posits that the proper limits of law enforcement conduct are delineated by the necessity of protecting society's general welfare. Promotion of crime by a police agency could hardly be conducive to the general welfare. Alternatively, when the police plan and induce criminal conduct, remaining in such close control of the situation that society's interests in protecting itself from crime are not threatened, the defendant has not endangered the social welfare which the police are to protect. In either event there is no justification, consistent with the proper objectives of law enforcement, for prosecuting the defendant for his conduct.¹²⁵ The response given in *Russell* is that since entrapment is justified only where the defendant was criminally predisposed, society *does* have a legitimate interest in promoting the commission of an invisible crime because evidence may be otherwise unobtainable. Thus continued reliance on the touchstone of predisposition has served to negate these due process claims.

B. Viable Due Process Claims

Yet other due process claims have been given a new vitality by the *Russell* decision. It is probably natural to view specific constitutional prohibitions as the most secure moorings for constitutional doctrine, if only because specificity implies certainty. Thus it is tempting to analogize the

¹²⁴ Comment, *supra* note 37, at 825. See also *Lambert v. California*, 355 U.S. 225 (1957); *Morrisette v. United States*, 342 U.S. 246 (1952).

¹²⁵ Note, *supra* note 17, at 945-47.

requirements of due process in the entrapment situation to certain exclusionary rules supported by the fourth amendment prohibition against unreasonable searches and seizures,¹²⁶ the fifth amendment right to refrain from self-incrimination,¹²⁷ and the sixth amendment right to be advised by counsel.¹²⁸ There are numerous instances in which specific law enforcement practices, such as search of a premises and seizure of evidence,¹²⁹ coercion of involuntary confessions, and denial of the right to counsel,¹³⁰ have violated these prohibitions. Where such is the case, federal courts have developed protective doctrines that require suppression of the evidence acquired. It is clear that the evidence obtained through the use of entrapment is particularly damaging to the defendant; he supplies the authorities with the *corpus delicti* and the identity of the perpetrator. If the defendant is to be protected by an analogy to the exclusionary rules, some constitutional principle must be adduced to support suppression of the evidence.¹³¹

One may be entrapped without having one's specific fourth, fifth, and sixth amendment rights violated in any direct sense. Nothing need have been seized improperly, nor need the accused have volunteered any oral or written implicating statements without the formality of waiver.¹³² The defendant has not necessarily been deprived of the assistance of counsel in any way that would be relevant had he succumbed to the enticements of a person other than an agent of government. This is no doubt the import of Justice Rehnquist's distinction between the *Russell* case and the exclusionary rule cases on the ground that the government in *Russell* did not violate any of its own laws.¹³³ But it would be untenable to suggest

¹²⁶ The people shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

¹²⁷ No person "shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

¹²⁸ "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

¹²⁹ *Katz v. United States*, 389 U.S. 347 (1967); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

¹³⁰ *United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964).

¹³¹ Suppression of the evidence gleaned from the entrapment would, in practical effect, amount to the suppression of the charge against the defendant, because that evidence is by hypothesis the whole basis of the prosecution's case.

¹³² It has been suggested that there is a similarity between entrapment and the coerced confession in that the police have somehow overcome the entrapped defendant's reluctance to engage in criminal activity in order to obtain the conduct which they then prosecute. The difference is essentially in the degree of coercion, the coerced confession being a "twentieth century form of the rack and thumbscrew," with entrapment being something less. Comment, *supra* note 37, at 825. But the entrapped defendant has done more than confess, he has acted out the corroboratory conduct to the confession at the behest of the authorities. If that conduct were truly involuntary, then lack of *mens rea* might be a defense. If the conduct were voluntary, the fifth amendment would not protect the accused from a submission against him of any evidence freely given.

¹³³ Agent Shapiro's act consisted of supplying material, which was not in itself illegal in spite of his representations to the defendant of the purposes of the transaction. See note 96 and accompanying text *supra*.

that all entrapment cases are so distinguishable. In many cases the government has engaged in conduct that is expressly criminal, and would, no doubt, support a charge of conspiracy against the government's agents if they were acting in any other capacity. The Court in *Russell* fails to resolve the question presented in those cases, but it has seemingly raised the entrapment defense to an appeal to the community sense of justice.¹³⁴ The analogy to the exclusionary rule remains relevant if such an appeal yields the conclusion that government conduct which violates the law is so fundamentally unfair that it is similar to the violation of a defendant's specific constitutional rights and, through that analogy, a denial of due process of law.

The *Russell* majority suggested that there is a judicial reluctance to embody the entrapment doctrine in specific prohibitions¹³⁵ and thereby express due process principles in the form of "fixed rules."¹³⁶ For this reason, the Court *may* have rejected the specific notion that government provision of an otherwise unavailable, yet necessary, element of crime is by nature a violation of fifth amendment due process.¹³⁷ For the same reason, it is not clear that this rejection was given the status of a general rule.¹³⁸ The dissenting opinion would have given a different legal significance to the limited availability of phenyl-2-propanone.¹³⁹ In the end, Justice Rehnquist concluded that this question was irrelevant because the essential element of the crime, official conduct aside, was in fact otherwise available to the defendant.

In a case where the essential element of the crime was not otherwise available to the accused, *United States v. Dillett*,¹⁴⁰ an acquittal on the grounds of entrapment was reached. The court there held that provision of narcotics to the defendant followed by resale to a government agent proved that the criminal disposition was in the government, not in the accused. It is speculative whether Justice Rehnquist might have reached the same result in *Russell* had he perceived the facts differently. That would, of course, be a different case. Yet one must wonder whether, given an appropriate set of facts, government provision of an otherwise unavailable element of a crime might trigger a constitutional finding of entrapment¹⁴¹ even under the Rehnquist test, the majority's dictum notwith-

¹³⁴ See note 147 and accompanying text *infra*.

¹³⁵ See part II *supra*.

¹³⁶ See text accompanying notes 115-116 *supra*.

¹³⁷ "No person shall . . . be deprived of life, liberty or property without due process of law." U.S. CONST. amend. V.

¹³⁸ See text accompanying notes 115 *supra* and 142 *infra*.

¹³⁹ See text accompanying notes 115, 119, and 120 *supra*.

¹⁴⁰ 265 F. Supp. 980 (S.D.N.Y. 1966).

¹⁴¹ This caveat may be tempered by the Supreme Court's memorandum opinion in *United States v. McGrath*, ___ U.S. ___, 93 S. Ct. 2769 (1973). The defendant was convicted of unlawful possession of counterfeit obligations. It was proved at trial that the defendant was predisposed to commit the crimes charged, but that the government had infiltrated the conspiracy and then gained "substantial control" over the scheme, including the supervision of the actual printing of counterfeit bills. *United States v. McGrath*, 468 F.2d 1027, 1028 (7th Cir. 1972). The court of appeals con-

standing.¹⁴²

The specific point of reference, which the *Russell* majority did hold out as illustrative of the type of law enforcement conduct that it is the role of the constitutional entrapment doctrine to prevent,¹⁴³ was the case of *Rochin v. California*.¹⁴⁴ The *Rochin* case presented a hopefully unusual example of extreme police conduct. Officers had forcibly entered defendant's bedroom without a warrant, physically assaulted him in an unsuccessful effort to prevent him from swallowing morphine capsules observed on a nightstand, and immediately transported him against his will to a hospital where his stomach was pumped to obtain the evidence. In a federal court the warrantless search and seizure would have precluded the use of the evidence so obtained.¹⁴⁵ Since the exclusionary rule for illegally seized evidence had not yet been extended to the states,¹⁴⁶ the Court explored the reaches of fourteenth amendment due process as a limitation on state law enforcement conduct. The Court concluded that the due process clause embodies the heritage of a legal tradition "so rooted in the . . . conscience of our people as to be ranked as fundamental,"¹⁴⁷ requiring that prosecutorial efforts "respect certain decencies of civilized conduct."¹⁴⁸ Law enforcement officials, therefore, must conduct themselves within the confines of a "community sense of fair play and decency,"¹⁴⁹ stopping short of actions which "discredit law,"¹⁵⁰ "brutalize the temper of a society,"¹⁵¹ or shock the conscience of justice.

Thus stated, the due process standard in the context of the entrapment situation, if an objective test, represents a subjective judgment.¹⁵² Indeed, Justice Frankfurter recognized as much in *Rochin*:

cluded that there could be no predisposition as a matter of law "where the Government itself performs essential parts of a criminal offense that might otherwise not have been committed." 468 F.2d at 1029-30. But the court also found that "the Government's activities in the instant case [were] 'shocking to [the court's] sense of justice.'" 468 F.2d at 1030. The conviction was reversed. The Supreme Court vacated the judgment and remanded the case to the court of appeals "for further consideration in light of *United States v. Russell*, 411 U.S. 423." 93 S. Ct. at 2769.

¹⁴² 411 U.S. at 431. See text accompanying note 115 *supra*.

¹⁴³ 411 U.S. at 431-32. See text accompanying note 118 *supra*.

¹⁴⁴ 342 U.S. 165 (1952).

¹⁴⁵ *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁴⁶ See *Wolf v. Colorado*, 338 U.S. 25 (1949). This exclusionary rule was subsequently extended to the states when *Wolf* was overruled in *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁴⁷ 342 U.S. at 169, citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

¹⁴⁸ 342 U.S. at 173.

¹⁴⁹ *Id.* at 173.

¹⁵⁰ *Id.* at 174.

¹⁵¹ *Id.* at 172.

¹⁵² "Subjective" in the sense used here refers to the court's own notion of when police conduct is fundamentally fair and decent and thus within the limits implied by the due process clause. The subjective reaction of a court is to be distinguished from the subjective-objective dichotomy descriptive of the kinds of entrapment tests suggested by different schools of thought on that subject (see notes 9 and 10 *supra*). In that context it will be recalled that "subjective" refers to a primary concern with the defendant's predisposition, and "objective" to an emphasis on law enforcement practice.

In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims. . . .¹⁵³

Though this description of the inquiry would appear to be imprecise,

Due process of law, as a historic and generative principle, precludes defining and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a "sense of justice."¹⁵⁴

V. CONCLUSIONS

While *Russell* has reaffirmed the predisposition focus of the orthodox entrapment doctrine, the case has made it equally clear that federal and state government inducement of criminal conduct as an evidence-gathering technique is subject to constitutional due process limitations.¹⁵⁵ As yet these due process principles have not taken the form of prohibitions on particular kinds of police conduct. Particular prohibitions may never evolve, and it might well be questioned whether they should, given the conceptual perplexities and conflicting equities generated in the entrapment situation, a context which necessarily varies from case to case.

Courts cannot be expected to develop a unitary constitutional theory of entrapment that treats criminal predisposition as irrelevant. But defense counsel will surely attack the due process issue with vigor, as an alternative defense, once the evidence has forced them to concede on the issue of predisposition.¹⁵⁶ The analytical result, unless the Supreme Court later entirely withdraws due process support from the entrapment doctrine, should be similar to that in the *Banks*¹⁵⁷ and *Chisum*¹⁵⁸ cases, for the conscience of the community has been set forth as the applicable due process standard by the Supreme Court's reference to *Rochin* in *Russell*.¹⁵⁹

¹⁵³ *Id.* at 172.

¹⁵⁴ *Id.* at 173.

¹⁵⁵ See note 14 and accompanying text *supra*.

¹⁵⁶ This approach was taken in *United States v. Anderson*, Criminal No. 602-71 (D.N.J. May 20, 1973), decided by jury verdict shortly after the Supreme Court's *Russell* decision. The trial judge, in light of *Russell*, agreed to charge the jury that if you find that the overreaching participation by Government agents or informers in the activities as you have heard them here was so fundamentally unfair as to be offensive to the basic standards of decency, and shocking to the universal sense of justice, then you may acquit any defendant to whom this defense applies.

The judge distinguished this defense from the predisposition-oriented entrapment defense, upon which a separate charge was given.

¹⁵⁷ 249 F.2d 672 (9th Cir. 1957). See text accompanying note 61 *supra*.

¹⁵⁸ 312 F. Supp. 1307 (C.D. Cal. 1970). See text accompanying note 63 *supra*.

¹⁵⁹ 411 U.S. at 431-32.

The law enforcement conduct in *Rochin* was clearly excessive. Most situations in which police conduct approaches entrapment are much more ambiguous. But factual ambiguity enhances the need for sharp judicial scrutiny of particular cases. The language used by courts may change, but it is not a difficult jump in legal semantics from unbecoming conduct, overreaching, and offensiveness per se, to the language of due process.

—*Robert H. Thomson, III*