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# The Development of Entrapment Law

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## THE DEVELOPMENT OF ENTRAPMENT LAW

Paul Marcus†

### INTRODUCTION

The famous statement of a New York court characterizes nineteenth century attitudes towards the defense of entrapment: "We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it."<sup>1</sup> After all, once the crime is committed, why should it matter what particular incentives were involved and who offered them? The answer to this question encompasses a long history of evolving attitudes reflecting a growing, though limited, sympathy toward the entrapped defendant. In addition, the public is increasingly intolerant of government activities that are likely to induce even a law abiding citizen to crime, or to state it more fashionably, one who was not "predisposed" to commit the crime. The history of the entrapment defense from nineteenth century indifference to the defense to modern intolerance for improper governmental conduct represents attempts to strike a balance between criminal predisposition on the one hand, and law enforcement practices on the other. Generally, the goal has been to catch the habitual criminal, but not at the expense of the innocent. A court's or jurisdiction's particular sympathies dictate its judicial priorities.

### I. ENGLISH COMMON LAW

Although the entrapment defense is generally accepted in the United States, the English courts generally still do not accept the

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1. *People v. Mills*, 178 N.Y. 274, 289, 70 N.E. 786, 791 (1904).

doctrine. Thus, English precedent is understandably limited to a few cases in which the entrapment defense apparently was rejected. In 1774, in perhaps the first case in which a court considered entrapment as a defense to crime, the court held that highwaymen could not be excused for robbery on the ground that the victim flaunted his wares in hopes of being robbed.<sup>2</sup> Later, in 1810, a court rejected entrapment when an agent of a bank purchased forged bank notes for the singular purpose of detection and prosecution.<sup>3</sup> At trial the defendants maintained that "the disposition of the notes established by the evidence was insufficient, inasmuch as the prisoners were solicited to commit the act proved against them, by the bank themselves, by means of their agents."<sup>4</sup> Defense counsel attempted to distinguish previous cases on the ground that property could not be said to be taken "invito domino" when the offense "originates with the person supposed to be prejudiced by it."<sup>5</sup> Moreover, "[i]f the treachery of the servants of the bank would make the offense of the utterers complete, it would be putting the lives of persons in the power of the bank and their agents."<sup>6</sup> Although the judges did not pronounce an opinion regarding these arguments, they were unmoved. The prisoners were executed according to their sentence.<sup>7</sup>

A later English case involved the classic "informer" that suggests what has now become known as entrapment. In *Regina v. Mullins*,<sup>8</sup> a witness for the prosecution infiltrated certain meetings to obtain information regarding a treasonable conspiracy. The witness' sole intent was to communicate this information to governmental authorities. Though the issue before the court involved the applicability of an "accomplice testimony" rule to a governmental agent who only pretended to be an accomplice, the charge to the jury sustained the use of governmental "spies."<sup>9</sup>

Although entrapment was not used as a defense in *Mullins*, the

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2. Norden's Case, Fost. Crim. Cas. 129 (1774).

3. *Regina v. Holden*, 127 Eng. Rep. 1107 (Cr. Cas. Res. 1810).

4. *Id.* at 1107.

5. *Id.* at 1108.

6. *Id.* at 1109.

7. *Id.*

8. 3 Cox Crim. Cas. 526 (Cent. Crim. Ct. 1848).

9. The court stated:

A spy . . . may be an honest man, he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offenses no further than by pretending to concur with the perpetrators.

*Id.* at 531.

government's inducement practices apparently were given approval. A stronger case of governmental inducement arose in 1880 in *Regina v. Titley*.<sup>10</sup> In this case, the defendant chemist was indicted for unlawfully supplying materials designed to induce an abortion. A police officer went to the defendant's shop pretending to be the seducer of the pregnant woman. After initially insisting that the woman submit to an operation, the defendant agreed to provide an alternative chemical solution, which he sold to the officer. Although the governmental officer's inducement activities were reasonably strong and involved a fair degree of persistence, the defense did not contend that such practices were at all inappropriate. His sole argument was that the absence of the woman involved betrayed an insufficiency of evidence to support the indictment.

Until 1880, in no English case did a defendant appear to raise the issue of entrapment or inappropriate governmental inducement as a defense to a crime. This is arguably due not only to a general attitude against such defenses, but also to a lack of a case in which such governmental inducement clearly violated intuitive standards of fairness and justice. In current American terminology, no case existed in which the defendant was not otherwise "predisposed" to commit the criminal act.

In 1881, a case arose in Scotland that seemed contrary to the English trend. In *Blaikie v. Linton*,<sup>11</sup> the defendant was charged with selling whiskey without having a proper certificate pursuant to the Public-Houses Act of 1862.<sup>12</sup> The defendant sold the whiskey to a governmental agent specifically employed to induce him to sell it. Though the judge convicted the defendant, he suspended his sentence without opinion. When moving for the suspension, the defendant pled that the conviction was improper because the police solicited and entrapped him by saying that it would be a very great favor to the agent if he sold her the whiskey. Further, the defendant urged that the whole scheme was grossly unjust, oppressive and corrupt.<sup>13</sup>

Despite the *Blaike* decision and some criticisms of police practices involving inducement that occasionally appeared in law journals of the day,<sup>14</sup> entrapment as a defense has not been sanctioned by the courts. The rejection of entrapment does not suggest necessarily that English courts were insensitive to the "innocent" victim of public

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10. 14 Cox Crim. Cas. 502 (Cent. Crim. Ct. 1880).

11. 18 Scot. Law Rep. 583 (1881).

12. *Id.* at 583.

13. *Id.*

14. See 1 CANADIAN L. TIMES 542 (1881) (discussed in DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F.L. REV. 243, 246 (1967)); IRISH L. TIMES & SOLIC. J. 395, 410, 494, 583 (1881); 71 LONDON L. TIMES 223 (1881).

inducement practices. Instead, it may reflect a policy decision that the victim of government inducement is usually "predisposed" toward the criminal act that is induced, and thus not innocent. The English rejection of entrapment primarily seems to be a rejection of the idea that police activities can be inherently wrong irrespective of the defendant's mental state. Arguably, the English courts simply rely upon the strong, intuitively reasonable assumption that the entrapped defendant was predisposed.

In *Regina v. Bickley*,<sup>15</sup> a 1909 case, a governmental "spy" induced the defendant to supply a drug to terminate pregnancy. Entrapment was not raised as a defense and the defendant was convicted.<sup>16</sup> After *Bickley*, the general question of governmental inducement did not arise again in a reported case until 1947 in *Branan v. Peek*.<sup>17</sup> In that case, a plainclothed policeman induced a bookmaker to take a bet in a public house. Though entrapment was not an issue, Lord Goddard used the occasion to criticize the police conduct. He declared that permitting police officers to break the law to prove the offense of another is wrong, and he hoped that such practice would not become common in his country.<sup>18</sup>

By American standards, the police conduct in *Peek* would not be extreme enough to constitute entrapment. In *Browning v. J.W.H. Watson (Rochester), Ltd.*,<sup>19</sup> however, the actions of the licensing authority clearly were unjust. In that case, the defendants were charged with "unlawfully permitting a motor coach to be used as an express carriage without a road service license."<sup>20</sup> The carriage was used to transport members of a private club to football games, as such uses by "private parties" were permitted without a license. The legal infraction occurred when two nonmembers employed by the licensing authority secretly joined the party without the defendant's knowledge. The defendants were convicted solely because of the presence of the nonmembers.

As mentioned, one need not, and perhaps should not, interpret the English rejection of entrapment as a betrayal of the notion of the "innocent" victim of governmental inducement. In fact, one commentator has attributed the doctrine's rejection to its lack of a theoretical grounding.<sup>21</sup> Thus, the contention is that entrapment as a de-

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15. 2 Crim. App. 53 (1909).

16. The court held that the evidence of a police spy requires no corroboration and that just because she was a spy does not invalidate her evidence. *Id.* at 54. The appellant argued that "here it is the police agent who herself suggested, instigated, and created the offense." *Id.* at 53.

17. [1947] 2 All E.R. 572 (K.B.).

18. *Id.* at 574.

19. [1953] 2 All E.R. 775 (Q.B.).

20. *Id.* at 775.

21. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 256, at 785 (2d ed.

fense is inappropriate because it cannot fit into established legal concepts.<sup>22</sup>

## II. EARLY AMERICAN BEGINNINGS

Entrapment as a defense in the United States gained acceptance slowly. As with the English, American courts initially adhered to the general attitude that a crime was a crime regardless of the circumstances surrounding its commission. *Board of Commissioners v. Backus* exemplified this view when the New York Supreme Court first stated the now famous Biblical analogy:

Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the pleas as ancient as the world, and first interposed in Paradise: "The serpent beguiled me and I did eat." That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will.<sup>23</sup>

Though entrapment as a defense did not achieve general acceptance until well into the twentieth century, the defense was given early impetus in several influential pre-twentieth century state cases that attacked the propriety of governmental involvement in crime.

In *Saunders v. Michigan*,<sup>24</sup> a lawyer was accused of burglarizing a police court room to secure certain contracts and other public records. Prior to the burglary, Saunders asked a policeman named Webb to assist him by leaving the door to the court unlocked. Before agreeing to this request, the policeman consulted with a superior who decided to use the occasion to lay a trap. At trial, the court refused to allow cross examination pertaining to Webb's illicit association

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1961).

22. Williams argues:

Is there any technical means by which the courts could give effect to a defence of official instigation or procurement, if they were so minded? If one thinks merely in terms of established legal concepts, as the English courts have hitherto done, it may seem difficult to give an affirmative answer. The police have no general power to consent to or authorize acts that would otherwise be breaches of the criminal law. The strict doctrine of estoppel has not been applied in criminal law, except in respect of estoppel by judgment . . . . There is no other ready-made doctrine to cover the situation.

*Id.*

23. 29 How. Pr. 33, 42 (1864).

24. 38 Mich. 218 (1878).

with the defendant. In overruling the trial court on this refusal, Justice Cooley of the Michigan Supreme Court stated that the entrapment context of the crime ought to be available to the jury as evidence of the witness' credibility.<sup>25</sup> A concurring opinion sharply and directly rebuked the police activity.

I cannot . . . silently permit the extraordinary course adopted by the police officers in this case to pass unnoticed and uncondemned.

. . . .

The course pursued by the officers in this case was utterly indefensible. Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his farther debasement. Some courts have gone a great way in giving encouragement to detectives, in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing. The mere fact that the person contemplating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification for the course adopted and pursued in this case. If such were the fact, then the greater reason would seem to exist why he should not be actively assisted and encouraged in the commission of a new offense which could in no way tend to throw light upon his past iniquities, or aid in punishing him therefor, as the law does not contemplate or allow the conviction and punishment of parties on account of their general bad or criminal conduct, irrespective of their guilt or innocence of the particular offense charged and for which they are being tried. Human nature is frail enough at best, and

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25. *Id.* at 220. The court emphasized that the witness did not entice the defendant into crime but only allowed him the opportunity he already had sought. This reasoning suggests that even at this early date a distinction was already manifest between providing an opportunity for an already predisposed defendant and actually instigating the criminal activity. Interestingly, though under modern standards "entrapment" probably did not occur here, the court still indicated disapproval of the witnesses' and government entrapping role.

requires no encouragement in wrong-doing.<sup>26</sup>

The other leading case in the early development of entrapment in America is an 1879 case, *O'Brien v. Texas*.<sup>27</sup> In *O'Brien*, the defendant was convicted of attempting to bribe a jailer to procure the escape of an alleged murderer. The evidence is unclear whether the defendant or the jailer first suggested the possibility of a bribe; however, the jailer clearly went along with the plan in an effort to entrap the defendant. In its jury charge, the trial court stated that bribing an officer would be a violation of the law, regardless of who initially instigated the crime, and that an officer offering to be bribed would not be an accomplice under the existing statute. The court of appeals disagreed, holding that an officer who originates the criminal intent by first offering to accept a bribe and then joins in the criminal act to entrap the defendant does not violate the criminal code.<sup>28</sup> Despite these two state cases, and perhaps others, courts failed to recognize entrapment as a defense. Other early state cases followed *Saunders* and *O'Brien* in condemning the entrapment practices of government, but few actually held that the entrapment entitled the defendant to an acquittal.<sup>29</sup>

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26. *Id.* at 221-22 (Marston, J., concurring). For its time this is a rather remarkable quotation, particularly its sympathetic attitude toward an "entrapped" defendant. As a moral indictment of police activities that encourage crime, it is timeless, and represents a shifting of attitudes towards a future legitimization of entrapment defenses. The quotation is also informative. It confirms that "questionable methods" geared to the discovery of crime were already developing within enforcement agencies even though the agencies had not formally sanctioned encouragement of, or assistance in, crime to apprehend and punish criminals. Governmental practice eventually went this far, which is one reason that the entrapment defense achieved a firm footing in American law. The modern entrapment defense, however, is much more limited than what is suggested as inappropriate in this opinion. Under the modern view, encouraging and assisting parties to commit crime when they are predisposed to do so is—at least by majority law—perfectly acceptable.

27. 6 Tex. Crim. 665 (1879).

28. *Id.* at 668. Interest in *O'Brien* extends beyond its early date. The suggestion that "the case is not within the spirit" of the statute suggests the later doctrine of "legislative intent." Moreover, the appellate court seems to reject a somewhat literal statutory interpretation on the ground that no authority supports such a view, and accepts a rather nonliteral interpretation without citing authority. Thus, the court appears to say that entrapment is illegal because no authority says that it is legal. This is a rather handy—though unusual—way of introducing the entrapment defense into statutory law. Note the later version of this approach in *Sorrells*, in which the Supreme Court focused on the introduction of legislative intent as the foundation of the entrapment doctrine. *See Sorrells v. United States*, 287 U.S. 435 (1932).

29. *See Love v. People*, 116 Ill. 501, 43 N.E. 710 (1896) (burglary conviction reversed on ground that owner consented); *Commonwealth v. Wasson*, 42 Pa. Super. 38 (1910) (trial court did not err in refusing to order an acquittal on the ground of entrapment); *Commonwealth v. Bickings*, 12 Pa. D. 206 (1903) (entrapment by pri-



Early federal cases also followed the sympathetic view of entrapment as a defense. The earliest case is *United States v. Whittier*.<sup>30</sup> The defendant in *Whittier* offered the defense of entrapment in a nonmailable matter case, claiming inducement by an agent of the Society for the Suppression of Vice.<sup>31</sup> Though the defendant was acquitted on other grounds, a concurring opinion condemned entrapment practices. Citing the lack of dispositive case law, the concurrence stated that a court should not "lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime."<sup>32</sup> The concurrence stressed that "resort to unlawful means is not to be encouraged," even though such means will be unavailable as a defense to the offender.<sup>33</sup>

In a later federal case, *United States v. Adams*,<sup>34</sup> the defendant had been charged with illegally mailing contraceptive information, a crime based upon a nonmailable matter statute. The defendant's mailing had been in response to a decoy letter of inquiry written by a governmental inspector. Citing *Whittier* and *Saunders*, the Court held that no crime had been committed under the particular facts of the case.<sup>35</sup>

As with the state courts, entrapment generally remained a mere subject of displeasure in the federal courts until 1915 when a case finally appeared before a circuit court and launched entrapment as a criminal defense. In *Woo Wai v. United States*,<sup>36</sup> the defendants had been convicted of conspiring to illegally bring certain Chinese persons into the United States from Mexico. At trial the defendant asserted that no law had been broken since government officers had induced the defendants into committing the alleged acts. Nevertheless, the trial court instructed the jury that, even if the facts were as the defendants stated, they would not constitute a legal defense to the charge.<sup>37</sup> Notably, the defendant Woo Wai was approached and induced into committing the crime not because he previously had been suspected of being involved in any illegality, but because the authorities suspected that he had information about the illegal activities of others. The intent of the officers was to induce Woo Wai into the commission of a crime to make him reveal what he knew. Woo Wai at first expressed reluctance to participate in the scheme, say-

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vate person).

30. 28 F. Cas. 591 (C.C.E.D. Mo. 1878) (No. 16,688).

31. Since this was a private society, not involving government, the entrapment defense did not strictly apply.

32. 28 F. Cas. at 594 (Treat, J., concurring).

33. *Id.*

34. 59 F. 674 (D. Or. 1894).

35. *Id.* at 676-77.

36. 223 F. 412 (9th Cir. 1915).

37. *Id.* at 413.

ing, "This is in violation of the law. It could not be done."<sup>38</sup> He eventually was persuaded after repeated solicitations spanning several months. In reversing Woo Wai's conviction, the circuit court of appeals noted:

We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case . . . and that 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.<sup>39</sup>

The court distinguished the cases that had not recognized entrapment as a defense to crime. In those cases, the defendants originated the criminal intent to commit the crime, while in *Woo Wai* the governmental officers suggested the criminal act.<sup>40</sup>

*Woo Wai* clearly marked the beginning of the modern doctrine of entrapment with its emphasis on—and limitation of—the notion of "origin of intent." The entrapment defense was applicable only to cases in which the intent to commit the crime originated in the minds of the governmental agents rather than the accused. Governmental conduct encouraging and even participating in crime was permissible.<sup>41</sup> After the *Woo Wai* decision, the entrapment defense became prevalent in the lower federal courts concomitantly with confusion as to its proper application and scope.<sup>42</sup>

In retrospect, it is somewhat remarkable that the entrapment defense won judicial credibility in America in such a short time, particularly when English law has yet to embrace the controversial doctrine. Identifying a single cause for the acceptance would be too simplistic; a number of circumstances undoubtedly contributed. At least one commentator has emphasized the nature and role of the crimes that developed during the period in question.<sup>43</sup>

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38. *Id.*

39. *Id.* at 415.

40. *Id.*

41. The holding in *Woo Wai* was based on "public policy," an approach seemingly best suited to the minority, objective approach to entrapment. See *infra* text accompanying notes 58-62.

42. See generally Annot., 86 A.L.R. 263 (1933); Annot., 66 A.L.R. 478 (1930); Annot., 18 A.L.R. 146 (1922). For early discussions of the entrapment defense, see Note, 28 COLUM. L. REV. 1067 (1928); Comment, 2 S. CAL. L. REV. 283 (1929); Note, 41 YALE L.J. 1249 (1931).

Most of the early confusion surrounding the entrapment defense after *Woo Wai* centered on the proper theoretical grounding of the defense and the appropriateness of the defense under particular circumstances. Some courts continued to reject the defense altogether, and the defense received occasional judicial criticism. See, e.g., *United States v. Washington*, 20 F.2d 160 (D. Neb. 1927).

43. DeFeo, *supra* note 14, at 250-51, states:

## III. ENTRAPMENT AND THE SUPREME COURT

A. *The Beginnings*

By the time the United States Supreme Court addressed the entrapment defense in 1928, the acceptance of the defense in American courts was well on its way. In *Casey v. United States*,<sup>44</sup> the defendant was accused of supplying morphine to prison inmates addicted to narcotics. The defendant was a lawyer who frequently visited inmates to provide legal consultation. The jailer observed, however, that, after the defendant's visits, inmates whom he had visited frequently were under the influence of narcotics. At the jailer's instigation, an elaborate scheme was concocted to trap the defendant. The narrow issue in *Casey* was whether possession of morphine not in the original stamped package was sufficient evidence to sustain the charge that it was illegally purchased. The majority dismissed the entrapment issue by offhandedly stating, "Furthermore Casey according to the story was in no way induced to commit the crime beyond the simple request of Cicero to which he seems to have acceded without hesitation and as a matter of course."<sup>45</sup>

The majority's rather curt dismissal in *Casey* of the entrapment claim might well have gone unnoticed but for Justice Brandeis' strong dissent focusing on the government's conduct. Brandeis' comments brought attention to the entrapment issue, paving the way for the *Sorrells* decision and its progeny.

I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or by other practices of detectives even more

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The cause of this phenomenon was basically the nature of the crimes in which entrapment practices are used by the police. America in the late nineteenth and early twentieth centuries witnessed the coming of Comstockery, the Mann Act, the Harrison Drug Act, Prohibition and sumptuary legislation generally to a degree unheard of at common law. . . .

The significance of all these new crimes is their inadaptability to a prosecutor scheme based on private complaint . . . . Consequently the creation of these new offenses brought unaccustomed difficulties of enforcement in the attempt to discover the existence of criminal activity and to gather evidence of same. Viewed in historical perspective, the whole problem of entrapment has stemmed from a judicial reaction to the means used by police to achieve presence of such illegal transactions, either in person or through the agency of informers.

In considering the entrapment cases of the late nineteenth and early twentieth century, DeFeo's comment may be an overstatement. A significant number of cases did not directly involve "vice" crimes.

44. 276 U.S. 413 (1928).

45. *Id.* at 419.

revolting. But the objection here is of a different nature. . . . The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature. . . . Their conduct is not a defense to [the defendant]. For no officer of the Government has power to authorize the violation of an Act of Congress and no conduct of an officer can excuse the violation. But it does not follow that the court must suffer a detective-made criminal to be punished. To permit that would be tantamount to a ratification by the Government of the officers' unauthorized and unjustifiable conduct.

. . . .  
. . . This prosecution should be stopped, not because some right of [the defendant's] has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts.<sup>46</sup>

#### B. *Sorrells v. United States*<sup>47</sup>

The significance of the Supreme Court's treatment of the entrapment defense in *Sorrells* can not be overstated. It is not that *Sorrells* established entrapment as a defense, nor even that it provided legitimacy or credibility. Though the opinion significantly furthered these ends, the primary and pervasive impact of *Sorrells* was its establishment of the theoretical underpinning of entrapment doctrine. In many circumstances, such a contribution may be merely of academic importance. But with the entrapment doctrine, it had far-reaching influence over the scope of the doctrine and the nature of its development and application in both federal and state courts.

The influence of the *Sorrells* case is not limited to the majority opinion. The minority view of Justice Roberts also was to have a tremendous impact on the nature of the acceptance and application of the doctrine. Its alternative theoretical view was sufficiently compelling to divide both the Court and the judicial and academic communities for decades. The entrapment doctrine as applied today reflects the tensions that were first apparent there. *Sorrells* was a prohibition case in which a governmental agent visited the home of the defendant and repeatedly coaxed him to secure a quantity of li-

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46. *Id.* at 423-25.

47. 287 U.S. 435 (1932).

quor. After three attempts in which the agent played upon the comradery of war experiences, the defendant finally provided a half gallon of liquor for which he was paid. Though the government called witnesses who testified that the defendant had a general reputation as a "rum runner," the Court found that "the act for which defendant was prosecuted was instigated by the prohibition agent, . . . [and] that defendant had no previous disposition to commit it."<sup>48</sup> After acknowledging that merely affording opportunities or facilities to commit a crime does not of itself defeat the prosecution, the majority identified the limits of governmental conduct: "A different question 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."<sup>49</sup>

The *Sorrells* Court cited numerous cases for the proposition that the truly entrapped defendant should not be punished. *Butts v. United States*<sup>50</sup> typified this proposition and the Court quoted the opinion at length.<sup>51</sup> The substance of the Court's initial remarks was relatively uncontroversial and merely reflected the rhetoric of the entrapment doctrine that numerous lower court cases offered. Significantly, however, the Court then eased its way into the now famous theoretical justification involving "legislative intent." Noting that literal statutory interpretation can produce absurd results or flagrant injustice,<sup>52</sup> the Court concluded that Congress did not intend "that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."<sup>53</sup> The Court further added that in such a case the

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48. *Id.* at 441.

49. *Id.* at 442.

50. 273 F. 35 (8th Cir. 1921).

51. The *Butts* court stated:

[I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to an attempt to commit it.

*Id.* at 38, quoted in 287 U.S. at 444-45. In a similar vein, the Court cited and quoted from *Casey v. United States*, 276 U.S. 413, 419, 423 (1928); *Ellis v. United States*, 206 U.S. 246, 257 (1907); *Newman v. United States*, 299 F. 128, 131 (4th Cir. 1924).

52. 287 U.S. at 446. The Court cited or quoted *United States v. Katz*, 271 U.S. 354 (1926); *Lau Ow Bew v. United States*, 144 U.S. 47 (1892); *United States v. Kirby*, 74 U.S. (7 Wall.) 278 (1869); *United States v. Palmer*, 16 U.S. (3 Wheat.) 471, 477 (1818).

53. 287 U.S. at 448.

government is estopped from prosecuting.<sup>54</sup> The majority in *Sorrells* explicitly rejected the view that the Court had authority to grant immunity to an entrapped defendant if the statute in question applied to him.<sup>55</sup> Thus, the majority viewed the adoption of "legislative intent" as a necessity of accommodating the entrapment defense.

The doctrine of legislative intent—the idea that the legislature did not intend that a criminal statute extend to entrapped defendants—suggests two further doctrines that have been the focus of controversy with regard to entrapment. First, since the statute does not extend to the entrapped defendant, the entrapped defendant must be innocent of the crime. Therefore, under this view, entrapment would not be a matter of confession and avoidance, but would go directly to a challenge of the defendant's guilt: the government is "estopped to prosecute" because the defendant is not guilty.<sup>56</sup> Generally, the guilt or innocence of a defendant is a jury question.<sup>57</sup> Nevertheless, the Court in *Sorrells* explicitly acknowledged that the entrapped defendant was not guilty of the crime.<sup>58</sup>

The second doctrine emerging from the notion of "legislative intent" is that of "predisposition." This single word has generated the bulk of controversy concerning the entrapment defense. As indicated above, the "legislative intent" view claims that the criminal statute does not extend to persons who are "otherwise innocent." This characterization indicates that the entrapped defendant will be in a certain mental state of innocence before governmental inducement invades this disposition. Entrapment, by definition, encompasses the

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54. *Id.*

55. The majority stated that "[w]here defendant has been duly indicted for an offense found to be within the statute, and the proper authorities seek to proceed with the prosecution, the court cannot refuse to try the case in the constitutional method because it desires to let the defendant go free." *Id.* at 449-50.

56. The use of estoppel in *Sorrells* seems misplaced. Under the view of legislative intent, there is no estoppel effect since the entrapment question becomes part of the guilt-innocence determination of the trier of fact. "Estoppel" would seem to be applicable if entrapment involved criteria independent of the defendant's guilt or innocence, as in the minority *Sorrells* view.

57. One source of confusion regarding the entrapment doctrine is whether the judge or jury should decide entrapment. Under the legislative intent doctrine, entrapment is apparently a jury question. See Marcus, *The Entrapment Defense and the Procedural Issues: Burden of Proof, Questions of Law and Fact, Inconsistent Defenses*, 22 CRIM. L. BULL. 197 (1986) [hereinafter cited as *Entrapment Procedures*].

58. The *Sorrells* Court reasoned:

The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct. The federal courts in sustaining the defense in such circumstances have proceeded in the view that the defendant is not guilty.

287 U.S. at 452.

idea that the entrapped defendant is not predisposed to commit the crime. Predisposition of the accused becomes all important, for "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."<sup>59</sup> Because of the "controlling" nature of the predisposition question, the *Sorrells* majority acknowledged the need to allow evidence that would, under normal circumstances, be inadmissible as prejudicial.<sup>60</sup> The majority's adoption of legislative intent, along with its related doctrines of the entrapped defendant's innocence and predisposition, generated difficult questions extending beyond the mere definition of entrapment. These include judge versus jury<sup>61</sup> and burden of proof<sup>62</sup> questions, along with the issue of the propriety of inconsistent defenses.<sup>63</sup>

The minority opinion in *Sorrells* remains quite important because it represents the modern trend in the entrapment defense. The main focus of the opinion—an alternative conception of entrapment—suggests different attitudes towards both the defendant's mental state and the procedural questions surrounding the defense.

Speaking for the minority (Justices Brandeis and Stone), Justice Roberts emphasized the public policy justification for the entrapment defense that numerous cases had stated and that the majority had acknowledged. He claimed, however, that such an underpinning requires neither fiction of legislative intent nor the excusing of a guilty defendant.<sup>64</sup> After criticizing the majority's doctrine of legislative intent as "unwarranted judicial construction,"<sup>65</sup> Justice Roberts added that entrapment rests on public policy and that it is the Court's province "to protect itself and the government from such prostitution of the criminal law."<sup>66</sup> Roberts followed the natural course of his justification of entrapment by suggesting that generally the question of entrapment would be one for the judge rather than

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59. *Id.* at 451 (emphasis added).

60. *Id.* at 451-52.

61. See *Entrapment Procedures*, *supra* note 57, at 211-42.

62. *Id.*

63. *Id.*

64. Justice Roberts explained:

This view calls for no distinction between crimes *mala in se* and statutory offenses of lesser gravity; requires no statutory construction, and attributes no merit to a guilty defendant; but frankly recognizes the true foundation of the doctrine in the public policy which protects the purity of government and its processes.

287 U.S. at 455.

65. *Id.* at 456.

66. *Id.* at 457.

the jury.<sup>67</sup> He closed his opinion with a biting criticism of the majority's acceptance of an investigation into a defendant's past.<sup>68</sup>

Roberts' opinion was effective more as a criticism of the majority view and "legislative intent" ground than it was at articulating a plausible alternative. Though it suggests a focal point away from the accused toward governmental conduct, the opinion offered little explanation of what governmental conduct would constitute entrapment. More particularly, the question arises as to how such conduct can be measured as appropriate or inappropriate without reference to the predisposition of the accused. If appropriate governmental conduct is a function of the accused's predisposition, then the inquiry returns to an examination of the accused's predisposition to determine entrapment. Justice Frankfurter was left the task of formulating this approach more fully in the next major Supreme Court decision.

### C. *Sherman v. United States*<sup>69</sup>

The facts in *Sherman* created an interesting case in which to assess the merits and difficulties of the two opposing approaches to entrapment. The defendant was convicted of selling narcotics. A governmental informer had first met the defendant in a doctor's office where both were apparently being treated for narcotics addiction. After several meetings under similar circumstances, they developed a friendship. Soon after, the governmental informer began to ask the defendant for the name of a source for narcotics. After repeated requests predicated on the informant's presumed "suffering," the defendant supplied the drugs. The evidence indicated that the informer not only induced the defendant to commit the crime, but to return to his drug habit as well.

After reviewing the Court's decision in *Sorrells*, the majority in

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67. Roberts seemed rather noncommittal on this point. He merely noted: "If in doubt as to the facts it may submit the issue of entrapment to a jury for advice. But whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury." *Id.* For a discussion of the judge-jury question, see *Entrapment Procedures*, *supra* note 57, at 211.

68. Justice Roberts concluded:

To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. . . . The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment.

287 U.S. at 459.

69. 356 U.S. 369 (1958).



*Sherman* held that entrapment was established as a matter of law.<sup>70</sup> The precise basis for this holding is unclear. The Court carefully reaffirmed the *Sorrells* decision, focusing its opinion upon the defendant's lack of predisposition. The defendant was previously convicted of illegally selling and possessing narcotics. The Court reasoned, however, that "a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics . . . particularly when we must assume from the record he was trying to overcome the narcotics habit at the time."<sup>71</sup> The difficulty with this conclusion is in determining how a man, previously convicted of both the sale and possession of narcotics, and who evidently was still an addict, could be entrapped as a matter of law.

Alternatively, the Court may have based its conclusion on the distasteful practices of the governmental informer rather than on the defendant's predisposition.<sup>72</sup> The strong language of the Court has led some to suggest that the agent exhibited conduct tantamount to a constitutional violation of due process.<sup>73</sup>

The facts in *Sherman* dramatically illustrate the danger of assessing a defendant's predisposition through past conduct and reputation. Relying on *Sorrells*, the trial court rejected the defendant's entrapment defense and convicted him. A unanimous court of appeals affirmed the conviction.<sup>74</sup>

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70. *Id.* at 373.

71. *Id.* at 375-76.

72. The Court stated:

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The setup is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.

*Id.* at 376.

73. See generally *Entrapment Procedures*, *supra* note 57.

74. 356 U.S. at 372. The Second Circuit heard the case twice. In the second opinion, with the court affirming, the opinion principally discussed the proper use of prior convictions as evidence of predisposition. 240 F.2d 949 (2d Cir. 1957). In the first opinion, however, Judge Hand dealt broadly with the basic defense contention:

As we understand the doctrine it comes to this: that it is a valid reply to the defence, if the prosecution can satisfy the jury that the accused was ready and willing to commit the offense charged, whenever the opportunity offered. In that event the inducement which brought about the actual offense was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person, but has only provided the means for the accused to realize

*Sherman* provided an excellent opportunity to develop the minority view of entrapment. Justice Frankfurter launched an attack on the majority view, echoing much that Justice Roberts had stated twenty-five years previously. The concurrence voiced two sharp criticisms of the majority's subjective predisposition test. First, such a test relying on jury determinations, would not develop standards of proper police conduct in these difficult situations.<sup>75</sup> Second, the Court's test was based on an odd and dangerous concept—legislative intent. According to Justice Frankfurter, the notion that convictions must be overturned because Congress did not intend its statutes to be enforced by temptation is sheer fiction. He reasoned that in entrapment cases the only legislative intent inherent in the statute is "to make criminal precisely the conduct in which the defendant has engaged."<sup>76</sup> Furthermore, he argued that "conduct is not less criminal because the result of temptation, whether the tempter is a private person or a government agent or informer."<sup>77</sup> Unfortunately, Justice Frankfurter's opinion is more of a critique than a set of di-

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his preexisting purpose. The proof of this may be by evidence of his past offenses, of his preparation, even of his "ready complaisance." Obviously, it is not necessary that the past offenses proved shall be precisely the same as that charged, provided they are near enough in kind to support an inference that his purpose included offenses of the sort charged.

200 F.2d 880, 882 (2d Cir. 1952).

75. In his conclusion, Justice Frankfurter made the point forcefully:

[A] jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands.

356 U.S. at 385.

76. *Id.* at 379. His argument continued:

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

*Id.* at 381.

77. *Id.* at 380. Justice Frankfurter stated that the reason courts refuse to convict an entrapped defendant is because "the methods employed on behalf of the Government to bring about conviction cannot be countenanced." *Id.*

rections on the application of objective standards.<sup>78</sup>

*D. United States v. Russell*<sup>79</sup>

In *Russell*, governmental agents were heavily involved in the commission of the crime by supplying the defendants with a scarce but necessary ingredient with which to manufacture methamphetamine ("speed"). After the drug was manufactured, the agents arrested the defendants.<sup>80</sup> The court of appeals had reversed the conviction, relying on the argument that the government's conduct was overreaching. The court found entrapment had occurred as a matter of law.<sup>81</sup>

Justice Rehnquist, for the majority, viewed the case differently. He traced the entrapment doctrine from *Sorrells* to *Sherman*, reaffirmed it,<sup>82</sup> and concluded that the key inquiry is properly focused on the individual's state of mind, not the government's involvement. The Court noted that entrapment is a limited defense rooted in the premise that a defendant should not be punished for committing a crime when the government induces its commission.<sup>83</sup> The Court fur-

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78. See generally *id.* at 382. Justice Frankfurter did comment on the objective test:

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. It is as objective a test as the subject matter permits, and will give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised. It draws directly on the fundamental intuition that led in the first instance to the outlawing of "entrapment" as a prosecutorial instrument. The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime.

What police conduct is to be condemned, because likely to induce those not otherwise ready and willing to commit crime, must be picked out from case to case as new situations arise involving different crimes and new methods of detection.

*Id.* at 384.

79. 411 U.S. 423 (1973).

80. The agent's scheme was straightforward and well orchestrated. The defendants seemed amazingly trusting. *Id.* at 425-26.

81. The court had concluded that "a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise." *Id.* at 424 (quoting 459 F.2d 671, 673 (9th Cir. 1972)). The appellate court's position rested on both entrapment and due process grounds. *Id.* at 427-28.

82. He acknowledged, however, that criticism of the rule was "not devoid of appeal." *Id.* at 433-34.

83. *Id.* at 435.

ther noted that the purpose of the entrapment defense is not to protect against overzealous law enforcement.<sup>84</sup>

The majority rejected the defense argument that the conviction should be reversed on a ground analogous to the fourth and fifth amendments' exclusionary rules, noting that the exclusionary rule was adopted because the government failed to follow its own laws. Unlike the exclusionary rule cases, "the Government's conduct here violated no independent constitutional right of the respondent."<sup>85</sup> Further, the police agent did not violate any federal law in infiltrating the criminal enterprise.<sup>86</sup>

The Court also rejected the defendant's due process argument. In essence, the defendant argued that the government's overinvolvement was so outrageous and so contrary to public policy that the conviction could not stand. Although the majority did not deny the legitimacy of such a ground,<sup>87</sup> it found that the facts in the instant case did not justify the application of the principle.<sup>88</sup>

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84. *Id.*

85. *Id.* at 430. The Court continued:

Respondent would overcome this basic weakness in his analogy to the exclusionary rule cases by having the Court adopt a rigid constitutional rule that would preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent "supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels." Even if we were to surmount the difficulties attending the notion that due process of law can be embodied in fixed rules, and those attending respondent's particular formulation, the rule he proposes would not appear to be of significant benefit to him. For, on the record presented, it appears that he cannot fit within the terms of the very rule he proposes.

The record discloses that although the propanone was difficult to obtain, it was by no means impossible. The defendants admitted making the drug both before and after those batches made with the propanone supplied by Shapiro.

*Id.* at 431.

86. *Id.* at 430.

87. The Court acknowledged that some day police conduct may be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," but found that the instant case fell outside of that category. *Id.* at 431-32.

88. The Court stated:

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

*Id.* at 432 (citations omitted).

Justice Rehnquist elaborated on the need for undercover governmental involvement to detect crime, particularly crimes such as drug manufacturing. He noted that illegal drug manufacturing is an ongoing business enterprise for which detection and conviction requires infiltration of, and limited participation in, the enterprise's illegal practices.<sup>89</sup> Because infiltration is deemed an appropriate means of investigation, supplying a valuable item to the crime ring must, generally, also be acceptable.<sup>90</sup> An agent may fail to infiltrate the crime ring without a proffer of something of value to the criminals.<sup>91</sup> These types of practices do not violate "fundamental fairness" or "shock the universal sense of justice."<sup>92</sup> Finding such involvement a necessity, the majority deemed the objective test of the dissent unworkable and contrary to public policy.<sup>93</sup>

Justice Stewart's dissent<sup>94</sup> indicated that the position of Justices Roberts and Frankfurter was consistent with the supporting rationale for the entrapment defense. He reiterated that the entrapment defense could not be grounded in legislative intent, for "to say that such a defendant is 'otherwise innocent' or not 'predisposed' to commit the crime is misleading, at best. The very fact that he has committed [the crime] . . . demonstrates conclusively that he is not innocent of the offense."<sup>95</sup>

Once again, it was asserted that the true basis for the entrapment defense is to monitor governmental overinvolvement in crime. Therefore, the inquiry is not the defendant's predisposition to crime, but whether "the government agents have acted in such a way as is likely to instigate or create a criminal offense."<sup>96</sup> The appropriate-

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. The Court stated that complete immunity for a crime is not desirable "simply because government undercover agents subjected [the criminal] to inducements which might have seduced a hypothetical individual who was not so predisposed." *Id.* at 434.

94. *Id.* at 439. Justices Douglas, Brennan, and Marshall also dissented.

95. *Id.* at 442. He explained his point more fully:

He may not have originated the precise plan or the precise details, but he was "predisposed" in the sense that he has proved to be quite capable of committing the crime. That he was induced, provoked, or tempted to do so by government agents does not make him any more innocent or any less predisposed than he would be if he had been induced, provoked or tempted by a private person—which, of course, would not entitle him to cry "entrapment." Since the only difference between these situations is the identity of the tempter, it follows that the significant focus must be on the conduct of the government agents, and not on the predisposition of the defendant.

*Id.*

96. *Id.* at 441.

ness of the agents' methods must be determined by the trial judge, not the jury.<sup>97</sup> The dissent, applying these principles to this case, concluded that the defendant had been entrapped as a matter of law and that the case should never have gone to the jury.<sup>98</sup> The Court had considered the dissent's view on several prior occasions and was not about to change its position.

*E. Hampton v. United States*<sup>99</sup>

The most recent Supreme Court decision on entrapment involved a defendant's claim that the heroin he allegedly sold was supplied by a governmental informer who entrapped him into selling it to other governmental officers. Although testimony of the informer was not consistent with that of the defendant Hampton, the defense requested that the court instruct the jury to acquit the defendant if the jury found that an informer supplied the narcotics.<sup>100</sup> Relying on

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97. *Id.*

98. Justice Stewart emphasized his view of the facts:

But assuming in this case that the phenyl-2-propanone was obtainable through independent sources, the fact remains that that used for the particular batch of methamphetamine involved in all three counts of the indictment with which the respondent was charged—*i.e.*, that produced on December 10, 1969—was supplied by the government. This essential ingredient was indisputably difficult to obtain, and yet what was used in committing the offenses of which the respondent was convicted was offered to the respondent by the Government agent, on the agent's own initiative, and was readily supplied to the respondent in needed amounts. If the chemical was so easily available elsewhere, then why did not the agent simply wait until the respondent had himself obtained the ingredients and produced the drug, and then buy it from him? The very fact that the agent felt it incumbent upon him to offer to supply phenyl-2-propanone in return for the drug casts considerable doubt on the theory that the chemical could easily have been procured without the agent's intervention, and that therefore the agent merely afforded an opportunity for the commission of a criminal offense.

In this case, the chemical ingredient was available only to licensed persons, and the Government itself had requested suppliers not to sell that ingredient even to people with a license. Yet the Government agent readily offered, and supplied, that ingredient to an unlicensed person and asked him to make a certain illegal drug with it. The Government then prosecuted that person for making the drug produced *with the very ingredient* which its agent had so helpfully supplied. This strikes me as the very pattern of conduct that should be held to constitute entrapment as a matter of law.

*Id.* at 448-49.

99. 425 U.S. 484 (1976).

100. The requested jury instruction read:

If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a

*Russell*, both the trial court and the court of appeals rejected this instruction.<sup>101</sup> On appeal, the defense did not request that the predisposition test be rejected,<sup>102</sup> but rather seized upon the statement in *Russell* suggesting the possibility of a situation sufficiently outrageous that due process principles would apply.<sup>103</sup> A plurality<sup>104</sup> of the Court acknowledged that the government's role in the present case was more significant than that in *Russell*. Nevertheless, the plurality dismissed the defendant's due process argument, indicating that the government's conduct did not deprive the defendant of any constitutional protections. The plurality stated:

The limitations of the Due Process Clause of the fifth amendment come into play only when the Government activity in question violates some protected right of the *defendant*. . . . But the police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights.<sup>105</sup>

Justices Powell and Blackmun joined in the judgment and with

matter of policy forbids his conviction in such a case.

Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offense charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

*Id.* at 488 (quoting Brief for Petitioner at 9).

101. *Id.* at 488.

102. The defense counsel's strategy proved wise because the plurality spoke strongly in support of the *Russell* opinion:

In *Russell* we held that the statutory defense of entrapment was not available where it was conceded that a Government agent supplied a necessary ingredient in the manufacture of an illicit drug. We reaffirmed the principle of *Sorrells v. United States* and *Sherman v. United States*, that the entrapment defense "focus[es] on the intent or predisposition of the defendant to commit the crime," rather than upon the conduct of the Government's agents. We ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.

In holding that "[i]t is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play," we, of course, rejected the contrary view of the dissents in that case and the concurrences in *Sorrells*, and *Sherman*.

*Id.* at 488-89 (quoting *Russell*, 411 U.S. at 429, 436 (citations omitted)).

103. See *supra* note 87 and accompanying text.

104. Justice Rehnquist wrote the opinion, joined by Chief Justice Burger and Justice White.

105. 425 U.S. at 490-91 (emphasis in original).

“much of the plurality opinion directed specifically to Hampton’s contention.”<sup>106</sup> They did not, however, accept the wide dismissal of the due process argument.<sup>107</sup> Justices Powell and Blackmun preferred to leave the due process question open, and to retain the Court’s “supervisory power to bar conviction of a predisposed defendant because of outrageous police conduct.”<sup>108</sup>

Justices Brennan, Stewart, and Marshall dissented, adhering to the view originally espoused by Justice Roberts in *Sorrells*,<sup>109</sup> and concluded that the police conduct—providing an unlawful substance—“would plainly be held to constitute entrapment as a matter of law.”<sup>110</sup> The dissenting Justices, however, believed that the conviction should have been reversed even under the subjective test. The opinion focused on the activity of the government, which was “more pervasive” in *Hampton* than in *Russell*.<sup>111</sup>

106. *Id.* at 491.

107. Justices Powell and Blackmun commented:

In discussing Hampton’s due process contention, [the plurality] enunciates a *per se* rule:

“[In *Russell*,] [w]e ruled out the possibility that the defense of entrapment could *ever* be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.

. . . .

“The remedy of the criminal defendant with respect to the acts of Government agents, which . . . are encouraged by him, lies *solely* in the defense of entrapment.”

The plurality thus says that the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.

*Id.* at 492 (quoting *id.* at 488-89, 490) (citations omitted).

108. *Id.* at 493.

109. 287 U.S. 485 (1932). The dissent went beyond the *Sorrells* opinion:

While the Court has rejected any view of entrapment that does not focus on predisposition, a reasonable alternative inquiry might be whether the accused would have obtained the contraband from a source other than the Government. This factor could be brought into the case through the jury charge. Once the accused comes forward with evidence that the Government is the supplier, the prosecution would bear the burden of proving beyond a reasonable doubt either (1) that the Government is not the supplier or (2) that the defendant would have obtained the contraband elsewhere to complete the transaction.

425 U.S. at 496 n.1.

110. *Id.* at 497.

111. The dissent reasoned:

In any event, I think that reversal of petitioner’s conviction is also compelled for those who follow the “subjective” approach to the defense of entrapment. . . . [T]he Government’s role in the criminal activity involved in this case was more pervasive than the Government involvement in *Russell*. In addition, I agree with [the concurring opinion] that *Russell* does



The dissent carefully avoided deciding the due process argument.<sup>112</sup> Instead, it concluded that the case should have been resolved in favor of the defense "as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by a Government agent."<sup>113</sup>

The opinion in *Hampton*, therefore, is ambiguous. A clear majority of the Court reaffirmed the subjective entrapment test of *Sorrells* and *Russell*. Only three Justices, however, cast negative votes

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not foreclose imposition of a bar to conviction—based upon our supervisory power or due process principles—where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be "predisposed." In my view, the police activity in this case was beyond permissible limits.

Two facts significantly distinguish this case from *Russell*. First, the chemical supplied in that case was not contraband. It is legal to possess and sell phenyl-2-propanone and, although the Government there supplied an ingredient that was essential to the manufacture of methamphetamine, it did not supply the contraband itself. In contrast, petitioner claims that the very narcotic he is accused of selling was supplied by an agent of the Government.

Second, the defendant in *Russell* "was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the Government agent had left the scene." *Russell* was charged with unlawfully manufacturing and processing methamphetamine, and his crime was participation in an ongoing operation. In contrast, the two sales for which petitioner was convicted were allegedly instigated by Government agents and completed by the Government's purchase. The beginning and end of the crime thus coincided exactly with the Government's entry into and withdrawal from the criminal activity involved in this case, while the Government was not similarly involved in *Russell*'s crime.

Whether the differences from the *Russell* situation are of degree or of kind, I think they clearly require a different result. Where the Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser, the Government's role has passed the point of toleration. The Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary. There is little, if any, law enforcement interest promoted by such conduct; plainly it is not designed to discover ongoing drug traffic. Rather, such conduct deliberately entices an individual to commit a crime. That the accused is "predisposed" cannot possibly justify the action of government officials in purposefully creating the crime. No one would suggest that the police could round up and jail all "predisposed" individuals, yet that is precisely what set-ups like the instant one are intended to accomplish. Thus, this case is nothing less than an instance of "the Government . . . seeking to punish for an alleged offense which is the product of the creative activity of its own officials."

*Id.* at 497-99 (citations omitted).

112. *Id.* at 500 n.4.

113. *Id.* at 500. Justice Brennan's dissent relied heavily on the Fifth Circuit's opinion in *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971).

on the application of the Due Process Clause to the entrapment defense.

#### IV. THE STATE APPROACH

Neither the majority nor the minority Supreme Court view of entrapment advocates a general constitutional basis for the entrapment defense.<sup>114</sup> Thus, reasonable governmental inducement, even toward a nondisposed suspect, does not violate any constitutional right. If it did, than legislatures could not ignore entrapment defenses or legislate entrapment statutes without severe constitutional limitations. States have been free to form their own opinions concerning the entrapment defense and to establish their own parameters as to its theoretical underpinnings and application. As a result, states have often taken their own initiative in establishing either the subjective or objective view of entrapment by judicial decision or statute. Some states have attempted to combine the views and have shown ingenuity in resolving the procedural ramifications of these views.<sup>115</sup>

##### A. *The Objective Test*

The states that have adopted the objective view have been assisted by numerous formulations of the test, particularly that of the Model Penal Code (M.P.C.). Indeed, the formulation of the entrapment defense in the M.P.C. in 1962 was the first clear step after *Sorrells* in establishing the objective view as a viable alternative. In section 2.13, entrapment occurs when a law enforcement officer or informant induces or encourages another person to engage in conduct constituting a criminal offense by either:

- (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
- (b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.<sup>116</sup>

The virtue of the M.P.C. is its focus on the government ("law enforcement official[s] . . . employing methods of persuasion"<sup>117</sup>) rather than on the predisposition of the defendant. Thus, this test strongly follows the Roberts-Frankfurter-Stewart-Brennan approach to entrapment. The obvious difficulty, seized upon by the majority of

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114. A possible Due Process claim for outrageous government conduct might exist.

115. See generally *Entrapment Procedures*, *supra* note 57.

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

117. *Id.*

the Supreme Court, is that it deals with hypothetical people and allows culpable individuals to be set free.

After the acceptance of the objective view in the M.P.C.,<sup>118</sup> states slowly began to adopt the view. Scholarly commentary that overwhelmingly supported this view as superior to the subjective view facilitated this gradual acceptance.<sup>119</sup> Alaska led the way in adopting the objective view of entrapment in *Grossman v. State*.<sup>120</sup> The Court noted that the "underlying basis of entrapment is found in public policy."<sup>121</sup> It quoted with approval this statement by Learned Hand: "The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist."<sup>122</sup> On this basis, the court rejected the Supreme Court's subjective test of entrapment. The court reasoned that the subjective inquiry is limited to predisposition, placing the defendant on trial for past offenses and character.<sup>123</sup> The defendant, however, is prejudiced by the subjective approach, especially if the question is presented to a jury.<sup>124</sup> Moreover, whether or not a defendant has a police record

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118. The accepted objective view is also reflected in the proposed Criminal Code Revision Act of 1981, which provides:

§ 707. Entrapment

(a) It is a bar to a prosecution for an offense that the defendant was entrapped into committing such offense.

(b) Entrapment occurs when a Federal, State, or local law enforcement agent, or a person cooperating with such an agent, induces the commission of an offense, using persuasion or other means likely to cause a normally law-abiding person to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

H.R. 4711, 97th Cong., 1st Sess. (1981).

119. See, e.g., L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME*, 265-72 (1967); 1 *WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS* 320 (1970) [hereinafter cited as *BROWN COMMISSION*]; Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 *YALE L.J.* 1091 (1951); Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 *YALE L.J.* 683, 687-90 (1975); McClean, *Informers and Agent Provocateurs*, 1969 *CRIM. L. REV.* 527; Sagarin & MacNamara, *The Problem of Entrapment*, 16 *CRIME & DELINQ.* 363 (1970); Schecter, *Police Procedure and the Accusatorial Principle*, 3 *CRIM. L. BULL.* 521 (1967); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 *FORDHAM L. REV.* 399 (1959). For support of the subjective approach, see DeFeo, *supra* note 14; Park, *The Entrapment Controversy*, 60 *MINN. L. REV.* 163 (1976).

120. 457 P.2d 226 (Alaska 1969).

121. *Id.* at 227.

122. *Id.*

123. *Id.* at 229.

124. *Id.*

will yield different results.<sup>125</sup> The majority of the Alaska Supreme Court stated that “[t]o speak of entrapment as an implied statutory condition, and then to focus inquiry on the origin of intent, the implantation of criminal design, and the predisposition of the defendant does not make much sense.”<sup>126</sup> Instead, the court concluded that the proper view would be one that “focuses the determination upon the particular conduct of the police in the cases presented.”<sup>127</sup>

The formulation of the objective view in *Grossman* is interesting because it characterizes the hypothetical person as an “average person.”<sup>128</sup> Although the Alaska Supreme Court has conceded that the objective test does not eliminate all difficult issues,<sup>129</sup> the objective test has spread to other states. The Brown Commission instigated the spread by adopting the objective standard in 1971. Its test is similar to that in *Grossman*: “[E]ntrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense.”<sup>130</sup>

Perhaps the most significant acceptance of the objective view of the entrapment defense occurred in 1970 when California judicially embraced the view in *People v. Barraza*.<sup>131</sup> Prior to this time, California strictly had followed the subjective view. Undoubtedly, the *Barraza* decision resulted in large part from Chief Justice Traynor’s

125. *Id.*

126. *Id.*

127. *Id.*

128. The court stated that under the objective test:

[u]nlawful entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offense, induces another person to commit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who is ready and willing, to commit such an offense.

*Id.*

129. In *Pascu v. State*, 577 P.2d 1064, 1067 (Alaska 1978) (citations omitted), the court stated:

[T]here are certain difficulties in applying the foregoing standard. An “average person” probably cannot be induced to commit a serious crime except under circumstances so extreme as to amount to duress. Yet it is clear that entrapment may occur where the degree of inducement falls short of actual duress. What is prohibited, by *Grossman*, is unreasonable or unconscionable efforts on the part of the police to induce one to commit a crime so that he may be arrested and prosecuted for the offense. In determining whether entrapment has occurred, the trial court must focus “upon the particular conduct of the police in the case presented.” The question is really whether that conduct falls below an acceptable standard for the fair and honorable administration of justice.

130. BROWN COMMISSION, *supra* note 119, § 702(2).

131. 23 Cal. 3d 675, 591 P.2d 947, 153 Cal. Rptr. 459 (1979).

famous dissenting opinion in *People v. Moran*.<sup>132</sup> In that opinion, Chief Justice Traynor traced the development of the entrapment doctrine, acknowledging that the purpose of the defense is not to protect the "innocent, but to protect the purity of government processes and to deter impermissible police conduct."<sup>133</sup> He then stressed that the correct test would be the objective one, in which "the court must concern itself with the activity it would seek to control. It must not lose sight of that purpose by focusing on the character and conduct of the accused."<sup>134</sup> He further explained that all police conduct cannot be condemned because a person might be tempted to commit a crime. An officer, despite appearing to be a willing participant in a crime, may not induce a person to commit a crime who would not do so otherwise; that is, the officer cannot manufacture the crime. The distinction is "drawn between methods likely to persuade those otherwise unwilling to commit an offense from methods likely to persuade only those who are ready to do so."<sup>135</sup> Thus, "the test must be objective and focus only on the methods used."<sup>136</sup>

In *Barraza*, the court followed Chief Justice Traynor's reasoning. The court reiterated, however, that "entrapment is a facet of a broader problem."<sup>137</sup> The court reasoned that entrapment is a form of lawless law enforcement, springing from a common motivation similar to illegal search and seizure, wiretapping, false arrest, illegal detention, and the third degree.<sup>138</sup> Moreover, "[e]ach is condoned by the sinister sophism that the end, when dealing with known criminals or the 'criminal classes,' justifies the employment of illegal means."<sup>139</sup> The court adopted the formulation of the entrapment doctrine espoused by the Brown Commission based on the "normally law-abiding person" standard.<sup>140</sup>

Most states that have adopted the objective view of entrapment

132. 1 Cal. 3d 755, 463 P.2d 763, 83 Cal. Rptr. 411 (1970).

133. *Id.* at 763, 463 P.2d at 768, 83 Cal. Rptr. at 416.

134. *Id.* at 765, 463 P.2d at 769, 83 Cal. Rptr. at 417.

135. *Id.*

136. *Id.*

137. 23 Cal. 3d at 689, 591 P.2d at 955, 153 Cal. Rptr. at 467 (quoting *Donnelly*, *supra* note 117, at 1111).

138. *Id.*

139. *Id.*

140. *Id.* The court justified this formulation:

For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. . . . [B]ut it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.

*Id.*

have done so by statute.<sup>141</sup> In the early 1970s, after California had provided authoritative precedent, Arkansas, Hawaii, North Dakota, Pennsylvania, Texas, and Utah all adopted statutes establishing the objective view.<sup>142</sup> These states modeled their laws after the M.P.C., the Brown Commission model, or Justice Frankfurter's opinion in *Sherman*. The Pennsylvania statute is typical and provides:

(a) General Rule. A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

1. making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
2. employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(b) Burden of Proof. Except as provided in subsection (c) of this section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment.<sup>143</sup>

Currently, about a dozen states have adopted the objective view of entrapment in one of its various forms. In the last ten years, however, the trend toward the objective view has waned. Unless the United States Supreme Court changes its view, or the version of the Proposed Revised Criminal Code containing an objective standard is enacted, considerable movement in that direction remains unlikely.<sup>144</sup>

### B. *The Subjective Test*

The states that follow the subjective view of entrapment have essentially done so judicially, following the precedent of the United States Supreme Court or the corresponding federal circuit court. A

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141. Other states have adopted the objective view by judicial decision. *See, e.g.*, *State v. Mullen*, 216 N.W.2d 375 (Iowa 1974); *People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1973).

142. ARK. STAT. ANN. § 41-209 (1977); HAWAII REV. STAT. § 702-237 (1976); N.D. CENT. CODE § 12.1-05-11 (1985); 18 PA. CONS. STAT. ANN. § 313 (Purdon 1983); TEX. PENAL CODE ANN. § 8.06 (Vernon 1974); UTAH CODE ANN. § 76-2-303 (1978).

143. 18 PA. CONS. STAT. ANN. § 313 (Purdon 1983).

144. Several versions of a revised federal criminal code have been proposed in recent years. *See, e.g.*, H.R. 4711, 97th Cong., 1st Sess. (1981); S. 1630, 97th Cong., 2d Sess. (1981); H.R. 6915, 96th Cong., 2d Sess. (1980).

number of states, however, have adopted statutes reflecting the subjective view, either explicitly or by interpretation. The Illinois statute is typical and provides:

A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated.<sup>145</sup>

The formulations of these statutes vary considerably. Often, the "subjective" character of the statute is not apparent on its face and requires judicial interpretation to determine its applied content. The statutes that do display their subjective character do so by emphasizing the mental state of the particular defendant. This usually is done with language such as "origin of intent," "predisposition," or suggestions that, but for the inducement, the defendant "would not otherwise have committed the crime."

### C. *The Hybrid Test*

A few states have adopted entrapment statutes that, regardless of the wording of the statute, are interpreted to contain both subjective and objective elements. Prior to the enactment of an entrapment statute, two entrapment defenses existed in New Jersey, each reflecting a different view of the defense.

The subjective entrapment defense was available when the police had implanted a criminal plan in the mind of an innocent person who otherwise would not have committed the crime. The burden in this type of entrapment case was on the State to prove to the jury beyond a reasonable doubt the absence of entrapment. In contrast, the objective entrapment defense was available when the police conduct was impermissible, even if the defendant had been predisposed to commit the crime. Whether this type of entrapment existed would be determined by the trial court.<sup>146</sup>

In 1979 the legislature adopted an entrapment statute that combined the two tests.<sup>147</sup> The New Jersey Supreme Court explained the rela-

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145. ILL. ANN. STAT. ch. 38, § 7-12 (Smith-Hurd 1972).

146. *New Jersey v. Rockholt*, 96 N.J. 570, 576, 476 A.2d 1236, 1239 (1984) (footnote omitted).

147. The statute provides:

a. A public law enforcement official or a person engaged in coopera-

tionship between the two "prongs" of the New Jersey entrapment law, noting that the new law modified the prior entrapment law in three ways. First, it shifted the burden of proof from the state to the defendant by requiring the defendant to prove entrapment by a preponderance of the evidence. Second, the new law requires both the subjective and objective aspects of entrapment to be determined by the trier of fact. Third, the new definition of entrapment requires that the police conduct establish a substantial risk that an offense would be committed by persons lacking the predisposition to commit it *and* that the police conduct caused the defendant to commit the offense.<sup>148</sup>

New Hampshire law similarly seems to combine both of the traditional entrapment tests.<sup>149</sup> As the Supreme Court of New

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tion with such an official or one acting as an agent of a public law enforcement official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such offense by either:

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

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

b. Except as provided in subsection c. of this section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the trier of fact.

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

N.J. STAT. ANN. § 2C:2-12 (West 1982).

148. 96 N.J. at 577, 476 A.2d at 1239. The court explained the procedural approach to the statute:

In sum, under the Code, when there is evidence of entrapment and that defense is asserted, the trial court should submit the issue to the jury. The court's charge should explain that the defendant must prove, by a preponderance of the evidence, that the police conduct constituted entrapment by both objective and subjective standards. First, the defendant must prove that the police conduct constituted an inducement to crime by objective standards or, in the Code's terms, that the conduct by its nature created a "substantial risk" that the crime would be committed by an average person who was not otherwise ready to commit it. The defendant would not satisfy this requirement if the evidence demonstrated that he was unusually susceptible to inducement and that an ordinary person would not have succumbed to the type of inducement to which he had succumbed. Second, the defendant must prove that the police conduct in fact caused him to commit the crime . . . .

*Id.* at 581, 476 A.2d at 1241.

149. The New Hampshire statute provides:



Hampshire noted, the statute does not require that the standard inquiry "focus solely on the conduct of the police because in order for the defense to succeed the conduct must be 'such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it.'"<sup>150</sup>

## V. CONCLUSION

In contrast to the English experience, the entrapment defense in the United States has developed as a vibrant and active doctrine. The Supreme Court's emphasis on the doctrine's basis being one of legislative intent has, however, severely limited the doctrine's development. The Supreme Court's emphasis on this single ground has caused other courts deciding entrapment cases to focus on the defendant's state of mind and to virtually exclude other factors, such as the nature of the government's conduct.<sup>151</sup> This result is unfortunate for a number of reasons. First, the procedural questions on the defense have become paramount. Issues such as inconsistent defenses and burden of proof often can dominate these proceedings and cause both judge and jury to lose sight of the fundamental issue. Second, the fundamental issue is not often the main point of debate—the nature of the government's conduct. The legislative intent inquiry involves an analysis of a legal fiction—what the legislators had in mind in drafting substantive criminal statutes. As pointed out by the concurring Supreme Court Justices,<sup>152</sup> the real purpose for the entrapment doctrine is to curb overreaching governmental intrusion in the detection and potential development of criminal activity. The objective approach of the M.P.C. properly requires substantial inquiry into this difficult area. However, until the United States Supreme

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It is an affirmative defense that the actor committed the offense because he was induced or encouraged to do so by a law enforcement official or by a person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence against him and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. However, conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

N.H. REV. STAT. ANN. § 626:5 (1974).

150. *State v. Little*, 121 N.H. 765, 771, 435 A.2d 517, 520 (1981) (quoting, in part, N.H. REV. STAT. ANN. § 626:5 (emphasis in original)).

151. *Sherman*, 356 U.S. 369, is an obvious exception to this point, as the Court dealt harshly with the government activity. *Hampton*, 425 U.S. 484, and *Russell*, 411 U.S. 423, are far more typical.

152. See especially Justice Frankfurter's concurring opinion in *Sherman*, 356 U.S. 369, 378-85.

Court rejects the subjective test, it is highly unlikely that the focus will shift from the defendant toward a policy review of governmental conduct.