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Article

An Interest Balancing Test for Entrapment

John Cirace*

I. Introduction

Since the Supreme Court of the United States decided its first entrapment case, *United States v. Sorrells*,¹ the standard analysis of the entrapment defense in a criminal prosecution² has been concerned with three elements: whether the defendant had a subjective predisposition to commit the crime;³ whether the defendant had an objective predisposition to commit the crime;⁴ or whether the criminal's predisposition to commit the

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1. 287 U.S. 435 (1932).

2. See *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Sorrells*, 287 U.S. 435 (1932); Lester B. Orfield, *The Defense of Entrapment in the Federal Courts*, 1 DUKE L.J. 39 (1967); Daniel L. Rotenberg, *The Police Detection Practice of Encouragement*, 4 Hous. L. REV. 609 (1967); Whilliam C. Sherrill, Jr., *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 FLA. L. REV. 63 (1967); Note, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046 (1969); W. Amon Burton, Jr., Note, 45 TEX. L. REV. 578 (1967); Charles S. McCowan, Jr., Comment, *Entrapment: Instigation, Not Investigation*, 26 LA. L. REV. 848 (1960); Note, *The Serpent Beguiled Me and I Did Eat — The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965) [hereinafter "Serpent"].

3. See *Sorrells*, 287 U.S. at 451; *United States v. Russell*, 411 U.S. 423, 433 (1973) (acknowledging that the *Sorrells* Court stressed the defendant's predisposition to commit the crime); Jeffrey N. Klar, Note, *The Need for a Dual Approach to Entrapment*, 59 WASH. U. L.Q. 199, 200 n.10 (1981) (discussing the interpretations of "predisposition" offered by courts and commentators).

4. See *Sherman*, 356 U.S. at 379-80 (Frankfurter, J., concurring); *Sorrells*, 287 U.S. at 459 (Roberts, J., dissenting). More recently, the Supreme Court has stated "that a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews v. United States*, 485 U.S. 58, 63 (1988). See also Brian Thomas Feeney, Note, *Scrutiny for the Serpent: The Court Refines*

crime balances against the appropriateness of police practices.⁵ However, allowing evidence of a defendant's predisposition to commit crime in entrapment cases often allows the jury to hear testimony that is unduly prejudicial to the defendant and is irrelevant to the real public policy issues which concern: a) the extent to which entrapment is necessary for efficient law enforcement, considering factors such as the crime's seriousness, secrecy, and difficulty of detection; and b) the nature and extent of government involvement, from surveillance to simple solicitation to elaborate and prolonged inducement.⁶ This second issue concerns the supervisory power of courts over the administration of criminal justice⁷ and whether police tactics fall below standards for the proper use of governmental power,⁸ shock the universal sense of justice,⁹ or violate fundamental fairness inherent in the guarantee of due process.¹⁰ The rule of law ultimately depends upon "public confidence in the fair and honorable administration of justice."¹¹

An analysis of the six entrapment cases decided by the Supreme Court of the United States¹² demonstrates that these cases are more easily rationalized as a balancing via trade-offs of the government's need for entrapment against the nature and extent of government involvement than they are as a defendant's predisposition to commit the crime. The two elements in this balancing test derive from Justice Frankfurter's concurring opinion in the second entrapment case decided by the Supreme Court, *Sherman v. United States*:

Entrapment Law in Jacobson v. United States, 42 CATH. U. L. REV. 1027 (1993); *infra* note 46 and accompanying text.

5. See PAUL MARCUS, *THE ENTRAPMENT DEFENSE* 1 (1989). Other tests have been suggested. See Maura F.J. Whelan, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1197 (1985).

6. See *infra* Part II.

7. See *Hampton v. United States*, 425 U.S. 484, 495 (1976) (Powell, J., concurring); *Sherman*, 356 U.S. at 381 (Frankfurter, J., concurring).

8. See *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring).

9. See *United States v. Russell*, 411 U.S. 423, 432 (1973) (citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

10. See *Hampton*, 425 U.S. at 491-95 (Powell, J., concurring).

11. *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring).

12. Twelve lower federal court decisions are also analyzed.

The crucial question, not easy of answer, 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 governmental power. For answer it is wholly *irrelevant* to ask if the "intention" to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of "the creative activity" of law-enforcement officials.¹³

Additionally, "[t]he court should also consider 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."¹⁴

Justice Frankfurter also said that under the predisposition test for entrapment, the jury is allowed to hear evidence of the defendant's prior criminal record, bad reputation, and rumored activities, of which the prosecution may have insufficient evidence to obtain an indictment. The jury may even hear the government's motives in choosing to tempt this defendant. All of this evidence is unduly prejudicial to the defendant.¹⁵

Section II is concerned with the question of why a society dedicated to the concept of ordered liberty should ever allow its law enforcement authorities to entice citizens into criminal activity. In Section III, it is argued that Justice Frankfurter was correct: evidence of a criminal's predisposition to commit a crime is both irrelevant to the two entrapment policy issues and unduly prejudicial to the defendant. Section IV contains an interest balancing (via trade-offs) analysis of the six entrapment cases decided by the Supreme Court of the United States. In Figure 1,¹⁶ the six cases are depicted in terms of a trade-off between two variables: the government's need for entrapment is ranked on the horizontal axis; the nature and extent of government inducement is ranked on the vertical axis. In general, the greater the need for entrapment, the easier it is for the government to justify prolonged and elaborate schemes. In Section V,

13. *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring) (emphasis added) (citations omitted).

14. *Id.* at 385.

15. *See id.* at 382; *United States v. Russell*, 411 U.S. 423, 443 (1973) (Stewart, J., dissenting); *United States v. Sorrells*, 287 U.S. 435, 458 (1932) (Roberts, J., dissenting).

16. *See infra* p. 417.

it is shown how interest balancing via trade-offs can be used by judges when they engage in line drawing, that is, the separation of cases that should be decided one way from cases that should be decided another way.

II. Why Allow Police to Use Entrapment?

The initial question that must be answered is: why should a free society, dedicated to the concept of ordered liberty, ever allow police to set traps that induce its citizens to commit crimes? The rationale is straight forward: crimes that are consensual (victimless), conspiratorial, or secret in nature often will not be exposed other than through entrapment. As Judge Learned Hand said, "[i]ndeed, it would seem probable that, if there were no reply [to the claim of government inducement], it would be impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret."¹⁷ Judge Hand's view effectively disposes of the overbroad view of entrapment espoused by Justice Roberts in his concurrence in *Sorrells*: "The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents."¹⁸ Moreover, many consensual and secret crimes are either so directly destructive to the fabric of a free society, such as the bribing of public officials (judges, legislators, or civil servants), or so indirectly destructive, such as the sale of illegal drugs, which involve serious negative spill-overs or externalities, and which are often financed by violent crime, that entrapment is justified as the lesser evil.

17. *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952). On remand, the defendant was again convicted, reversing the prior conviction due to an improper instruction on entrapment. *See United States v. Sherman*, 240 F.2d 949 (2d Cir. 1957) *rev'd* 356 U.S. 369 (1958) (entrapment was established as a matter of law). *See also* Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 WAKE FOREST L. REV. 829, 831 (1992) (police undercover activity remains an integral part of the overall law enforcement scheme because of the difficulty inherent in detecting and prosecuting consensual crimes, such as drug trafficking, prostitution, gambling, and bribery).

18. *Sorrells*, 287 U.S. at 459. *See* Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 164 (1976); Paul W. Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399, 403-4 (1959).

Consider two extreme cases. One where the government is usually justified in initiating elaborate and creative entrapment schemes. For example, a "sting" operation to apprehend legislators, judges, or civil servants who accept bribes is usually justifiable, even though the scheme is initiated by police authorities and is elaborate and of prolonged duration. These crimes are hard to detect and, if unchecked, can completely undermine public confidence in government. In the other case, where entrapment can rarely be justified, police should generally not be allowed to set a trap for someone "predisposed" to commit theft. For example, allowing police to park an automobile, which is unattended, unlocked, with its windows rolled down, and containing an expensive camera lying on the front seat, is not justifiable. Because such theft is not among consensual or conspiratorial crimes that go unreported, or crimes of violence,¹⁹ there is generally no need (justification) for the government to set such traps whether or not someone is predisposed to commit this type of theft.

The six entrapment cases decided by the Supreme Court of the United States all involve consensual crimes.²⁰ One of those cases, *United States v. Mathews*,²¹ involved the use of entrapment to uncover alleged bribery of a government official.²² Such crimes as this, which involve elaborate, government-initiated entrapment schemes, are almost always justified. In four other cases, all of which involved the sale of controlled substances, the balance or trade-off between the government's need for entrapment and the degree of government inducement depended on the facts of each case.²³ Finally, in the sixth and most recent

19. Police authorities are justified in setting a trap for violent muggers who attack unsuspecting or vulnerable individuals.

20. See *United States v. Jacobson*, 503 U.S. 540 (1992) (receipt of child pornography); *United States v. Mathews*, 485 U.S. 58 (1988) (bribery of government officials); *Hampton v. United States*, 425 U.S. 484 (1976) (narcotics); *United States v. Russell*, 411 U.S. 423 (1973) (narcotics); *United States v. Sherman*, 356 U.S. 369 (1958) (narcotics); *United States v. Sorrells*, 287 U.S. 435 (1932) (liquor prohibition violation).

21. 485 U.S. 58 (1988).

22. See *id.* at 61.

23. See *United States v. Hampton*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Sorrells*, 287 U.S. 435 (1932).

entrapment case, *United States v. Jacobson*,²⁴ two federal agencies, as part of an elaborate and prolonged (two and a half year) entrapment campaign, enticed a citizen into ordering a magazine containing child pornography through the mail.²⁵ An entrapment scheme such as this shocks the conscience and falls far below standards to which common feelings respond for the proper use of governmental power.²⁶

III. Defendant's Predisposition to Commit Crime is "Irrelevant"²⁷

A. *The Subjective Predisposition Theory*

In *Sorrells*, the Supreme Court adopted what has been called the "subjective predisposition" approach to the defense of entrapment. The Court stated that, "the controlling question [is] whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."²⁸ The key phrase is "otherwise innocent," because under this test the entrapment defense is available only to those who would not have committed the crime but for the government inducement.²⁹ Thus, the subjective approach focuses on the conduct and propensities of the particular defendant in each individual case. "[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue."³⁰ Further,

[i]f he had the "predisposition" to commit the crime, or if the "criminal design" originated with him, then—regardless of the nature and extent of the Government's participation—there has been no entrapment. And, in the absence of a conclusive showing

24. 503 U.S. 540.

25. *See id.*

26. *See Sherman v. United States*, 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring).

27. *Id.* at 382 (Frankfurter, J., concurring). *See supra* notes 13-14 and accompanying text.

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

29. *See id.* *See also United States v. Russell*, 411 U.S. 423, 440 (1973) (Douglas, J., dissenting).

30. *Sorrells*, 287 U.S. at 451.

one way or the other, the question of the defendants "predisposition" to commit the crime is a question of fact for the jury.³¹

In the opinion of the *Sorrells* majority, this view supposedly derives from an unexpressed intent of Congress: "[f]undamentally, the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose."³²

Although many courts and commentators have criticized the predisposition test for entrapment,³³ the concurring opinions of Justice Roberts in *Sorrells*³⁴ and Justice Frankfurter in *Sherman*³⁵ have been most influential in noting the flaws in this approach. As Justice Frankfurter said, the subjective approach is based on an interpretation of Congressional intent which is:

sheer fiction [T]he only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged

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. . . .

. . . A false choice is put when it is said that either the defendant's conduct does not fall within the statute or he must be convicted. The statute is wholly directed to defining . . . the substantive offense concerned and expresses no purpose . . . regarding the . . . conduct that will be tolerated in detection of crime. A statute prohibiting the sale of narcotics is as silent on the question of entrapment as it is on the admissibility of illegally obtained evidence.³⁶

31. *Russell*, 411 U.S. at 440 (Douglas, J., dissenting)

32. *Sorrells*, 287 U.S. at 452.

33. See Scott C. Paton, "The Government Made Me Do It": A Proposed Approach To Entrapment Under *Jacobson v. United States*, 79 CORNELL L. REV. 995 (1994); Sherrill, *supra* note 2; Stephen G. Mirakian, Note, *Entrapment: Time to Take an Objective Look*, 16 WASHBURN L.J. 324, 336 (1977); *Serpent*, *supra* note 2.

34. 287 U.S. 435, 453-59 (1932) (Roberts, J., concurring).

35. 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring).

36. *Id.* at 379-81.

It is the role of courts to "formulat[e] standards for the administration of criminal justice when Congress . . . has not specifically legislated to that end [T]o look to a statute for guidance in the application of a policy not remotely within the contemplation of Congress at the time of its enactment is to distort analysis."³⁷

"Since, by definition, the entrapment defense cannot arise unless the defendant actually committed the proscribed act, that defendant is manifestly covered by the terms of the criminal statute involved."³⁸ Even if, as in most cases in which entrapment is an issue, the intention that the particular crime be committed originated with the police and without their inducement the crime would not have occurred, the defendant was "predisposed" in the sense that he was capable of committing the crime.³⁹ If the defendant is to be relieved from the usual punitive consequences of his acts, it is not because he is innocent of the offense for which he is charged.

That he was induced, provoked, or tempted to do so by government agents does not make him any more innocent or any less predisposed than he would be if he had been induced, provoked, or tempted by a private person – which . . . would not entitle him to cry "entrapment." Since the only difference between these situations is the identity of the temptor, . . . the significant focus must be on the conduct of the government agents, and not on the predisposition of the defendant.⁴⁰

In short, "it is *wholly irrelevant* to ask if the 'intention' to commit the crime originated with the defendant or government officers. . . ."⁴¹

Moreover, making the entrapment defense depend on whether the defendant has the requisite predisposition permits the introduction into evidence of hearsay, suspicion, and rumor, which would be inadmissible in other contexts, in order to prove the defendant's predisposition.

37. *Id.* at 381.

38. *United States v. Russell*, 411 U.S. 423, 442 (1973).

39. *See id.*

40. *Id.*

41. *Sherman v. United States*, 356 U.S. 369, 382 (1958) (Frankfurter, concurring) (emphasis added).

Stated another way, this subjective test means that the Government is permitted to entrap a person with a criminal record or bad reputation, and then to prosecute him for the manufactured crime, confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway.⁴²

"Furthermore, a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment."⁴³ "Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct in the future."⁴⁴ "[A] judgment aimed at blocking off areas of impermissible police conduct is appropriate for the court and not the jury."⁴⁵

B. *The Objective Predisposition Theory*

The objective predisposition theory of entrapment was stated by Justice Frankfurter in *Sherman*. He said:

in holding out inducements [government officers] should act in such a manner as is likely to induce to the commission of crime only these [predisposed] persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention 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.⁴⁶

At least fourteen states have adopted the objective approach.⁴⁷ "Moreover, this objective approach is the one favored

42. *Russell*, 411 U.S. at 443 (Stewart, J., dissenting).

43. *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring).

44. *Id.* at 385.

45. *Id.*

46. *Id.* at 384. See also *Sorrells v. United States*, 287 U.S. 435, 453-59 (1932) (Roberts, J., concurring); *Carbajal-Portillo v. United States*, 396 F.2d 944, 948 (9th Cir. 1968); *United States v. Kros*, 296 F. Supp. 972, 979 (E.D. Pa. 1969).

47. See ALASKA STAT. § 11.81.450 (Michie, 1989); ARK. CODE ANN. § 5-2-209 (Michie 1993); COLO. REV. STAT. § 18-1-709 (1986); HAW. REV. STAT. § 702-737 (1993); KAN. STAT. ANN. § 21-3210 (1995); N.Y. PENAL LAW § 40.05 (McKinney 1987 & Supp. 1997); N.D. CENT. CODE § 12.1-05-11 (1985 & Supp. 1997); 18 PA. CONS. STAT. § 313 (1983); TEX. PENAL CODE ANN. § 8.06 (West 1994 & Supp. 1997); UTAH CODE ANN. § 76-2-303 (1995 & Supp. 1997); *State v. Mullen*, 216 N.W.2d 375

by a majority of the commentators."⁴⁸ The objective test received some support in *Hampton v. United States*⁴⁹, where five Justices subscribed to the view that extreme cases may arise where the government conduct was so outrageous as to violate due process even though the evidence permitted the jury to find that the defendant was predisposed.⁵⁰ However, since the Supreme Court has never applied the Due Process Clause to invalidate a conviction based on *outrageous* governmental inducement, the factual circumstances that would meet such a standard remain unclear.

Although the objective predisposition theory is an improvement over the subjective theory because it directs attention to the conduct of the police, it does so for the same irrelevant purpose, to determine whether a person, hypothetical rather than actual, would be predisposed to commit the crime in question. When an entrapment defense is raised in a criminal case, public policy issues arise, such as whether the entrapment is necessary for efficient law enforcement of the particular crime and whether the government conduct is appropriate.

As an example of the problems inherent in the objective predisposition test, consider *Carbajal-Portillo v. United States*.⁵¹ In *Carbajal-Portillo*, two defendants were convicted by a jury of having brought sixteen ounces of heroin into the United States from Mexico.⁵² The first defendant carried a package containing heroin on a 1000 mile journey within Mex-

(Iowa 1974); *People v. Turner*, 210 N.W.2d 336, 342 (Mich. 1973); ; *State v. Wilkins*, 473 A.2d 295, 298 (Vt. 1983).

48. *United States v. Russell*, 411 U.S. 423, 445 n.3 (1973) (Stewart, J., dissenting) (citing MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 702, Final Report (1971); Richard A. Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. CRIM. L.C. & P.S. 447 (1959); Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Paul W. Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959); Michael Senneff, Comment, *Entrapment in the Federal Courts*, 1 U.S.F.L. REV. 177 (1966-67)).

49. 425 U.S. 484, 491-95 (1976) (Powell, J., concurring).

50. *See id.* at 495-500.

51. 396 F.2d 944 (9th Cir. 1968) (cited in *Russell*, 411 U.S. at 445 n.3, as an example of the application of the objective test).

52. *See Carbajal-Portillo*, 396 F.2d at 945.

ico to a city adjacent to the United States border.⁵³ When he arrived at his destination, his contact said that he was unable to pay and suggested that he cross the border and sell it to a named man at a designated place.⁵⁴ The defendant left the package in Mexico, crossed the border, met the man, who was in reality a state narcotics agent, but expressed reluctance to bring the narcotics into the United States.⁵⁵ The defendant asked his contact (the agent) to cross the border so that the sale could be made in Mexico.⁵⁶ After the contact refused, the defendant agreed to bring the narcotics across the border the next day for an agreed upon price.⁵⁷ After returning to Mexico, the defendant met a local resident in a bar.⁵⁸ After discovering that they came from the same state in Mexico and had mutual friends, the second defendant agreed to transport the heroin across the border in his car.⁵⁹ Both defendants were arrested after they crossed the border.⁶⁰

The Court held that the first defendant would not have engaged in the illegal narcotics trafficking if his reluctance had not been overcome.⁶¹ The agent affirmatively persuaded him to commit the crime in order that he might arrest him.⁶² The Court held that this constituted entrapment as a matter of law.⁶³ However, with respect to the second defendant, who agreed to assist by transporting the narcotics across the border, the Court said that his willingness to participate in the illegal activity was not affected by the circumstances under which the first defendant agreed to make the sale.⁶⁴ Thus, under the objective predisposition test, we are faced with the situation in which the principal participant goes free because he was entrapped, while his lesser confederate was convicted.⁶⁵ In terms of balanc-

53. *See id.*

54. *See id.* at 945-946.

55. *See id.* at 946.

56. *See id.*

57. *See Corbajal-Portillo*, 396 F.2d at 946.

58. *See id.* at 947.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See Corbajal-Portillo*, 396 F.2d at 947.

63. *See id.*

64. *See id.*

65. *See id.*

ing the interests, which are discussed below, the government's need for entrapment to stop the flow of illegal drugs into the United States is substantial, and the extent and nature of government involvement is well within acceptable bounds. Therefore, both convictions should have been sustained.⁶⁶

IV. Balancing the Nature and Extent of Government Involvement Against the Government's Need for Entrapment

A. *The Six Entrapment Cases Decided by the Supreme Court*

The six entrapment cases decided by the Supreme Court of the United States are more easily rationalized as balancing the government's need for entrapment against the nature and extent of government inducement than they are by the criminal's subjective or objective predisposition to commit a crime. Balancing competing interests through trade-offs employs the method of economic rationality.⁶⁷ This method allows a judge, lawyer, or commentator to order cases consistently. However, it should be noted that the method of economic rationality does not postulate that it is always possible to order cases in which judges balance interests via trade-offs, but only that if a consistent ordering is not possible, the inconsistency must be due to a mistake or conflicting preferences among judges.⁶⁸

The six cases involve three types of crimes: one instance of receiving (as opposed to producing or selling) child pornography through the mail,⁶⁹ four cases of selling controlled substances,⁷⁰ and one case of alleged solicitation of a bribe for an official act.⁷¹

66. See *infra* part IV.

67. See HAL VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 120-23 (1987); See also EDWIN MANSFIELD, *MICROECONOMICS*, Chs. 3, 7 (7th ed. 1991); PAUL SAMUELSON & WILLIAM NORDHAUS, *ECONOMICS*, Chs. 6, 8 & App. (14th ed. 1992); JOSEPH STIGLITZ, *ECONOMICS*, Chs. 8, 12 & App. (1993).

68. See VARIAN, *supra* note 69. One or more of the decisions must be in error because economic rationality is *transitive*. The property of transitivity in economic rationality requires a rigorous consistency: it says that if $x = y$, and $y = z$, then $x = z$; or if $x > y$, and $y > z$, then $x > z$. See *id.* at 35, 120-23. However, if judges have conflicting preferences and decisions are made by majority rule, individual rationality may not result in collective rationality. See DENNIS MUELLER, *PUBLIC CHOICE II*, Ch. 5 (revised ed. 1989).

69. See *infra* pp. 413-17.

70. See *infra* pp. 417-26.

71. See *infra* pp. 426-28.

Police conduct in these cases runs the gamut from surveillance that was instituted in response to a civilian complaint⁷² to an elaborate two and one-half year campaign conducted by two government agencies for the purpose of inducing a person to violate the law.⁷³

1. *Jacobson v. United States*⁷⁴

In 1984, Jacobson ordered two magazines by mail, *Bare Boys I* and *Bare Boys II*, which contained photographs of nude preteen and teenage boys.⁷⁵ The young men depicted in the magazines were not engaged in sexual activity, and Jacobson's receipt of the magazines was legal under both federal and state law.⁷⁶ Three months later, Congress passed the Child Protection Act of 1984 making illegal the receipt through the mail of sexually explicit depictions of children.⁷⁷ Shortly thereafter, postal inspectors found Jacobson's name on the mailing list of the bookstore from which he had received the magazines.⁷⁸ Over the next two and a half years, two government agencies repeatedly attempted to induce Jacobson to break the new law by ordering sexually explicit photographs of children.⁷⁹ The government used five fictitious organizations to facilitate the inducement: The American Hedonist Society, Midlands Data Research, Heartland Institute for a New Tomorrow (HINT), Far Eastern Trading Company, and Produit Outaouais (Canada). The government also used a bogus pen pal, under the pseudonym Carl Long.⁸⁰

Acting through these fictitious organizations, government agents sent material that disparaged the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials. It also exerted substantial pressure on Jacobson to obtain and read such material as part of a fight

72. *See infra* p. 426.

73. *See infra* p. 413.

74. 503 U.S. 540 (1992).

75. *See id.* at 542.

76. *See id.* at 543.

77. *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended in 18 U.S.C. § 2251).

78. *See Jacobson*, 503 U.S. at 543.

79. *See id.* at 543-47.

80. *See id.*

against censorship and the infringement of individual rights.⁸¹ For example, HINT described itself as “‘an organization founded to protect and promote sexual freedom and freedom of choice’ and stated that ‘the most appropriate means to accomplish [its] objectives is to promote honest dialogue among concerned individuals and to continue its lobbying efforts with State Legislators.’”⁸² Two solicitations raised the spectre of censorship and suggested that Jacobson ought to be allowed to do what he had been solicited to do.⁸³ The Postal Service’s solicitation described the concern about child pornography as “hysterical nonsense,” decried “international censorship,” and assured Jacobson, based on consultation with “American solicitors,” that a mail order that had been posted could not be opened for inspection without authorization of a judge.⁸⁴

When, after two and a half years of persuasion by government agents, Jacobson ordered Boys Who Love Boys from a catalogue sent to him by one of the fictitious organizations, he was arrested after delivery of a photocopy of the magazine.⁸⁵ In Jacobson’s home “the government found the Bare Boys magazines and the materials that the government had sent to him in the course of its protracted investigation [and solicitation], but no other materials that would indicate that petitioner collected or was actively interested in child pornography.”⁸⁶

Jacobson was convicted of violating a provision of the Child Protection Act of 1984, which criminalizes the knowing receipt through the mails of a visual depiction that involves the use of a minor engaging in sexually explicit conduct.⁸⁷ The Eighth Circuit reversed, but then on rehearing affirmed the conviction.⁸⁸ The Supreme Court reversed, holding that:

[b]ecause the Government overstepped the line between setting a trap for the “unwary innocent” and the “unwary criminal,” . . . and as a matter of law failed to establish that petitioner was inde-

81. *See id.* at 546-47.

82. *Id.* at 552 (quoting Record, Defendant’s exhibit 13).

83. *See Jacobson*, 503 U.S. at 546-47.

84. *Id.* at 547.

85. *See id.*

86. *Id.*

87. *See id.* *See also* 18 U.S.C. § 2252(a)(2)(A) (1984 & Supp. 1997).

88. *See United States v. Jacobson*, 893 F.2d 999 *aff’d* 916 F.2d 467 (1990) (en banc).

pendently predisposed to commit the crime for which he was arrested, we reverse the Court of Appeals' judgment affirming his conviction.⁸⁹

The Court said that the evidence that Jacobson was ready and willing to commit the offenses came only after the government had devoted two and a half years to convincing him that he had, or should have had, the right to engage in the very behavior proscribed by law. Moreover, the Court stated that "[h]ad the agents . . . simply offered [Jacobson] the opportunity to order child pornography through the mails, and . . . [h]e had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction."⁹⁰

In her dissent, Justice O'Connor said that although the government agents admittedly did not offer Jacobson the chance to buy child pornography right away, the Court had previously held that a defendant's predisposition is to be assessed as of the time the government agents first suggested the crime, not when the government agent first became involved.⁹¹ However, in the last paragraph of her dissenting opinion, she stated forthrightly the essence of the case: "*The crux of the Court's concern in this case is that the Government went too far and 'abused' the 'processes of detection and enforcement' by luring an innocent person to violate the law.*"⁹²

In Figure 1, *Jacobson* and the Supreme Court's other five entrapment cases, which are discussed below, are depicted in relation to two competing policy issues that are balanced through trade-offs: the government's need for entrapment and

89. *Jacobson*, 503 U.S. at 542. See also *Sherman v. United States*, 356 U.S. 369, 372 (1958).

90. *Jacobson*, 503 U.S. at 549-550. "It is well settled that 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. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." *Sorrels v. United States*, 287 U.S. 435, 441 (1932) (citations omitted).

91. See *Jacobson*, 503 U.S. at 555-56 (O'Connor, dissenting). Justice O'Connor feared that "the Court's opinion could be read to prohibit the Government from advertising the seductions of criminal activity as part of its sting operation," and that such a restriction "would be especially likely to hamper sting operations such as this one, which mimic the advertising done by genuine purveyors of pornography." *Id.* at 557-58.

92. *Id.* at 560 (emphasis added).

the nature and extent of government inducement. The relative need for entrapment, from little to great, is ranked on the horizontal axis. The nature and extent of police inducement from simple solicitation to elaborate and prolonged entrapment schemes is ranked on the vertical axis. *Jacobson* is depicted in the upper left hand corner of Figure 1; it belongs at the intersection of a relatively high value on the Nature and Extent of Government Inducement axis because the tactics employed violate fundamental fairness,⁹³ and of a relatively low value on the

93. *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915) was the first case in which a federal court clearly sustained a claim of entrapment by government officers as a defense to an indictment. A federal agent lured Woo Wai, a Chinese merchant who had resided for many years in San Francisco, into an illegal immigration scheme. The purpose of the scheme was to place Woo Wai in a position where he would disclose facts of which he was suspected to have knowledge, knowledge not shown to be derived from unlawful acts of his own, but which related only to the unlawful acts of other persons—certain officers of the Immigration Commission at San Francisco. See *id.* at 413.

The agent employed a detective who approached Woo Wai and suggested to him that he knew a scheme by which they could make money. Without disclosing the nature of the scheme, the detective induced Woo Wai to accompany him to San Diego, more than 500 miles away. The expenses of Woo Wai and the detective were paid by the government. The detective introduced Woo Wai to local immigration inspectors at San Diego, who had been informed of the nature of the plan. In their presence, the detective made the proposition that they permit Woo Wai to bring Chinese across the Mexican border, for which they should receive \$50 a head. The inspectors assured him that no arrest would be made or they too would go to jail. See *id.* Woo Wai declined. After returning to San Francisco, the detective again urged Woo Wai to carry out the scheme. Subsequently Woo Wai, accompanied by his partner and an agent, went to San Diego a second time and had another interview with the inspectors, "and again Woo Wai and his partner returned to San Francisco, for the reason, as Woo Wai testified, that he did not like to handle this kind of work." *Id.* at 419. Nearly a year later, the detective was still urging Woo Wai to enter into the scheme. One of the inspectors Woo Wai had met in San Diego wrote several letters to him for the same purpose, detailing how the scheme could be carried out and methods of avoiding arrest. The inspector went so far as to go to San Francisco to interview Woo Wai. It was not until more than a year and a half after the scheme was initiated "that Woo Wai finally assented to enter into the scheme that had been so assiduously and persistently urged upon him." *Id.*

The trial court charged the jury that even if they believed the defendant, those facts would not constitute a valid defense in law to the charges. See *id.* at 413. The Ninth Circuit reversed the judgment and remanded the case for a new trial. *Woo Wai*, 223 F. at 416. The Court said there was no evidence that, prior to the time when the detective first approached Woo Wai, that any of the defendants had ever been engaged in the unlawful importation of illegal Chinese immigrants. One of the grounds for reversal was that, "it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case . . ."

Need for Entrapment axis.⁹⁴Nature & Extent of
Government InvolvementUnfair Tactics and/or
Prolonged Entrapment
Schemesx *Jacobson*
Entrapment as a
Matter of Lawx *Sherman*x *Sorrells*
Jury Issuex *Russell* NO Entrapment as a
Matter of Lawx *Hampton*x *Mathews*Simple Solicitation
Fair TacticsReceiving
Pornography
by MailSelling
Controlled
SubstancesBribing
Government
Officials

Little Need

Great Need

Government's Need for Entrapment

Id. at 415.

In terms of Figure 1, the nature and extent of government involvement in *Woo Wai* is as egregious as that in *Jacobson*; and, while the offense of unlawful importation of illegal immigrants is arguably more serious than one instance of receiving pornography through the mail, *Woo Wai* should be depicted well within the upper left quadrant in which there is entrapment as a matter of law.

94. In *United States v. Kros*, 296 F. Supp. 972 (E.D. Pa. 1969), government investigators placed an advertisement in *Swingers Life Magazine*, initiating the correspondence that culminated in defendant's mailing of obscene films. Although several of the defendant's letters did reflect an interest in buying and selling films, such activity is not an indictable offense and none of the material evidence presented by the government reflected defendant's intention to violate federal law by using the mails for delivery of obscene films. The evidence at trial clearly indicated that defendant used the mails only because his correspondent (a federal agent) insisted that he do so. The defendant's past correspondence showed that he was primarily interested in meeting other people who shared his enjoyment of extra-marital or unusual sexual activities. Indeed, the record shows that on at least two occasions he was successful in meeting a sexual partner through responding to advertisements such as the one placed by the government. See *id.* at 978. The court said that "[t]he doctrine of entrapment focuses both upon the Government's conduct and defendant's criminal predisposition, but the thrust of the doctrine is to enjoin the government from acting in improper ways." *Id.* at 979. The court reversed defendant's conviction, stating that "[t]o sustain a conviction in this case would be to give judicial approval to methods of law enforcement which can only in the long run contaminate the temple of justice itself." *Id.* at 979. In terms of Figure 1, *Kros* would be depicted just below *Jacobson*, well within the area of acquittal as a matter of law.

Figure 1

2. *Sherman v. U.S.*⁹⁵

A government informant first met Sherman at a doctor's office where both were being treated for narcotics addiction.⁹⁶ The informant, who was under criminal indictment for illegally selling narcotics, had agreed to aid federal agents in apprehending other sellers of illegal drugs in return for a reduced jail term.⁹⁷ Subsequently, he received a suspended sentence.⁹⁸ The informant testified that although he believed Sherman was undergoing treatment for narcotics addiction, he nonetheless sought to persuade him to obtain and sell narcotics.⁹⁹ In subsequent meetings, the informant engaged Sherman in conversations concerning mutual experiences regarding their narcotics addiction.¹⁰⁰ The informant then appealed to Sherman's sympathies by asking Sherman to supply him with narcotics because he was not responding to treatment.¹⁰¹ At first, Sherman tried to avoid the issue.¹⁰² The informant testified that he first had to overcome Sherman's refusal, then his evasiveness, and finally his hesitancy in order to achieve capitulation.¹⁰³ Only after several requests over an extended period of time, predicated on the informant's presumed suffering, did Sherman finally acquiesce.¹⁰⁴ The informant not only caused Sherman to procure a source of narcotics, but apparently also induced him to return to the habit.¹⁰⁵ Sherman obtained narcotics which he shared with the informant who in turn shared in the cost of the narcotics,

95. 356 U.S. 369 (1958).

96. *See id.* at 371.

97. *See id.* at 373-74.

98. *See id.*

99. *See id.* at 373.

100. *See id.* at 371.

101. *See Sherman*, 356 U.S. at 371.

102. *See id.*

103. *See id.* at 373.

104. *See id.* at 371.

105. *See id.* at 373. The government introduced Sherman's two past narcotics convictions as evidence of Sherman's predisposition to commit the crime. The Supreme Court held that a nine-year old sales conviction and a five-year old possession conviction were insufficient to prove Sherman was ready to sell narcotics when the informant approached him, especially where the record established that he was trying to overcome his narcotics habit. *See Sherman*, 356 U.S. at 375-76.

the taxi fare and other expenses necessary to obtain the drug.¹⁰⁶ After several such sales, the informant, who had been the instigator of at least two other prosecutions, told federal agents that he had another seller for them.¹⁰⁷ On three separate occasions, government agents observed Sherman pass narcotics to the informant in return for money supplied by the government.¹⁰⁸ When Sherman's apartment was searched after his arrest, no narcotics were found.¹⁰⁹ There was also no evidence that Sherman was involved in the narcotics trade.¹¹⁰

Sherman's conviction for the illegal sale of narcotics was subsequently overturned by the Second Circuit due to improper jury instructions relating to the issue of entrapment.¹¹¹ Sherman's second trial resulted in a conviction that was overturned by the Supreme Court which held that he was entrapped as a matter of law.¹¹² The federal agent in charge of the case testified that he approved the set-up without question. The Court, however stated that the government cannot make such use of an informant and then claim disassociation though ignorance¹¹³ because, "law enforcement does not require methods such as this."¹¹⁴

106. *See id.* at 371.

107. *See Sherman*, 356 U.S. at 373-74.

108. *See id.*

109. *See id.* at 375.

110. *See id.*

111. *See Sherman v. United States*, 200 F.2d 880 (2d Cir. 1952) (Hand, J.).

112. *See Sherman*, 356 U.S. at 373.

113. *See id.* at 373-74. With respect to the facts of this case Justice Frankfurter, concurring, said "it is clear that the Court in fact reverses the conviction because of the conduct of the informant Kalchinian, and not because the Government has failed to draw a convincing picture of petitioner's past criminal conduct." *Id.* at 383.

114. *Id.* at 376. In *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), the court held that there was no entrapment because defendants had a predisposition to manufacture and sell bootleg whiskey from the time the federal agent first contacted them. The convictions were nevertheless reversed because the government may not, "involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators." *Id.* at 787. This decision was disapproved of in *United States v. Russell*, 411 U.S. 423, 428-29 (1973).

A federal agent, who posed as a member of the "Syndicate" and wanted to purchase large quantities of illegal liquor, was introduced to defendants by an informant. *See Green*, 454 F.2d at 784. Defendants sold the agent eight gallons of illegal liquor, after which federal agents raided a still on defendant's property. *See id.* Defendants pleaded guilty and were sentenced to six months in jail. *See id.*

Because the government was responsible for this elaborate and prolonged attempt to induce Sherman to sell controlled substances, the conduct in *Sherman* is depicted at a relatively high value on the Nature and Extent of Government Inducement axis. Although the conduct in *Sherman* is as inappropriate as the conduct in *Jacobson*, the conduct in *Sherman* is depicted at a slightly lower value because the government's conduct in *Sherman* is indirect and based on negligence, rather than direct and intentional as in *Jacobson*. On the Government's Need for Entrapment axis, *Sherman* is depicted at a slightly higher value than *Jacobson* because there is a greater need to apprehend those who instigate or peddle illegal materials or substances (pornography and drugs, for example) than those who receive them.¹¹⁵ This is especially true if the seller is involved in more than a single instance.¹¹⁶

While defendants were out on bail and awaiting sentencing, the agent, whose true identity was still unknown to defendants, initiated telephone contact with one of the defendants concerning further relationship between them. *See id.* This reestablishment of contact occurred at a time when the agent would ordinarily have had no reason to recontact the defendants, because his earlier undercover work had been successfully completed. *See id.* at 786. "Second, the course of events which led to the [subsequent] arrests was of extremely long duration, lasting approximately two and one-half years if measured from the defendants' 1963 release from jail, or three and one-half years if measured from the [agent's] reinitiation of contact." *Greene*, 454 F.2d at 786. Third, the agent's involvement in the bootlegging activities was also substantial in nature, treating defendants as partners and offering to provide a still, a still site, still equipment, and an operator. *See id.* He actually provided two thousand pounds of sugar at wholesale. *See id.* Fourth, the agent pressured defendants into producing bootleg alcohol. *See id.* at 787. Fifth, the federal agent helped reestablish, and then sustain, criminal operations that had ceased with the first convictions. *See id.* "Finally, throughout the entire period involved, the government agent was the only customer of the illegal operation he had helped to create." *See Greene*, 454 F.2d at 787.

In terms of Figure 1, this selling of controlled substances case belongs at or above *Sherman* on the Nature and Extent of Government Involvement axis, well within the upper left hand area where defendants are acquitted as a matter of law.

115. *See id.* at 784.

116. In *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933), two salesmen, who had plead guilty to selling obscene stories and pictures which defendant furnished to them, agreed to become decoys in a plan to capture the defendant engaging in similar conduct. The court held that the defendant, who regularly sold and distributed obscene matter, was not entrapped notwithstanding that federal agents had instigated the violation in question. *See id.* at 1008. In terms of Figure 1, this case would be depicted at a very low level on the Nature and Extent of Government Involvement axis (simple solicitation) and at the level of selling illegal substances on the Need for Entrapment axis, well within the area where defendants are not entrapped as a matter of law.

3. *Sorrells v. United States*¹¹⁷

During the “prohibition” era, when the sale of liquor was illegal, a federal agent visited Sorrell’s home, posing as a tourist.¹¹⁸ Accompanying the agent were three local residents who were all well acquainted with the defendant.¹¹⁹ At trial, one resident stated that the agent was introduced as a furniture dealer from Charlotte.¹²⁰ The agent, who was the only person among those present who said anything about procuring liquor, told the defendant that he wished to purchase a half gallon of whiskey to take back to Charlotte for a friend. In response, the defendant stated that, “he did not fool with whiskey.”¹²¹ The agent made a second request of the defendant which was equally unsuccessful.¹²² During a conversation which lasted approximately one and a half hours, the agent learned that defendant and another witness were World War I veterans who had served in the 30th Division. The agent himself had served in that same division. The conversation turned to their war experiences, whereafter the agent again asked defendant if he could get him some liquor.¹²³ There was conflicting testimony as to whether the agent asked the defendant to sell liquor to him a total of three times or as many as five times before the defendant acquiesced.¹²⁴ The defendant finally agreed to, “see if he could get a half gallon of liquor.”¹²⁵ The defendant left the group and returned about twenty or thirty minutes later with the liquor.¹²⁶ The agent then paid the defendant five dollars for the liquor.¹²⁷ A witness, who had been in the 30th Division, testified that he believed that one former war buddy would get li-

117. 287 U.S. 435 (1932).

118. *See id.* at 439.

119. *See id.*

120. *See id.* at 440.

121. *See id.*

122. *See Sorrells*, 287 U.S. at 439.

123. *See id.*

124. *See id.* at 440.

125. *See id.*

126. *See id.* at 439-41. Witnesses for the defendant testified as to his good character and that they had never heard of him being in the liquor business. To rebut this testimony, the government called three witnesses who testified that the defendant had the general reputation of a rum runner. *See Sorrells*, 287 U.S. at 439-41.

127. *See id.* at 439.

quor for another. There was also conflicting evidence as to whether the defendant had a reputation as a "rum runner."¹²⁸

Sorrells was convicted of selling one-half gallon of whiskey in violation of the National Prohibition Act.¹²⁹ The trial court found, as a matter of law, that there was no entrapment and thus did not submit the entrapment issue to the jury. The Fourth Circuit affirmed¹³⁰ and the Supreme Court reversed the decision, holding that the trial court erred in refusing to submit the issue of entrapment to the jury.¹³¹

128. See *id.* at 439-40.

129. See *id.* at 438.

130. See *United States v. Sorrells*, 57 F.2d 973 (4th Cir. 1932).

131. See *Sorrells*, 287 U.S. at 452. For a discussion of Justice Roberts' dissenting opinion, see *supra* notes 4 and 12, and accompanying text. In *Butts v. United States*, 273 F. 35 (8th Cir. 1921), the defendant, who in 14 years had 18 operations for tuberculosis of the bones, was addicted to the pain reliever, morphine. He had never sold or dealt in the drug prior to the transaction which formed the basis for his prosecution. A government informant, who was also addicted to morphine, was acquainted with the defendant but had never obtained any morphine from the defendant prior to the transaction for which the defendant was prosecuted. The informant, who had served jail time for violation of the Narcotics Act and had recently been arrested for another violation, was told that he would be released if he agreed to act as a government informant. He called the defendant on the telephone and told him that he was interested in obtaining some morphine. See *id.* at 37. When the defendant replied that he had none, the informant asked him if he could get an ounce of morphine. The defendant replied that he did not have any morphine himself, and that he could not get any. The informant called again the next day and again the defendant told him that he had no morphine. When the informant renewed his request for morphine, defendant agreed to get some morphine, for which the informant paid \$190. The court of appeals held that the district court erred in refusing to instruct the jury on entrapment as requested by defendant's counsel. See *id.* at 38.

In *Lutty v. United States*, 198 F.2d 760 (9th Cir. 1952), which also involved the sale of narcotics, the Ninth Circuit held that the trial court erred in declining to instruct the jury on the defense of entrapment in view of conflicting testimony; defendant's testimony, if believed, portrayed impermissible actions by enforcement officers, inducing defendant to commit the crime. The defendant alleged that the government's witness had become a close friend and drinking companion of his, and that the witness entrapped him by making an appeal to his sympathy for a fictitious heroin addict who needed heroin. See *id.* at 761.

In *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933), the trial court erred in not submitting to the jury the question of whether government agents took unfair advantage of the sympathy defendant would naturally have for a person he thought was addicted to morphine and with whom he formerly had illicit intimate relations. The court held that if defendant acted solely upon the belief that by doing so he would alleviate her suffering, and he was not in any other way interested in the unlawful sale, this would amount to entrapment. See *id.* at 994.

Although *Sorrells* is similar to *Sherman* in that in both cases defendants were induced to sell controlled substances through an appeal to empathy and fellowship, the solicitations in *Sorrells* were not as morally blameworthy as in *Sherman*. Causing a person to return to drug abuse for the purpose of reducing one's own jail sentence, as was the case in *Sherman*, is more unscrupulous than an appeal to violate the law based on common war experience. Additionally, the *Sherman* entrapment scheme was much more prolonged than that in *Sorells*. This analysis is borne out by the Supreme Court's rulings in these cases. In *Sherman*, the Court held that there was entrapment as a matter of law,¹³² while in *Sorrells* the Court held that the issue should have been submitted to the jury.¹³³ Thus, in Figure 1, *Sorrells* is depicted at a relatively low level on the Nature and Extent of Government Inducement axis; it is depicted at the same level on the horizontal Need for Entrapment axis because both cases involve the sale of controlled substances. Since the Supreme Court's holding that the entrapment scheme in *Sorrells* is a question for the jury, it is depicted in the area between cases like *Sherman* and *Hampton*¹³⁴ (discussed below). *Sherman* is ranked higher than *Sorrells* because where there is entrapment as a matter of law, the nature and extent of government inducement outweighs the need for entrapment. On the other hand, cases like *Hampton* are ranked below *Sorrells* because there is no entrapment as a matter of law; and because the need for entrapment outweighs the nature and extent of government inducement.

4. United States v. Russell¹³⁵

In *Russell*, a federal agent went to the defendants' home and offered to supply the chemical phenyl-2-propanone, an essential, difficult to procure, but legal ingredient in the manufacture of methamphetamine ("speed"), in return for half of the

Numerous cases affirming convictions after the issue had been properly submitted to the jury are cited in *Sherman v. United States*, 356 U.S. 369, 377 n.8 (1958). In terms of Figure 1, these cases would be depicted at or close to *Sorrells*.

132. See *supra* note 113.

133. See *supra* note 130.

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

135. 411 U.S. 423 (1973).

drug produced.¹³⁶ During the conversation, one of the defendants revealed that he had been making the drug for six months. He took the agent to a methamphetamine laboratory where the agent observed an empty bottle with the chemical label phenyl-2-propanone. As arranged, the agent returned with a supply of phenyl-2-propanone and observed the manufacturing process. The following morning, the agent was given one-half of the drug and bought the other half for \$60.¹³⁷ About one month later, the agent returned and the defendant sold him more methamphetamine. Three days later, the agent returned with a search warrant and seized several items, including an empty bottle of phenyl-2-propanone and another partially filled bottle of the same.¹³⁸

Russell and two codefendants were convicted of unlawfully manufacturing and selling processed methamphetamine. The defendant conceded that the jury could have found him predisposed to commit the offenses.¹³⁹ The Court of Appeals for the Ninth Circuit, with one judge dissenting, reversed the conviction and concluded that there was entrapment as a matter of law solely for the reason that a undercover agent supplied an essential chemical for manufacturing the drug.¹⁴⁰ The Ninth Circuit reasoned that, "a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise."¹⁴¹ The Supreme Court, in reversing the decision stated that, "[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would

136. *See id.* at 425-27.

137. *See id.* at 426.

138. *See id.* at 425-27. In *Lewis v. United States*, 385 U.S. 206 (1966), an undercover federal narcotics agent, who had misrepresented his identity on the telephone, was twice invited to the home of petitioner for the purpose of executing unlawful narcotics transactions. *See id.* at 207. The defendant did not raise an entrapment defense but argued that his Fourth Amendment rights were violated. The Supreme Court sustained the conviction and held that when a home is opened as a place of illegal business, the Fourth Amendment is not violated when a government agent entered pursuant to an invitation and did not see, hear, or take anything unrelated to the business purpose of his visit. *See id.* at 211. In terms of Figure 1, *Lewis* would be depicted at or near *Russell*.

139. *See Russell*, 411 U.S. at 433.

140. *See id.* at 424.

141. *See id.* (quoting *United States v. Russell*, 459 F.2d 671, 673 (9th Cir. 1972)).

absolutely bar the government from invoking judicial processes to obtain a conviction, . . . the instant case is distinctly not of that breed.”¹⁴² The Court further stated that the agent’s contribution of phenyl-2-propanone to the criminal enterprise already in progress was scarcely objectionable.¹⁴³ The chemical itself is harmless, and its possession is legal. Additionally, the Court found that while the government may have been seeking to make it more difficult for drug rings such as the defendant’s to obtain the chemical, the evidence nonetheless indicated that the chemical was obtainable. Here, the law enforcement conduct stopped far short of violating that, “fundamental fairness [which is] shocking to the universal sense of justice.”¹⁴⁴ Thus, since the Court held that there was no entrapment as a matter of law, *Russell* should be placed below *Sherman* on the Nature and Extent of Government Inducement axis in Figure 1. Since both cases involve the sale of controlled substances, the cases are at the same level on the Need for Entrapment axis.

5. Hampton v. United States¹⁴⁵

According to the testimony of a government informant, defendant observed “track” (needle) marks on the informant’s arms while they were “shooting” pool. The defendant then told the informant that he needed money and that he could get some heroin for him.¹⁴⁶ The informant responded that he could find a buyer, and the defendant suggested that he do so. The informant called a government agent and arranged for a sale. After two federal agents posed as narcotics dealers and bought heroin from the defendant on two separate occasions, the defendant was arrested.¹⁴⁷ The defendant’s version of the events was quite different; he claimed that all of the drugs he sold were supplied by the informant.¹⁴⁸

142. See *Russell*, 411 U.S. at 431-32 (citations omitted). The Supreme Court reaffirmed the subjective predisposition theory of the entrapment defense as set forth in the majority opinions in *Sorrells* and *Sherman*. See *id.* at 435-36.

143. See *id.* at 432.

144. See *id.* at 432 (citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

145. 425 U.S. 484 (1976).

146. See *id.* at 485-86.

147. See *id.* at 486.

148. See *id.* at 486-87.

The defendant was convicted on two counts of selling heroin.¹⁴⁹ On appeal before the Supreme Court, the defendant's predisposition to commit the crime was assumed to have been established.¹⁵⁰ The issue concerned the trial court's refusal to instruct the jury that the defendant should be acquitted as a matter of law if the drugs were supplied to him by an informant acting on behalf of the government. The Supreme Court held that the supplying of illegal drugs in a narcotics investigation is not illegal as a matter of law.¹⁵¹ In his concurring opinion, Justice Powell stated that the Court, "recognized that the practicalities of combating the narcotics traffic frequently require law enforcement officers legitimately to supply 'some item of value that the drug ring requires.'"¹⁵² Since the defendant initiated the discussion concerning the sale of drugs according to the informant, whose testimony was found to be credible by the jury, the nature and extent of government inducement in *Hampton* is slightly less than solicitation which is initiated by the government or its agents.¹⁵³ Thus, with respect to the Nature and Extent of Government Inducement axis of Figure 1, *Hampton* should be placed below *Russell*.

6. United States v. Mathews¹⁵⁴

Mathews, an employee of the Small Business Administration, [hereinafter "SBA"] was responsible for a government program which provided aid to small businesses. Under the program, the SBA obtained government contracts, subcontracted them to program participants, and assisted them in performing the same. The president of one of the participating

149. See *id.* at 485.

150. See *Hampton*, 425 U.S. at 489.

151. See *id.* at 488-89. If police engage in illegal activity beyond the scope of their duties, while acting in concert with a defendant, the remedy lies not in freeing the equally culpable defendant, but in prosecuting the police. See *id.* at 490. See also *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

152. See *id.* at 491 (quoting *United States v. Russell*, 411 U.S. 423, 432 (1973)).

153. The Court said that the government played a more significant role in enabling petitioner to sell contraband in *Hampton*, where it supplied an illegal drug, than it did in *Russell*, where it supplied a legal ingredient which was used in the manufacture of an illegal drug. See *Hampton*, 425 U.S. at 489.

154. 485 U.S. 58 (1988).

companies believed that Mathews was not providing his company with certain program benefits because he had refused Mathews' repeated requests for personal loans.¹⁵⁵ As a result of his complaint to a government official, federal agents launched an investigation of Mathews.¹⁵⁶ Under surveillance, the businessman offered Mathews a loan that, according to the businessman, Mathews had previously requested.¹⁵⁷ Mathews agreed to accept the loan. Two months later, the businessman met Mathews at a restaurant and gave him the money. Mathews was immediately arrested and charged with accepting a gratuity in exchange for an official act.¹⁵⁸

The district court characterized the evidence of entrapment as, "shaky at best,"¹⁵⁹ but rather than premise its denial of Mathews' motion for a jury instruction on that ground, the court held as a matter of law that Mathews was not entitled to an entrapment instruction. This rested on the fact that he did not admit having committed the crime.¹⁶⁰ Mathews was subse-

155. *See id.* at 60.

156. *See id.* In *Casey v. United States*, 276 U.S. 413 (1928), a jailer suspected that a lawyer was smuggling narcotics into prison while visiting inmates. A scheme was devised to entrap him whereby a prisoner paid the lawyer to procure morphine. The Supreme Court of the United States affirmed the lawyer's conviction. Justice Brandeis dissented. He said that, "the prosecution must fail because officers of the Government instigated the commission of the alleged crime." *Id.* at 421.

The fact that no objection on the ground of entrapment was taken by the defendant, either below or in this Court, is without legal significance. This prosecution should be stopped, not because some right of [defendant's] has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts.

Id. at 424.

Justice Brandeis's overbroad view of entrapment is similar to that expressed by Justice Roberts in *Sorrells*. *See supra* accompanying text note 18. To the contrary, the smuggling of illegal drugs into prison by a lawyer, who by virtue of his position is an officer of the court, is a very serious breach of public trust. In such cases, the government's need for entrapment, in order to protect the integrity of prisons, is much higher than in "street" sale cases; moreover, unlike *Sherman* or *Sorrells* where there was an unfair emotional appeal to sympathy and fellowship, the lawyer was merely given an opportunity to break the law. Thus, in terms of Figure 1, *Casey* should be depicted in the lower right hand corner, near *Mathews*, where there is no entrapment as a matter of law.

157. *See Mathews*, 485 U.S. at 60.

158. *See id.* at 61.

159. *Id.* at 62.

160. *See id.*

quently convicted of accepting a bribe in exchange for an official act.¹⁶¹ The case reached the Supreme Court on a procedural issue rather than the merits: did the district court err in ruling as a matter of law that Mathews was not entitled to an entrapment instruction because he refused to admit committing the crime?¹⁶² The Supreme Court, citing examples such as where a defendant charged with manslaughter is also entitled to plead self-defense, held that defendants in criminal cases are entitled to plead inconsistent defenses and reversed Mathews' conviction.¹⁶³ Under the interest balancing test for entrapment, where the defendant's predisposition to commit the crime is irrelevant, the procedural issue decided by the Supreme Court in *Mathews* would not have arisen.

On the merits, *Mathews* is depicted in the lower right corner of Figure 1, at a relatively low value on the Nature and Extent of Government Inducement axis. Because the entrapment scheme was not initiated by the government, but was commenced in response to a private citizen's complaint, it amounts to even less government inducement than in cases where solicitation is initiated by the government. It also maintains a relatively high value in terms of the seriousness of the crime, because selling official acts, which is the type of crime that if unchecked would completely undermine the public's trust in government,¹⁶⁴ is an extremely serious offense.¹⁶⁵

161. See *id.* at 61-62.

162. See *Mathews* at 62.

163. See *id.* at 62-66.

164. Such crime is endemic in many third world countries.

165. In *United States v. Williams*, 705 F.2d 603 (2d Cir. 1983), a former United States Senator and his associate were found guilty of bribery and related offenses arising out of the "Abscam" investigation. The Senator promised to use his position to help obtain government contracts for the purchase of titanium from a mining venture in which he held an interest. The promises were made in connection with a proposed loan of \$100 million to have been financed ostensibly by a fictitious entity purporting to be an enterprise of two wealthy Arab sheiks and a second Arab group's offer to purchase the mining venture for a sum that would have yielded the owners of the venture an estimated \$70 million profit. Among other defenses, the Senator contended that the methods used by government agents exceeded an outer limit of fairness mandated by the Due Process Clause. Specifically, those engaged in the "sting" operation endeavored to put words in the Senator's mouth. The Court said that there is no, "indication that the 'coaching' was persistently directed at an unwilling subject in an unconscionable effort to erode his law-abiding instincts." *Id.* at 620. The Court also noted that since the financial inducement of \$100 million was initially discussed in connection with

V. Interest Balancing Via Trade-Offs and Line Drawing by Judges

Balancing competing interests through trade-offs is central to economic rationality.¹⁶⁶ When judges, and lawyers who replicate the reasoning of judges, balance interests through trade-offs, they often use the deductive reasoning of economic rationality to engage in *line drawing*, that is, the separation of cases that should be decided one way from cases that should be decided the other way. As indicated above, economic rationality

what appeared to be an entirely legitimate business transaction, it recognized that the subtle shifting of a legitimate proposal into an unlawful one had the potential for presenting a jury with close questions of intent and thus risked incorrect fact-finding. However, the Court said that the clarity of the evidence placed this case well short of any point at which it might be apprehensive that the verdicts had been rendered questionable by governmentally-created ambiguities in the presentation of a criminal opportunity to a target. *See id.* at 613-14. *See also* United States v. Myers, 635 F.2d 932 (2d Cir. 1980); United States v. Murphy, 642 F.2d 699 (2d Cir. 1980); and in affirming their convictions, United States v. Myers, 692 F.2d 823 (2d Cir. 1982).

In Figure 1, *Williams* should be depicted at a high value on the axis which measures the nature and extent of government involvement in view of the elaborate nature of the "sting" operation, as well as the subtle shift from a legitimate proposal to an unlawful one. However, given the seriousness of the crime, bribery of a high public official, *Williams* should also be depicted at a high value on the axis representing the government's need for entrapment. Since the seriousness of the crime justifies extensive government involvement, the entrapment defense should not be allowed.

In *United States v. Hunt*, 749 F.2d 1078 (4th Cir. 1984), a North Carolina state district judge, who presided over misdemeanor cases and traffic offenses, was convicted of accepting bribes. He alleged entrapment. The court of appeals sustained his conviction on the ground that a ready response to solicitation showed predisposition. The prosecution arose from an undercover investigation of corruption by federal agents after they received information from several individuals that they could bribe ("deliver") the judge. A federal agent presented himself to an intermediary as a representative of a criminal syndicate that was interested in making financial investments in the area as a front for various illegal activities, and needed protection from local authorities. The intermediary introduced the defendant to federal agents, who met him at a motel for an exploratory meeting. No explicit offer of money was made at that meeting. At subsequent meetings, the defendant accepted money in return for protection of the planned gambling venture. The defendant also agreed to set low bonds for those arrested for drug dealing. The defendant further agreed to "take care" of traffic tickets and help the agent get a license for a business that would be a drug smuggling front. *See id.* at 1079-82. Although the nature and extent of government involvement is substantially greater than in *Mathews*, the seriousness of official bribery justifies the entrapment scheme. In terms of Figure 1, this case would be depicted within the area of no entrapment as a matter of law.

166. *See supra* note 38.

does not postulate that all cases in which judges balance interests via trade-offs must be capable of a consistent ordering, but only that if a consistent ordering is not possible the inconsistency must be due to a mistake or conflicting preferences among judges.¹⁶⁷ As an example of how the logic of balancing interests via trade-offs aids in line drawing, consider a controlled substance entrapment case in relation to the four controlled substance cases depicted in Figure 1. For ease of reference, these four cases are reproduced in Figure 2.

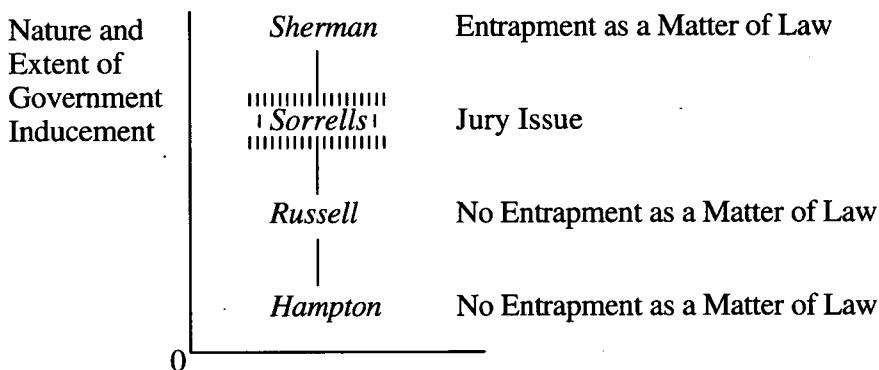


Figure 2

If the facts of a controlled substance case require that it be ranked at or below *Russell* on the Nature and Extent of Government Inducement axis, there is no entrapment as a matter of law. If, however, the case is ranked at or above *Sherman* on the same axis, there is entrapment as a matter of law. If the case ranks close to *Sorrells* in terms of the Nature and Extent of Government Inducement, it is one about which reasonable persons can differ. As case law develops and precedents accumulate, the gray area between *Sherman* and *Russell* may become narrowed. If a court determines that there is entrapment as a matter of law in a case that ranks below *Sherman* yet above *Sorrells* in terms of the Nature and Extent of Government Inducement, the area between *Sherman* and *Russell* shrinks. This use of deductive reasoning is quite general. For example, whenever courts engage in balancing of interests through trade-

167. See *supra* text accompanying notes 38-40.

offs and a Case Y, which was decided one way, can be sandwiched between a Case X, whose outcome is in question, and a Case Z, which was decided the other way, economic rationality requires that Case X be decided like Case Y (X—Y—Z).

VI. Conclusion

An analysis of entrapment cases demonstrates that these cases are more easily rationalized as balancing interests via trade-offs between the government's need for entrapment and the nature and extent of government involvement, rather than by a defendant's predisposition to commit a crime. The "predisposition test" for entrapment, whether subjective or objective, is irrelevant to the real public policy issues which concern (A) the extent to which entrapment is necessary for efficient law enforcement, considering factors such as the crime's seriousness, secrecy, and difficulty of detection; and (B) the nature and extent of government involvement, from surveillance to simple solicitation and to elaborate and prolonged inducement. Moreover, the "predisposition test," which allows juries to hear evidence which is unduly prejudicial to the defendant, can result in entrapment decisions which are inconsistent with these policies.