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Entrapment Re-Examined By United States Supreme Court

tation in favor of its own construction. Moreover, one of the criteria utilized by the federal court will be its own interpretation of the substantive-procedural aspects of the state statute. That federal rules of evidence are used in cases under the Act has been neither challenged nor denied.[50] But the federal court itself will interpret those elements which bear varying degrees of relation to the offense adopted and will, in accordance with its interpretation, adopt them in lieu of or reject them in favor of federal procedure.

Telescoping the opinion in *Kay*, it can be said that the court noted that while the statutory section providing for a blood test and also prescribing the details of such test is largely procedural, "it is a preliminary, pre-judicial procedure ... designed ... to insure the reliability of the report of the test and to protect the validity of the presumptions ... [which] presumptions are not merely procedural, for they amount to a redefinition of the offense ... [and] as a new definition of the substantive offense ... [were] adopted by the Assimilative Crimes Act of 1948."[51]

FRANK C. BOZEMAN

ENTRAPMENT RE-EXAMINED BY UNITED STATES SUPREME COURT

Two questions that continue to arise in connection with the defense of entrapment[1] are how far may the police go in acting as decoys to apprehend criminals and who decides whether permissible limits have been overstepped. Although the Supreme Court apparent-

[50]Fed. R. Crim. P. 26: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See 4 Barron, Federal Practice and Procedure 172 (1951). "The procedure is entirely federal. There is no occasion to look to the state law. Consequently it is more important that uniform rules of the law and of evidence be applied in all the courts of the United States in criminal matters than that a particular rule of evidence be given effect because favored in the courts of a particular state." Id. at 174.

[51]255 F.2d at 479-80.

[1]The question of lack of consent or some other element necessary to constitute a particular crime is not considered under entrapment as treated here. Actions of the victim or those acting with him can be dealt with under the term "entrapment." Hitchler, Entrapment as a Defense in Criminal Cases, 42 Dick. L. Rev. 195 (1938). But the inducement by police officers to commit a crime is the modern concept of entrapment. Scriber v. United States, 4 F.2d 97 (6th Cir. 1925).

ly answered these questions in 1932, the problems continually recur in practice because of the enthusiasm of police officials in performing their designated duties.[2] In two recent cases, the United States Supreme Court re-examined and reaffirmed principles which it had earlier delineated for the federal court system.[3]

In *Sherman v. United States*[4] a government informer met the petitioner in a doctor's office where both were ostensibly undergoing treatment for narcotics addiction. The acquaintanceship grew through subsequent meetings, finally reaching the point where mutual addiction problems were freely discussed. The informer represented that he was not responding to treatment and asked the petitioner to obtain narcotics for him. Only after repeated requests containing references to the informer's feigned suffering did the petitioner obtain the narcotics for him. The informer used government-supplied money to pay the petitioner one-half the cost of the narcotics. The petitioner claimed that these facts constituted entrapment. This issue was submitted to the jury, which rejected it as a defense. Accordingly, the petitioner was convicted of an illegal sale of narcotics.

In *Masciale v. United States*[5] the petitioner was introduced by a third party to a government agent posing as a narcotics buyer. The agent testified that he made known his desire to purchase narcotics at their first meeting and that petitioner stated that he knew someone from whom the agent could purchase heroin. The petitioner denied this, claiming that he originally met the agent only to help the informer impress the third party. After at least ten conversations during which time the petitioner told the agent that he was trying to contact his source, the petitioner finally introduced the agent to a person who sold some narcotics to the agent. Again, the jury found no entrapment and convicted.

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[2]According to the federal courts, the entrapping person must be an agent or officer of the government; inducement by a private person does not make the defense available. Polski v. United States, 33 F.2d 686 (8th Cir. 1929), cert. denied 280 U.S. 591 (1929). However, courts have considered paid informers and those promised immunity to be government agents. Cratty v. United States, 163 F.2d 844 (D.C. Cir. 1947); Hayes v. United States, 112 F.2d 676 (10th Cir. 1940); Wall v. United States, 65 F.2d 993 (5th Cir. 1933). Cf. Mayer v. United States, 67 F.2d 223 (9th Cir. 1933).

[3]The state legislatures usually leave the entrapment issue to court determination. Tennessee and New York have rejected the defense. People v. Mills, 178 N.Y. 274, 70 N.E. 786 (1904); Thomas v. State, 182 Tenn. 380, 187 S.W.2d 529 (1945). For an example of state court treatment of the defense see Note, 14 Wash. & Lee L. Rev. 88 (1957).

[4]356 U.S. 369 (1958).

[5]356 U.S. 386 (1958).

The issue before the Supreme Court in both of these cases was whether the defense of entrapment should have been established as a matter of law. The Court held in *Sherman* that entrapment was so established. Mr. Chief Justice Warren pointed out that the arranged meetings, the conversations relating to addiction, and the resort to sympathy made the criminal conduct the product of creative police activity. Futhermore, an examination of the accused's past record did not show any ready compliance on his part to engage in the narcotics trade. Four Justices, in a concurring opinion by Mr. Justice Frankfurter, disagreed with the reasoning employed by the Court to determine the existence of the defense. Justice Frankfurter stated that the appropriate test should be a comparison of the police methods actually employed in a particular case with a standard of permissible techniques which the police should use. Under this test any examination of the accused's past record would be excluded.[6]

In *Masciale* the conflict between the agent's testimony and the petitioner's claim of an easy-money lure as his reason for entering the narcotics trade was held sufficient to justify sending the issue of entrapment to the jury. However, the Justices who concurred in *Sherman* dissented in *Masciale* on the ground that the defense should be determined by the judge—not by the jury.

The distinction between proper and improper criminal detection methods was recognized in early twentieth century federal court cases allowing the use of decoy letters to obtain information.[7] With the passage of the National Prohibition Act and the intensification of police investigation in other criminal areas where detection is difficult, the scope of authorized detection means was broadened,[8] and cases in which the plea of entrapment was utilized increased consid-

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[6]The admissibility of evidence of past offenses has been assailed. It has been stated that usually such evidence is allowed only to prove an element of the crime, but in entrapment cases all elements of the crime itself are already proved or admitted. Mikell, The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. Rev. 245, 252 & n. 38 (1942). See United States v. Washington, 20 F.2d 160, 163 (D. Neb. 1927) denying the admissibility of hearsay, suspicions, and past offenses. But see United States v. Johnson, 208 F.2d 404 (2d Cir. 1953), cert. denied 347 U.S. 928 (1954); Carlton v. United States, 198 F.2d 795 (9th Cir. 1952); Ryles v. United States, 183 F.2d 944 (10th Cir. 1950), cert. denied 340 U.S. 877 (1950); Strader v. United States, 72 F.2d 589 (10th Cir. 1934); United States v. Seigel, 16 F.2d 134 (D. Minn. 1926). Also see I Wigmore, Evidence § 58 (Supp. 1957).

[7]Grimm v. United States, 156 U.S. 604 (1895); Ackley v. United States, 200 Fed. 217 (8th Cir. 1912); Ennis v. United States, 154 Fed. 842 (2d Cir. 1907). See Annot., 18 A.L.R. 146 (1922).

[8]Such activities as the use of disguises, United States v. Washington, supra note 6, and the use of normal coaxing, United States v. Wray, 8 F.2d 429 (N.D. Ga. 1925) were included as permissible police methods.

erably.[9] While recognizing the need for unusual police activity in detecting and apprehending criminals, courts advised against any governmental methods which "may become the means of the ruin of its citizens, instead of their safeguard and protection."[10]

The entrapment rule to be applied in the federal courts was first crystallized in the landmark case of *Sorrells v. United States*.[11] In this case the government agent induced the defendant to supply him with liquor by repeated requests which included sentimental stories of wartime experiences as members of the same service division. The Supreme Court reversed the lower court's finding and ruled that the defense of entrapment was available.

The two-fold test established by the *Sorrells* case looked both to the origin of the intent to commit the offense and to the predisposition of the accused. The essential questions to be asked under this test were whether the police or the accused conceived the criminal action and whether an examination of the accused's past indicated a predisposition to commit the crime.[12] If the crime was the result of the creative activity of the police and if the accused was not predisposed to commit the crime, then the defense of entrapment was available.

Mr. Justice Roberts, in his separate concurring opinion in *Sorrells*, said the sole criterion for determining the entrapment issue was the police conduct test. If the methods employed to obtain a conviction were improper, an entrapment plea was valid. He emphasized that no matter how bad the past record of the accused may have been, such prior acts never justified improper criminal detection means.[13]

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[9]Compare the number of cases listed in Annot., 18 A.L.R. 146 (1922) with those in Annot., 66 A.L.R. 478 (1930).

[10]United States v. Echols, 253 Fed. 862 (S.D. Tex. 1918). Among the cases setting forth specific methods which courts have condemned are: Hunter v. United States, 62 F.2d 217 (5th Cir. 1932) (appeals to kindness); Butts v. United States, 273 Fed. 35 (8th Cir. 1921) (supplication to relieve suffering); Woo Wai v. United States, 223 Fed. 412 (9th Cir. 1915) (continued persuasion). See also United States v. Wray, 8 F.2d 429 (N.D. Ga. 1925).

[11]287 U.S. 435 (1932).

[12]The meaning of "predisposed" has been suggested as "some known or reasonably suspected previous connection with the unlawful course of conduct which prompted the entrapment." Note, 18 U. Pitt. L. Rev. 663, 665 (1957). There is a contention that the use of reasonable suspicion to rebut entrapment bears no relevance to the origin of the criminal intent, but the cases do not support this contention. Rossi v. United States, 293 Fed. 896 (8th Cir. 1923); United States v. Certain Quantities of Intoxicating Liquors, 290 Fed. 824 (D. N.H. 1923); Fisk v. United States, 279 Fed. 12 (6th Cir. 1922); Billingsley v. United States, 274 Fed. 86 (6th Cir. 1921); Partan v. United States, 261 Fed. 515 (9th Cir. 1919).

[13]The view of Justice Roberts has been suggested as being "more consistent with the rationale of the entrapment doctrine." Anderson, Some Aspects of the Law of

While there does not necessarily appear to be any correlation between a specific doctrinal approach to the defense and the particular test adopted, the theoretical justifications for the defense did differ in the two opinions of *Sorrells*. This fact may possibly help to explain the test variations seen in each opinion. Mr. Chief Justice Hughes, in the majority opinion, declared that Congress did not intend criminal statutes to apply in cases where the innocent were enticed to commit wrong. This implied legislative intent contrasts sharply with Justice Roberts' theoretical basis for the defense, which seemed to stem from an anxiety to protect the courts from any stigma of participation in entrapment-procured convictions.[14]

Before *Sorrells* the federal courts took the position that "where the evidence on the question of entrapment is in conflict it presents an issue of fact for the jury on proper instructions, and it is not within the province of the court to decide it."[15] The Court in *Sorrells* followed this jury-determination view, which remains the prevailing one today unless the issue can be decided as a matter of law.[16]

On the other hand, Justice Roberts believed that the judge should always rule on the entrapment issue. Stating that "the preservation of the purity of its own temple belongs only to the court,"[17] he felt that the court should deal with the issue whenever it arose. A definite interrelation between Justice Roberts' doctrinal theory of the defense and his view of who should determine the issue can be seen, for the underlying considerations in each appears to be the protection of the courts from the stain of entrapment.

The issue of judge or jury determination becomes pointedly significant in the *Masciale* case. In *Masciale* the concurring Justices of *Sherman* dissented because they believed that the trial judge should

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Entrapment, 11 Brooklyn L. Rev. 187, 196 (1942). In addition this view has also been said to be less strained because the moral guilt of the defendant seems the same in government-procured crimes as in enticement by a private person. Note, 46 Harv. L. Rev. 848 (1933).

[14]287 U.S. at 457.

[15]Jarl v. United States, 19 F.2d 891, 896 (8th Cir. 1927). See O'Brien v. United States, 51 F.2d 674 (7th Cir. 1921); Butts v. United States, 273 Fed. 35 (8th Cir. 1921); Peterson v. United States, 255 Fed. 433 (9th Cir. 1919). But some pre-Sorrells authority existed that the court should decide the issue whenever it was asserted. United States v. Mathues ex rel. Hassel, 22 F.2d 979 (E.D. Pa. 1927); United States v. Echols, 253 Fed. 862 (S.D. Tex. 1918); United States v. Healy, 202 Fed. 349 (D. Mont. 1913). The standard view that the jury should determine the issue remains unchanged since Sorrells. United States v. Klosterman, 248 F.2d 191 (3d Cir. 1957).

[16]356 U.S. at 377.

[17]287 U.S. at 457. This concept was foreshadowed by the language of Justice Brandeis in an earlier dissent. Casey v. United States, 276 U.S. 413, 425 (1928).

rule on the entrapment question. The five-four decision in the latter case may be indicative of more scrutinizing judicial inquiries into this phase of entrapment in the future.

The unusual nature of the defense of entrapment which finds its roots in idealism from its ethical genesis,[18] and in realism from its practical policy considerations,[19] certainly does not facilitate the easy establishment of specific standards for its application. The proper consideration of individual fact situations[20] and a balancing of conflicting interests, championed by those who see the problem as essentially one of practical law enforcement,[21] have been urged as necessary whenever the defense is employed. Such considerations are reasonable and perhaps often required, but it cannot be denied that they make more difficult the application of any explicit standards to an entrapment case. In addition, certain practical difficulties, such as ascertaining just what kind of conduct on the part of the accused determines whether he was "predisposed"[22] to commit the crime, present a fertile area for criticism of the defense as it is applied in the federal court system today.

If a synthesis of the divergent views expressed in *Sorrells* and reiterated in *Sherman* were possible, it would seem that a combination of Justice Roberts' police conduct test and the usual jury determination of the issue would be desirable. Of course, the adoption of the police conduct test presents certain problems. In mitigation of the

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[18]It has been said that the courts categorize the defense as a recognized principle of law even though "it is based more on ethical than legal principles." Anderson, supra note 13, at 188. Justice Roberts compared entrapment cases to civil actions which are abated when in violation of the "rules ... which formulate the ethics of men's relations to each other." 287 U.S. at 455.

[19]Consideration of such elements as the type and frequency of the crime, the difficulty of getting evidence, and the public danger involved reflect this practical aspect. Note, 28 N.Y.U.L. Rev. 1180, 1182 (1953).

[20]Zucker v. United States, 288 Fed. 12, 16 (3d Cir. 1923); United States v. Washington, 20 F.2d 160 (D. Neb. 1927). See also, Note, 28 Colum. L. Rev. 1067, 1072 (1928). Chief Justice Hughes seemed to appreciate this individual fact consideration when he said: "The question in each case must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object." 287 U.S. at 451.

[21]Note, 44 Harv. L. Rev. 109 (1930). It would appear that the law enforcement interpretation of the problem is complementary to an emphasis on the practical considerations of the defense. If the facilitating of law enforcement is desired, a weighing of interests would seem to aid the accomplishment of this end.

[22]See note 6 supra. Judge Learned Hand has suggested three instances in which an inducement may be excused: "an existing course of similar criminal conduct; ... already formed design ... ready compliance." United States v. Becker, 62 F.2d 1007, 1008 (2d Cir. 1933).

criticism that secret criminal activities would be impossible to uncover under such a test,[23] it should be emphasized that the more heinous crimes, such as murder and rape, do not "lend themselves to entrapment; nor is detection an unusual problem."[24] The probable answer would be that when organized crime has perfected covert criminal activity almost to a science, many serious crimes might be rendered more difficult of proof if the predisposition element of the entrapment test were omitted. Perhaps the best answer to this seemingly valid statement would be the oft-quoted words of Chief Justice Holmes that it is "a less evil that some criminals should escape than that the Government should play an ignoble part."[25] It is submitted that the primary purpose of the defense is to protect the innocent from inordinate police activity. If this be true, the limitation of the test *only* to an examination of the police conduct used would appear to serve this purpose best.

The orthodox viewpoint of the courts that the jury should determine the question seems more sound than the minority contention that the judge should so rule. An objective standard—conduct which is no greater than that which would entice "a person engaged in an habitual course of conduct for gain and profit"[26] to commit a crime—has been advanced as the yardstick against which to measure the police conduct utilized in each case. This standard would have to be applied by the jury much like the jury applies the "reasonable man" standard in the negligence cases of tort law; however, the judge could still find the existence of entrapment as a matter of law whenever the evidence warranted such a ruling.

It is evident from a comparison of the two opinions in the *Sherman* case that no matter which approach is upheld, supporters of both views desire the accomplishment of the same end: the detection

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[23]Judge Hand raised this question in United States v. Sherman, 200 F.2d 880, 882 (1952). Apparently the criticism is directed at the lack of any way to show the accused was merely furnished an opportunity to commit a crime of the type in which he was prepared to engage. Practically speaking, it would seem a long record of convictions of similar offenses would place the minority's position in danger of being compromised.

[24]Note, 35 Texas L. Rev. 129 (1956). The Court refused to say whether such crimes would prevent any exception to a statutory prohibition in entrapment cases as the Court allowed in Sorrells. 287 U.S. at 450-52.

[25]Olmstead v. United States, 277 U.S. 438, 470 (1928).

[26]Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L.J. 1091, 1114 (1951). This standard is presented with the view that only an examination of the officer's conduct is proper in the test for entrapment.