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the basis of sex or religion with those relating to race or national origin.

Finally, *Griggs* involved an employment test<sup>105</sup> and its precedential value may be limited on that basis. Consequently, different employment practices would be analyzed under different standards within the same statutory scheme.

The most likely impact of the *General Electric* decision will be to allow the courts to analyze employment practices which pertain to pregnant employees under different standards than other employment practices: while the *Griggs* effect test will remain a viable tool for the analysis of other Title VII cases,<sup>106</sup> a fourteenth amendment standard of discrimination will be applied to those cases which involve pregnant women. Thus, the test which the Court has announced to determine whether an employment practice discriminates against women itself is discriminatory.

BARBARA UNGAR ROYSTON

## Defense of Entrapment Is Denied to a Defendant Who Is Predisposed to Commit a Crime

*In Hampton v. United States the Supreme Court held that the defense of entrapment is not available to a defendant who procured contraband from a government agent if the defendant was predisposed to commit the crime. In this article the history of the defense of entrapment and the reasoning of the divided court in deciding the Hampton case are examined in detail. The author concludes that the rule set by the Hampton case encourages violation of defendants' rights by police, and that legislative reform may be necessary.*

Charles Hampton made two sales of heroin to federal agents. The heroin was allegedly<sup>1</sup> supplied to Hampton by a Federal Drug En-

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105. 42 U.S.C. § 2000e-2(h) (1970) dealt with employment tests. *Griggs* also dealt with the requirement of a high school education for purposes of being hired or transferred.

106. A majority of the Court in *General Electric* still expressed support for the *Griggs* test at least in some instances.

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1. The defendant and the government witnesses related two significantly dissimilar versions of events to the jury. Defendant claimed that the DEA informant obtained the drug (which defendant believed to be nonnarcotic) that defendant admittedly thereafter solicited and sold. The government's witnesses testified that Hampton had obtained and supplied what he knew to be contraband. The Supreme Court dealt with defendant's version for purposes of the appeal, and went on to hold this "fact" legally insignificant.

forcement Administration (DEA) informant. At a jury trial in the United States District Court for the Eastern District of Missouri, Hampton did not request the standard entrapment jury instructions;<sup>2</sup> rather, he requested an instruction which in essence stated that if the jury should find that the narcotics sold by the defendant were supplied to him by an agent of the government, then the jury "must acquit."<sup>3</sup>

The trial court refused the proffered instruction, and the jury found Hampton guilty.<sup>4</sup> Hampton appealed his conviction to the Court of Appeals for the Eighth Circuit, which affirmed.<sup>5</sup> On certiorari to the Supreme Court of the United States, *held*, affirmed: "[A] defendant may be convicted for the sale of contraband which he procured from a government informer or agent."<sup>6</sup> The defense of entrapment is not available to a defendant who has admitted that he was predisposed to commit the crime charged. Nor will a claim that the defendant was denied due process be upheld solely on the basis that the government has supplied him with the contraband. *Hampton v. United States*, 425 U.S. 484 (1976).

Prior to *Hampton*, the nature and extent of the affirmative defense<sup>7</sup> of entrapment<sup>8</sup> in the federal courts<sup>9</sup> had been roughly de-

2. 425 U.S. 484 (1976).

3. *Id.* at 486. Specifically, defendant had requested the following:

The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.

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 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.

4. Hampton was convicted of violating 21 U.S.C. § 841(a)(1). 425 U.S. at 485.

5. 507 F.2d 832 (8th Cir. 1975), *aff'd*, 425 U.S. 484 (1976).

6. 425 U.S. at 485.

7. Where the issue has been presented, most courts have rejected the use of the entrapment defense by a defendant who has denied committing the unlawful act. See Groot, *The Serpent Beguiled Me and I (Without Scientist) Did Eat—Denial of Crime and the Entrapment Defense*, 1973 U. ILL. L.F. 254; 56 IOWA L. REV. 686 (1971). *But cf.* Sorrells v. United States, 287 U.S. 435 (1932).

8. The unlawful use of entrapment must be distinguished from legitimate police practices, including police encouragement which "is used to detect such crimes as prostitution, gambling and narcotic sales—those 'vice crimes' that are prohibited by laws protecting the general health and welfare of the public." 23 DEPAUL L. REV. 570 (1973). One commentator explains:

By their very nature, many crimes require the use of artifice and deception by the police to ferret out offenders. As a result, it has become well settled that police officers may use traps, decoys, and informers to prevent and detect criminal

linedated by three Supreme Court decisions.<sup>10</sup> In *Sorrells v. United States*,<sup>11</sup> a federal prohibition agent posing as a tourist visited the defendant twice and asked him for some liquor. Each time the agent's request was refused. Subsequently, the agent managed to gain the defendant's confidence with conversations about their mutual war experiences. Whereupon, after a third request, the defendant supplied his visitor with a half gallon of whiskey. The defendant was thereafter prosecuted for violating the National Prohibition Act. Chief Justice Hughes, in a majority opinion joined by four other members of the Court, held that as a matter of Congressional intent and statutory construction<sup>12</sup> the defense of entrapment was

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conduct. This practice is known as encouragement and, generally, resort to such means will not prevent prosecution of the offender. There are times, however, when police solicitation of crime goes beyond merely affording the opportunities or facilities for the commission of the offense, and becomes instead police manufacture of crime—entrapment.

Comment, 59 IOWA L. REV. 655 (1974). See also Comment, 20 U. FLA. L. REV. 63 (1967).

9. The scope of this note is limited to a discussion of entrapment in the federal courts. Since the defense has not been elevated to constitutional dimensions, its application is not obligatory upon the states. However, all states, with the possible exception of Tennessee, recognize the entrapment defense in some form. IOWA L. REV., *supra* note 8, at 655 n.10. See also Comment, 37 MO. L. REV. 633 (1972).

10. *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

The defense of entrapment was first mentioned by a federal court in *United States v. Whittier*, 28 F. Cas. 591 (E.D. Mo. 1878); See 58 MINN. L. REV. 325, 326 (1973); 45 TEX. L. REV. 578, 579 (1967). The defense was first recognized and upheld by a federal court in 1915 in *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915) (government agents induced defendant to import illegal aliens). For a general historical background of the development of entrapment, see Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. CRIM. L.C. & P.S. 447 (1959); Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application*, 1 U. S. F. L. REV. 243 (1967); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 YALE L.J. 1091 (1951); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942).

Entrapment was defined by Mr. Justice Roberts in *Sorrells v. United States*, 287 U.S. 435 (1932) (concurring opinion), as: "[T]he conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." *Id.* at 454.

For a general discussion of both encouragement and entrapment, see Bancroft, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U. CHI. L. REV. 137 (1963); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963).

11. 287 U.S. 435 (1932).

12. Chief Justice Hughes, in referring to the National Prohibition Act, stated:

We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation of government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.

287 U.S. at 448.

The Chief Justice concluded: "Fundamentally, the question is whether the defense, if

available and that the trial court had erred in concluding that there was no entrapment as a matter of law. Rather, the issue was one that should have been presented to the jury.<sup>13</sup>

The majority recognized that while the government may employ artifice and stratagem to apprehend those who engage in criminal enterprises,<sup>14</sup> "[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>15</sup> Since this test, frequently characterized as the subjective test,<sup>16</sup> focuses on the origin of intent the Court indicated that "the predisposition and criminal design of the defendant are relevant."<sup>17</sup> Accordingly,

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the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such gross perversion of its purpose." *Id.* at 452.

13. *Id.* at 452.

14. See note 8 *supra*.

15. 287 U.S. at 442.

16. For example, see Mr. Justice Stewart's dissenting opinion in *Russell v. United States*, 411 U.S. 423, 439 (1973).

Adoption and application of the subjective test has produced a flood of commentary—much of it severely critical. See, e.g., Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39; Rotenberg, *The Police Detection Practice of Encouragement*, 4 HOUS. L. REV. 609 (1967); 74 YALE L.J. 942 (1965); 59 CORNELL L. REV. 546 (1974); 5 U.C.L.A.L. REV. 82 (1973).

One commentator explained:

Moreover, the genesis of intent test is fraught with inconsistencies. The entrapment doctrine by definition concerns itself with the impermissibility of some police detection practices. If the question is *which* practices, it is plainly unresponsive to answer with an inquiry into the state of mind of the victim of the police conduct in issue. The result of that inquiry would be the same if the entrapper were a private citizen, yet it is settled that in such a case there is no defense. And when the courts speak of genesis of intent, they cannot mean pure intent to the specific crime charged, for even an entrapped defendant intends the acts for which he is indicted. The courts can be referring only to a general, pre-existent disposition to violate the law; attempts to defend the test as a psychiatrically valid distinction between "chronic" and "situational" offenders certainly have assumed as much. This suggests a more fundamental problem: in finding that the defendant harbored a general criminal predisposition, on the basis of evidence of his prior criminal behavior, the courts are convicting the defendant for offenses for which he is not being tried. For these offenses, the chronic offender apparently could not be convicted directly, for if the police had possessed sufficient evidence thereof, there would have been no need to induce defendant into another offense.

42 FORDHAM L. REV. 454, 458-59 (1973).

17. 287 U.S. at 451.

The defense of entrapment under the subjective predisposition test, has four essential elements: (1) a governmental instigation resulting in the commission of a crime, (2) actual inducements by government agents, (3) establishment of causation between the government's inducements and the defendant's actions, and (4) lack of criminal design by the defendant

the government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.<sup>18</sup>

Several leading jurists<sup>19</sup> and commentators<sup>20</sup> have severely criticized the admissibility of such hearsay evidence on the grounds, *inter alia*, that it severely prejudices the defendant and is often unreliable.

Mr. Justice Roberts, joined by Justices Brandeis and Stone, concurred in the decision to reverse, but did so through a different approach. Mr. Justice Roberts believed that the doctrine of entrapment is based not on statutory construction, but on "a fundamental rule of public policy."<sup>21</sup> The concurring justices argued that the true doctrinal basis for entrapment rests in the importance of preserving "the purity of government and its processes."<sup>22</sup> In short, the focus of Mr. Justice Roberts' approach was on the nature of police conduct,<sup>23</sup> instead of on the origin of intent or predisposition. It is prin-

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with regard to commission of the instant crime. 49 NOTRE DAME LAW. 579, 580 (1977); MINN. L. REV. *supra* note 10, at 328 n.16.

18. 287 U.S. at 451.

19. The concurring Justices in *Sorrells* and *Sherman*, and the dissenters in *Russell* all expressed their fear of such a procedure. Mr. Justice Stewart explained:

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

411 U.S. 423, 443 (1973) (dissenting opinion).

20. Bancroft, *supra* note 10, at 171; Donnelly, *supra* note 10, at 1108; Mikell, *supra* note 10, at 252; 40 BROOKLYN L. REV. 802, 806 (1974); IOWA L. REV., *supra* note 8, at 659-60; U. FLA. L. REV., *supra* note 8, at 77.

21. 287 U.S. at 457 (concurring opinion).

22. *Id.*

23. Since it was Mr. Justice Roberts' belief that the underlying rationale for the defense of entrapment was based on an intolerable degree of government participation, he urged that the entrapment issue was one that should properly be submitted to the court—not the jury. Specifically, Mr. Justice Roberts stated: "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law." *Id.*

cipally for this reason that this formulation has been characterized as the "objective" approach.<sup>24</sup>

This split in doctrinal philosophy, the subjective-objective or majority-minority dichotomy, again surfaced in the Supreme Court in 1958 in *Sherman v. United States*.<sup>25</sup> In *Sherman*, a government informer first met the defendant in a doctor's office where both were apparently being treated for narcotics addiction. Several accidental meetings followed, and conversation progressed to a discussion of mutual experiences and problems including their attempts to overcome addiction to narcotics. Ultimately, the informer asked Sherman to supply him with a source of narcotics because he was not responding to treatment. Only after a number of repetitions of the request, predicated on the informer's purported suffering, did the defendant finally acquiesce. Several times thereafter the defendant shared narcotics with the informer, who notified agents of the Bureau of Narcotics. Subsequently, the defendant was convicted of selling narcotics.

On the authority of *Sorrells*, Chief Justice Warren concluded for the majority<sup>26</sup> that entrapment had been established as a valid defense.<sup>27</sup> The Court affirmed the theory underlying *Sorrells*, stating:

[T]he fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.<sup>28</sup>

Moreover, he reiterated the belief that "Congress could not have intended that its statutes were to be enforced by tempting innocent

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24. Unlike its "subjective" counterpart, the objective test has received a warm reception in a substantial body of literature. See, e.g., Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 *FORDHAM L. REV.* 399 (1959); 40 *BROOKLYN L. REV.* 802 (1974); 42 *FORDHAM L. REV.* 454 (1973); Comment, 1 *U.S.F.L. REV.* 177 (1966). The objective approach, however, is not without its critics. For a brief criticism of both tests and a proposed alternative, see 73 *HARV. L. REV.* 1333 (1960).

25. 356 U.S. 369 (1958).

26. In addition to the Chief Justice, the majority included Justices Black, Burton, Clark, and Whittaker.

27. The *Sherman* Court found entrapment as a matter of law. It should be noted, however, that the Court did not in any way abandon the concept that entrapment was generally to be submitted to the jury. The Court emphasized that in this case there was not a question of "choosing between conflicting witnesses, nor judging credibility." 356 U.S. at 373.

28. *Id.* at 372 (emphasis added) (citations and explanatory notes omitted).

persons into violations.”<sup>29</sup> In essence, the *Sherman* majority had expanded the *Sorrells* majority’s statutory construction of the National Prohibition Act into a general principle of law.<sup>30</sup> Furthermore, it was again decided that in all but the clearest cases, the question of entrapment is to be decided by the jury.<sup>31</sup>

Mr. Justice Frankfurter, joined by three other members<sup>32</sup> of the Court, concurred in the result, while urging that Mr. Justice Roberts’ minority opinion in *Sorrells* represented the better reasoned theory for the entrapment defense. He strenuously argued that the basis for the test should necessarily be objective; it must focus on the permissible level of police activity which “does not vary according to the particular defendant concerned.”<sup>33</sup> He framed the underlying question: “[W]hether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.”<sup>34</sup> Mr. Justice Frankfurter further insisted that it was immaterial to decide whether the intention to commit the crime originated with either the defendant or the police.<sup>35</sup>

In *Russell v. United States*,<sup>36</sup> the next entrapment case to reach the Supreme Court, the majority’s approach remained the same, although an important factual difference existed. In *Russell*, an undercover agent for the Federal Bureau of Narcotics offered to supply the defendants with an essential ingredient<sup>37</sup> in the manufacture of methamphetamine<sup>38</sup> in return for one half of the drug produced. Thereafter, one of the defendants completed the manufacturing process and consummated with the arrangement with the agent. Subsequently, the “business arrangement” was repeated on request of the agent, who then secured a search warrant and seized several incriminating items from the laboratory where the manufacturing process had taken place. Defendants were convicted, and on appeal defendant Russell “conceded that the jury could have found him predisposed to commit the offenses.”<sup>39</sup> The Court of Appeals for

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29. *Id.*

30. See Mikell, *supra* note 10, at 255-56; 42 *FORDHAM L. REV.* 454, 458 (1973).

31. See 356 U.S. at 377.

32. Justices Douglas, Harlan, and Brennan.

33. 356 U.S. at 383 (concurring opinion).

34. *Id.* at 382.

35. *Id.* In addition, he expressed concern with the prejudicial effect of past character evidence on the jury.

36. 411 U.S. 423 (1973).

37. The chemical was phenyl-2-propanone. 411 U.S. at 425.

38. Methamphetamine is commonly referred to as “speed.”

39. *Id.* at 427.

the Ninth Circuit<sup>40</sup> reversed, however, and "in effect expanded the traditional notion of entrapment . . . to mandate dismissal of a criminal prosecution whenever the court determines that there has been 'an intolerable degree of governmental participation in the criminal enterprise.'"<sup>41</sup>

In reversing the Ninth Circuit and affirming Russell's conviction, the Supreme Court, through Mr. Justice Rehnquist,<sup>42</sup> emphasized that *Sorrells* and *Sherman* had established entrapment as a relatively limited defense.<sup>43</sup> The Court recognized that there are criticisms<sup>44</sup> and drawbacks to the subjective test, yet reiterated in haec verba:

[The subjective-majority test] is rooted . . . in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government.

. . . Thus, the thrust of the entrapment defense was held to focus on the intent or predisposition of the defendant to commit the crime.<sup>45</sup>

The *Russell* decision served, *inter alia*, as a response to several lower federal courts,<sup>46</sup> numerous critics,<sup>47</sup> and Russell, himself, who were insisting that entrapment was present whenever there was "overzealous law enforcement."<sup>48</sup> The Court, in fact, admonished the federal courts to refrain from applying the defense as a "chancellor's foot" veto over law enforcement practices of which [they do] not approve.<sup>49</sup> Although Mr. Justice Rehnquist did not specifically mention any lower court decisions, it is clear that he was referring to several which had more or less adopted the objective test

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

41. 411 U.S. at 427.

42. Justice Rehnquist was joined by Chief Justice Burger, and Justices White, Blackmun, and Powell.

43. 411 U.S. at 435.

44. *Id.* at 433-34. Justice Rehnquist briefly mentioned the criticisms and summarily dismissed them on the basis of *Sherman* and *Sorrells*. It is interesting to note, however, that in *Sorrells* the rationale of implied Congressional intent was used solely to construe the National Prohibition Act—not as a broad doctrinal base. Furthermore, in *Sherman*, the criticisms of the predisposition test were not discussed by the Court because the arguments had not been raised by counsel. *Sherman v. United States*, 356 U.S. 369, 376 (1958).

45. 411 U.S. at 435, 429.

46. "By 1973, most circuits had at least implicitly embraced the minority approach in cases of truly reprehensible police conduct." 59 CORNELL L. REV. 546, 557 (1974) (footnote omitted). See note 51 *infra*, and accompanying text.

47. See notes 16, 19, 20 and 24, *supra*.

48. 411 U.S. at 435.

49. *Id.*

in lieu of the *Sorrells-Sherman* subjective test.<sup>50</sup>

Mr. Justice Rehnquist initially had rejected the defendant's argument that the government's participation in his case violated the fundamental principles of due process.<sup>51</sup> The Court held that the analogy to the exclusionary rule's application to illegal searches and seizures<sup>52</sup> and confessions<sup>53</sup> was imperfect, "for the principal reason

50. See, e.g., *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *Carbajal-Portillo v. United States*, 396 F.2d 944 (9th Cir. 1968); *Smith v. United States*, 331 F.2d 784 (D.C. Cir. 1964) (en banc); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970); cf. *United States v. Morrison*, 348 F.2d 1003 (2d Cir. 1965); *Accardi v. United States*, 257 F.2d 168 (5th Cir. 1958); *United States v. Kros*, 296 F. Supp. 972 (E.D. Pa. 1969).

The most frequently discussed cases of this type, cited in both the *Russell* and *Hampton* dissents, include *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); and *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970). In *McGrath*, the Seventh Circuit reversed a conviction for possession of counterfeit currency where the government had taken charge of the counterfeiting operation after the defendant had initially purchased the requisite materials. The court explained that it was "repugnant to the most elemental notions of justice to permit law enforcement personnel to manufacture counterfeit bills, deliver them, and then arrest the recipient for possession of contraband." 468 F.2d at 1030. The Ninth Circuit in *Greene* found "wholly impermissible participation by the Government," where an undercover agent supplied the defendant with sugar at wholesale prices and acted as his only customer in a bootlegging operation. 454 F.2d at 784. Finally, in *Chisum*, the defendant was charged with receipt of counterfeit bills with intent to pass them as genuine where the bills had been supplied by a federal agent. The district court dismissed the indictment on the basis of government misconduct. 312 F. Supp. at 1312.

Additionally, *McGrath* and *Chisum* and the decision of the Fifth Circuit in *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), share the characteristic that in each, the government agents themselves furnished the defendant with the contraband for which he was convicted. The *Russell* majority concluded that this point need not be decided because, in any event, the ingredient supplied to the defendant by the government agent was not unlawful or impossible to obtain. 411 U.S. at 431-32.

In *Bueno*, a case pre-dating *Russell*, entrapment was held as a matter of law on facts closely analogous to those in *Hampton*. The court described the conduct of the government informer in selling heroin to Bueno and arranging sales for him as follows: "The story takes on the element of the government buying heroin from itself, through an intermediary, the defendant, and then charging him with the crime." 447 F.2d at 905. This principle was subsequently upheld by the Fifth Circuit in *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974), in the face of *Russell*.

51. 411 U.S. at 430-32.

It is interesting to note that the majority in *Russell* emphasized this fact and immediately thereafter alluded to the possible application of the due process principles in other situations to bar a criminal prosecution. *Id.* Mr. Justice Stewart, dissenting, relied on the finding of the Court of Appeals that "there could not have been the manufacture, delivery or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients." 452 F.2d 671, 672 (9th Cir. 1972).

Subsequently, in *Hampton*, the Justices voting to affirm defendant's conviction stressed the difficulty of obtaining pheno-2-propanone. Mr. Justice Powell, in fact, cited to Mr. Justice Stewart's dissent in *Russell*. Conversely, the *Hampton* dissenters attempted to distinguish *Russell* by using the *Russell* majority's description of the situation. 425 U.S. at 498 (Brennan, J., dissenting).

52. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

53. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

behind the adoption of the exclusionary rule was the Government's 'failure to observe its own laws.' Unlike the situations giving rise to the holdings in *Mapp* and *Miranda*, the Government's conduct here violated no independent constitutional right of the [defendant]."<sup>54</sup>

It seemed, however, that the *Russell* majority nonetheless left the door open for a future claim of outrageous police conduct violative of due process.<sup>55</sup>

A strong dissenting opinion was filed by Mr. Justice Stewart who was joined by two other Justices.<sup>56</sup> Mr. Justice Stewart summarized both the subjective and objective approaches to the entrapment defense, and expressed his extreme disfavor with the former. He indicated that the majority's reliance on the "unexpressed intent" of Congress not to prosecute those "otherwise innocent" was misplaced.<sup>57</sup> Such a rationale, he urged, does not explain why the defense may be raised only where the conduct of the government, as opposed to private citizens, instigates an "otherwise innocent" non-predisposed defendant to commit a criminal act.<sup>58</sup> Stewart's solution was adoption of the objective test enunciated by Justices Roberts and Frankfurter. Due to the importance to him of preserving the integrity of the system, Justice Stewart emphasized the level of governmental activity in framing the issue: "[W]hether—regardless of the predisposition to crime of the particular defendant involved—the government agents have acted in such a way as is likely to instigate or create a criminal offense."<sup>59</sup>

It should be emphasized that a defense based upon due process was not adopted by any of the dissenters, notwithstanding the rec-

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54. 411 U.S. at 430 (citation omitted).

55. Justice Rehnquist stated: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed." *Id.* at 431-32 (citation omitted).

In support of this brief statement, Mr. Justice Rehnquist alluded to *Rochin v. California*, 342 U.S. 165 (1952), a case wherein the Court unanimously voted to reverse a defendant's narcotics conviction resulting from police misconduct that "shocks the conscience." In *Rochin*, several deputy sheriffs forced their way into defendant's bedroom and ultimately took defendant to a hospital where his stomach was forcibly pumped in order to retrieve two drug capsules. The capsules were used as evidence to convict Rochin of illegal possession of morphine. The Supreme Court reached the conclusion that the government's actions, on the totality of the circumstances, had violated due process.

56. Justices Brennan and Marshall. Justice Douglas, joined by Justice Brennan, filed a brief dissent.

57. 411 U.S. at 440-41 (Stewart, J., dissenting).

58. *Id.* at 442. Justice Stewart reiterated the strong concern with the probative effect on the jury of the type of evidence necessary to prove predisposition. *Id.* at 443-44.

59. *Id.* at 441.

ommendations of some lower federal courts<sup>60</sup> and a significant number of legal scholars.<sup>61</sup> In addition, several other theories have been suggested as possible bases for the constitutionalization of the entrapment defense. These embrace, for example, analogy to the fourth amendment's prohibition against unreasonable searches and seizures and the fifth amendment's protection against self-incrimination.<sup>62</sup> Several scholars have cogently argued that these sources of an individual's constitutional rights necessarily encompass entrapment-type situations—serving as a response to Mr. Justice Rehnquist's statement that the exclusionary rule was an improper analogy.<sup>63</sup>

In the aftermath of *Russell*, several federal court decisions<sup>64</sup> reflected a decline in the focus upon the level of police activity. For example, where the initial determination by the Court of Appeals for the Seventh Circuit in *United States v. McGrath*<sup>65</sup> was remanded by the Supreme Court for reconsideration in light of *Russell*, the court rejected the entrapment defense which had been based on government overinvolvement.<sup>66</sup> Although the Fifth Circuit similarly denied application of the objective approach in a number of cases,<sup>67</sup> it chose to sustain the continued validity of *United States v. Bueno*<sup>68</sup>

60. See, e.g., *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957), modified, 258 F.2d 318 (9th Cir.), cert. denied, 358 U.S. 886 (1958); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970).

61. See note 63 *infra*, and accompanying text.

62. One commentator summarized:

[T]he Constitution establishes three independent limitations on police conduct, breach of any one giving rise to a valid entrapment defense. The privilege against self-incrimination prohibits the use of coercion in solicitation. Due process forbids the conviction of any person for a solicited offense unless he had been engaged in a course of criminal conduct or had a criminal design. The prohibition against search and seizure requires the police to have reasonable grounds for suspecting such conduct or design before they engage in solicitation. Through acknowledged operation of the fourteenth amendment, each of these three limitations is applicable to the state, as well as the federal government.

See also Cowen, *supra*, note 8; Rotenberg, *supra* note 8; YALE L.J., *supra* note 16, at 952; Comment, U. FLA. L. REV., *supra* note 8; Comment, 1964 U. ILL. L.F. 821; Comment 1971 UTAH L. REV. 266. For a list of alternative theories, see DEPAUL L. REV., *supra* note 8, at 573 n.26.

63. 411 U.S. at 430.

64. *United States v. Spivey*, 508 F.2d 146 (10th Cir.), cert. denied, 421 U.S. 949 (1975); *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973); *United States v. Cuomo*, 479 F.2d 688 (2d Cir.), cert. denied, 414 U.S. 1002 (1973).

65. 468 F.2d 1027 (7th Cir. 1972). For a discussion of the first *McGrath* decision, see note 50, *supra*.

66. *United States v. McGrath*, 494 F.2d 562 (7th Cir. 1974).

67. *United States v. Fink*, 502 F.2d 1 (5th Cir. 1974), cert. denied, 421 U.S. 911 (1975); *United States v. Register*, 496 F.2d 1072 (5th Cir. 1974), cert. denied, 419 U.S. 1120 (1975).

68. 447 F.2d 903 (5th Cir. 1971). For a discussion of *Bueno*, see note 50 *supra*.

by finding entrapment as a matter of law in situations where the police furnished *contraband* to the defendant who subsequently sold it to another government agent.<sup>69</sup>

It is against this background that an extremely divided Court handed down its controversial decision in *Hampton*. In view of the special difficulty of the questions presented, it is not surprising that a majority opinion was not rendered. The Court voted five to three to affirm Hampton's conviction; yet, Justices Powell and Blackmun were not prepared to adopt the sweeping language of the plurality opinion.

In each of the three opinions<sup>70</sup> authored by the *Hampton* Court, primarily two issues were discussed with varying degrees of emphasis. First, could entrapment be found where the defendant conceded that he harbored a predisposition to commit the crime charged? Second, does the fact that the government supplied the defendant with the *contraband* involve a violation of due process?

The plurality opinion, written by Mr. Justice Rehnquist and joined by the Chief Justice and Mr. Justice White, answered both questions in the negative. In reference to the question of entrapment, Mr. Justice Rehnquist reviewed briefly the analysis of *Russell*, *Sherman*, and *Sorrells*, concluding: "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."<sup>71</sup>

Justice Rehnquist next stated that Hampton had misapprehended the meaning of the "due process" language in *Russell*.<sup>72</sup> The Justice then unconvincingly argued that *Hampton* differed from *Russell* only in "degree" but not in "kind." Justice Rehnquist failed to explain how Hampton had misconstrued the *Russell* language. In short, what does the particular phrase mean? When would the activities of the police constitute a denial of due process? It would appear that the plurality has now rejected that possibility.

Basically, the plurality opinion treated the due process analysis, given much support by commentators,<sup>73</sup> with surprisingly short shrift. It recognized that the role of the government was more signif-

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69. *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974).

70. A plurality opinion was written by Mr. Justice Rehnquist and joined by the Chief Justice and Mr. Justice White. Mr. Justice Powell, joined by Mr. Justice Blackmun, filed an opinion concurring in the judgment. Mr. Justice Brennan filed a dissenting opinion joined by Justices Stewart and Marshall.

71. 425 U.S. at 488-89 (plurality opinion).

72. See note 55, *supra*.

73. See note 62, *supra*.

icant here than in *Russell*.<sup>74</sup> It emphasized, however, that Hampton “acted in concert” with the illegal conduct of the Government.<sup>75</sup> For this reason, “[T]he 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>76</sup>

Justices Powell and Blackmun concurred in the judgment of the Court affirming Hampton’s conviction. They believed that the factual situation was “completely controlled by *Russell*.”<sup>77</sup> In addition, the two Justices refused to accept Petitioner’s contention that the government’s conduct constituted a per se denial of due process.<sup>78</sup>

Nevertheless, Justices Powell and Blackmun were unable to join the plurality opinion because it went too far. The two Justices viewed the opinion as enunciating an absolute rule. Citing to two passages<sup>79</sup> in the plurality opinion, they commented:

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.

I do not understand *Russell* or earlier cases delineating the predisposition-focused defense of entrapment to have gone so far, and there was no need for them to do so.<sup>80</sup>

Justices Powell and Blackmun believed that it was unnecessary to decide whether a per se approach to entrapment was required where predisposition had been established, since this point was left open by *Russell*, “and this case is controlled completely by *Russell*.”<sup>81</sup> Furthermore, the Justices suggested the possibility of utilizing the

74. 425 U.S. at 489.

75. *Id.*

76. *Id.* at 490-91.

77. 425 U.S. at 491-92 (concurring opinion).

78. *Id.* at 492.

79. The two passages read as follows:

[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. Ante, at 488-89 (emphasis supplied).

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. Ante, at 489. (emphasis supplied.)

*Id.* at 492.

80. 425 U.S. at 492-93.

81. *Id.* at 495.

Court's supervisory powers or due process principles to protect a defendant against gross government overinvolvement. They could not envision, however, a situation where either the Court's supervisory powers or due process could be appropriately applied.<sup>82</sup>

Dissenting, Mr. Justice Brennan, with whom Justices Stewart and Marshall joined, urged that reversal of Hampton's conviction was required under either the objective or subjective approach to the entrapment defense. Initially, Mr. Justice Brennan argued that the objective standard was the proper basis for entrapment, although he recognized that the Court had disregarded any view that did not focus on predisposition.<sup>83</sup> Justice Brennan then submitted that the police conduct in the case at bar clearly violated this standard as a matter of law.<sup>84</sup>

Next, Mr. Justice Brennan postulated that *Russell* did not control the factual setting in *Hampton*, even under the majority or "subjective" approach.<sup>85</sup> No argument was based on a lack of defendant's predisposition, however, since Hampton conceded that he may have been predisposed to sell narcotics.<sup>86</sup> Rather, the dissenters placed reliance on "[t]wo facts [which] significantly distinguish this case from *Russell*."<sup>87</sup> First, Hampton had been supplied with *contraband* by the government; whereas, the informer in *Russell* had merely furnished the defendants with a legally obtainable *ingredient* in the manufacture of *contraband*. Second, in *Hampton*, the *government* had participated *throughout* the course of the illegal activities; its agents had allegedly sold narcotics to and bought them from the defendant. As indicated previously, five members of the Court found both facts unpersuasive. Despite the absence of a majority opinion, it is clear that *Hampton* nonetheless rejects the analysis of those lower courts<sup>88</sup> which have limited *Russell* to its

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82. *Id.*

In a footnote, Mr. Justice Powell stated:

I emphasize that the cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to *contraband* offenses, which are so difficult to detect in the absence of undercover government involvement.

*Id.* at 495, n.7.

83. Mr. Justice Brennan suggested that perhaps a "reasonable alternative inquiry might be whether the accused would have obtained the *contraband* from a source other than the Government." 425 U.S. at 496 n.1 (dissenting opinion).

84. *Id.* at 497.

85. *Id.*

86. *Id.* at 500.

87. *Id.* at 497.

88. *United States v. West*, 511 F.2d 1083 (3d Cir. 1975); *United States v. Oquendo*, 490 F.2d 1012 (5th Cir. 1974).

precise facts. Mr. Justice Brennan, on the other hand, cited a number of these and pre *Russell* decisions<sup>89</sup> for legal support and reasoning, placing particular emphasis on cases decided by the Fifth Circuit. Generally speaking, these decisions have taken the position that "where the Government has provided the contraband that the defendant is convicted of selling, there is entrapment as a matter of law."<sup>90</sup> This stance has been justified on the policy basis that, in such situations, the government is in fact creating the crime and jailing the "predisposed" defendant who carries it out. Mr. Justice Brennan would therefore, "at a minimum engraft the *Bueno* principle upon [the subjectively-oriented entrapment] defense and hold that conviction is barred 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>91</sup>

With respect to the application of his analysis to the states via the due process clause of the fourteenth amendment, Mr. Justice Brennan postponed consideration. In a footnote, he explained that for present purposes it would be sufficient to adopt his rule under the Court's supervisory power over the federal courts.<sup>92</sup>

Despite the absence of a majority opinion in *Hampton*, at least one point is clear: it will be extremely difficult, if not impossible, to show that a defendant's established predisposition is not dispositive. This is particularly true in contraband cases like the present one.

It is submitted that the Supreme Court's stubborn reliance on a test so fraught with criticism and drawbacks is unfortunate. A majority of the Court simply refuses to reconsider the analytical framework for the entrapment defense. *Hampton* and its predecessors represent blind adherence to a doctrine never really justified by the Court. On the other hand, it is urged that the objective test has a logical base and the support of the majority of legal scholars who have considered the problem.

The present composition of the Court virtually precludes the possibility that the objective test will be recognized, even as an alternative basis for a defense of entrapment. Therefore, it remains with the Congress to restructure the contours of the defense.<sup>93</sup> The

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89. *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971).

90. 425 U.S. at 499 (dissenting opinion).

91. *Id.* at 500.

92. *Id.* n.4.

93. In *United States v. Russell*, 411 U.S. 423, 433 (1973), the Court explained that since the entrapment defense did not reach constitutional dimensions, Congress was free to legislate.

American Law Institute has recommended legislation adopting, in essence, the objective, police conduct approach.<sup>94</sup>

Finally, there is little chance that a constitutional foundation for entrapment will be accepted. The Supreme Court refused to consider a due process challenge in the most extreme of contraband cases, and even Justices Powell and Blackmun were not especially encouraging in other areas. Essentially, the Court has once again sanctioned an all-out war by police against hypothetically "predisposed" individuals.

DOUGLAS KRAMER

## The Freedom of Information Act: 1974 Amended Time Provisions Interpreted

*The United States Court of Appeals for the District of Columbia Circuit has interpreted the 1974 amended time provisions of The Freedom of Information Act to mean that under exceptional circumstances, where an agency diligently processes requests for information but physically cannot comply with the restricted time limits, a court may grant the agency additional time. The author suggests that the court's holding avoids a political question that a less narrow holding would embrace. If the amendments are to retain their force, Congress may need to clarify the emphasis it intends for agencies to place on the screening of requests as opposed to the performance of their normal regulatory duties.*

Open America, a corporation, was organized to undertake projects in the public interest. One of these projects involved testing

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94. MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962). The Code provides in pertinent part as follows:

- (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
  - (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
  - (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.
- (2) Except . . . [when causing or threatening bodily injury is an element of the offense charged] . . . a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.