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Constitutional Law - Defenses - Entrapment

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Recent Decisions

CONSTITUTIONAL LAW—DEFENSES—ENTRAPMENT—The Supreme Court of the United States has held that the defense of entrapment is available only if the police implant a criminal design or intent in an otherwise innocent person and thereby induce him to commit a crime.

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

Respondent Russell and two other defendants were engaged in the manufacture of methamphetamine, an illicit drug commonly known as "speed." Shapiro, an undercover agent posing as a narcotics dealer, supplied the defendants with a quantity of phenyl-2-propanone,[1] an essential ingredient in the manufacture of methamphetamine, in exchange for one-half of the "speed" produced with the aid of the propanone. After receipt of his one-half share Shapiro returned to the place of manufacture and arrested the defendants.[2]

At respondent's federal district court trial the jury, after being given the standard entrapment instruction,[3] returned a verdict of guilty on counts of unlawfully manufacturing, selling, and delivering methamphetamine. The Court of Appeals for the Ninth Circuit, in spite of respondent's concession that there was sufficient evidence for the jury to have found him predisposed to commit the offenses, found entrapment as a matter of law in view of the police conduct in supplying the highly scarce propanone.[4] The Supreme Court reversed,[5] reasoning that the evidence of respondent's predisposition to commit the offense defeated a claim of entrapment.

1. Propanone was not illegal to possess, but was difficult to obtain. United States v. Russell, 411 U.S. 423, 426 (1973).
2. *Id.*
3. The jury was instructed to find respondent not guilty if there was a "reasonable doubt whether the defendant had the previous intent or purpose to commit the offense . . . and did so only because he was induced or persuaded by some officer or agent of the government." *Id.* at 427 n.4.
4. United States v. Russell, 459 F.2d 671, 674 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973). The court based its ruling on two alternative theories recently formulated by other federal courts. The first theory would find entrapment as a matter of law, regardless of a defendant's predisposition, if the government supplied the defendant with contraband. United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970). The second theory operated apart from the defense of entrapment and would bar prosecution without regard to the defendant's predisposition when government conduct is so intertwined with the criminal activity that for the court to hear the case would be "repugnant to American criminal justice." Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971).
5. 411 U.S. at 436.

The Supreme Court first recognized the defense of entrapment in *Sorrells v. United States*.[6] In that case a federal prohibition agent, assuming the role of a tourist, was introduced to the defendant and proceeded to strike up a conversation about their war experiences. During the course of the conversation the agent twice solicited the defendant for some liquor and was twice refused. Upon the third request by the agent the defendant relented and obtained a half-gallon of whiskey, whereupon he was arrested and subsequently convicted for a violation of the National Prohibition Act.

The Court reversed the conviction, holding that the issue of entrapment should have been presented to the jury in the defendant's trial.[7] The majority emphasized that it was not entrapment for the police merely to provide a defendant with the opportunity or the means to commit an offense.[8] Entrapment did not occur, the majority held, unless the police induced an otherwise innocent person to commit a crime.[9] The majority's test for entrapment thus contained a twin inquiry: First, the police conduct had to be examined to see if the accused was induced by the police to commit a crime. Second, the character of the accused had to be scrutinized since he could only be entrapped if he were held not to have been predisposed[10] to commit a crime at the time he was subjected to the police inducement.

The majority in *Sorrells* viewed entrapment as a matter of statutory construction.[11] An entrapped defendant was simply not guilty if the legislative intent of the statute which was allegedly violated indicated that its framers did not intend it to be enforced against entrapped violators.[12]

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6. 287 U.S. 435 (1932). For a discussion of the historical background of entrapment *see* Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application*, 1 U. SAN FRAN. L. REV. 243 (1967) [hereinafter cited as Defeo].

7. 287 U.S. at 452.

8. *Id.* at 441.

9. *Id.* at 448.

10. The "predisposition" necessary to defeat a claim of entrapment only had to be a "general pre-existing intent to violate the law" since the intent to commit the specific offense charged would always have been implanted by the police. Note, *Entrapment by Government Officials* 28 COLUM. L. REV. 1067, 1069 & n.9 (1928).

11. 287 U.S. at 452.

12. *Id.* One reason for the Court's approval of the statutory construction rationale may have been the firm belief by the majority that the courts did not have the power to acquit a person found guilty of violating a statute, even if he were entrapped since "[c]lemency is the function of the Executive." *Id.* at 449. The majority's theory raised no such problem since if a statute were construed as not being applicable to an entrapped violator, the defendant who was entrapped could in no sense be considered "guilty." *Id.* at 452. The statutory construction rationale, however, contained two important ramifications. The first, as noted by the Court, was that if the crime were sufficiently "heinous" the statute which was violated could possibly be construed to apply even if the defen-

Mr. Justice Roberts concurred in the result[13] but disagreed with the majority's theory that entrapment was a question of statutory construction. He argued rather that the basis for the doctrine was that public policy demanded that "the courts must be closed to the trial of a crime instigated by the government's own agents."[14] In contrast to the majority, Justice Roberts considered the question of the criminal predisposition of the accused to be meaningless, since he felt the court should focus only on the police conduct to determine if there had been a "violation of the principles of justice by the entrapment of the unwary into crime."[15]

Justice Roberts also differed with the majority over the important question of who should decide the issue of entrapment. Since Justice Roberts felt the defense of entrapment was a method by which the court protected "itself and the government from . . . prostitution of the criminal law. . . .,"[16] he urged that the court should decide the issue of entrapment.[17] The majority, however, allowed the jury to decide the question.[18]

Twenty-six years after *Sorrells* the Court again considered the defense of entrapment in *Sherman v. United States*.[19] In that case a government informer met the defendant at a doctor's office where both men were being treated in an effort to withdraw from narcotics addiction. The informer, after cultivating a friendship with the defendant over a period of time, asked the defendant for some drugs with which to ease his withdrawal pains. After repeated requests the defendant relented and supplied the informer with narcotics.

The Court reversed the defendant's conviction for selling drugs, finding entrapment as a matter of law.[20] The majority reaffirmed the

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dant were entrapped. *Id.* at 451. The second was that implicit in the theory was the possibility that Congress could completely abolish entrapment as a defense. *E.g.*, Cowen, *The Entrapment Doctrine in the Federal Courts and Some State Court Comparisons*, 49 J. CRIM. L.C. & P.S. 447, 449 (1959) [hereinafter cited as Cowen].

By resting its theory of entrapment on statutory construction the majority would seem to have precluded the defense in common law offenses. Such a position is not so drastic, however, since entrapment will ordinarily negate the element of non-consent necessary to make out most common law offenses. *See* Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 262-63 (1942).

13. 287 U.S. at 453 (Roberts, J., concurring). Justice Roberts was joined in his concurring opinion by Justices Brandeis and Stone.
14. 287 U.S. at 459.
15. *Id.* at 457.
16. *Id.*
17. *Id.*
18. *Id.* at 452.
19. 356 U.S. 369 (1958).
20. *Id.* at 373.

test for entrapment formulated by the majority in *Sorrells*, that for entrapment to occur, the police must have implanted a criminal design or intent in a defendant who was not predisposed to commit crime.[21] The majority in *Sherman* also agreed with the *Sorrells* majority that the basis for the defense of entrapment was statutory construction and, therefore, a defendant was simply not guilty if the statute which was allegedly violated was construed as not intended to apply to cases of entrapment.[22]

Justice Frankfurter concurred in the result,[23] but echoed the argument of Justice Roberts in *Sorrells* that entrapment was not a matter of statutory construction, but was rather a means by which the court refuses to countenance a repugnant method of crime detection.[24]

The Court split along the same lines as in *Sorrells* over the relationship of the predisposition of the accused to the issue of entrapment. Regardless of the amount of police inducement, the majority test would not sustain a defense of entrapment if the accused were held to have been predisposed to commit crime.[25] The minority, however, counselled a test in which attention was shifted "from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime."[26]

The Court in *Sherman* also split (as it did in *Sorrells*) over the question of who should decide the issue of entrapment. The majority felt

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21. *Id.* at 372.

22. *Id. Sorrells* may not have been completely reaffirmed since the majority in *Sherman* hinted that Congress did not intend its statutes to be enforced in entrapment situations no matter how "hienous" the crime. Compare *Sherman*, 356 U.S. at 372, with *Sorrells*, 287 U.S. at 451. *See* Defeo, *supra* note 6, at 257.

23. 356 U.S. at 378 (Frankfurter, J., concurring). Justice Frankfurter was joined in his concurring opinion by Justices Douglas, Harlan and Brennan.

24. *Id.* at 380.

> The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced.

25. *Id.* at 376-77.

26. *Id.* at 384. The difference between the majority and minority theories in *Sorrells* and *Sherman* may best be illustrated by two examples:

> Under the . . . [majority theory] if *A*, an informer, makes overreaching appeals to compassion and friendship and thus moves *D* to sell narcotics, *D* has no defense if he is predisposed to narcotics peddling. Under the . . . [minority theory] a defense would be established because the police conduct, not *D*'s predisposition, determines the issue. Under the . . . [majority theory] *A*'s mere offer to purchase narcotics from *D* may give rise to the defense provided *D* is not predisposed to sell. *A* contrary result is reached under the . . . [minority theory]. *A* mere offer to buy hardly creates a serious risk of offending by the innocent.

MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959).

entrapment should be a question for the jury unless the issue was so clear that the court could decide as a matter of law.[27] The minority advocated that the decision be made by the court.[28]

Now, fifteen years after the *Sherman* decision, the Court has for a third time felt compelled to consider the defense of entrapment in *Russell*.[29] Before dealing with the traditional defense of entrapment, the Court considered first, however, an argument which was not mentioned in *Sorrells* or *Sherman*—respondent's contention that the defense of entrapment ought to be controlled by the constitutional principles of due process.[30]

Respondent proposed a rule which would have barred prosecution as violative of the right to due process whenever the police "supplied an indispensable means to the commission of a crime that could not have been obtained otherwise, through legal or illegal channels."[31] The Court rejected such a fixed rule in favor of a broader case-by-case standard.[32] Citing *Rochin v. California*,[33] the Court warned that "we

27. 356 U.S. at 377.

28. *Id.* at 385.

29. Certiorari was apparently granted in response to the drift by some lower courts toward adoption of the Roberts-Frankfurter test of entrapment. *See* 411 U.S. at 435. *See* cases cited note 4 *supra*.

30. This is a proposal favored by many commentators. *See* Note, *The Defense of Entrapment and the Due Process Analysis*, 43 COLO. L. REV. 127 (1971); Note, *Due Process of Law and the Entrapment Defense*, 64 ILL. L.F. 821 (1964); Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63, 68-73 (1967); Note, *The Serpent Beguiled Me and I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942, 945-49 (1965) [hereinafter cited as *The Serpent*]. A few courts have linked due process principles with entrapment. In Banks v. United States, 249 F.2d 672 (9th Cir. 1957), the court held entrapment to be a violation of the fifth amendment right to due process but the case was later overruled in Banks v. United States, 258 F.2d 318 (9th Cir.), *cert. denied*, 358 U.S. 886 (1958). *But see The Serpent supra* note 30, at 949 n.31. In United States *ex rel.* Hall v. Illinois, 329 F.2d 354 (7th Cir. 1964) the court hinted that it might be a denial of due process for a state not to make the defense of entrapment available to defendants. For a criticism of this case *see The Serpent supra* note 30, at 949 n.31. In United States v. Chisum, 312 F. Supp. 1307, 1312 (C.D. Calif. 1970), the court held that entrapment was "indistinguishable from other law enforcement practices which the courts have held to violate due process." And in Cox v. Louisiana, 379 U.S. 559 (1965) and Raley v. Ohio, 360 U.S. 423 (1959), the Supreme Court reversed the convictions of defendants who had violated the law only after being advised by state officials that their conduct would be legal. *But see* Note, *The Defense of Entrapment and the Due Process Analysis*, 43 COLO. L. REV. 127 (1971), for a distinction of *Raley* and *Cox* from the usual case of entrapment.

31. 411 U.S. at 431.

32. *Id.* at 431-32. Judge Mercer, in his concurring opinion in United States *ex rel.* Toler v. Pate, 332 F.2d 425 (7th Cir. 1964), anticipated the Court's case-by-case standard when he wrote that "it seemed clear that the circumstances of an entrapment case *such as shown by this record* are so offensive to the conscience of our society that it must be embraced within the fluid concept of the due process requirement." *Id.* at 427 (emphasis added).

33. 342 U.S. 165 (1952). Petitioner swallowed two capsules lying on a nearby table upon being surprised in bed by police who had illegally entered his house. Petitioner was handcuffed and taken to a hospital where his stomach was pumped against his will

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."[34]

The Court clearly indicated that this due process standard was not a replacement for the nonconstitutional defense of entrapment as enunciated in *Sorrells* and *Sherman*.[35] The due process clause is to be used to bar prosecution of cases characterized by police conduct which was fundamentally unfair, a question apart from the issue of entrapment.[36] It is apparently only after the court has determined that the police conduct did not "violate fundamental fairness, shocking to the universal sense of justice" that the inquiry may focus on the issue of entrapment. The important distinction to be noted between the new due process standard and the traditional entrapment defense is that, if the police conduct is outrageous enough to violate principles of due process, the case will be dismissed, *regardless of the defendant's criminal predisposition.* In contrast, the traditional entrapment defense can never be sustained if the defendant were shown to be criminally predisposed.[37]

The Court's broad due process standard is necessarily vague, no matter how "scientific"[38] the analysis. As Justice Douglas noted in his concurring opinion in *Rochin,* judgments as to what police conduct is sufficiently outrageous to offend notions of fundamental fairness may vary with the "idiosyncracies of the judges."[39] The Court may, however, have hinted at some future guidelines when it emphasized that the agent in *Russell* contributed propanone, a substance legal to obtain and possess, to defendants who were already engaged in the manufacture of "speed", and that such police conduct stopped short of violating the due process clause of the fifth amendment.[40] Whether the

and two capsules of morphine recovered. The Court reversed petitioner's state court conviction for possession of narcotics on the ground that the police conduct violated fourteenth amendment due process principles of fundamental fairness.

34. 411 U.S. at 431-32. Courts have often used similar language to describe entrapment and police conduct violative of due process rights. *See* Orfield, *The Defense of Entrapment in the Federal Courts,* 67 DUKE L.J. 39, 55 (1967), in which the author compared the language of Butts v. United States, 273 F. 35, 38 (8th Cir. 1921), where the court spoke of entrapment as "unconscionable," with, coincidentally, *Rochin,* where the Court characterized the police activity as "conduct that shocks the conscience." 342 U.S. at 172.

35. 411 U.S. at 433.

36. A victim of sufficiently outrageous police conduct will apparently be acquitted because his right to due process has been violated, not because he was entrapped.

37. Sorrells v. United States, 287 U.S. 435, 451 (1932).

38. Rochin v. California, 342 U.S. 165, 172 (1952) (Douglas, J., concurring).

39. *Id.* at 179.

40. 411 U.S. at 432.

controlling element in the Court's decision was the legality of the substance supplied by the police, or the preexistence of the criminal enterprise, or a combination of both facts, remain to be determined.[41]

Turning next to a consideration of the nonconstitutional defense of entrapment, the Court was content merely to reaffirm *Sorrells* and *Sherman*. Entrapment will continue to occur only if the police implant a criminal disposition in a previously innocent person and thereby induce a crime.[42] By inviting Congress to define entrapment,[43] the Court emphasized that the defense is still considered a matter of statutory construction.

Justice Stewart, in a strong dissent,[44] resurrected the arguments of Justice Roberts in *Sorrells* and Justice Frankfurter in *Sherman* that rather than being a matter of statutory construction, the defense of entrapment exists so that the courts may have a means "to prohibit unlawful government activity in instigating crime."[45] Justice Stewart agreed with Justices Roberts and Frankfurter that, since the issue of entrapment should focus on the conduct of the police, the question of the predisposition of the defendant was irrelevant.[46] Justice Stewart also reflected the views of Justices Roberts and Frankfurter when he urged that the issue of entrapment should be decided by the court and not the jury.[47]

Regrettably, in reaffirming *Sorrells* and *Sherman*, the majority in *Russell* declined to discuss the weaknesses which have been pointed out in the rationale of those opinions. Two of the more serious questions are: (1) upon what basis does the Court attribute an intent on the part of Congress that its criminal statutes not be applied to intentional violators merely because their conduct was induced by the government? (2) is it fair that one who intentionally violates the law and

41. In any case the Court's standard of fundamental fairness would presumably apply to state, as well as federal courts. *See* Rochin v. California, 342 U.S. 165 (1952).
42. 411 U.S. at 434-35.
43. *Id.* at 433. It is interesting to note that Congress is considering legislation which would adopt the objective test for entrapment espoused in the minority opinions in *Sorrells* and *Sherman*, and by the dissenters in *Russell*. *See* S. 1, 93d Cong., 1st Sess. § 1-3B2 (1973). The MODEL PENAL CODE § 2.13 (Prop. Offic. Draft 1962), also adopts such an objective test.
44. 411 U.S. at 439 (Stewart, J., dissenting). Justice Stewart was joined in his dissent by Justices Brennan and Marshall. Justice Douglas filed a separate dissent joined by Justice Brennan. *Id.* at 436. *Russell* is the first Supreme Court opinion in which the two theories of entrapment have led to different results.
45. 411 U.S. at 442.
46. *Id.*
47. *Id.* at 446.

who was not predisposed to commit the offense should go free if his conduct was induced by the government, but not if induced by a private citizen?[48]

Also, the Court only partially considered the prosecution practice of introducing in rebuttal of a claim of entrapment evidence of the defendant's past record and reputation in an effort to demonstrate his predisposition to commit the offense charged.[49] The Court considered admission of such evidence to be indispensable in rebutting a claim of entrapment,[50] but said nothing about its prejudicial effect on the judge or jury.[51] Aside from prejudicing the defendant's case, admission of a defendant's past record and reputation could lead to inconsistent results for identical conduct. Assuming the police induced two defendants to commit a crime in exactly the same manner, the defendant with a bad record or reputation will be more likely held to have been predisposed to commit the crime, and thus have his claim of entrapment defeated, than the defendant with no police record and a good reputation.[52]

Finally, the Court failed to discuss whether entrapment should be a question of fact for the jury to decide or a question of law for decision by the judge.[53] While there are arguments in support of both positions,[54] presumably the judge is less likely than the jury to be prejudiced by prosecution introduction of defendant's past record and reputation in rebuttal of a claim of entrapment.[55]

The Court's application of due process principles of fundamental fairness in order to regulate police encouragement of crime is novel and its evolution uncertain. As to the nonconstitutional defense of entrapment, forty years of Supreme Court history have failed to produce a decisive victory for either of the two theories which underlie the defense.[56] The decision in *Russell,* characterized by a Court closely

48. The majority's position was that "[a]rguments such as these, while not devoid of appeal, have been twice previously made to this Court, and twice rejected by it, first in *Sorrells* and then in *Sherman.*" *Id.* at 433-34.

49. This practice was bitterly opposed by the minority in *Russell,* 411 U.S. at 443, *Sherman,* 356 U.S. at 382-83, and *Sorrells,* 287 U.S. at 458.

50. 411 U.S. at 434.

51. *See* cases cited note 49 *supra.*

52. *See* Cowen, *supra* note 12, at 451.

53. The weight of lower court authority would seem to consider entrapment to be a question for the jury to decide, unless the facts are so clear as to allow the judge to rule as a matter of law. *Id.* at 452.

54. *See* Defeo, *supra* note 6, at 270-71.

55. *See* Cowen, *supra* note 12, at 453.

56. The majority in *Sorrells, Sherman,* and *Russell* were able to muster only five votes.

divided along the same theoretical lines as the Court in *Sorrells* and *Sherman*, would seem to indicate that the Supreme Court has not debated the defense of entrapment for the last time.

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CONSTITUTIONAL LAW—EQUAL PROTECTION—VALIDITY OF TEXAS PUBLIC SCHOOL FINANCING SYSTEM—The United States Supreme Court has held that the Texas public school financing system, based on revenue raised by an ad valorem tax on property within a school district and resulting in substantial disparities in per-pupil expenditures between districts, did not violate the equal protection clause.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Suit[1] was originally brought in 1968[2] on behalf of Mexican-American public school children and their taxpaying parents who live in the Edgewood Independent School District, challenging the constitutionality of the Texas school financing system under the equal protection clause of the fourteenth amendment.[3]

The plaintiffs stated that the Texas constitution[4] requires the state to support a free public school system and that the state financing system denied them equal educational opportunity.[5] The district court

1. San Antonio Independent School Dist. v. Rodriguez, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973). The suit was filed as a class action pursuant to FED. R. CIV. P. 23. The plaintiffs also represented all other children throughout Texas who live in school districts with low property valuations.

2. The trial was delayed until 1970 to allow extensive pretrial discovery and completion of a pending Texas legislative investigation as to the need for reform of its public school financing system. 337 F. Supp. at 285 n.11.

3. U.S. CONST. amend. XIV.

4. TEX. CONST. art. 7, § 1. Though the Texas constitution seems to create a right to public education, plaintiffs challenged the existing financing scheme under the federal equal protection clause.

5. The plaintiffs alleged that the Texas school financing system denied them equal educational opportunity in that: (1) it made the quality of education a function of the local school district; (2) it provided students, living in school districts other than Edgewood, with material advantages for education; (3) it provided educational resources which were substantially inferior to those received by children of similar age, aptitude, motivation, and ability in other school districts; (4) it perpetuated marked differences in the quality of educational services; and (5) it discriminated against Mexican-American school children. *See* Parker, *An Attack on the Texas School Financing System: Rodriquez v. San Antonio Independent School District*, 26 Sw. L.J. 608 n.3 (1972).