1974

Criminal Procedure: Entrapment Rationale Employed to Condemn Government's Furnishing of Contraband

Minn. L. Rev. Editorial Board

Criminal Procedure: Entrapment Rationale Employed to Condemn Government's Furnishing of Contraband

Angel Luis Oquendo had sold heroin to a federal undercover agent on three occasions. At trial, despite his admitted willingness to deal in narcotics, he sought to raise an entrapment defense.[1] Claiming to be an addict, Oquendo asserted that a contingent-fee informer[2] had supplied him with heroin, promising to help support his addiction if he would sell the drugs to the federal agent without divulging their source.[3] The prosecution produced the informer, who denied furnishing Oquendo with drugs.[4] Rejecting his entrapment defense, the jury found Oquendo guilty on three counts of distribution of heroin in violation of federal law.[5] The Court of Appeals for the Fifth Circuit reversed for

1. Oquendo "admitted all of the elements of the crime charged." United States v. Oquendo, 490 F.2d 161, 162 (5th Cir. 1974). Furthermore, at trial, Oquendo admitted he had willingly distributed heroin on other occasions. Brief for Appellee at 8. He based his defense essentially on United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973), which held that a person cannot be prosecuted for possession or sale of narcotics furnished to him by a government agent or informer.

2. A "contingent-fee informer" is an unofficial undercover agent who is paid only if he succeeds in "making" a case. *See, e.g.*, United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959). The terms of informers' agreements with the government vary, and payment does not necessarily depend upon a conviction. In *Oquendo*, the informer was paid $100 for arranging a sale of heroin to an agent of the Federal Drug Abuse Law Enforcement Agency and a further $50 for a second sale. Brief for Appellant at 5, 6.

3. Brief for Appellant at 6, 7.

4. 490 F.2d at 162. Had the prosecution refused to produce the informer to contradict Oquendo's allegation, Oquendo would have been entitled to an acquittal—a procedural rule unique at this time to the Fifth Circuit. *See* United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973); *cf.* United States v. Pollard, 483 F.2d 929, 932 (8th Cir. 1973), *cert. denied*, 414 U.S. 1137 (1974). The Supreme Court has held that where an informer does not testify, the case may nonetheless reach the jury, which is entitled to disbelieve the defendant's unrebutted allegations even if they establish a prima facie case of entrapment. Masciale v. United States, 356 U.S. 386 (1958). *But cf.* Roviaro v. United States, 353 U.S. 53 (1957) (requiring disclosure of an informer's identity where his testimony is relevant and helpful to the accused's defense, or, alternatively, requiring dismissal of the action). The majority of the circuits follow *Masciale* with respect to the jury issue. *See, e.g.*, United States v. Jett, 491 F.2d 1078 (1st Cir. 1974); United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973); United States v. Hayes, 477 F.2d 868 (10th Cir. 1973).

5. Oquendo was convicted of violating section 401(a) of the Com-

error in the jury charge,[6] *holding* that regardless of a person's willingness to sell drugs, he cannot be convicted of the possession or sale of narcotics furnished to him by a government informer. *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974).[7]

Each time the Supreme Court has considered the entrapment defense, the Justices have sharply divided in support of two theories concerning its legal foundation, policy goals, and ultimate focus.[8] In *Sorrells v. United States*[9] and *Sherman v. United States*,[10] Chief Justices Hughes and Warren respectively spoke

---

prehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a) (1970).

6. The sole question in dispute was whether the informer had supplied Oquendo with the heroin he sold to the undercover agent. With respect to this question, two members of the court found that the jury charge had been framed as a mere credibility choice between the informer and the defendant, thus impermissibly relaxing the prosecution's burden of proof beyond a reasonable doubt. 490 F.2d at 165. *See* United States v. Womack, 454 F.2d 1337, 1337-44 (5th Cir. 1972) (disapproving statements within the charge to the jury which "[s]tanding alone . . . could be interpreted . . . as a directed verdict of guilty").

The third member of the court concurred in the reversal, 490 F.2d at 166, agreeing that the jury charge prejudiced the defendant; however, he would not have preserved a *Bueno* instruction on remand, reasoning that a defense based solely on the source of the heroin, *see* note 1 *supra*, was rendered untenable by United States v. Russell, 411 U.S. 423 (1973). *See* text accompanying notes 31-33 *infra*.

7. The Fifth Circuit unanimously reiterated this holding in United States v. Mosley, 496 F.2d 1012 (5th Cir. 1974). *But cf.* United States v. Workopovich, 479 F.2d 1142 (5th Cir. 1973) (entrapment not established as a matter of law where the government supplied funds for the purchase of contraband to a predisposed defendant).

8. *See generally* 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); Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. CRIM. L.C. & P.S. 447 (1959); Groot, *The Serpent Beguiled Me and I (Without Scienter) Did Eat*, 1973 U. ILL. L.F. 254; Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942); Rotenberg, *The Police Detection Practice of Encouragement: Lewis v. United States and Beyond*, 4 HOUSTON L. REV. 609 (1967); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959).

9. 287 U.S. 435 (1932). In *Sorrells*, a federal prohibition agent posing as a tourist engaged the defendant in conversation about their mutual war experiences. After gaining defendant's confidence, the agent repeatedly requested liquor, persuading the reluctant defendant to procure for him one-half gallon of whiskey. *Id.* at 439-40. The defendant's conviction was reversed by the Supreme Court, which held, as a matter of construction of the National Prohibition Act, that because he was not predisposed to deal in liquor, he was entitled to the defense of entrapment. *Id.* at 448.

10. 356 U.S. 369 (1958). In *Sherman*, the defendant and a government informer, both narcotics addicts, became acquainted during visits

for majorities of but five members of the Court; in each case the majority based the entrapment defense on the narrow rationale that Congress could not have intended that its statutes be construed to permit prosecution of an "otherwise innocent" person whose criminal act was "created" by police instigation.[11] According to this theory, an entrapment occurs when a criminal act is performed, but

> 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 . . . [to] prosecute.[12]

Not all government inducements result in entrapment, however. The majority's approach permits the police to encourage one who is "awaiting any propitious opportunity to commit the offense,"[13] on the rationale that exposure of certain crimes requires the police to provide suspects with "opportunities or facilities"[14] necessary to their accomplishment. Thus, the majority's approach distinguishes entrapment from permissible police inducement according to the defendant's predisposition.[15] This "subjective"[16] issue determines guilt or innocence and is, therefore, appropriately resolved by the trier of fact.[17]

---

to a doctor for treatment. In response to the informer's persistent complaints of suffering and requests for a source of narcotics, defendant eventually submitted and obtained a supply, which he shared with the informer. *Id.* at 371. Finding that Sherman was not predisposed to commit the crime charged, the Supreme Court reaffirmed the entrapment defense articulated by the *Sorrells* majority. *Id.* at 372-73.

11. This theory of statutory construction was originally articulated by Chief Justice Hughes in *Sorrells*, 287 U.S. at 448.

12. Sorrells v. United States, 287 U.S. 435, 442 (1932) (emphasis added). This passage was quoted by the Supreme Court in both *Sherman*, 356 U.S. at 372, and United States v. Russell, 411 U.S. 423, 434-35 (1973).

13. United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952) (L. Hand, J.), *rev'd*, 356 U.S. 369 (1958).

14. United States v. Russell, 411 U.S. 423, 435 (1973), quoting Sorrells v. United States, 287 U.S. 435, 441 (1932).

15. Chief Justice Warren articulated this distinction, stating: "To determine whether entrapment has been established, a line must be drawn between the trap for the *unwary innocent* and the trap for the *unwary criminal*." Sherman v. United States, 356 U.S. 369, 372 (1958) (emphasis added).

16. The predisposition test is subjective in that the ultimate question concerns the defendant's state of mind, *i.e.*, his readiness and willingness to commit the offense, rather than his behavior or that of the investigating agents. *See* United States v. Russell, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting); Note, *Entrapment*, 73 HARV. L. REV. 1333 (1960).

17. *See, e.g.*, United States v. Russell, 411 U.S. 423, 433 (1973).

A minority of the Supreme Court, on the other hand, has repeatedly urged recognition of an entrapment defense based on the proposition that judicial condonation of improper police practices is contrary to public policy.[18] In *Sherman*, Justice Frankfurter, speaking for four concurring Justices, argued that the judiciary should rely on its supervisory power over the administration of criminal justice in the federal courts as a basis for scrutinizing and assuring proper standards of police conduct *regardless* of a defendant's predisposition.[19] He reasoned that jury verdicts are of limited precedential value, maintaining that "significant guidance for official conduct for the future . . . [can be provided by] [o]nly the court" and envisioning a "gradual evolution of explicit standards in accumulated precedents . . . ."[20] With its primary goal the guiding of police behavior, the minority interpreted the courts' supervisory power broadly and suggested an "objective" test[21] for entrapment: if the police are shown to have employed methods likely to instigate commission

---

18. *See* authorities cited in note 8 *supra*.

19. 356 U.S. 378, 380-81 (Frankfurter, J., concurring, joined by Douglas, Harlan, and Brennan, JJ.). In the words of the *Sherman* minority:

> The crucial question . . . to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of government power.

Id. at 382.

20. *Id.* at 385.

21. Justice Frankfurter argued that his was "as objective a test as the subject matter permits . . . ." *Sherman*, 356 U.S. at 384. As an assessment of a hypothetical person's likely response to the government's attempts to induce commission of a crime, Frankfurter's approach is "objective" in a traditional sense. Those lower courts that have adopted a "government conduct" basis for entrapment have not strictly applied the Frankfurter test, however. In United States v. Russell, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973), for example, the Court of Appeals for the Ninth Circuit held certain police conduct to be an "*intolerable degree* of governmental *participation* in the criminal enterprise." *Id.* at 673 (emphasis added). Thus, the Ninth Circuit's standard for assessing police conduct, unlike Frankfurter's, allowed for "*subjective*" value judgments by trial judges, and this factor especially appears to have troubled the majority of the *Russell* Court. Justice Rehnquist, writing for the majority, regarded the Ninth Circuit's standard as "unmanageabl[e]." 411 U.S. at 435.

Entrapment defenses which focus without explanation on "tolerability" or "degree" of government conduct involve considerable subjectivity in application—more so than Frankfurter apparently had in mind in *Sherman*. However, a per se *rule* against furnishing contraband, such as that propounded in *Oquendo*, would not allow for subjectivity in its application. By definition, it would bar *all* prosecutions founded on such government conduct.

of a crime by a person who normally would have resisted, the minority would acquit even a predisposed defendant.

Before the Supreme Court's decision in *United States v. Russell*,[22] most lower federal courts followed the *Sorrells-Sherman* majority position by limiting the availability of the entrapment defense to "otherwise innocent" persons. Several, however, focused on the propriety of police practices without regard to a particular defendant's criminal inclinations.[23] With varying degrees of explicitness, these courts reasoned that the law of entrapment was uncertain,[24] and based their approaches on the minority rationale. Two lines of "government conduct" cases emerged. In one, the courts "objectively" assessed the *general* nature of police involvement under several different standards.[25] These cases culminated in *Greene v. United States*,[26] where the

22. 411 U.S. 423 (1973).

23. *See* United States v. Russell, 459 F.2d 671 (9th Cir. 1972), *rev'd* 411 U.S. 423 (1973); United States v. McGrath, 468 F.2d 1027 (7th Cir. 1972), *vacated and remanded for reconsideration in light of Russell*, 412 U.S. 936 (1973); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Morrison, 348 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970); United States v. Dillet, 265 F. Supp. 980 (S.D.N.Y. 1966); *cf.* United States v. Arceneaux, 437 F.2d 924 (9th Cir. 1971); Kadis v. United States, 373 F.2d 370 (1st Cir. 1967); Whiting v. United States, 321 F.2d 72 (1st Cir. 1963); Accardi v. United States, 257 F.2d 168 (5th Cir. 1958); Banks v. United States, 249 F.2d 672 (9th Cir. 1957); Wall v. United States, 65 F.2d 993 (5th Cir. 1933).

24. Three reasons were advanced for this proposition. First, *Sorrells* and *Sherman* were "easy" cases involving a classic inducement of an "otherwise innocent" person. *See, e.g.*, United States v. McGrath, 468 F.2d 1027, 1028 (7th Cir. 1972), *vacated and remanded for reconsideration in light of Russell*, 412 U.S. 936 (1973). Second, the *Sherman* court did not confront the policy issues underlying the defense, finding this unnecessary because the defendant was not predisposed and did not argue the minority view. *Id.* at 1031. Third, shortly after *Sherman*, the majority of the Supreme Court considered both approaches before rejecting petitioner's argument in Lopez v. United States, 373 U.S. 427 (1963), suggesting that the matter was unresolved. *Id. See generally* Recent Developments, *Predisposition of Defendant Crucial Factor in Entrapment Defense*, 59 CORNELL L. REV. 546 (1974); Note, *Elevation of Entrapment to a Constitutional Defense*, 7 U. MICH. J.L. REFORM 361 (1974).

25. *Compare, e.g.*, United States v. Arceneaux, 437 F.2d 924, 925 (9th Cir. 1971) ("unbecoming conduct"), *with* United States v. Morrison, 348 F.2d 1003, 1004 (2d Cir. 1965) ("reasonably decent civilized standards for the proper use of government power"); Whiting v. United States, 321 F.2d 72, 76 (1st Cir. 1963) ("shocking or offensive per se"); *and with* Williamson v. United States, 311 F.2d 441, 444 (5th Cir. 1962) ("fair and lawful conduct from federal agents"). *See generally*, Recent Developments, *supra* note 24, at 562-63; Note, *supra* note 24, at 371-78.

26. 454 F.2d 783 (9th Cir. 1971). The Government involvement in *Greene* lasted for more than two and one-half years. After defendants had been once convicted of bootlegging charges, sentenced, and paroled,

Court of Appeals for the Ninth Circuit described the police involvement as so "enmeshed" in the criminal enterprise as to render prosecution "repugnant to American criminal justice."[27] In a second line of cases, federal courts condemned *specific* police practices. One such case, *United States v. Bueno*,[28] established direct precedent for *Oquendo*; there, the Court of Appeals for the Fifth Circuit barred appellant's prosecution solely because he had received the heroin at issue from a government agent. The *Bueno* and *Greene* lines of cases appeared to merge in *United States v. Russell*,[29] where a government agent provided defendants with a scarce and essential ingredient for the illegal manufacture of methamphetamine. Relying alternatively on both *Greene* and *Bueno*, the Court of Appeals for the Ninth Circuit reversed Russell's conviction, holding that this conduct manifested an "intolerable degree of governmental participation in the criminal enterprise."[30]

The Supreme Court disagreed, however, and reversed the judgment of the Ninth Circuit, holding that the conviction was permissible because Russell was predisposed to commit the crime.[31] It thereby expressly reaffirmed the position of the majority of the Court in *Sorrells* and *Sherman*.[32] Justice Rehnquist, speaking for the five-member majority in *Russell*, characterized entrapment as a "relatively limited defense" and sharply criticized those federal courts which, following the minority position, had barred prosecutions on the basis of what they determined to be "overzealous law enforcement practices":

---

a government agent urged them to resume production. Acting as their only customer, he offered to provide them with equipment and a still operator, and supplied them with 2000 pounds of sugar at wholesale prices. *Id.* at 784-86.

27. *Id.* at 787.

28. 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973). The salient facts in *Bueno* were identical to those in *Oquendo*: a contingent-fee informer had furnished heroin to an addict for resale to a government agent. An earlier federal case supporting this line of development was United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970) (government provision of counterfeit bills bars prosecution of defendant for possession of those bills with intent to pass as genuine, even though defendant initiated the contact). *Cf.* United States v. Dillet, 265 F. Supp. 980 (S.D.N.Y. 1966), discussed in note 56 *infra*.

29. 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973).

30. *Id.* at 673.

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

32. *Id.* at 433. Chief Justice Burger and Justices White, Powell, and Blackmun joined in Justice Rehnquist's opinion for the Court. The *Sorrells-Sherman* minority views were urged in the dissent of Justice Douglas, joined by Justice Brennan, *id.* at 436, and in that of Justice Stewart, joined by Justices Brennan and Marshall. *Id.* at 439.

> Several decisions of the United States district courts and courts of appeals have undoubtedly gone beyond this Court's opinion in *Sorrells* and *Sherman* . . . . [T]he defense of entrapment . . . was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve.[33]

Despite the *Russell* Court's strong reiteration of *congressional* intent as the basis for a narrow entrapment defense, the *Oquendo* Court implicitly based its entrapment holding on the supervisory power of the *courts*.[34] Finding that the govern-

---

33. *Id.* at 435.

34. A "supervisory power" basis of *Oquendo* is revealed by the court's reliance on Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), in which the Fifth Circuit barred prosecution of a defendant under an entrapment theory based on the rationale of McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957). In those cases, the Supreme Court had interpreted specific federal statutes or rules as requiring that it exercise a supervisory power to assure "proper standards for the enforcement of the federal criminal law in the federal courts." *McNabb*, 318 U.S. at 341. The *effect* of the Court's action in these cases was to condemn out-of-court conduct by the police. Thus, in *McNabb*, the Court determined that the police had violated a federal statute (now FED. R. CRIM. P. 5(a)) which requires arraignment with reasonable promptness, and concluded that the appropriate remedy for this violation was exclusion of the confessions thereby obtained. *Id.* at 342-47. Similarly, the *Mallory* Court disallowed a confession obtained from the defendant while he was detained in violation of FED. R. CRIM. P. 5(a).

In several cases, Justice Frankfurter urged expansion of this supervisory role of the courts. Dissenting in another context in On Lee v. United States, 343 U.S. 747, 758 (1952), and concurring in *Sherman*, he urged that the federal courts refuse to countenance abusive police measures, whether or not the police had violated constitutional or statutory provisions. However, the majority of the Supreme Court has never relied solely on an unrestrained power to determine that the out-of-court conduct of a federal agent is unlawful; such determinations have rested on an independent basis, as in *McNabb* and *Mallory*. *See also* Upshaw v. United States, 335 U.S. 410 (1948) (violation of Rule 5(a)); United States v. Mitchell, 322 U.S. 65, 70-71 (1944) ("Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct."). *See generally* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969).

Several commentators have explained *McNabb* and *Mallory* on the theory that the exercise of power over the admissibility of evidence is traditionally a judicial function, but have argued that a judicially-created bar to prosecution based solely on a finding of reprehensible police conduct would constitute an unwarranted restraint on executive prerogatives. *Id.* at 214; Comment, *Limitation on Undercover Police Activity*, 87 HARV. L. REV. 243, 249 n.47 (1973). The majority of the Supreme Court would likely be in accord and would probably regard the supervisory approach to entrapment, as it is employed in *Oquendo*, an infringement on the separation of powers. In *Russell*, for example, Justice Rehnquist noted for the Court that "[agent] Shapiro [did not] violate any federal statute or rule or commit any crime in infiltrating the re-

ment's provision of contraband exceeded the "bounds of reason," the Fifth Circuit espoused a broad per se rule barring this practice regardless of the defendant's criminal inclinations.[35] As a per se rule, the decision of the *Oquendo* Court represents a fulfillment of Justice Frankfurter's vision in that it sets a clear precedent to guide police behavior. On the other hand, as a per se rule it cannot be readily reconciled with the *Russell* Court's reaffirmance of the predisposition test. By focusing on predisposition, the Supreme Court would permit a "furnishing contraband" defense only to an "otherwise innocent" person, and not to Oquendo.

Apparently recognizing this problem, the Court of Appeals for the Fifth Circuit attempted to reconcile its holding with *Russell* in several ways. First, the court quoted language used in both the *Sorrells* and *Sherman* majority opinions to the effect that "the sales of heroin were made through *the creative activity* of the government";[36] thus they could be held to constitute entrapment under the majority rationale. This attempt to align the two cases is clearly unsatisfactory, however, because from the majority's perspective "creative activity" is conclusory language. "Creative activity" refers not only to the government's role in perpetrating the particular crime, but also necessarily to the government's creation of the defendant's criminal designs in

---

spondent's drug enterprise." 411 U.S. at 430.

Congress has for some time had before it several bills to codify the entrapment defense as part of a general revision of the Federal Criminal Code. *See, e.g.*, S. 1400, 93d Cong., 1st Sess. § 531 (1973) (Nixon administration proposal); S. 1, 93d Cong., 1st Sess. § 1-3B-2 (1973); *Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 212 (1971) (§ 702 of Study Commission draft). Specific entrapment legislation could clearly serve as a foundation for the exercise of a supervisory power. Notwithstanding the absence of such legislation, however, the court could have used existing criminal legislation to bar prosecution under its supervisory power. In stating without explanation that government agent Shapiro did not violate existing law, *Russell* assumes its conclusion. Had the agent not been acting for the purpose of catching Russell and his codefendants, his activities would seem clearly to have violated the federal conspiracy statute, 18 U.S.C. § 371 (1970). Thus, if the agent's conduct was not unlawful, it was because the Court determined that the conspiracy statute contains an implied exception for conspiracies engaged in for purposes such as agent Shapiro's. That determination, of course, was precisely the broader issue before the Court in *Russell*, but the Court never explicitly faced it. *See* 411 U.S. at 427-36.

35. 490 F.2d at 163.

36. 490 F.2d at 164 (emphasis in original), quoting United States v. Bueno, 447 F.2d at 903, 905 (1971). The reference to "creative activity" also appears in *Sherman*, 356 U.S. at 372, and *Sorrells*, 387 U.S. at 451.

the first instance.[37]

Second, the court attempted to reduce the import of *Russell* by restricting that decision to its facts. There, the court observed, the government had provided defendants with merely an *ingredient* for the manufacture of methamphetamine, while in *Oquendo* the government had provided *actual contraband.* This distinction appears to turn at least in part on the degree of the defendant's participation: Russell had to complete the manufacture of a controlled substance, but Oquendo had only to deliver contraband to the arresting agent. Oquendo's role, therefore, was merely that of a conduit and, in the words of the Fifth Circuit,

> [t]he story takes on *the element of the government buying heroin from itself, through an intermediary the defendant, and then charging him with the crime.*[38]

On the basis of this characterization, the court concluded that a finding of entrapment where the government furnishes actual contraband was not inconsistent with *Russell,* regardless of the defendant's predisposition.[39]

The Supreme Court did not likely intend, however, that the lower courts so narrowly regard its third major consideration of the entrapment defense. Ascribing less significance to the specific facts of *Russell,* a number of recent decisions and commentators have interpreted that case broadly, reasoning that the

37. *See* United States v. Russell, 411 U.S. 423, 435; Note, *supra* note 16, at 1335.

38. 490 F.2d at 163 (emphasis in original), quoting United States v. Bueno, 447 F.2d 903, 905 (1971).

The Fifth Circuit has refused to extend an *Oquendo* defense to a defendant who cannot be characterized as a conduit. Thus, the rule against furnishing contraband does not protect all persons in a "chain." In United States v. Rodriguez, 474 F.2d 587 (5th Cir. 1973), the Fifth Circuit affirmed the conviction of a defendant whose brother was furnished cocaine by an informer, stating that "*Bueno* will not support the theory that the introduction of narcotics into the marketplace by the Government informer is sufficient to cloak all subsequent sellers with an entrapment defense." *Id.* at 589. Since the government's act of providing contraband is precisely the same in *Rodriguez* and *Oquendo,* the Fifth Circuit's reasoning appears to lack theoretical consistency. However, *Bueno* imposed on the government the burden of proving that the contraband was *not* furnished by the informer. *See* note 4 *supra.* Were the government required to prove such a negative proposition by tracing all stages of the chain of supply, its burden would be virtually impossible to meet. Thus, *Rodriguez* appears a necessary exercise in line-drawing, although some consistency is sacrificed.

39. 490 F.2d at 164. The *Russell* Court did indicate that *Russell* was not a contraband case, but did so in its discussion and rejection of due process as a foundation for Russell's defense, not in its discussion of entrapment. 411 U.S. at 432. *See* note 66 *infra.*

Supreme Court meant its rejection of the minority rationale to foreclose the availability of entrapment defenses founded simply on government conduct.[40] The Court may have reinforced these broad interpretations with its decision to vacate the judgment of the Court of Appeals for the Seventh Circuit in *United States v. McGrath*.[41] There, the counterfeiting conviction of an admittedly predisposed defendant had been overturned because the government had assumed control over the printing and manufacture of the bills, ultimately delivering them to the defendant.[42] Although *McGrath* thus appears to have involved government provision of actual contraband,[43] the Fifth Circuit merely regarded the Supreme Court's handling of that case as "cryptic," choosing to ignore it, rather than attempting to distinguish it from *Oquendo*.[44]

The "conduit" characterization of the Fifth Circuit may be appealing; unelaborated, however, it falls short of reconciling *Oquendo* with *Russell* and *McGrath*. It is thus especially disappointing that the court failed to explain its judgment—that furnishing actual contraband exceeds the "bounds of reason"—by elaborating on the essential policy considerations underlying the entrapment defense. In this respect, two generalized posi-

40. *See, e.g.*, United States v. Jett, 491 F.2d 1078, 1081 (1st Cir. 1974) ("We do not accept *Bueno*"); United States v. Rosner, 485 F.2d 1213, 1223 (2d Cir. 1973) (*Russell* renders untenable the argument that furnishing "the means for the commission of the crime" constitutes entrapment); United States v. Johnson, 484 F.2d 165, 167 (9th Cir. 1973) (*Russell* rejects entrapment based on "impermissible degree of government participation"); United States v. Hayes, 477 F.2d 868, 873 (10th Cir. 1973) (*Russell* "rejected reasoning similar to that found in . . . *Bueno*") (dictum). *See also* R. Park, Drug Crimes: Cases and Materials XIV-XVI (Jan. 1974 ed.) (unpublished course materials on file in the University of Minnesota Law Library); Recent Developments, *supra* note 24; Note, *supra* note 24; Comment, *supra* note 34.

However, each of these commentators argued that although the Court had rejected the minority approach to entrapment, it had theoretically expanded the defense through its due process dicta. *See* note 66 *infra*. Due process was not pursued, however, in the cited cases.

41. 468 F.2d 1027 (7th Cir. 1972), *vacated and remanded for reconsideration in light of Russell*, 412 U.S. 936 (1973). On remand, the Seventh Circuit determined that *Russell* controlled and reinstated the conviction. United States v. McGrath, 494 F.2d 562 (7th Cir. 1974).

42. 468 F.2d at 1028.

43. Under the *Russell* rationale, the printing press furnished in *McGrath* could have been regarded as harmless and legally obtainable, merely "something of value." Certainly a printing press is more readily available than paper and ink suitable for counterfeiting. Moreover, the delivery of the bills to defendants arguably was only incidental government conduct. *McGrath* was less a "furnishing contraband" than a "government involvement" case. *See* authorities cited in notes 25-29 *supra*.

44. 490 F.2d at 164 n.7.

tions have competed for priority since the inception of the entrapment doctrine, each stressing a different policy choice. In adopting a limited role for the courts, and in focusing on predisposition, the *Russell* majority emphasized a need for flexible means of detecting undercover crime. Consequently, innocent persons might be afforded only an after-the-fact remedy, a defense in a court of law. Furthermore, otherwise intolerable police behavior might receive judicial condonation merely because that behavior is directed against a "predisposed" individual.[45] On the other hand, in assuming it appropriate that the courts review police practices, the minority position has emphasized a need for fairness and for protecting innocent persons from abusive police tactics in the first instance—on the streets. Commentators have argued that no one test will suffice, but that different crimes merit different resolutions of these conflicting policies.[46] In this respect, Justice Frankfurter suggested that judicial rules guiding police conduct should take into consideration a number of different factors:

> Evidence of the setting in which the inducement took place . . . the nature of the crime involved, its secrecy and difficulty of detection, and the manner in which the particular criminal business is usually carried on.[47]

Applying these considerations, narcotics sales cases such as *Oquendo* and *Bueno* are distinguishable from *Russell* and *McGrath* in three major ways: first, the nature of the instigating government agent; second, the complexity of the crimes and the detection problems they create for the police; and third, the probability of innocent persons being instigated to commit crimes, if police tactics are left uncontrolled.[48]

In regard to the first two distinctions, the undercover instigators in *Russell* and *McGrath* were full-time, professional

45. *See* notes 66-67 *infra* and accompanying text.

46. *See, e.g.*, Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent* [sic] *Provocateurs*, 60 YALE L.J. 1091, 1113-15 (1951); Rotenberg, *supra* note 8, at 625-34.

47. 356 U.S. at 384-85. *Russell* also can be read to suggest such an approach. Justice Rehnquist stated that:

> The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a *continuing . . . business enterprise*. . . . [T]he gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. . . . [O]ne of the *only practicable* means of detection [is] the infiltration of drug rings and a limited participation in their unlawful present practices.

411 U.S. at 432 (emphasis added).

48. This Comment focuses primarily on entrapment through the furnishing of narcotics, and these distinctions may be unique to narcotics sales cases; the government's furnishing of other contraband, such as counterfeit bills or weapons, may raise other considerations.

agents employed by the federal government.[49] Their tasks were complex, in that multiple suspects were involved in manufacturing illegal drugs. Infiltration was necessary, and as the *Russell* majority concluded, a flat rule prohibiting the provision of "something of value" to these operations could well have been fatal to the process of detection.[50] By contrast, the instigating agents in *Oquendo* and *Bueno* were informers—part-time, unofficial employees of the government who were paid on a contingent-fee basis.[51] Their tasks were relatively simple since their targets were isolated individuals. The informers were also addicts, and to sustain their addictions, they needed to induce other addicts to sell heroin to official undercover agents.[52]

---

49. In *Russell*, the instigator was an undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs, 411 U.S. at 425; in *McGrath*, the undercover agents were employed by the Secret Service, 468 F.2d at 1028.

50. 411 U.S. at 432. *But see* note 43 *supra*.

51. The use of informers is an accepted, multinational law enforcement practice, *see, e.g.*, Miers, *Informers and Agents Provocateurs*, 120 NEW L.J. 577 (1970), and a method of detecting undercover crime considered indispensable by law enforcement personnel. One commentator estimates that 95 percent of all federal narcotics cases result from the efforts of informers. Williams, *supra* note 8, at 402-04. Notwithstanding the need for informers, the possibilities for abusive practices in their use are legion. *See generally* Donnelly, *supra* note 46; Rotenberg, *supra* note 8; Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963).

Oquendo sought to raise a second entrapment issue on the basis of the informer's contingent-fee arrangement. Although he failed to raise this issue at trial, he argued on appeal that FED. R. CRIM. P. 52(b) required the Court to examine the informer's contingent-fee arrangement as an independent basis for acquittal. 490 F.2d at 166 n.11. He relied on Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), which requires the prosecution to explain the appropriateness of any contingent-fee agreement to produce evidence against particular named defendants as to crimes not yet committed. *Williamson* was not compelling authority, however, as it had been substantially diluted by the Fifth Circuit itself, *see, e.g.*, Hill v. United States, 328 F.2d 988 (5th Cir.), *cert. denied*, 379 U.S. 851 (1964); Sears v. United States, 343 F.2d 139 (5th Cir. 1965), and no other circuit had expressly followed it. *See, e.g.*, United States v. Grimes, 438 F.2d 391 (6th Cir. 1971); Annot., 13 A.L.R. Fed. 905 (1972). The Supreme Court's decision in United States v. Russell, 411 U.S. 423 (1973), had further clouded the viability of *Williamson*, *see* note 34 *supra*, and, in any event, the informer's agreement in the instant case had *not* been predicated on apprehension of a specific, named individual. Brief for Appellee at 14. The court of appeals declined to consider Oquendo's argument. 490 F.2d at 166 n.11.

52. Judge Edward J. Weinfeld commented on the motives of an informer as follows:

> Since the informer was to be paid only in those cases wherein his efforts were successful, and his livelihood was dependent upon the funds derived from his activities, he had every motive to induce the commission of the offense charged to this defend-

With respect to the third distinction, the potential for abuse in an informer system, if no controls are imposed, [53] is considerable. In *United States v. Silva*,[54] a 1959 case in which the "furishing contraband" defense began to emerge in the federal courts, the district court found no evidence that Silva had had any prior association with narcotics. Instead, Silva testified, a contingent-fee informer introduced him to heroin free of charge, began to exact payment, and ultimately took advantage of his addiction by offering him a "fix" in return for delivering heroin to the arresting agent.[55] District Judge Weinfeld evinced little regard for the informer's integrity, stating:

> In the exercise of restraint and moderation, and bearing in mind that perhaps at times the use of informers is required in fighting the evils of the illegal drug activities, I shall not characterize the informer's testimony further than to say it not only abounds in substantial and material contradictions but is utterly unreliable, untrustworthy and undependable.[56]

An informer's motives, the ease with which he can introduce narcotics into the marketplace, and the absence of clear rules or standards to guide his activities all create an obvious danger to innocent persons. This fact becomes particularly clear when the nature of the "innocent" person likely to be a target is considered. Informers function among persons particularly vulnerable to offers of narcotics, including not only dealers and occasional users, but also addicts and persons attempting to quit. The majority approach to entrapment is frequently criticized by commenta-

---

ant, who was in desperate need to satisfy his drug habit which resulted from his initiation by the informer.

United States v. Silva, 180 F. Supp. 557, 559 (S.D.N.Y. 1959).

53. The absence of controls such as probable cause, reasonable suspicion, or fixed rules against certain practices is a normal characteristic of the informer's environment. *See* Rotenberg, *supra* note 8, at 617-29.

54. 180 F. Supp. 557 (S.D.N.Y. 1959).

55. *Id.* at 558.

56. *Id.* at 559. Finding no predisposition, Judge Weinfeld granted Silva's motion for acquittal.

The Southern District of New York was also the first federal court to articulate a defense approaching a per se rule against furnishing contraband. United States v. Dillet, 265 F. Supp. 980 (S.D.N.Y. 1966), barred the prosecution of a defendant who, needing money for rent, agreed to deliver cocaine for an informer he knew as a narcotics dealer. The court held that the government had failed to prove that the drugs were not supplied by the informer, and thereby failed to prove that it had not created the disposition to commit the offense. In that case, District Judge Motley found that "an *atrociously wicked* new profession is emerging in the enforcement of our narcotics laws, i.e., the simultaneous *seller-informer*." *Id.* at 986 (emphasis added). Judge Motley was referring to a tendency of some contingent-fee informers to supplement their incomes by profiting from the sales of narcotics to their targets.

tors[57] and is rejected by several proposed criminal codes[58] not only because innocent persons are potentially subject to abusive police tactics under that approach, but also because such persons with questionable backgrounds—even if innocent—are especially susceptible to conviction.[59] Even an acquittal, however, would scarcely be solace for one such as Silva, whose addiction was conceived of and hastened by a government agent. In contrast to the limited remedy the majority affords innocent, but vulnerable persons, per se rules developed under Justice Frankfurter's rationale would in the first instance discourage the government from serving as a tempter of the weak-willed.[60]

A per se "rule" against furnishing contraband, such as that proposed in *Oquendo*, would serve to minimize potentially abusive crime detection in two ways. First, it would cause the police to exercise greater precautions and to assert greater control over informers in their charge. Second, it would deprive informers of a motivation to deal in or distribute contraband, because their fees would be contingent on the use of more conventional means of encouragement. Moreover, the "furnishing contraband" tactic lacks the element of *necessity* that has historically been the basis for rationalizing government involvement in the commission of undercover crimes.[61] Thus, in *Lewis v. United States*,[62] the Supreme Court held "deception" a "necessity" for purposes of revealing unlawful activities.[63] Under this rationale, the conventionally available tactic of offering to *purchase* contraband arguably can be justified as essential for exposing persons otherwise willing to sell. To show further that the *provision* of con-

57. *See* authorities cited in note 8 *supra*.

58. *See* MODEL PENAL CODE § 2.13(1)(b) (Proposed Official Draft, 1962); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702 (1971).

59. Once the defendant raises the defense of entrapment, the majority approach permits the introduction of evidence not necessarily bearing on his present criminal inclinations. This may include hearsay evidence regarding his reputation, character, and criminal activities generally, as well as evidence of past convictions and the degree of reticence, or lack thereof, he exhibited in response to the government's instigation. *See, e.g.*, Donnelly, *supra* note 46, at 1108; Mikell, *supra* note 8, at 252; Note, *supra* note 16, at 1339.

60. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. Sherman v. United States, 356 U.S. 369, 382-83 (1958) (Frankfurter, J., concurring).

61. *See generally* authorities cited in note 8 *supra*.

62. 385 U.S. 206 (1966).

63. *Id.* at 208-09.

traband is a necessity in certain circumstances, it can perhaps be asserted that where a suspect does not presently possess contraband, neither an arrest nor a search nor even an offer to purchase is a viable police tactic. By furnishing contraband in such a case and following with an immediate arrest, the government can prevent commission of future crimes.[64] This argument, however, leaves even the most innocent persons vulnerable to manipulation by the government. If a person is in fact predisposed to possess or distribute contraband, he ordinarily will be able to obtain it himself; if not, little purpose would be served by his conviction. Expediency appears to be the only advantage supporting the government's provision of contraband, and expediency alone does not appear sufficient to justify the use of otherwise unnecessary police practices by either informers *or official government agents.*[65] Were there not other alternatives, a different conclusion might be reached; as evidenced by *Russell* and *Lewis*, however, undercover crime detection does not suffer for want of permissible police practices.

With respect to present entrapment doctrine, *Oquendo* demonstrates that the pre-*Russell* division among the lower federal courts continues. Although the *Russell* majority may have intended to narrowly circumscribe the power of the courts over this defense, the *Oquendo* decision is evidence that it has not completely succeeded. Exercising an asserted power to condemn a particular police practice, the Court of Appeals for the Fifth Circuit departed from and went beyond the Supreme Court's re-

64. This is, of course, a standard justification of a need for government instigation, here extended to include provision of contraband. *See, e.g.*, Rotenberg, *supra* note 8, at 625.

65. While it may be concluded as a matter of policy that tight controls over informers are especially appropriate, it does not follow that reprehensible tactics of official government agents should be countenanced. The ultimate concern is not the specific status of the agent but the conduct of the government itself and the tactics it employs. *See, e.g.*, Sherman v. United States, 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970) (official government agent supplying counterfeit bills).

With respect to expediency, Justice Stewart questioned its sufficiency as a basis for instigation in *Russell*, asking:

> If the chemical was so easily available elsewhere, then why did not the agent simply wait until the respondent had himself obtained the ingredients and produced the drug, and then buy it from him?

411 U.S. at 448-49.

This reasoning seems to apply a fortiori to the instant case in which the instigating agent was an informer, there was but one suspect, and the "wait" between anticipated sales would have been more brief than the wait for a substantial quantity of a manufactured product.

affirmation of the *Sorrells-Sherman* statutory construction rationale, refusing, as a matter of policy, to condone the furnishing of contraband. The Fifth Circuit reached a result, however, that is not necessarily inconsistent with the position of the Supreme Court. Although *Russell* renders the supervisory power rationale a less than viable basis for *Oquendo*, that Supreme Court decision also suggests that where police practices are sufficiently egregious, defendants such as Oquendo can also challenge police conduct on grounds transcending the narrow confines of traditional entrapment doctrine. Dicta in *Russell* suggests the availability of due process as a basis for judicial condemnation of certain abusive police practices, and perhaps the policy bases of a rule against furnishing contraband may be so substantial as to support such a due process defense.[66] Arguably, it is funda-

66. Oquendo did not argue that due process of law mandated his acquittal. However, due process might prove to be an alternate foundation for a rule against furnishing contraband. While the Supreme Court rejected a supervisory power approach to entrapment in both *Sherman* and *Russell*, the latter opinion explicitly left open the possibility that certain police conduct might be so outrageous as to impel the Court to bar prosecution on due process grounds. Justice Rehnquist stated that police conduct so "shocking to the universal sense of justice" as to violate the standard of "fundamental fairness" would justify such a result. 411 U.S. at 432. In propounding this standard, the Justice expressed an aversion to the "notion that due process of law can be embodied in fixed rules," and thus rejected a rule of due process proposed by Russell that would have prohibited the government from furnishing an "indispensable means" for commission of a crime. *Id.* at 431. Justice Rehnquist's own opinion may undercut this reluctance to countenance fixed rules, however, because it distinguished the ingredient furnished Russell from contraband, characterizing it as a "harmless substance" and determining that its possession was legal. *Id.* at 431-32.

As a result of this ambiguity, it is difficult to predict what police conduct might be found violative of due process. This difficulty is compounded by Justice Rehnquist's unexplained citation to Rochin v. California, 342 U.S. 165 (1952), where police in search of morphine committed an unlawful entry and pumped defendant's stomach to obtain the incriminating evidence. *Id.* at 166-67.

If the *Russell* Court's aversion to fixed rules was a response solely to the rule proposed in that case, if *Rochin* does not represent the Court's threshold test for due process violations, and if the Court were to take the position that police practices can *only* be justified where *necessary* for the detection of undercover crime, then a rule against contraband could assume constitutional dimensions. As to the latter, necessity is arguably the thrust of both *Russell* and Lewis v. United States, 385 U.S. 206 (1966), which held that certain deceitful police practices are permissible. *Cf.* Comment, *supra* note 34, at 252.

At this time, the courts of appeals have not directly confronted the due process question in the contraband context. However, an issue of police misconduct was framed as a due process question and left to the jury in United States v. Anderson, Crim. No. 602-71 (D.N.J. May 20, 1973), *see* Note, *supra* note 24, at 386. In dictum, moreover, the Court of Appeals for the Tenth Circuit has suggested that the furnishing of

mentally unfair for the "government [to] suppl[y] the contraband, the receipt of which is illegal . . . [and] be permitted to punish the one receiving it."[67] Regardless of the legal foundation on which the rule against furnishing contraband rests, however, it is so firmly rooted in policy as to explain the Fifth Circuit's present determination to restrict *Russell* to its facts.

---

contraband is sufficiently overreaching to violate due process as a matter of law, stating:

> If, as Johnson testified, *the informer provided the heroin* which was sold to the undercover agent, we think the government would have been perilously close to what Justice Rehnquist conceived in [*Russell*] as *conduct so outrageous as to violate standards of due process.*

United States v. Johnson, 495 F.2d 242, 244 (10th Cir. 1974) (emphasis added).

67. United States v. Chisum, 312 F. Supp. 1307, 1312 (C.D. Cal. 1970).