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# ENTRAPMENT

## Hampton v. United States, 425 U.S. 484 (1976)

In *Hampton v. United States,*[1] the Supreme Court held in a five-to-three[2] decision that a defendant's conviction for the sale of heroin, which he procured from a government informer and sold to government agents, was not barred by the defenses of entrapment or denial of due process of law. A three-judge plurality in an opinion by Justice Rehnquist held that where the predisposition of the defendant to commit the crime was established, and government agents acted in concert with the defendant, not only is the defense of entrapment unavailable, but also a violation of due process rights cannot properly be claimed.[3] However, Justices Powell and Blackmun, concurring in the judgement, refused to adopt the plurality's per se rule.[4] The *Hampton* decision reinforced and extended the Court's 1973 pronouncements on entrapment in *United States v. Russell,*[5] which upheld conviction of a defendant who had been supplied by government agents with a scarce, though legally obtainable chemical used in the manufacture of illegal drugs.

Charles Hampton was convicted in the United States District Court for the Eastern District of Missouri on two counts of distributing heroin.[6] The charges grew out of two sales of heroin by Hampton to agents of the Federal Drug Enforcement Administration (DEA), arranged by Jules Hutton, an acquaintance of Hampton's and also a DEA informant. The events prior to the sales were in dispute. According to Hampton, Hutton proposed a plan for selling a non-narcotic compound closely resembling heroin to gullible acquaintances of Hutton. Hampton testified that Hutton supplied him with packets containing the alleged "pollutants" which were in fact real heroin; Hampton subsequently made two sales to federal agents. Hutton testified that Hampton had initiated the plan to sell heroin and denied giving Hampton the substances Hampton sold to the DEA agents. Hutton claimed his only part in the transaction was "finding" the buyer for Hampton.

At trial, Hampton requested a special entrapment instruction; he argued that the jury must acquit him if it found that the informant supplied the narcotics to him, irrespective of his predisposition to commit the offense charged.[7] The trial court refused this instruction; the jury was instructed to convict if it found that the defendant knowingly and intentionally committed the unlawful act charged.[8]

On appeal to the Eighth Circuit following his conviction, Hampton argued that the trial court erred in refusing to give his requested instruction on entrapment. He contended that, notwithstanding *United States v. Russell,*[9] where the government supplied the contraband, without which there would be no crime, such government conduct constitutes a basis for entrapment or "due process" defenses, irrespective of predisposition.[10] The court of appeals rejected this argument, holding that *Russell* forecloses consideration of any entrapment defense once predisposition has been established.[11]

The "predisposition theory" has consistently received a majority of the Supreme Court's support

[1] 425 U.S. 484 (1976).

[2] Justice Rehnquist wrote a plurality opinion for himself, Chief Justice Burger, and Justice White. Justice Powell, joined by Justice Blackmun, concurred, while Justice Brennan, joined by Justices Stewart and Marshall dissented. Justice Stevens did not participate in the decision.

[3] 425 U.S. at 489–90.

[4] *Id.* at 491–95 (Powell & Blackmun, JJ., concurring). The concurrence believed that prior Court decisions had not gone so far and that, since this case was controlled by those prior decisions, the adoption of a per se rule was beyond the scope of this case. *See* notes 57–61 *infra* and accompanying text.

[5] 411 U.S. 423 (1973).

[6] Hampton was convicted under 21 U.S.C. § 841 (a)(1) (1970) which provides in relevant part:

> [I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

Heroin is classified as a controlled substance in 21 U.S.C. § 812 (c) Schedule I (b)(10) (1970).

[7] United States v. Hampton, 507 F.2d 832, 833 (8th Cir. 1974).

[8] The defendant did not request a standard entrapment instruction, which directs the jury to acquit if it has a reasonable doubt whether the defendant had the previous intent to commit the offense and did so only because he was induced or persuaded by some officer or agent of the Government. *See* note 16 *infra* and accompanying text.

[9] 411 U.S. 423 (1973).

[10] On appeal, defendant's counsel conceded that Hampton was predisposed to commit the offense. 507 F.2d at 836 n.5.

[11] 507 F.2d at 835. The Court of Appeals noted that the Fifth Circuit in United States v. Bueno, 447 F.2d 903 (5th Cir. 1971) held that entrapment is established as a matter of

in cases dealing with entrapment.[12] The theory was first enunciated in *Sorrells v. United States,*[13] a case involving a violation of the National Prohibition Act.[14] The Court held that entrapment occurs 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."[15] The test to determine the existence of entrapment was to be "subjective": Has the government in fact induced the commission of the crime by a person "otherwise innocent"? Did the intent to commit the crime originate with the government officials, or was the defendant "predisposed" to commit the offense? Was the defendant in the case, under the attendant circumstances, initially unwilling to commit the crime?[16] The *Sorrells* Court justified the creation of the entrapment defense by applying the traditional rule[17] that a statute should not be interpreted to create an unjust or unreasonable result.[18] Since the "origin of intent" to violate the Prohibition Act was in the government officials, the majority reasoned that Congress could not have intended to include an entrapped defendant's conduct within the purview of the criminal statute.[19]

Twenty-six years later, in *Sherman v. United States,*[20] the Court re-affirmed *Sorrells'* focus on the defendant's predisposition in the context of the sale of narcotics to a government agent. Writing for the majority, Chief Justice Warren cited the *Sorrells* concern with whether or not the intent to commit criminal conduct originated with law enforcement officials.[21] In attempting to clarify *Sorrells,* the Chief Justice cautioned that in any entrapment situation, a line must be drawn between the "trap for the unwary innocent and the trap for the unwary criminal."[22] Only close scrutiny at trial will uncover the truth:

> On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence.[23]

The fact situation of *Sherman* led the Court to conclude that the defendant clearly was induced by the government informant[24] and in fact never had a

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law to a charge of possessing or distributing contraband where such contraband was supplied to the defendant by a government agent or informant. The Fifth Circuit has also held that the *Bueno* principle is not eroded by *Russell.* United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974). However, the Eighth Circuit chose to follow, in addition to *Russell,* the Seventh Circuit's decision in United States v. McGrath, 494 F.2d 562 (7th Cir. 1974), holding the defense of entrapment unavailable even in the context of extensive government participation in an illegal counterfeiting scheme, given the defendant's predisposition to commit the crime.

[12] *See* 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 "predisposition theory" is also referred to as the "subjective test" and the "origin of intent" theory.

[13] 287 U.S. 435 (1932).

[14] The defendant had procured whiskey for a government agent at the latter's repeated and persistent requests for liquor to "take home to a friend," and by appealing to mutual experiences as members of the same division in World War I. *Id.* at 439–41.

[15] *Id.* at 442.

[16] *Id.* at 451. These questions are to be decided by the jury in light of the circumstances of each case. Although the subjective test considers the conduct of government officials as relevant to a consideration of the circumstances surrounding the commission of the crime, the primary emphasis is on determining the defendant's "predisposition." As noted in the text accompanying notes 33–37 *infra,* one of the major criticisms of this test is the difficulty and potential prejudice involved in determining "predisposition." In order to demonstrate criminal predisposition, the prosecutor is allowed to introduce evidence of the defendant's general character, past criminal convictions, rumored criminal activities, and his reaction to the Government's offer. *See* 22 C.J.S. *Criminal Law* § 45(2) (1961). Not only does this evidence potentially prejudice the jury, but it also is not really probative of the defendant's willingness to have committed the crime, the professed object of the inquiry into "predisposition." *See, e.g.,* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs,* 60 YALE L. J. 1091, 1108 (1951); Mikell, *The Doctrine of Entrapment in the Federal Courts,* 90 U. PA. L. REV. 245, 251–52 (1942); Comment, *Entrapment in the Federal Courts,* 1 U.S.F.L. REV. 177, 179–80 (1966). The Supreme Court has not specifically outlined the ingredients which may or may not be considered in determining predisposition, other than to say that it is a proper question for the jury, and that evidence of prior convictions, without more, is insufficient to show predisposition. *See* Sherman v. United States, 356 U.S. 369, 375 (1958).

[17] *See, e.g.,* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 628–33 (1818).

[18] 287 U.S. at 446–49.

[19] *Id.* at 450–52.

[20] 356 U.S. 369 (1958).

[21] *Id.* at 372.

[22] *Id.*

[23] *Id.* at 373.

[24] Defendant was being treated for narcotics addiction; only after repeated requests and pleadings from the informant did defendant acquiesce in a sale. The Court noted the defendant's reluctance to become involved in the sale, as well as his attempt to kick his narcotics addiction; his two prior narcotics convictions, without more, were insufficient to show predisposition. The facts of *Sherman* led the Chief Justice to decry such government action which "plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." 356 U.S. at 375–76 (footnote omitted).

predisposition to commit the crime.[25]

The concurring Justices in both *Sorrells* and *Sherman*[26] proposed an alternative to the predisposition theory, focusing on the conduct of the government officials in each case.[27] Under this government conduct test the relevant consideration is whether the average law-abiding citizen would have been induced to commit the crime by the tactics used by the government.[28] The proponents of this objective test reasoned that since the availability of the entrapment defense depends on government involvement in a crime, the proper focus is on the propriety of government conduct. Behind this assertion is the view that the entrapment defense is rooted, not in some hypothetical intent of Congress, but instead in the judiciary's inherent power to protect the purity of the judicial process.[29] As Justice Roberts saw it, "courts must be closed to the trial of a crime instigated by the government's own agents."[30] The question of a defendant's predisposition is thus irrelevant if the goal is to discourage improper use of governmental power.[31] Instead, the determination of whether a defendant is entrapped should depend upon such factors as the setting in which the inducement took place, the nature of the crime, its secrecy and difficulty of detection, and the manner in which the particular criminal business is carried on.[32]

The *Sorrells* and *Sherman* concurrences objected to what they characterized as theoretical and practical problems of the subjective test. One is a problem previously noted: the adherence to a hypothetical Congressional "intent" not to punish entrapped defendants for their conduct which, whether induced or not, was violative of a federal statute.[33] In addition, it is questionable whether a defendant's predisposition can be ascertained accurately[34] and without prejudice to those with prior criminal records or unsavory reputations.[35] Despite cautionary jury instructions, the probability of conviction for prior activity remains substantial.[36] Equally important, the subjective test's focus on predisposition could result in a variable standard of police conduct, dependent on the target of police solicitation.[37]

In *United States v. Russell,*[38] the Court had the opportunity to re-examine the two conflicting theories underlying the entrapment defense. Instead, the Court relied on precedent to re-affirm the appropriateness of the subjective test.[39] While the majority conceded the existence of bona fide criticisms of the subjective approach, they noted that similar arguments had twice been rejected by the Court, in *Sorrells* and *Sherman.*[40] Finding the objective test

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[25] *Id.* at 376.

[26] Justices Roberts, Brandeis, and Stone concurred in *Sorrells*; Justices Frankfurter, Douglas, Harlan, and Brennan concurred in *Sherman.*

[27] This principal rival to the subjective test is known as the government conduct theory, and is also referred to as either the "objective test," or the "police conduct" approach.

[28] Sherman v. United States, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. 435, 456–59 (1932) (Roberts, J., concurring).

[29] 356 U.S. at 381–85. (Frankfurter, J., concurring).

[30] 287 U.S. at 456–59 (Roberts, J., concurring).

[31] *Id.* at 458; *See* 356 U.S. at 382.

[32] 356 U.S. at 385. Justice Frankfurter felt that the court, and not the jury, is the proper vehicle to analyze these factors, since rules of law, rather than case-by-case jury determinations, lend significant guidance for acceptable future police conduct.

[33] *See* note 29 *supra* and accompanying text. If Congress' intent were truly not to punish individuals who would not have committed the crime without governmental inducement, it is troubling that case law has held that similar enticement by private citizens does not establish an entrapment defense, even though such a defendant's act would be no more blameworthy. *See, e.g.,* Carbajal-Portillo v. United States, 396 F.2d 944, 948 (9th Cir. 1968); Polski v. United States, 33 F.2d 686 (8th Cir. 1929), *cert. denied,* 280 U.S. 591 (1929).

[34] *See, e.g.,* Mikell, *supra* note 16, at 251–52.

[35] 287 U.S. at 356–59; *see* note 16 *supra.*

[36] *Id.*

[37] *See* United States v. Russell, 411 U.S. 423, 443–44 (1973) (Stewart, J., dissenting); 356 U.S. at 381–85 (Frankfurter, J., concurring); 287 U.S. at 456–59 (Roberts, J., concurring). Police might go to greater extremes to entice an individual with a criminal record and bad reputation into violating the law, "confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway." 411 U.S. at 444 (Stewart, J., dissenting).

[38] 411 U.S. 423 (1973). *Russell* was a five-to-four decision, Justice Rehnquist writing for the Court, upholding a district court conviction of a defendant who had been supplied by government agents with a legal, but difficult to obtain chemical central to the manufacture of illegal methamphetamine ("speed").

[39] 411 U.S. at 433–44. Justice Douglas, joined by Justice Brennan, and Justice Stewart, joined by Justices Brennan and Marshall, wrote dissenting opinions in *Russell.* Justice Douglas believed the government's conduct made it an "active participant in the unlawful activity." *Id.* at 437 (Douglas, J., dissenting). Justice Stewart, espousing the objective theory, believed as a matter of law that the government conduct constituted entrapment. *Id.* at 439–50 (Stewart, J., dissenting).

[40] The majority noted that at least equally cogent criticism has been made of the concurring views in these cases. In particular Justice Rehnquist found distasteful the

open to as much criticism as the subjective test, the Court flatly declined to overrule long-standing precedent and instead suggested that, since the claim is not of constitutional dimension, Congress is the appropriate body to "adopt any substantive definition of the defense that it may find desirable."[41] Justice Rehnquist, writing for the Court, reprimanded several United States district courts and courts of appeal for going beyond the Court's opinions in *Sorrells* and *Sherman* in order to bar prosecutions resulting from "overzealous law enforcement":

> But the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve. . . .[42]

In addition to its consideration of the proper theoretical bases of the entrapment defense, the *Russell* Court dealt with an alternative claim that was to be particularly important in the *Hampton* decision: that the activities of law enforcement officers in *Russell* were analogous to the "overzealous" conduct which had prompted adoption of the exclusionary rule for evidence obtained by illegal search and seizure[43] and coerced confessions.[44] Justice Rehnquist rejected the defendant's contention that government conduct in supplying the legal chemical necessary to the manufacture of an illegal drug violated the fundamental principles of due process:

> Unlike the situations giving rise to the holdings in *Mapp* and *Miranda*, the government's conduct here violated no independent constitutional right of the respondent. Nor did [the informant] violate any federal statute or rule or commit any crime in infiltrating the respondent's drug enterprise.[45]

The *Russell* Court conceded the possibility that certain police conduct may violate due process standards:

> . . . [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 . . . .[46]

The Court concluded, however, that the supply of an item of value to a drug ring as a means of gaining the confidence of "illegal entrepreneurs" is both a practical and permissible means of apprehension in drug related offenses and not a violation of "fundamental fairness."[47]

The acknowledgement in *Russell* of a possible due process defense in the area of police solicitation of crime provided an apparently logical basis for defendant Hampton's appeal to the Supreme Court after the Eighth Circuit affirmed his conviction. However, the *Russell* majority joined in the different fact situation of *Hampton* to sustain the defendant's conviction. Unlike *Russell,* there were two separate opinions by the five Justices. Justice Rehnquist, writing for Chief Justice Burger and Justice White, interpreted his majority opinion in *Russell* as ruling out the possibility that the defense of entrapment could ever be based on governmental misconduct where a defendant's predisposition was established.[48] Thus disposing of the narrow "entrapment" question, Justice Rehnquist next considered the defendant's constitutional contention that the police conduct in this instance was that type of "outrageous" activity, violative of due process, which even *Russell* conceded could possibly operate to bar a conviction.

Justice Rehnquist indicated that, although the government played a more significant role in enabling Hampton to sell contraband than in *Russell,* the difference was one of degree, not of kind.[49] In both cases the government agents were acting in concert with a defendant who was predisposed to commit the crime:

> 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. But, as noted, petitioner's conceded predisposition rendered this defense unavailable to him.[50]

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objective approach's precluding, by virtue of a sole focus on government conduct, the finding of guilt in a case where an individual had himself planned and committed a crime, notwithstanding the government's inducements. *Id.* at 434.

[41] *Id.* at 433.

[42] *Id.* at 435.

[43] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

[44] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

[45] 411 U.S. at 430.

[46] *Id.* at 431–32. In Rochin v. California, 342 U.S. 165 (1952), police committed unlawful entry, battery, torture, and false imprisonment in order to obtain evidence against the defendant. 342 U.S. at 167. The Supreme Court refused, on due process grounds, to admit the evidence gained as a result of this conduct. *Id.* at 172. Justice Rehnquist did not find the government conduct in *Russell* analagous. *See* note 47 *infra* and accompanying text.

[47] 411 U.S. at 432.

[48] 425 U.S. 484, 488–89 (1976).

[49] *Id.* at 489.

[50] *Id.* at 490.

Justice Rehnquist invoked his "chancellor's foot veto" analogy as justification for the Court's restraint in passing judgement on law enforcement practices—an area where Congress has the primary role.[51]

To Justice Rehnquist, due process principles come into play only when the governmental activity violates some protected right of the defendant, which was not the case either here or in *Russell*.[52] Here the police, the government informer, and the defendant acted in concert. The remedy for illegal police activity in such a situation lies "not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."[53]

Justice Powell, joined by Justice Blackmun, concurred to the extent that they rejected Hampton's contention that it is a per se denial of due process whenever the government supplies contraband to one later prosecuted for trafficking in that contraband.[54] Justice Powell called the supplying of an essential ingredient in the manufacture of an illegal drug, as opposed to the supplying of the illegal drug itself, a "distinction without a difference," and thus found *Russell* controlling. The Justices objected, however, to the remainder of the plurality opinion on the ground that it "would unnecessarily reach and decide difficult questions not before us."[55]

Justices Powell and Blackmun's fundamental objection to the plurality opinion was its enunciation of a per se rule which, given the predisposition of a defendant to commit the offense charged, precludes any further inquiry into a possible violation of due process, no matter how outrageous the police behavior:

> 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.[56]

Justice Powell stated his agreement that *Russell* required an entrapment inquiry to focus solely on predisposition, but refused to accept the entrapment defense as necessarily the only doctrine relevant to cases of government involvement in a crime.[57] To support this view, Justice Powell cited with approval Judge Friendly's opinion in *United States v. Archer*[58] that there is a constitutional limit to allowing government involvement in crime, especially if it involves injury to protected rights of citizens.

The concurrence did not accept Justice Rehnquist's "chancellor's foot veto" reasoning; they did not feel that *Russell* forecloses reliance on the Court's supervisory power to bar conviction of a predisposed defendant because of outrageous police conduct.[59] *Russell* indicated only that the Court should be "extremely reluctant" to invoke the supervisory power in such cases, but nevertheless should retain the discretion to exercise this power.[60]

[51] *Id.* at 490.

[52] *Id.*; *see* note 45 *supra*. An example of such a protected right would be an individual's right under the fourth amendment to be free from unreasonable search and seizures, as evidenced by Justice Rehnquist's reference to the *Mapp* decision. *See* note 43 *supra* and accompanying text.

[53] 425 U.S. at 490. *See* Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976); O'Shea v. Littleton, 414 U.S. 448, 503 (1974). In O'Shea, the Court denied injunctive relief to residents of Cairo, Illinois who had brought a civil rights action under 42 U.S.C. § 1983 (1970) against a magistrate and a circuit court judge charging illegal bond-setting, sentencing, and jury-fee practices in criminal cases. The Court indicated that the proper remedy for judges who would "willfully discriminate on the ground of race or otherwise would willfully deprive the citizen of his constitutional rights" is to be found in 18 U.S.C. § 242 (1970) which provides for fine or imprisonment for those acting under color of state law to deprive persons of their civil rights. 414 U.S. at 503. In *Imbler*, the Court declared that prosecutors of a state are immune from liability in suits under § 1983 for civil damages, but that this absolute grant of immunity from civil suit need not leave the public powerless to deter misconduct in view of the "criminal analogue of § 1983"—§ 242 of Title 18. 424 U.S. at 428–29.

[54] 425 U.S. at 491.

[55] *Id.*

[56] *Id.* at 492–93 (footnote omitted).

[57] *Id.* at 492 n.2 (Powell & Blackmun, JJ., concurring).

[58] 486 F.2d 670, 676–77 (2d Cir. 1973). In *Archer*, government agents arranged a phony arrest of an informant with the purpose of causing the bribery of an allegedly corrupt state assistant district attorney. The government scheme involved lying to a New York police officer and perjury before New York judges and grand jurors. In reversing the convictions under the Travel Act for illegal use of telephone facilities in interstate commerce, the Second Circuit relied on the narrow ground of insufficiency of the evidence. However, the court made clear that it considered the government conduct in the case beyond that of any proper prosecutorial role:

> The investigators apparently permitted their deserved contempt for corrupt practitioners in the Queens criminal justice system to spill over into disdain for all the participants in the system . . . [this conduct] is substantially more offensive than the common cases where government agents induce the sale of narcotics in order to make drug arrests.

*Id.* at 677.

[59] 425 U.S. at 493–94.

[60] *Id.* at 494. Justice Powell indicated in a footnote that it would be a rare case in which proof of predisposition was not dispositive. Police overinvolvement in

Justices Powell and Blackmun were sympathetic with the plurality's concern that the Court might find it difficult to formulate standards of acceptable police conduct should the supervisory power be used. Nevertheless, they felt that the question was left open in *Russell,* and, since *Hampton* was controlled completely by *Russell,* the question remained open in *Hampton* as well. The concurring Justices pointed out that difficulties in defining limits on police conduct do not themselves justify an absolute rule; in appropriate circumstances, the Court must not be bound by unbending rules that foreclose all judicial discretion, and instead must apply principles of due process to achieve a just result. [61]

Justice Brennan, joined by Justices Stewart and Marshall, dissented in the *Hampton* decision. Initially, the dissent paid allegiance to the "government conduct" theory espoused by Justices Frankfurter and Roberts in their concurrences in *Sherman* and *Sorrells.* The dissent viewed the police conduct in *Hampton* as "plainly" constituting entrapment as a matter of law under this theory. [62] However, Justice Brennan went on to delineate reasons why reversal was mandated under the "predisposition theory" as well. The dissent sought to distinguish the facts of *Russell* from *Hampton* in two respects: (1) the chemical supplied in *Russell* was not contraband; and (2) the defendant in *Russell* was involved in continuing illegal activity *prior* to, as well as *after* the time the government agent participated in the scheme of solicitation. [63] These distinctions, whether of degree or of kind, 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. . . . [T]his 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. . . . " *Sorrells v. United States* . . . . [64]

Justice Brennan agreed with Justice Powell's point that *Russell* permits imposition of a bar to conviction, notwithstanding the existence of a predisposed defendant, where conduct of police is sufficiently offensive. Examining the instant case, Justice Brennan concluded that the police activity went beyond permissible limits. [65] To prevent these abuses of police power, the dissent suggested an expansion of the entrapment defense, under the aegis of the Court's supervisory power, to bar as a matter of law convictions where the subject of the criminal charge is the sale of contraband provided to the defendant by a government agent. [66]

*Hampton* firmly establishes the Court's unwillingness to reconsider the "subjective versus objective" dialogue as to the appropriate basis of the entrapment doctrine. Clearly, the Court is determined to limit the entrapment defense to a predisposition-focused concept, in spite of the many theoretical and practical criticisms of this approach. [67] Though the Court is clear and consistent in its support of the predisposition theory, it is both unclear and inconsistent on the question of a due process defense raised by the same majority in *Russell.* [68] The principal problem with the *Hampton* decision is that it effectively renders the "outrageous conduct" exception meaningless, at least in the context of drug-related offenses. In the plurality opinion, Justice Rehnquist conceded that the government played a more significant role in enabling the defendant to sell contraband than in *Russell.* He would justify this by asserting that the government and the defendant acted "in concert," and thus no constitutional right of the defendant was infringed. [69] However, in *Russell,* Justice Rehnquist justified the government conduct not only because it "violated no independent constitutional right" of the defendant, but also because the government informer did not "violate any federal statute or rule or commit any crime in infiltrating the respondent's drug enterprise." [70] It is questionable whether the same may

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crime would have to reach "a demonstrable level of outrageousness" before a conviction could be barred. Furthermore, with respect to contraband cases such as *Russell* and *Hampton,* this "outrageousness" would be difficult to show since such offenses necessarily and justifiably involve undercover government involvement. *Id.* at 495–96, n.7.

[61] *Id.* at 494–95 nn. 5,6.

[62] *Id.* at 497 (Brennan, J., dissenting).

[63] *Id.* at 497–98.

[64] *Id.* at 498–99.

[65] *Id.* at 497. Brennan disputed the necessity of supplying contraband to catch participants in drug traffic. He noted that if the police believe an individual is a distributor of narcotics, all that is required is to set up a "buy": "the putative pusher is worth the investigative effort only if he has ready access to a supply." *Id.* at 499–500 n.3.

[66] *Id.* at 500 n.4. *See* United States v. Morley, 496 F.2d 1012 (5th Cir.), *aff'd mem.,* 505 F.2d 1251 (1974). United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), *cert. denied,* 411 U.S. 949 (1973);

[67] *See* notes 33–37 *supra* and accompanying text.

[68] *See* note 46 *supra* and accompanying text.

[69] 425 U.S. at 490–91.

[70] 411 U.S. at 430.

be said of the conduct in *Hampton*. If the participants were indeed acting in concert, as Justice Rehnquist concludes, then the transaction must be viewed, in the words of Justice Brennan, as "the Government . . . doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary." [71] Furthermore, if the exclusionary rule is predicated on the failure of the government to observe its own laws, as Justice Rehnquist contends in *Russell,* [72] it logically follows that government law-breaking in the buying and selling of heroin—even to catch a "predisposed" intermediary—should be considered sufficiently "outrageous" conduct to invoke "due process principles [to] absolutely bar the Government from invoking judicial processes to obtain a conviction." [73]

One possible explanation for the majority's unwillingness to follow its own reasoning in *Russell* to its logical conclusion in *Hampton* may be a feeling that courts should be hesitant to use the broad authority of the due process clause to bar *prosecution,* rather than just the introduction of evidence, on the basis of unlawful police conduct. [74] Underlying the Court's decisions in both *Russell* and *Hampton* is also a belief that government solicitation is a necessary police tactic against illegal drug traffic. [75]

Whatever its underlying motives, the majority opinions in *Hampton* effectively emasculate a possible "outrageous conduct"-due process defense, at least in the context of drug-related cases. For the plurality, Justice Rehnquist enunciates, without a single supporting authority, a new per se rule which in substance renders due process principles inapplicable for a predisposed defendant. [76] Secondly, under the guise of separation of powers, he argues that the Court may not exercise a "chancellor's foot veto" over those law enforcement activities which it did not approve. [77] Finally, Justice Rehnquist suggests that in those instances where police do engage in illegal activity beyond the scope of their duties, the remedy of the "equally culpable" defendant lies in the process of "prosecuting the police under the applicable provisions of state or federal law." [78] In short, the defendant's due process rights reserved in *Russell* are scarcely to be seen in the *Hampton* plurality. What is left is the citation to *Rochin,* and if the facts of this case indicate how outrageous police conduct must be before due process is denied to a defendant, the defense offers negligible protection beyond that already afforded by the exclusionary rule. [79]

Nor is the concurrence helpful in salvaging the due process defense. Justices Powell and Blackmun at least initially take exception to the plurality's pronouncements on "difficult questions not before us," and caution against, in the words of Justice Frankfurter, [80] the risk of shrinking the Court's responsibility to "accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals." [81] Yet Justices Powell and Blackmun, too, see no "outrageous conduct" in the government's scheme. Though they apparently recognize, without elaborating, some circumstances where due process or the Court's supervisory power may bar conviction of a predisposed defendant, [82] they conclude that:

> [T]he 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 a 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. [83]

The concurrence thus fails, as the dissent points out, to distinguish between the levels of government

[71] 425 U.S. at 498 (Brennan, J., dissenting).

[72] *See* note 45 *supra* and accompanying text.

[73] 411 U.S. at 430–32. Many commentators agree that the exclusionary rule analogy should extend to extensive government participation in a crime. *See, e.g.*, Donnelly, *supra* note 16 at 1112; Comment, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of The Entrapment Defense,* 74 YALE L.J. 942, 949–50 (1965).

[74] *See* note 40 *supra.* While courts exercise a traditionally broad power over the admission of evidence, they risk infringement of executive and legislative powers when they release a defendant found guilty on the basis of permissible evidence. *See* Note, *Entrapment,* 73 HARV. L. REV. 1333, 1334 (1960).

[75] *See* 411 U.S. at 432; Rotenberg, *The Police Detection Practice of Encouragement,* 49 VA. L. REV. 871, 875 (1963).

[76] 425 U.S. at 488–91.

[77] *Id.* at 490.

[78] *Id.*; see note 53 *supra.* It is ironic that Justice Rehnquist would recommend this remedy and then write the opinion for the Court in a case which makes it harder to pursue such a course of action. *See* Rizzo v. Goode, 423 U.S. 362 (1976). The impracticality of a judicial remedy against police abuse following *Rizzo* is discussed in Comment, *Rethinking Federal Injunctive Relief Against Police Abuse: Picking up the Pieces After Rizzo v. Goode,* 7 RUT.-CAM. L.J., 530 (1976).

[79] *See* notes 40, 43, and 44 *supra,* and accompanying text.

[80] Sherman v. United States, 356 U.S. 369, 381 (1958) (Frankfurter, J., concurring).

[81] *Id.* at 381.

[82] *See* note 46 *supra.*

[83] 425 U.S. at 495–96 n.7 (Powell & Blackmun, JJ., concurring).

involvement in *Russell* and *Hampton*. While supplying a legal ingredient in the manufacture of "speed" is arguably "necessary" to catch participants in illegal drug traffic, the supplying of contraband is not:

> If the police believe an individual is a distributor of narcotics, all that is required is to set up a "buy"; the putative pusher is worth the investigative effort only if he has ready access to a supply.[84]

While law enforcement officials must be allowed sufficient discretion to effectively counter narcotics traffic,[85] actions which involve government lawbreaking can hardly be deemed consistent with fundamental fairness in the judicial process.[86]

By refusing to hold government conduct in procuring contraband for a predisposed defendant and arranging its sale to undercover agents as an entrapment or a denial of due process, the Burger Court in *Hampton* has again shown its desire to avoid adding restraints on police apprehension and conviction of those clearly guilty of a crime.[87] An exclusionary-type rule, aimed at ending unlawful police behavior, is again avoided where the result would be to free the "equally culpable" defendant; instead, police conduct is left to regulation by state or federal law,[88] or by external review procedures.[89] Though *Hampton* stopped short of explicitly making the existence of a defendant's predisposition an absolute bar to the invocation of a due process defense, such a defense will be all but impossible to establish in future contraband-related cases.[90] Hampton will undoubtedly be a welcome addition to the tools of law enforcement officials in the battle against narcotics traffic. It remains to be seen whether the Court's emasculation of the *Russell* "outrageous conduct" caveat will unleash, in Justice Frankfurter's words, the "dangers of overzealous law enforcement," resulting, in the final analysis, in a loss of freedom for every individual.

[84] *Id.* at 499 n.3.

[85] *Id.* at 495–96 n.7.

[86] *See* United States v. Russell, 411 U.S. 423, 445 (Stewart, J., dissenting).

[87] *See* Hartman, *The Burger Court, 1973 Term: Leaving the Sixties Behind Us*, 65 J. CRIM. L. & C. 437 (1974).

[88] *See* note 53 *supra* and accompanying text.

[89] Chief Justice Burger has suggested establishing a civilian review board as an independent external measure to combat excesses of police activity. *See* Burger, *Who Will Watch the Watchman?* 14 AM. U. L. REV. 1, 9–23 (1964).

[90] *See* note 60 *supra*.