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Entrapment: United States v. Russell, 411 U.S. 423 (1973)

are; what "*serious* literary, artistic, political and scientific value" means; how much latitude a jury has in applying these standards; and finally, how much latitude the state legislature may take in defining and proscribing "*specific* depictions or descriptions of sexual *conduct*." Whatever the results of this new approach, another round will surely follow.

ENTRAPMENT

United States v. Russell, 411 U.S. 423 (1973)

The Supreme Court in *United States v. Russell*[1] decided whether a government agent's supply of a means for the commission of an offense to a defendant intending to commit the offense was a violation of due process or an entrapment. A majority of five held that furnishing a difficult to obtain but legal chemical needed in the illegal manufacture of a drug and a subsequent prosecution for the manufacture and sale of the drug did not violate due process. The Court also refused to alter the basis of the entrapment defense established in *Sorrells v. United States*[2] and affirmed in *Sherman v. United States*.[3] Under the theory offered in those cases, the defense is successful only if the prosecution fails to prove that the defendant had a predisposition or general intention to commit the crime encouraged by the government. Entrapment did not, as concurring opinions to *Sorrells* and *Sherman* urged and as Russell argued, bar a prosecution because the law enforcement conduct itself is found objectionable to a court. So defined, the defense was properly unavailable to Russell.

Richard Russell and two others, John and Patrick Connolly, were indicted and Russell was convicted of illegally manufacturing and selling methamphetamine, commonly known as "speed." Joseph Shapiro, an agent of the Bureau of Narcotics and Dangerous Drugs, met with the three in December, 1969. He told them he represented a group desiring to obtain control of the manufacture and distribution of methamphetamine in the Pacific northwest. He offered to supply them with phenyl-2-propanone (P-2-P), a chemical required to manufacture methamphetamine. In return, he wanted to receive one half of the speed made with his P-2-P. The chemical at that time could be sold legally but was difficult to obtain because the Bureau of Narcotics and Dangerous Drugs had asked drug manufacturers to stop selling it. Russell and the Connollys made methamphetamine a few days later with Shapiro's P-2-P and Shapiro received his share the next day.[4] He also bought some of the remainder from Russell.

At his trial, Russell moved for acquittal because of entrapment as a matter of law. The motion was denied. The trial court gave the jury a standard entrapment instruction[5] and Russell was found guilty.

On appeal to the Ninth Circuit, a divided court reversed the conviction and ordered the indictment dismissed.[6] There, it was conceded by Russell that the jury's finding of predisposition which precluded a verdict of not guilty, could be supported by the evidence. However, the majority held that a defense to a criminal charge could be founded upon "an intolerable degree of governmental participation in the enterprise."[7] The

[1] 411 U.S. 423 (1973). Justice Rehnquist wrote the majority opinion for himself, Chief Justice Burger and Justices White, Blackmun and Powell. Justice Douglas wrote a dissent concurred in by Justice Marshall and Justice Stewart dissented in another opinion with Brennan and Marshall, JJ., concurring.

[2] 287 U.S. 435 (1932).

[3] 356 U.S. 369 (1958).

[4] Shapiro's offer to supply P-2-P was conditioned upon receiving a tour of the laboratory in Patrick Connolly's home where the methamphetamine would be produced and inspection of previously manufactured speed.

[5] The jury was to acquit if it had:

> 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.

411 U.S. at 427 n.4. A source of confusion among lower federal courts is the burden placed on the defendant to show government inducement in order to shift the burden to the government to show previous intent or predisposition. The courts are also concerned about confusion in the minds of jurors arising from the application of these different burdens. For the varying results see, *e.g.*, Kadis v. United States, 373 F.2d 370, 373–74 (1st Cir. 1967); United States v. Riley, 363 F.2d 955, 958–59 (2d Cir. 1966); Notaro v. United States, 363 F.2d 169, 175 (9th Cir. 1966 Sagansky v. United States, 358 F. 2d 195, 203 (1st Cir. 1966).

[6] United States v. Russell, 459 F.2d 671 (9th Cir. *cert. granted*, 409 U.S. 911 (1972).

[7] *Id.* at 673.

majority offered two theories for this holding, but did not choose to specify which was responsible for the result since both mandated the same conclusion in this case. The court first noted two federal court decisions holding that regardless of a predisposition, entrapment occurred as a matter of law when the government supplied the contraband.[8] Although P-2-P was legal to possess, the court assumed that Russell could not have committed the offense without the "pervasive intervention" of the government.[9] Secondly, the court noted that besides entrapment, a bar to prosecution may be predicated upon extreme government involvement in the criminal enterprise.[10] Both theories, the court said, were based upon due process and reflected a judicial reluctance to approve extreme law enforcement tactics.

The government sought a writ of certiorari from the Supreme Court to review the Ninth Circuit's conclusions of law. The government admitted that due process may be violated if a government agent was the sole source of means to commit a crime, but claimed that was not the case here. The government argued that while *Sorrells* and *Sherman* dealt only with solicitation to commit a crime, both decisions tolerated the supply of a means to commit an offense to a defendant found predisposed.[11] And, even assuming that the degree of law enforcement conduct alone determines entrapment, it was argued that the agent's activity in this case did not reach that level.

Sorrells and *Sherman* are the only two Supreme Court decisions before *Russell* dealing with the theory of entrapment in the federal courts. In *Sorrells*, the Court analyzed the various bases put forward by lower federal courts and state courts to determine whether entrapment constituted a bar to prosecution or a defense to a criminal charge.[12] The majority chose to view it as a defense because of the constitutional difficulty they found in an approach which would bar a prosecution. To do that, they felt, would in effect grant immunity, which was not a function of the judiciary.

The Court in *Sorrells* held that a defendant is entrapped when the origin of intent to commit a criminal offense was in the government agent who encouraged or persuaded the defendent to commit an offense which the defendant did not intend to commit prior to the agent's activity. If the defendant, after "an appropriate and searching inquiry into his own conduct and predisposition" [13] was found to be entrapped by the fact finder, he was innocent of the crime charged. The majority reasoned that the act of an entrapped defendant was not within the scope of the statute. They believed that Congress could not have intended its statutes to "be abused by the instigation by government officials of an act on the part of per-

[8] United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970). In *Bueno* I, the Fifth Circuit reversed the conviction of the defendant and remanded the case because the government produced no evidence to rebut defendant's assertion that the government's informer gave him heroin which defendant in turn sold to an undercover agent. The court held that as a matter of law, a defendant cannot be convicted if the illegal substance was supplied by the government. On retrial, the government produced the informer who contradicted the defendant's testimony. On appeal, the court of appeals affirmed the conviction. United States v. Bueno, 470 F.2d 154 (5th Cir. 1972). In *Chisum*, the indictment against the defendant was dismissed because the government delivered counterfeit money to the accused who had solicited it from another. The court found entrapment an affront to the concepts of justice and ruled that the supply of contraband, no matter what the defendant's predisposition to commit the crime, was entrapment as a matter of law. The court reasoned that if it allowed prosecution, it "would be to countenance violations of justice." 312 F. Supp. at 1312. The court also felt that entrapment was a violation of due process. *Chisum*, in large part, relied on the decisions in United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959) and United States v. Dillet, 265 F. Supp. 980 (S.D.N.Y. 1966). Both those cases involved successful use of the entrapment defense because a government informer could have been the source of the drugs the defendants supplied to undercover agents. In this respect, they are factually similar to *Bueno* I. For a recent decision analyzing the decision in *Chisum* to determine what constitutes government supply of an illegal substance, see United States v. Mahoney, 355 F. Supp. 418 (E.D. La. 1973).

[9] 459 F.2d at 673.

[10] *Id.* at 674. As the basis for this theory, the court relied upon Greene v. United States, 454 F.2d 783 (9th Cir. 1971). There, the court reversed convictions of the defendants accused of illegal manufacture of liquor. An undercover agent helped the defendants re-establish themselves as bootleggers after their release from prison. The agent remained their sole customer for over a year, until their arrest.

[11] Where a criminal predisposition can be proved, "the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." Sorrells v. United States, 287 U.S. 435, 441 (1932), quoted in Sherman v. United States, 356 U.S. 369, 372 (1958).

[12] For discussions of the evolution of the entrapment doctrine in the federal courts see DeFeo, *Entrapment As A Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F.L. REV. 243 (1967); Mikell, *The Doctrine of Entrapment In The Federal Courts*, 90 U. PA. L. REV. 245 (1942); Orfield, *The Defense of Entrapment in The Federal Courts*, 1967 DUKE L.J. 39 (1967).

[13] 287 U.S. at 451.

sons otherwise innocent in order . . . to punish them." [14]

Justice Roberts, concurring in *Sorrells*, believed the true basis of entrapment was analogous to the equitable and civil law doctrine that courts should not "tolerate the use of their process to consummate a wrong." [15] Conviction of an entrapped defendant should be barred to protect the court's function of administering justice. Unfortunately, he offered no test to determine when law enforcement conduct barred a prosecution. While Justice Roberts said that entrapment occurs "where a law officer envisages a crime, plans it and activates its commission by one not theretofore intending its perpetration;"[16] he felt evidence of the accused's predisposition was a "false issue." [17] Once a defendant proved entrapment through inducement or instigation[18] to commit the offense, Roberts argued that it was the duty of the court to release the defendant immediately.[19] Justice Roberts' analysis thus required a determination of causation although he felt only police conduct should be examined.

A test for determining when law enforcement conduct becomes entrapment was provided by Justice Frankfurter in his concurring opinion in *Sherman v. United States*.[20] There, Chief Justice Warren's majority opinion reaffirmed the origin of intent test of *Sorrells*. He found no reason to reassess the theory of entrapment since that issue was not raised before the Supreme Court or in the lower courts.

Justice Frankfurter's analysis of entrapment was basically the same as Justice Roberts'. Both felt the only true Congressional intent to be derived from a reading of a statute "is . . . to make criminal precisely the conduct in which the defendant has engaged." [21] And, like Justice Roberts, Justice Frankfurter believed that the reason why an entrapped defendant is freed is the judiciary's supervision of the administration of criminal justice in the federal courts, not the fact that the conduct was not criminal in a statutory sense.[22] The decision in *McNabb v. United States*[23] which came after *Sorrells*, demonstrated that this supervisory function was necessary to preserve public confidence in the fair and honorable administration of criminal justice and transcends the interest of society in the conviction of a defendant.[24]

Like Justice Roberts, Justice Frankfurter believed a determination of an accused's predisposition was irrelevant to the question of entrapment and highly prejudicial to the defendant. His test to determine whether the government's conduct amounted to an entrapment was objective. It focused on the impact of the government's conduct on an average individual, not the intent of the particular defendant. Activity that encouraged the commission of a crime by a person other than one ready and willing to commit it was beyond the proper scope of governmental power and therefore constituted entrapment.[25] Justice Frankfurther felt that this test would provide guidance for acceptable police conduct that was otherwise lacking if its validity was determined by a retrospective determination of a particular defendant's predisposition.

Justice Rehnquist, writing for the Court in *Russell*, declined to overrule *Sorrells* because of its long standing precedent and its affirmance in *Sherman*. Therefore, he felt no need to answer a history of criticism of the theory of implied legislative intent said to underlie the defense, or to meet the argument that the origin of intent test creates an unacceptable difference in law enforcement activity permissible against predisposed and non-

[14] *Id.* at 448.

[15] *Id.* at 455 (Roberts, J., concurring). Justice Roberts felt there were serious constitutional problems in the majority's theory of entrapment. He saw their approach as a judicial amendment of legislation. He analogized the defense made available by the majority to the judicial modification of a statutorily prescribed penalty, which was found to be a non-judicial function in *Ex parte* United States, 242 U.S. 27 (1916). 287 U.S. at 458.

[16] 287 U.S. at 454 (Roberts, J., concurring).

[17] *Id.* at 458.

[18] Throughout the opinions in *Sorrells*, *Sherman* and *Russell*, the words inducement and instigation are used. Their definition can only be ascertained by regard to their use in context. To the majorities in those cases, a defendant is induced only if he had no predisposition to commit the offense prior to the government's activity. The justices who believed that government conduct alone is to be examined usually mean unacceptable encouragement to commit the offense, or encouragement beyond the level of resistance of a law abiding citizen.

[19] 287 U.S. at 457 (Roberts, J., concurring).

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

[21] *Id.* at 379 (Frankfurter, J., concurring).

[22] *Id.* at 380.

[23] 318 U.S. 332 (1943).

[24] Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them.
Sherman v. United States, 356 U.S. 369, 380 (Frankfurter, J., concurring).

[25] *Id.* at 383–84.

predisposed defendants.[26] The majority also agreed with criticism of Justice Roberts' position tendered by two courts in different stages of the *Sherman* case. This criticism was that Justice Roberts' opinion would not allow the government to show that a person was ready and willing to commit the crime after the defendant proved government inducement.[27] However well placed this criticism is, it would seem to be only of academic interest to the majority in *Russell* after Justice Frankfurter's concurring opinion in *Sherman*.

The *Russell* majority did not ignore the alternative formulation of entrapment offered by the concurring opinions in both *Sorrells* and *Sherman*. But they found it undesirable to bar a prosecution against one who intended to commit a criminal act and did commit it only because the proffered encouragement exceeded the resistance of a person not disposed to commit the act.

The Court criticized lower federal court opinions which reversed convictions because of a dislike for what amounted to overzealous law enforcement.[28] These courts went beyond the opinions in *Sorrells* and *Sherman* and presented unnecessary and awkward standards for execution of laws by the Executive branch.[29] According to Justice Rehnquist the majority opinions in *Sorrells* and *Sherman* demonstrated that the entrapment defense was a narrow one and was not intended to give the judiciary a "chancellor's foot" veto over distasteful law enforcement practices. Furthermore, because the defense was not of constitutional dimensions, Congress was free to formulate any definition of the defense it found desirable.[30]

[26] For criticism of the entrapment defense established in *Sorrells*, see 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 317–20 (1970); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1090, 1101–15 (1951); Rotenberg, *The Police Detection Practice of Encouragement*, 49 U. VA. L. REV. 871, 895–99 (1963); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399, 417 (1959); Comment, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U. CHI. L. REV. 137, 169–73 (1963); Comment, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of The Entrapment Defense*, 74 YALE L. J. 942 (1965).

[27] Chief Justice Warren, in his majority opinion in *Sherman*, observed that the burden on the prosecution would be obvious if it could not reply to a charge of inducement amounting to entrapment by showing the defendant's conduct was due to his own readiness to commit the offense. 356 U.S. at 376. Warren then noted a portion of Judge Learned Hand's opinion in Sherman's first appeal to the Second Circuit:

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

United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952), quoted in Sherman v. United States, 356 U.S. 369, 377 n. 7 (1958). *See also* text accompanying nn. 16–19 *supra*.

[28] The Court probably was referring to decisions such as United States v. McGrath, 468 F.2d 1027 (7th Cir. 1972), *judgm't vacated and remanded*, 93 S. Ct. 2769 (1973); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal 1970). In each of those cases, the court reversed because of the type or level of a government agent's activity.

[29] 411 U.S. at 435. The general criticism of the standards used by some of the lower federal courts is not without merit. Many of the decisions which found entrapment as a matter of law solely because of the government's conduct are conspicuous in their failure to discuss the application of any sort of test to the conduct. Justice Frankfurter's concurring opinion in Sherman is often invoked, but the test he offered is ignored or misstated. In the Ninth Circuit's decision in *Russell*, for example, the court said that the test for entrapment devised by Frankfurter was whether the police conduct "falls below standards, to which common feelings respond, for the proper use of governmental power." 459 F.2d at 673, quoting 356 U.S. at 382 (Frankfurter, J., concurring). The test Frankfurter did devise served as a barometer to determine when the conduct did fall below those standards.

[30] 411 U.S. at 435. Codification of entrapment as a defense or bar to prosecution is proposed in bills pending before the current Congress to revise Title 18 U.S.C., the federal criminal code. The National Commission on Reform of Federal Criminal Laws defined entrapment as an affirmative defense occurring where a law enforcement officer used "persuasion or other means likely to cause normally law abiding persons to commit the offense." Mere offer of an opportunity to commit an offense would not constitute entrapment. FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS—A PROPOSED NEW FEDERAL CRIMINAL CODE § 702, at 58 (1971). As it was initially introduced in the Senate, the proposed criminal code defined entrapment as a bar to prosecution available where the law enforcement officer or agent used methods "of inducement or encouragement as create a substantial risk that the conduct would be committed by persons other than those who are ready to commit it." Affording an opportunity to commit an offense was not entrapment, and the risk would be less substantial where the officer knew that the individual previously engaged in similarly prohibited conduct. The bar would not be available when the encouraged crime is causing or threatening serious bodily injury or harm. S. 1, 93d Cong., 1st. Sess. § 1-3B2. (1973). A proposal supported by the current administration appears to follow the origin of intent theory of *Sorrells* because entrapment is defined as a defense where the defendant was not predisposed to commit the offense charged. But it also states that solicitation "which would not induce an ordinary law-abiding citizen to commit an offense" does not constitute entrapment. H.R. 6046, 93d Cong. 1st. Sess. § 531 (1973). Since the majority in *Russell* believed that any definition of entrapment established by Congress is permissible, it would be interesting to consider whether Congress could enact criminal legislation specifically including within its

The majority chose not to respond directly to Russell's contention that he was entrapped as a matter of law regardless of his predisposition, and instead restated the theory of entrapment developed in *Sorrells*. Russell attempted to distinguish both *Sorrells* and *Sherman* from the facts of his own case on the ground that those cases only involved solicitation to do an act, while Shapiro provided the necessary means for the commission of the defense. This, it was argued, was the manufacturing of crime prohibited by the entrapment defense.[31]

Lower federal courts and state courts held in other cases that knowing or unknowing government supply of an illegal substance through a law enforcement agent or an informer was entrapment.[32] Only one of the cases so holding attempted to reconcile the result with the origin of intent test mandated by *Sorrells*.[33] Rather, the primary reason seemed to be that the government could not be the source of the *sine quo non* of an offense.[34] But the Court in *Russell* implicitly rejected that reasoning by observing that entrapment is a defense limited by an assumed intent of Congress not to punish those persons the government caused to commit an offense who had no prior intent to do so. Shapiro's activity provided only permissible "opportunities or facilities for the commission of an offense," [35] and was not the source of an intent to commit a crime that would not otherwise occur. Therefore, the court of appeals erred when it broadened the entrapment defense by considering the propriety of government conduct beyond determining whether it was the source of intent. In addition, it may be inferred that since the Court saw entrapment arising only when the original intent for an accused to commit an act is in the government, lower courts holding that entrapment occurred because the government's agent supplied the illegal substance also are erroneous.

Russell also argued that the proper way to view the government's activity was as a violation of due process and not as entrapment. Both the government and Russell suggested in their briefs before the Court that a conviction may be precluded on due process grounds when the government was the sole source of an otherwise unobtainable and necessary means to the commission of an offense.[36] The majority's opinion did concede that some conduct of law enforcement officials may be so "outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." [37] Nevertheless, the majority believed that the conduct of the government in this case fell short of violating those principles.

The Court said, instead, that Russell could not take advantage of the rule he propounded. It observed that P-2-P was difficult, but not impossible to obtain. The evidence showed that two bottles of the chemical were found after Shapiro supplied a bottle a month earlier. Furthermore, the defendants were said to have admitted manufacturing or selling methamphetamine before and after Shapiro's offer.[38] Therefore, the Court could conclude that P-2-P not only could be obtained, but was, in fact, available to the defendants.[39]

Shapiro's activity was categorized as "scarcely objectionable" primarily because the P-2-P was legal to possess and harmless. Furthermore, the Court felt that successful government infiltration

scope the act of an entrapped defendant. There is some authority for the proposition that a denial by a state of a defense or bar to prosecution because of entrapment would be unconstitutional. United States *ex rel.* Hall v. Illinois, 329 F.2d 354 (7th Cir. 1964).

[31] In *Sorrells*, the majority said the government cannot punish for an offense which is the creative activity of its own officers. 287 U.S. at 451. Numerous courts have found entrapment because they deemed the activity of the government to be creative. But they do not use the term in the sense it was offered in *Sorrells:* The government's activity becomes creative only when the defendant had no pre-existing intention to commit the offense solicited or encouraged or a similar offense. To see how some other courts applied the concept see, *e.g.*, United States v. Russell, 411 U.S. 423, 449 (1973) (Stewart, J., dissenting); McGrath v. United States 468 F.2d 1027, 1029 (7th Cir. 1972); United States v. Silva, 180 F. Supp. 557, 560 (S.D.N.Y. 1959).

[32] *See, e.g.*, McGrath v. United States, 468 F.2d 1027 (7th Cir. 1972); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); Chisum v. United States, 312 F. Supp. 1307 (C.D. Cal. 1970); People v. Strong, 21 Ill. 2d 320, 172 N.E.2d 765 (1961).

[33] United States v. Dillett, 265 F. Supp. 980, 985 (S.D.N.Y. 1966).

[34] People v. Strong, 21 Ill. 2d 320, 325, 172 N.E. 2d 765, 768 (1961).

[35] Sorrells v. United States, 287 U.S. 435, 441 (1932), quoted in Sherman v. United States, 356 U.S. 369, 372 (1958) and United States v. Russell, 411 U.S. 423, 435 (1973).

[36] 411 U.S. at 431, n. 8.

[37] *Id.* at 431–32.

[38] The dissenting judge in Russell's appeal to the Ninth Circuit recited portions of the trial transcript indicating that John Connolly previously manufactured speed and that Patrick Connolly refused a later offer by Shapiro of more P-2-P because he already had some. Russell v. United States, 459 F.2d 671, 675 (1972) (Trask, J., dissenting). Russell and one of the Connollys also attempted to purchase P-2-P after Shapiro's initial offer, but were unable to do so. Brief for Respondent at 4.

[39] 411 U.S. at 431.

of, and limited participation in, unlawful enterprises is a valid method of gathering evidence of criminal activity that would otherwise be unobtainable after the commission of an offense. Evidence of similar past activity would be almost impossible to obtain because of the paucity of complaining victims participating in sumptuary criminal acts.[40] Since infiltration is necessary as a detection device, the majority felt it only reasonable to allow an undercover agent to supply an item the enterprise needs. If that were not permitted, it would follow that the infiltrator would have a difficult time proving good faith and gaining the confidence of the participants.[41] Viewed as legitimate and lawful activity, Shapiro's conduct then violated none of Russell's independent constitutional rights.

Four Justices dissented from this viewpoint in two opinions.[42] Justice Douglas was not impressed with the fact that P-2-P could be obtained from other sources. In his view, supply of the chemical "made the United States an active participant in the unlawful activity."[43] Douglas expressed approval of Justice Frankfurter's views in *Sherman*, but made no attempt to examine whether the government conduct in *Russell* exceeded the level permitted by the Frankfurter objective test. He concluded by saying that law enforcement officials played a debased role by furnishing a chemical necessary for the manufacture of an illegal drug.[44] Justice Douglas' dissent also omitted any discussion of the due process arguments raised by Russell. Essentially, his dissent applied a set of values different from the majority's in examining Shapiro's conduct. What Justice Douglas found to be an illegitimate governmental enterprise, the majority treated as a necessary corollary to the infiltration and subsequent prosecution of clandestine criminal activity.

Justice Stewart authored the other dissent. He also agreed with Justices Roberts and Frankfurter that the entrapment defense[45] is grounded in the belief that extreme law enforcement activities simply cannot be countenanced by courts. The controlling question had to be whether the government's activity was likely to create a crime. These dissenters could not believe that the defense gave effect to an unexpressed Congressional intent to exclude from its criminal statutes and liability persons who committed a proscribed act.[46] He found the origin of intent test greatly flawed because it failed to explain why a person not originally intending an offense and induced by a private individual would not be entitled to use entrapment as a defense. If entrapment only occurs when the government was the original source of intent to commit the act, Justice Stewart thought it only followed that the government's conduct alone must be the primary focus of inquiry.[47]

Stewart's dissent observed that under any definition, entrapment would occur when the government was the sole source of a means to commit an offense. He apparently favored a test that would find an entrapment when, absent the government's activity, no crime would occur.[48] In contrast, the majority chose to view entrapment as occurring only when, absent the government's activity, no crime would occur because the accused had no prior intention to commit the act. The Stewart dissent went further than condemning the government's supply of an unobtainable means. He assumed at one point that the P-2-P could otherwise be obtained, but observed that the prosecution in this case was possible only because agent Shapiro supplied the chemical. That cast doubt on the theory that P-2-P was available elsewhere and that the government only furnished an opportunity to commit the act. If the chemical was available, the agent should only have offered to buy the finished product. The government still could have obtained the same convictions.[49] Shapiro's activities, then, satisfied these dissenters that entrapment occurred as a matter of law.

Justice Stewart's dissent is flawed in the same manner as Justice Douglas'. Both dissents railed against the undue promotion of crime by the government which the Frankfurter test was designed to measure, but that test was not applied

[40] *See* DeFeo, *Entrapment As A Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F.L. REV. 243, 250 (1967); Watt, *The Defense of Entrapment*, 13 CRIM. L. Q. 313, 314 (1971).

[41] 411 U.S. at 432.

[42] *See* note 1 *supra*.

[43] 411 U.S. at 437 (Douglas, J., dissenting).

[44] *Id.* at 439.

[45] Justice Stewart's dissent described both the origin of intent test and police conduct theories of entrapment as defenses. Since only the origin of intent test can result in a verdict of not guilty, it alone is a defense. The police conduct theory bars a prosecution if it is successful.

[46] 411 U.S. at 441–42 (Stewart, J., dissenting).

[47] *Id.* at 442.

[48] *Id.* at 449.

[49] *Id.* at 448–49.

and only value judgments about the government's conduct remain.

All of the opinions in *Russell* acknowledge that some government promotion of crime must be tolerated. The very fact of solicitation promotes crime, but it is a means of detecting a present offense at the convenience of law enforcement officials. Application of Justice Frankfurter's test would require asking, and answering, whether the conduct of the government agent was so excessive as to cause a reasonable, law abiding citizen to manufacture and sell methamphetamine to a stranger. Both dissents show the undesirability of attempting to use either the origin of intent or objective theory of entrapment as a defense to a crime committed by a predisposed defendant made possible by means supplied by the government. The majority looked only to the origin of intent to commit the act. Russell's apparent ready acceptance of Shapiro's offer barred the successful use of Justice Frankfurter's test. The temptation that was offered can hardly be considered strong enough to overcome the resistance of a person not then ready and willing to commit the offense.

Successful invocation of the entrapment defense under the facts of this case would indicate that the defense bore no relation either to the accused's general intention to commit the offense or the effect of the government's conduct on a law abiding citizen.[50] A better argument against the legitimization of such law enforcement conduct would be the due process argument raised by Russell before the Supreme Court.[51] While the Court thought that Russell could not take advantage of a rule that would find the supply of an otherwise unobtainable means by the government violative of due process, it did imply that some related law enforcement conduct could violate due process. The Court added qualifications to its endorsement of Shapiro's activity. P-2-P was legal and harmless and was not the offensive substance; evidence existed that the chemical was otherwise available; Shapiro's participation in the offense was limited to the supply of P-2-P; and there was evidence that the defendants made speed before and after Shapiro's offer of P-2-P.

The supply of a legal ingredient needed for the manufacture of an illegal drug did not seem fundamentally unfair to the majority because of the relation of that activity to the successful detection of sumptuary criminal acts. It was not entrapment because the accused was predisposed to commit the offense, or a similar one, before the agent made his offer. The dissenters found the activity an entrapment, although they did so out of a dislike for the activity and not because it violated a test they purport to embrace. Their dislike would be better framed in the context of a violation of due process where notions of fairness can properly be considered. The fundamental disagreement between the majority and the dissenters may have less to do with the legal niceties of defining entrapment than with the difference in opinion over what methods law enforcement officials can properly use to detect victimless crimes.

[50] Some courts have suggested that predisposition should be examined along with the government's activity. If the latter exceeds what the court determines to be the proper use of government power, an entrapment occurred. *See* United States v. Morrison, 348 F.2d 1003, 1004–05 (2d. Cir. 1965), Accardi v. United States, 257 F.2d 168, 172–73 n. 5 (5th Cir. 1958).

[51] Commentary on the entrapment defense suggests that it is actually rooted in due process considerations or a part of the fourth or fifth amendment. *See* Rotenberg, *The Police Detection Practice of Encouragement*, 49 U. VA. L. REV. 871, 882–83 (1963); Comment, *The Entrapment Doctrine in Federal Courts and Some State Court Comparisons*, 49 J. CRIM. L.C. & P.S. 447, 449 (1959); Comment, 1964 U. ILL. L. FOR. 821 (1964); Comment, *The Serpent Beguiled Me And I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965). Those articles suggest that values of privacy, dignity and personal integrity underlying the fourth amendment limit government in its search for possible solicitees to criminal offenses. A good summary of those views, and a critique, is found in Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 53–56 nn. 100–04 (1967).