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Richard A. Cowen

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CRIMINAL LAW COMMENTS AND ABSTRACTS

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THE ENTRAPMENT DOCTRINE IN THE FEDERAL COURTS, AND SOME STATE COURT COMPARISONS

RICHARD A. COWEN

It is said that a defendant is illegally entrapped when the criminal design originated in the mind of the government officer.¹ A definition of entrapment concise as any is that it is the "conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."² While decoys may be used to present an opportunity to one intending or willing to commit crime, they may not be used to ensnare the innocent and law abiding into the commission of crime.³

¹ *Sorrells v. United States*, 287 U.S. 435 (1932); *Sherman v. United States*, 356 U.S. 369 (1958).

² *Sorrells v. United States*, *supra* note 1 at 454. Any effective appeal made to the impulses of compassion, sympathy, pity, friendship, fear or hope may raise the issue. *United States v. Washington*, 20 F.2d 160, 162 (D.C. Neb. 1927).

³ *Newman v. United States*, 299 Fed. 128, 131 (4th Cir. 1924); *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921). Entrapment may oftentimes involve narcotics or liquor violations. Generally the police officer will supply a "stooge" with money to purchase from a suspected offender. Many times the suspect will readily agree to sell the drugs or liquor; he is then arrested and claims entrapment. In these situations the courts hold that it is permissible to use decoys to test a suspect.

In *Sherman v. United States*⁴ the Supreme Court recently had occasion to consider the doctrine of entrapment in the federal courts. While the Justices unanimously agreed the defendant had been entrapped, they failed to clarify the law of entrapment in three important respects: (1) the legal basis for the doctrine, (2) whether evidence of defendant's prior conduct should be admissible, and (3) whether the issue of entrapment is to be decided by the judge or by the jury.⁵ This Comment will consider these issues.

⁴ 356 U.S. 369 (1958). The facts are simple and sordid. Kalchinian, a government informer, and petitioner were under treatment to cure drug addiction when Kalchinian asked to be supplied with narcotics. Sherman resisted but after repeated requests capitulated. The trial court submitted the issue of entrapment to the jury and Sherman was found guilty. The Supreme Court reversed, finding entrapment as a matter of law.

⁵ The Court did not find it necessary to decide the questions of the admissibility of evidence of past conduct or the problem of who should decide the issue of entrapment because these issues were not argued by the parties. The Court did indicate the majority view is to submit the issue of entrapment to the jury. The lower court admitted evidence of prior convictions for narcotic offenses.

Legal Basis of the Doctrine

Courts have differed in their conclusions as to the legal theory supporting the defense of entrapment. Estoppel,⁶ public policy,⁷ and want of voluntary criminality⁸ have been advanced. The landmark case in this area, *Sorrells v. United States*,⁹ rejected both estoppel and public policy as the foundation for the doctrine. To the *Sorrells* majority the true basis was the intent of Congress, *i.e.* whether the criminal statute intended to recognize entrapment as a defense. In sustaining the defendant's claim of entrapment the Court concluded: ". . . it was not the intention of Congress in enacting the statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission."¹⁰ Thus the *Sorrells* ma-

majority viewed entrapment as a problem in statutory interpretation. Justices Roberts, Brandeis, and Stone concurred in the result but disagreed with the rationale. To them the basis for the doctrine is found in the public policy which protects the purity of government and its processes.¹¹

Twenty six years later in *Sherman v. United States*,¹² the Court again split on the same question—the legal basis for the doctrine. The majority seems to adopt the *Sorrells* basis of statutory intent when its opinion states that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." Yet the opinion is not crystal clear in deciding that the basis is the intent of Congress, for in the preceding sentence the statement appears that "When the criminal design originates with the officials of the Government and they implant in the mind of the innocent person the disposition to commit the alleged offense. . . stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search."¹³ This could indicate the majority is thinking in terms of the Supreme Court's supervisory functions over the administration of criminal justice in the federal courts, or in terms of a violation of a *constitutionally* protected right.

The concurring Justices read the majority opinion as following the *Sorrells* basis of statutory intent.¹⁴ They characterize this approach as sheer fiction; the only intent they find in the statute is to make criminal exactly what the defendant did. The refusal to convict is not because the defendant did not commit the offense but rather because the methods employed to bring about such a conviction cannot be tolerated. Law enforcement officers cannot be allowed to violate "vindicated standards of justice," there must be a "fair and honorable administration of justice."¹⁵ The concurring Justices appear to found the doctrine on public policy, or upon the supervisory jurisdiction of the Court over federal criminal procedures.

¹¹ *Sorrells v. United States*, 287 U.S. 435, 457 (1932). The doctrine rests, rather, on a federal rule of public policy.

¹² 356 U.S. 369 (1958). Chief Justice Warren wrote the majority opinion in which Justices Black, Whitaker, Burton and Clark concurred.

¹³ *Id.* at 372.

¹⁴ The concurring opinion was written by Mr. Justice Frankfurter, joined by Justices Harlan, Douglas, and Brennan.

¹⁵ *Sherman v. United States*, 356 U.S. 369, 380 (1958).

⁶ *United States v. Lynch*, 256 Fed. 983, 984 (S.D.N.Y. 1918); *United States v. Kaiser*, 138 F.2d 219 (7th Cir. 1943); *United States v. Healy*, 202 Fed. 349, 350 (D.C. Mont. 1913).

⁷ *Woo Wai v. United States*, 223 Fed. 412, 415 (9th Cir. 1915); *Strader v. United States*, 72 F.2d 589, 591 (10th Cir. 1934); *United States v. Echols*, 253 Fed. 862 (S.D. Tex. 1918); *Billingsley v. United States*, 274 Fed. 86 (6th Cir. 1921); *Ritter v. United States*, 293 Fed. 187 (9th Cir. 1923).

⁸ *Voves v. United States*, 249 Fed. 191 (7th Cir. 1918). It is clear that basing entrapment on non-voluntariness of the act is fictional. The defendant fully intended to do exactly what was done. The only thing that he did not intend was to allow the prosecuting authorities to find out.

⁹ 287 U.S. 445, 446 (1932).

¹⁰ *Id.* at 448. See also *Demos v. United States*, 205 F.2d 596 (5th Cir. 1953).

An analogous case which decided that the intent of the statute prohibited the conduct of the law enforcement officials is *Henderson v. United States*, 237 F.2d 169 (5th Cir. 1956). The court there held the defendant could not be prosecuted in a federal court when his claim of entrapment would have prevailed in a state court. This court found that defendant had been entrapped by state officers. Even though there was no participation on the part of the federal law enforcement officials the court concluded:

"The just rule seems to us to be that, when a state officer has induced a person otherwise innocent to commit a crime in order to punish him therefor, the United States cannot take over the task of punishment by prosecuting for the federal offense without allowing the defense of entrapment, the same as if the inducement had been by a federal officer. The moral wrong in each instance is equally grave, and each is equally outside of and contrary to the *spirit of the statute defining the federal offense*. In our opinion, the same high public policy in the maintenance of the integrity of administration which precludes the enforcement of a federal criminal statute, when Government officials have lured persons otherwise innocent to its violation . . . is sufficiently broad to include acts of inducement on the part of all officers of the law, state and federal alike." (Emphasis added.) 237 F.2d at 176.

The question arises, what difference does it make which basis is adopted since in both cases, *Sorrells* and *Sherman*, all Justices agreed the defendant had been illegally entrapped? One answer is that a determination of the proper basis is desirable in order to promote clarity of analysis.¹⁶ But there is a more important reason. Assume Congress were to expressly declare that entrapment is no defense to a charge of violating any federal criminal statute. If *Sorrells* is correct the defense of entrapment would be a relic of the past. No longer would there be any prohibition against luring, enticing, or tricking an otherwise innocent person into the commission of a crime. The fear expressed by one court, that weak and spineless people who find it hard to resist temptation would be prosecuted and convicted, might come true.¹⁷

It is undesirable that law enforcement officials, or their agents, be given unbridled authorization to catch and convict irrespective of the methods employed in doing so. Such free reign is not given in situations involving arrests, searches and seizures, and confessions.¹⁸ Considering the strong judicial expressions of dissatisfaction with practices constituting entrapment it seems most unlikely that these practices would be tolerated by the Court merely because Congress intended them to be. Although it is highly improbable that Congress would ever outlaw entrapment as a defense, the mere possibility, though remote, illustrates the weakness in the *Sorrells* position.

The greater number of cases follow the concurring opinions of *Sorrells* and *Sherman* in deciding that the correct basis is public policy.¹⁹ The *Sorrells* majority, in rejecting this basis and assuming that the criminal statute was enacted in furtherance of public policy and that, consequently, courts are not free to override the legislative determination of public policy, overlooks an important distinction. Public policy operates on different levels. At one level Congress has declared certain acts to be against public policy and therefore illegal; at an-

other level the courts have declared that certain methods employed by law enforcement officers are violative of accepted standards of justice and therefore against public policy. There is no inconsistency or conflict when the public policy involved in legislation is distinguished from the public policy involved in police conduct.

A possible foundation for entrapment is fifth amendment due process. While this basis has not been advanced by the Supreme Court, and finds only negligible support in lower federal courts,²⁰ it is significant that in sustaining the defense, courts speak of entrapment as "detestation", "indecent", "to be deplored", "intolerable",²¹ "unconscionable"²²—all implying that what has been done shocks the conscience and offends a sense of fairness and justice. Considering the various phrasings of the due process test, e.g., "fair play and substantial justice",²³ "fundamental principles of liberty and justice lying at the base of our civil and political institutions",²⁴ "fundamental fairness",²⁵ "minimum standards of fairness",²⁶ it could be that the courts are thinking in a due process framework when entrapment is involved, for the judicial characterizations of entrapment and of due process violations are oftentimes strikingly similar.

Recognizing due process as the basis of entrapment will give the doctrine constitutional significance and end the sheer fiction of *Sorrells*' statutory interpretation. While the same considerations will be relevant if the basis is public policy, and the judicial approach probably will not differ, due process affords the more solid foundation.

²⁰ In only one case, a recent Ninth Circuit decision, has fifth amendment due process been mentioned as the basis of entrapment. *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957). The court discusses entrapment and concludes:

"A conviction so procured is in violation of the due process provision of the Fifth Amendment. . . ."

However this case is weak authority. The case was sent back for a hearing and review of the record to determine if the claim of entrapment was supportable.

²¹ This is the view of Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 263 (1942).

²² *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921).

²³ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

²⁴ *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

²⁵ *Hoag v. New Jersey*, 356 U.S. 464, 467 (1958).

²⁶ *Green v. United States*, 355 U.S. 184, 215 (1957), (Mr. Justice Frankfurter dissenting).

¹⁶ *Id.* at 381. Justice Frankfurter also fears a court may shirk responsibility in this area if Congressional intent is to be the basis.

¹⁷ *United States v. Echols*, 253 Fed. 862 (S.D. Tex. 1918).

¹⁸ See *Miller v. United States*, 357 U.S. 301 (1958); *Rochin v. California*, 342 U.S. 165 (1952); *Watts v. Indiana*, 338 U.S. 49 (1949); *Payne v. Arkansas*, 356 U.S. 560 (1958).

¹⁹ *Supra*, n. 7.

Admissibility of Evidence of Past Conduct

The overwhelming majority of cases have admitted evidence of defendant's prior conduct, reasoning that when entrapment is raised the defendant's "predisposition and criminal design are relevant."²⁷ As stated by Judge Learned Hand in *United States v. Becker*, inducement by law enforcement officers or their agents is excused when there has been an "existing course of similar criminal conduct" or where the accused has an "already formed design to commit the crime or similar crimes."²⁸

Evidence that has been admitted to satisfy either of Judge Hand's exceptions has not been limited to showing prior convictions of felonies or misdemeanors but has included hearsay testimony.²⁹ This is a wider range of admissibility than found anywhere else in the law of evidence. This can be illustrated by briefly comparing an entrapment case with the three other situations in which a criminal defendant's character may be the subject of testimony on behalf of the prosecution:

A. When a defendant places his character in issue in a criminal trial not involving entrapment the prosecution may introduce evidence of his reputation in the community.³⁰ But entrapment cases are not limited to reputation testimony for even the suspicions of one individual would be admissible to show the officers were justified in believing the accused was criminally predisposed.³¹

B. If character is an operative fact, as it is in cases of criminal libel, slander, and seduction, courts have usually held that it may be proved by evidence of specific acts. Reputation testimony may not even be admissible.³² Entrapment is analogous since character is treated as an operative fact yet there is no limitation as to the type of character evidence that is admissible in entrapment cases.

C. In the third situation evidence of prior con-

²⁷ *Carlton v. United States*, 198 F.2d 795 (9th Cir. 1952); *Sorrells v. United States*, 287 U.S. 435, 451 (1932); *Billingsley v. United States*, 274 Fed. 86 (6th Cir. 1921). *Ryles v. United States*, 183 F.2d 944, 945 (10th Cir. 1950).

²⁸ 62 F.2d 1007 (2d Cir. 1933).

²⁹ *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947), which based a finding of criminal predisposition on hearsay and conclusional evidence. In *Trice v. United States*, 211 F.2d 513, 519 (9th Cir. 1954) it was said that hearsay was proper evidence.

³⁰ McCORMICK, EVIDENCE §158 (1954).

³¹ *Ibid.*

³² McCORMICK, *supra* note 30, at §154; 1 WIGMORE, EVIDENCE §§70-74 (3rd ed. 1940).

duct is admitted to show motive, identity, lack of mistake, knowledge, system, or intent. In a non-entrapment case, testimony is limited to evidence of specific acts,³³ but when entrapment is an issue, even though the evidence is being admitted to show the same things, there is no such restriction.

Two criticisms have been made of the position of the majority of cases. The first recognizes the evidence is relevant but would refuse to admit it because of its prejudicial possibilities. In *United States v. Washington*, the court said:

"A hated and suspected man must stand before the court like any other, to be fairly tried for the offense charged against him, and not otherwise. Nothing can justify...into a trial for a specific offense hearsay complaints or officers suspicions about other offenses...Neither suspicion nor honest belief that defendant committed other offenses at other times has any place in the inquiry."³⁴

There is little doubt that a defendant with a shameful past runs a substantial risk of the jury rejecting his plea of entrapment. The characterization of the accused as a "bad actor" would be difficult to overcome. However, allowing evidence of past conduct can work to the accused's advantage when his past conduct is unblemished. Although in fact he may have readily agreed to commit the crime charged, the court or jury will give weight to a spotless record and view his claim of entrapment more favorably. *Butts v. United States*³⁵ and *Morei v. United States*,³⁶ in sustaining entrapment, placed great emphasis on the lack of prior criminality. Thus, allowing evidence of prior conduct can be a two edged sword. When past conduct is bad the claim of entrapment will be weakened, but when

³³ McCORMICK, *supra* note 30, at §157; WIGMORE, *supra* note 32, at 215-218.

³⁴ 20 F.2d 160, 162 (D.C. Neb. 1927). This court also refused to allow evidence of similar offenses.

³⁵ 273 Fed. 35 (8th Cir. 1921). As a consequence of numerous surgical operations, Butts became addicted to morphine. The government used Rudolph, a friend of Butts, to attempt a purchase from Butts. Upon the second request he acquiesced. The court relied heavily upon Butts's past conduct and ruled that when the accused had never committed such offenses and had no intent to do so, the defense of entrapment will prevail.

³⁶ 127 F.2d 827 (6th Cir. 1942). Morei had a good reputation and was lured on by the promise of great sums of money. The court reasoned that it didn't matter that Morei knew where to go to obtain heroin, the fact was he never had engaged in similar activities in the past. Morei's good conduct worked in his favor.

past conduct is exemplary the defendant will be looked upon with greater kindness.

The second criticism, that of the concurring Justices in *Sorrells* and *Sherman*, denies the relevance or materiality of such evidence. To them the sole issue is the conduct of the police rather than the character and disposition of the accused.³⁷ Their position can best be illustrated by assuming that police officers use identical enticements which induce two persons to commit a crime. If one of the offenders has a spotless past, while the other has a long history of similar offenses, is entrapment sustained in the former case yet denied in the latter? If it is, there would appear to be an inconsistency since identical conduct on the part of police officers will constitute entrapment and at the same time will not constitute entrapment. The only argument to justify such an inconsistency is that greater latitude will be allowed police officers when the "target" is believed to have a criminal predisposition.

Another problem is presented. If the accused has been guilty of identical or even similar offenses in the past will this justify unbridled enticement? Will there then be no limit to what law enforcement officials may do in an attempt to test the suspected criminal? Forcing the majority view to its extreme, does it follow that the worse the accused's record the more the police can entice, lure, and deceive, and if the accused is a hardened criminal will virtually anything short of violence be permitted? Cases which look only to the defendant's past conduct suggest that once a record of identical or similar offenses, or even reasonable belief of criminal disposition, is found then "anything goes."³⁸

³⁷ *Sorrells v. United States*, 287 U.S. 435, 459 (1932); *Sherman v. United States*, 356 U.S. 369, 382 (1958).

³⁸ Chief Justice Warren indicated in the *Sherman* opinion that questions of relevancy still remain. The Government had introduced petitioner's record of two past narcotics convictions, but Chief Justice Warren held a nine-year-old sale conviction and a five-year-old possession conviction were insufficient to prove a readiness to sell narcotics. 356 U.S. at 375, 376.

The cases which consider only the defendant's prior conduct seem to tacitly acknowledge that once "reasonable belief" is shown, or similar offenses are introduced, the defendant is a "wolf's head"—free to be lured and deceived in any way possible. A clear expression of this is found in *Wall v. United States*, 65 F.2d 993, 994 (5th Cir. 1933) where it is stated:

"It may be conceded that if the government agents suspected appellant of unlawfully dealing in narcotics, they were authorized to take steps to purchase a quantity from him, and, although the device employed was *exceedingly indecent* and *beneath the dignity* of the

It seems there must be some point beyond which the police cannot go without violating fundamental fairness and decency. The limits of permissible police conduct will be difficult to define, but difficulty should be no deterrent. The defense of entrapment should not be denied *merely* because the defendant has a criminal past or because the police have reasonable belief of criminal predisposition for there is always the chance that even the toughest criminal was enticed into the commission of the particular crime charged.

A suggested approach is to admit evidence of past convictions of felonies or misdemeanors which are identical with, or substantially similar to, the crime charged, but to limit the use of such evidence to what amounts to an impeachment of the defendant.³⁹ At the same time the issue of whether the police conduct was fundamentally unfair is relevant and should be submitted to the court or jury, whichever is to decide the issue of entrapment. The verdict will be the result of balancing police conduct against the objective proof of defendant's criminal predisposition, or lack of it.

This approach preserves the strong points of the majority and minority positions while eliminating the most glaring injustice now present—the admission of hearsay, rumor, and suspicion to "prove" criminal predisposition. Felonies or misdemeanor convictions for identical or substantially similar offenses are relevant because in the interests of effective law enforcement society is willing to allow the government freer reign when pursuing the naturally wary criminal. Admitting prior convictions will undoubtedly weaken the claim of entrapment but the question of whether police methods violated a sense of decency and fairness must be answered regardless of how bad the accused's past conduct may be. Nor is it to be feared the pendulum will swing too far in favor of the accused so that a defendant with a spotless record will always

United States, the transaction would be sufficient to support the conviction." (Emphasis added.)

See also *Ryles v. United States*, 183 F.2d 944, 945 (10th Cir. 1950); *Trice v. United States*, 211 F.2d 513 (9th Cir. 1954), admitting the defendant had been entrapped but sustaining the conviction because the officer had reasonable grounds to believe that Trice was criminally predisposed.

³⁹ The tests suggested by Judge Learned Hand in *United States v. Becker*, 62 F.2d 1007, (2d Cir. 1933) would still be the cornerstone in viewing defendant's prior conduct. Testimony as to prior conduct would be admissible as *some evidence* of an existing course of similar criminal conduct of an already formed design to commit the crime or similar crimes.

escape prosecution, for the government may still succeed in proving ready compliance.⁴⁰

The argument may be advanced that by preventing evidence of the reasonable belief the officers had that the accused was criminally predisposed, prosecutions will become more difficult and many defendants will escape conviction. If it is believed that effective prosecution requires evidence of the reasonable belief to be admissible then such evidence might be admitted, but it should be balanced against the conduct of the police. No matter how

⁴⁰ If the government can show ready compliance the claim of entrapment fails. *Masciale v. United States*, 356 U.S. 386 (1958); *Casey v. United States*, 276 U.S. 413 (1928); *Rodriguez v. United States*, 227 F.2d 912 (5th Cir. 1955); *United States v. Perkins*, 190 F.2d 49 (7th Cir. 1951).

Is Entrapment an Issue for the Judge or the Jury?

The third question on which the *Sorrells* majority and concurring Justices divided, and which was left unresolved by *Sherman*, is whether the judge or the jury is to decide if the defendant has been entrapped. The overwhelming weight of authority is that entrapment presents a question of fact for the jury unless subject to a ruling as a matter of law.⁴² Probably one reason in support of this view is that the defense of entrapment is generally raised as part of a plea of not guilty.⁴³

The concurring Justices in both *Sorrells* and *Sherman* contend the issue is for the court, since sustaining a claim of entrapment is a means of preserving judicial integrity. The court should be the proper agency to protect its own processes.⁴⁴ A second argument is that a jury verdict does not provide a sufficient guide for future law enforcement activities. The wise administration of criminal justice demands the evolution of "explicit standards" which only the court can provide.⁴⁵

⁴² *United States v. Markham*, 191 F.2d 936 (7th Cir. 1951); *Nero v. United States*, 189 F.2d 515 (6th Cir. 1951); *Yep v. United States*, 83 F.2d 41 (10th Cir. 1936); *Butler v. United States*, 191 F.2d 433 (4th Cir. 1951); *United States v. Brandenburg*, 162 F.2d 980 (3d Cir. 1947).

⁴³ *Sorrells* held that the defense of entrapment is part of a plea of not guilty. The government's contention—that if the defense is available it must be pleaded in bar to further proceedings and could not be raised under a plea of not guilty—was overruled.

The issue of whether raising the defense of entrapment admits commission of the criminal acts is beyond the scope of this comment. See Note, 70 HARV. L. REV. 1302 (1957), for a discussion of this issue.

⁴⁴ *Sorrells v. United States*, 287 U.S. 435, 457 (1932); *Sherman v. United States*, 356 U.S. 369, 385 (1958).

⁴⁵ *Sherman v. United States*, *supra* note 44 at 385.

bad the defendant's past record may be, this balance must be struck.

Admittedly this is a difficult approach. Yet it probably is no more difficult than deciding questions of negligence or intent. Each case will turn on its particular facts and a black letter rule of law may never be possible. As Judge Hand said in discussing entrapment, "We are acutely aware of the nebulous outlines that emerge but we see no escape from defining them as occasion arises. . ."⁴¹

⁴¹ *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933). See *Morei v. United States*, 127 F.2d 827, 834 (6th Cir. 1942); *United States v. Perkins*, 190 F.2d 49, 51 (7th Cir. 1951), where it is stated:

"Our courts have found it difficult to state an all-embracing rule which will define the course of conduct or provocation by government officers constituting entrapment."

While it is true that an expression by the judge will be more enlightening in clarifying a basic approach to the issue, it is doubtful that "explicit standards" can be formulated because of the necessity of considering entrapment on a case to case basis with emphasis on the particular facts of each situation.

As a means of protecting judicial processes, dismissing a case because of entrapment is similar to the court's power to punish for contempt or to exclude illegally seized evidence or confessions taken during an unnecessary delay in bringing the prisoner before a magistrate. The power of the trial judge to punish for contempt is necessary as a "mode of vindicating the majesty of law, in its active manifestation, against obstruction and outrage."⁴⁶ In *McNabb v. United States*, involving the admissibility of a confession, Mr. Justice Frankfurter expressed the view that "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."⁴⁷ The defense of entrapment has the same policy basis in its refusal to allow the abuse of judicial processes by over-zealous law enforcement officials. Entrapment can also be analogized to a decision on a question of jurisdiction, since both involve the problem of whether the doors of the court are open to the particular litigation. It should be noted that questions of con-

⁴⁶ *Offutt v. United States*, 348 U.S. 11 (1954); *Sacher v. United States*, 343 U.S. 1 (1952), says that the court will protect the processes of orderly trial.

⁴⁷ 318 U.S. 332, 340 (1943).

tempt, admissibility of confessions, and jurisdiction all involve questions of fact so it is oversimplifying the issue to say entrapment is for the jury because it depends on questions of fact.

There is a further reason why the issue of entrapment should be for the judge. When a defendant is shown to have a record of prior convictions the judge is less likely than a jury to be prejudiced against the accused because of such evidence. And if the approach to the problem of entrapment which has been suggested above is adopted, the judge is more competent to handle the difficult problem of balancing the defendant's prior conduct against the methods employed by law enforcement officers. His judicial training and experience qualify him for rendering such decisions on matters of degree.

STATE COURT COMPARISONS

The doctrine of entrapment has not received the analysis in state courts that it has in federal courts. When the defense is raised, state courts have generally disposed of it by setting forth an encyclopedia-type definition and then holding that the facts do, or do not, sustain the defense.

Illinois decisions present an example of the superficial treatment given the doctrine. In *People v. Outten*⁴⁸ the issue is stated as whether the criminal intent originated in the mind of the officer or the accused. It is there stated that "As a general rule, entrapment can exist only when the criminal intent originates in the mind of the entrapping officer, and if such intent arose in the mind of the accused there is no entrapment. . . ."⁴⁹ If this test means what it says, the defense of entrapment would always prevail for the *particular offense* charged is always the result of some law enforcement official's plan. In devising ways of testing a suspect, believing that the suspect will behave as he is known or reputed to have behaved in the past, the officer will provide an opportunity for the commission of crime. If the suspect swallows the bait, he will have committed the exact crime the officers planned. Thus, unless a defendant is caught while engaging in the commission of a crime other than the "test" crime, the offense for which he will stand

trial will be the *particular crime* devised by the police. Since the police thought of the *particular crime* first, cannot it be fairly said that the intent originated in the mind of the officer? This indicates that viewing entrapment as a matter of who first formed the intent to commit the offense may be a catch word formulation but is otherwise unsound. The basic inquiry must always be whether the particular police methods employed were permissible.

Another Illinois decision appears to place the defense of entrapment on the good faith of the officers. In *People v. Clark* the court states that "It is not an instigation or solicitation to commit a crime for an individual or officer having reason to believe another is committing a crime to furnish an opportunity for the commission of the offense if the purpose is, *in good faith*, to secure evidence against a guilty person and not to induce an innocent person to commit a crime." (Emphasis added.)⁵⁰ There is no doubt that the issue of entrapment does not depend on whether the officers acted in good faith. A police officer could honestly, and with all sincerity believe that it was necessary to confine and interrogate a suspect for days in order to crack his story, but this would not be permissible, nor will unrestrained searches and seizures be permitted merely because police officers may in good faith believe they are necessary to law enforcement. A claim of entrapment should be considered no differently. The limits of permissible police conduct are not defined by the good faith of the officers, but rather by standards of fairness and decency.

When it comes to a consideration of the basis of the entrapment doctrine, state courts exhibit the same divergence as the federal courts. *In re Horwitz*⁵¹ the Illinois court discusses both the majority and concurring *Sorrells* opinions. The only indication the Illinois court provides as to the basis it would place entrapment upon is a statement that public policy is the "simpler ground."⁵² Some states place the doctrine on public policy;⁵³ one state court, purporting to follow *Sorrells*, advances estoppel as the correct foundation⁵⁴ while another

⁴⁸ 7 Ill.2d 21, 147 N.E.2d 284 (1958); *People v. Lewis*, 365 Ill. 156, 6 N.E.2d 175 (1937); *People v. Ficke*, 343 Ill. 367, 175 N.E. 543 (1931).

⁴⁹ 360 Ill. 313, 196 N.E. 208 (1935).

⁵⁰ *Id.* at 327.

⁵¹ *State v. Marquardt*, 139 Conn. 1, 89 A.2d 219 (1952); *Falden v. Commonwealth*, 167 Va. 549, 189 S.E. 329 (1937).

⁵² *State v. Marquardt*, 139 Conn. 1, 89 A.2d 9 (1952).

⁴⁸ 13 Ill.2d 21, 147 N.E.2d 284 (1958).

⁴⁹ *Id.* at 286. See also *Beasley v. State*, 282 P.2d 249 (Okla. Ct. of Crim. App. 1955); *People v. Jackson*, 42 Cal.2d 540, 268 P.2d 6 (1954); *State v. Poague*, 72 N.W.2d 620 (Minn. 1955); *Scott v. Commonwealth* 303 Ky. 353, 197 S.W.2d 774 (1946). All these cases formulate the test of entrapment as depending upon in whose mind the criminal intent first originated.

state reads *Sorrells* as establishing public policy as the basis.⁵⁵ Thus, there is not only a difference among the states as to the basis of the doctrine but there is also a difference in interpreting *Sorrells v. United States*. Finally, the Wisconsin court has indicated its belief that the doctrine is not based upon constitutional considerations, for in *State v. Hockman* it said: "With respect to the defense of entrapment the court is not called upon to deal with constitutional considerations as it is in the case of the validity of a search warrant or of a search made without warrant. The defense of entrapment is not in such a category."⁵⁶

Two states, New York and Tennessee, appear to reject the defense of entrapment,⁵⁷ but it is arguable that in spite of the case law in both states, the defense may still be available.

In *People v. Schacher*⁵⁸ the defendant was charged with violating a New York State War Emergency Act regulation by selling a bottle of scotch whiskey for more than the established ceiling price. In rejecting the claim of entrapment the court states: "The evidence fails to support such a claim. In any event it is well settled that entrapment is not recognized as a defense in New York State."⁵⁹ While this appears to be a clear rejection of the doctrine, the court itself suggests a reason why the rejection may be limited to the facts of the case. In discussing the regulation violated by the defendant the court indicates, in the following statement, that intent was not a necessary element of the crime. "In the opinion of the court the regulation in question is *malum prohibita* and under well established principles an intent is unnecessary. The mere commission of the act enjoined is sufficient to justify a conviction."⁶⁰ Whether the defendant knew he was committing an offense is immaterial; all that mattered is he sold the whiskey for more than the ceiling price. However, when an offense is involved where the *mens rea*, or criminal intent,

is an ingredient of the offense, the mere commission of the prohibited acts may not be enough to convict. An intent must be established, and if entrapment is claimed it becomes necessary to consider the voluntariness of the defendant's conduct. In other words, when a criminal intent is a requisite to the commission of a crime, it becomes important to decide if the defendant committed the crime voluntarily or if he was lured or enticed into its commission. If this argument is accepted, then the question of entrapment in cases requiring a criminal intent is still open in New York. Entrapment would be unavailable only in cases where intent is not an element of the crime, *i.e.* in cases where the mere commission of the prohibited acts is sufficient to sustain a conviction.

In three Tennessee supreme court decisions it is said that the defense of entrapment is not recognized. The latest expression is found in *Goins v. State*,⁶¹ but in that case no acts of state officers or their agents were involved. An employee of the victim had agreed to leave the store doors open so the defendant could enter and steal. In *Palmer v. State*⁶² the court again says that the defense is not recognized, although there is no discussion nor are any reasons advanced. This case can be explained as an example of ready compliance, for the defendant sold whiskey to a plainclothes detective without the least hesitation; moreover it is not clear that the defendant really relied on entrapment as a defense. From the report of the case defendant relied mainly on an alibi, contending he was somewhere else at the time the crime was allegedly committed. *Thomas v. State*⁶³ rejects entrapment yet there is no discussion of why it is unavailable.

*Hyde v. State*⁶⁴ is the case that seems to lay at the bottom of Tennessee's rejection of entrapment as a defense. Yet a careful reading of *Hyde* indicates that the defense was not denied because entrapment was not recognized, but because the facts of the case did not support the defense. Nowhere did the *Hyde* decision expressly reject the availability of entrapment; *Hyde* merely denied entrapment because of defendant's ready compliance.

Thus it is arguable that there has not been an authoritative expression on the question of entrapment by the Tennessee courts, and whether the doctrine is recognized is an open question. Ten-

⁵⁵ *Falden v. Commonwealth*, 167 Va. 549, 189 S.E. 329 (1937).

⁵⁶ 2Wis.2d 410, 76 N.W.2d 446 (1957). The court fails, however, to state what category it is in.

⁵⁷ A third state, Florida, has by statute abolished the defense of entrapment in a limited number of cases. 22 FLA. STAT. ANN. §838.11 (Cum.Supp. 1957) provides:

"The defense of entrapment is hereby abolished and prohibited in prosecution for bribery, offering bribes, accepting bribes, and offering or accepting unauthorized compensation for performance or non-performance of official duty. . . ."

⁵⁸ 47 N.Y.S.2d 371 (1944).

⁵⁹ *Id.* at 372.

⁶⁰ *Id.* at 373.

⁶¹ 192 Tenn. 32, 237 S.W.2d 8 (1950).

⁶² 187 Tenn. 527, 216 S.W.2d 25 (1948).

⁶³ 182 Tenn. 380, 187 S.W.2d 529 (1945).

⁶⁴ 174 S.W. 1127 (Tenn. 1915).