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Cover Page Footnote
Member of the New York Bar.

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THE DEFENSE OF ENTRAPMENT AND RELATED PROBLEMS IN CRIMINAL PROSECUTION

PAUL W. WILLIAMS

The defense of entrapment is one of man's earliest recorded pleas. The Bible tells us that Eve, when accused of eating the forbidden fruit, protested: "The serpent beguiled me, and I did eat." Yet, strangely enough, entrapment was not clearly recognized as a valid defense in the federal courts until the 1932 case of Sorrells v. United States. It is interesting to note that the English courts have never squarely upheld the defense of entrapment.

Entrapment was rejected by the New York Supreme Court in a Civil...
War case, *Board of Comm'rs v. Backus.* Referring to Eve's defense that the serpent had beguiled her, the court declared:

That defence was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any court of civilized, not to say christian ethics, it never will.

As a prophet the court could have hardly been more mistaken.

There is no other well-recognized defense in criminal law whose basis has been the subject for so much dispute, nor is there one which affords more difficulty in its practical application. It is an ancient maxim that the end does not justify the means. The problem is to find an objective standard which will be helpful in gauging the propriety of the means used in detecting criminal activity.

Judge Learned Hand has suggested that the entrapment of a criminal by officially instigated activity may be excused where there is either “an

5. Id. at 42.
It is possible that the New York cases may be explained as falling within the category of crimes involving serious bodily injury. Therefore, the defense of entrapment was not favorably received, although the opinions in those cases are not predicated on that theory. Cf. Model Penal Code § 2.10(3) (Tent. Draft No. 9, 1959). See Guarro v. United States, 237 F.2d 578, 582 (D.C. Cir. 1956), where the court distinguished narcotic cases from sexual assault cases. Cf. Coins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1951) (dictum); Thomas v. State, 182 Tenn. 380, 187 S.W.2d 529 (1945); Note, Entrapment—Federal Court Rule Reaffirmed—the Tennessee Rule?, 26 Tenn. L. Rev. 554 (1959). See also Kearns v. Aragon, 65 N.M. 119, 333 P.2d 607, 610 (1959) (citing cases to support proposition that the defense of entrapment is not available where specific intent is not essential element of crime); Model Penal Code 13-24 (Tent. Draft No. 9, 1959); Clark & Marshall, Crimes §§ 153-55 (5th ed. 1952); Donnelly, Judicial Control of Informers, Spies, Stool Pigeons and Agent Provocateurs, 60 Yale L.J. 1091 (1951); Mikell, The Doctrine of Entrapment in the Federal Court, 90 U. Pa. L. Rev. 245 (1942); Williams, Entrapment—A Legal Limitation on Police Techniques, 48 J. Crim. L. 343 (1957); Note, Entrapment by Government Officials as a Matter of Law, 8 Am. U.L. Rev. 58 (1959); Note, Entrapment Doctrine in the Federal Courts and Some State Court Comparisons, 4 A.J. Crim. L. 447 (1950); Note, Entrapment as a Defense, 8 Ala. L. Rev. 374 (1956); Note, Entrapment, 6 Buffalo L. Rev. 348 (1957); Note, Entrapment in North Carolina, 34 N.C.L. Rev. 536 (1956); Doctrine of Entrapment, 35 N.D.L. Rev. 144 (1959).
existing course of similar criminal conduct" or an "already formed de-
sign" or "ready complaisance."  

A recent case in the United States District Court for the Southern
District of New York, United States v. Silva,\(^8\) gave rise to a renewed
consideration of the defense of entrapment. This was a narcotics case
tried without a jury. The defendant, charged with the unlawful sale
of narcotics, acknowledged that he delivered the drugs and received
money on the two occasions set forth in the indictment. However, he
denied that he was, in fact, a principal and pleaded the defense of entrap-
ment—that the crime was induced by the actions and conduct of a
government agent.

The question posed in the case was the conflict of testimony between
the Government's special employee, who was the informer, and the
defendant. The defendant testified that he was led into addiction by the
informer who originally gave him drugs free of charge for a period of
time. Later, the informer charged the defendant $5 "per shot" which the
informer injected intravenously by the use of a hypodermic needle. The
defendant testified that with respect to the first transaction charged in
the indictment, he was in need of a "shot" and penniless. Going to the
room of the informer, the defendant was told the informer would take
care of the defendant if he would deliver a package. The defendant
agreed to do so and brought the package to his own apartment, where

\(^7\) United States v. Becker, 62 F.2d 1007, 1008 (2d Cir. 1933). See also Badon v. United
States, 269 F.2d 75, 80 (5th Cir. 1959): "Entrapment is given effect as a defense only when
the law officers envisage the crime, plan it and activate its commission by one not therefo-
re intending its perpetration; or where the officers pursue tactics which offend common
conceptions of decency." Compare Childs v. United States, 267 F.2d 619 (D.C. Cir.
1958), cert. denied, 359 U.S. 948 (1959) ("reasonable suspicion" that defendant is engaging
in criminal activities enough to justify entrapment), with Giordenello v. United States,
357 U.S. 480, 485-86 (1958) (need substantial factual basis upon which a finding of
"probable cause" in arrest and search warrant cases can rest). See also Casey v. United
United States, 79 Sup. Ct. 329 (1959) (hearsay information supplied by theretofore reliable
informer grounds constituting "probable cause" permitting defendant's arrest without a
warrant).

That "probable cause" as used in the fourth amendment is virtually the same concept
as the "reasonable grounds" terminology used in the Narcotics Control Act, 70 Stat. 570
(7th Cir. 1957). See also Henry v. United States, 28 U.S.L. Week 4015 (U.S. Nov. 23,
1959): "Probable cause exists if the facts and circumstances known to the officer warrant
a prudent man in believing that the offense has been committed. . . ." Id. at 4016. "[A]n
arrest is not justified by what the subsequent search discloses. . . ." Ibid. Under our
system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the
Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject
to easy arrest." Id. at 4017.

the informer later appeared with another person who turned out to be the narcotics agent. The defendant received $100 from the agent, which was turned over to the informer, and received an injection of heroin for his services.

A second transaction took place about twelve days later and followed substantially the same pattern. Both the agent and the informer testified at the trial.\(^9\)

It was on this state of facts that the court found in favor of the defendant. Judge Edward J. Weinfeld, in an opinion from the bench, said in part:

The informer's activities are spread upon the record. He was a professional special employee who was paid by Federal narcotics agents with Government funds for each case he 'made'. Payment was dependent upon the informer 'making' a case which meant an initial introduction and a sale to a narcotics agent. In all, the informer made, according to his own testimony and that of the agent, eighteen cases including this one. This appears to have been his sole business over a period of two years. During the period of his services as a paid informer, he was convicted in the State court on a narcotics charge. Previously while in the Army he had been convicted of two separate offenses and had been dishonorably discharged.\(^10\)

The court further commented on the informer's incentive to induce the commission of the crime:

Since the informer was to be paid only in those cases wherein his efforts were successful, and his livelihood was dependent upon the funds derived from his activities, he had every motive to induce the commission of the offense charged to this defendant, who was in desperate need to satisfy his drug habit which resulted from his initiation by the informer. He had every motive to testify falsely.\(^11\)

This case has stimulated a renewed discussion of two questions:

1. Is the Government justified in using informers or undercover agents?

2. What is the sound philosophical basis for the plea of entrapment?

I. ANALYSIS OF POLICE METHODS AND THE USE OF INFORMANTS, UNDERCOVER AGENTS AND PLAINCLOTHESMEN

Many laymen, and even some lawyers, are under the impression that the way to abolish crime is to pass a law. This prevailing fallacy is illustrated by the enormous problem that police and federal agents encounter in enforcing laws against narcotics, gambling and prostitution—to mention only three. If these laws are to be enforced at all, the enforcement

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\(^9\) In this respect, the case differs from Roviaro v. United States, 353 U.S. 53 (1956), where the Government failed to produce the informer, and the Supreme Court, for this reason, reversed the conviction. Cf. Carrow, Governmental Nondisclosure in Judicial Proceedings, Part Four, Information Obtained by Investigation. 141 N.Y.L.J. 4 (1959).


\(^11\) Id. at 7.
DEFENSE OF ENTRAPMENT

agencies must resort to informers and undercover agents. The problem is not solved by asserting that evidence so obtained comes from a polluted source and must be proscribed.

It is safe to say that ninety-five per cent of all federal narcotics cases are obtained as the result of the work of informers, whether they be paid or not.\textsuperscript{12} Narcotics agents (who are well-trained and of a high calibre) can uncover large syndicates selling narcotics only through informers and undercover agents who can "tip them off" as to peddlers and pushers. The latter, in turn, lead the agents to the wholesalers and importers.

It is impossible for a policeman or a narcotics agent, even though not in uniform, to make contact with the underworld and make a "buy" without using an informer or undercover agent as a decoy. A narcotics pusher, retailer or wholesaler, without this kind of stratagem, would no more sell to any one of the approximately 285 federal narcotics agents in this country than he would be foolish enough to sell directly to a police commissioner. The federal experience has been that normal victims of narcotic addiction are, by and large, a very poor class of people who can usually be recognized as addicts.\textsuperscript{13} An informer may pose as an addict or as a dealer in narcotics. Federal narcotic arrests are generally based on an original introduction by an informer to either a user or supplier and are usually made only after two or more sales. In the supplier cases, the agent's purpose is properly to endeavor to probe to the source of supply, and not merely to arrest the one making the delivery.

In our larger cities, the same problem exists with respect to prostitution and gambling. Likewise, in racketeering and extortion cases, victims do not complain. Indeed, all too frequently they plead the fifth amendment and refuse to testify. In any event, it is difficult for a law enforce-

\textsuperscript{12} Substantial progress has been made in curtailing the illicit narcotic drug trade. The United States Commissioner of Narcotics reports a decrease in the ratio of addiction from 1 in 400 in 1915 to 1 in 3,500 in 1959. Anslinger, The Treatment of Drug Addiction, 14 Food Drug Cosm. L.J. 240, 243-44 (1959). See also Senate Committee on the Judiciary, the Illicit Narcotics Traffic, S. Rep. No. 1440, 84th Cong., 2d Sess. 3 (1956). "Narcotics arrests in New York City alone have risen six hundred per cent in the past decade; arrests of persons under twenty-one have increased 2,300 per cent . . . ." Statement of then Governor Averell Harriman (in 1956) as quoted in Henderson v. United States, 261 F.2d 909, 913 (5th Cir. 1959). In 1957, on the basis of statistics furnished by the Federal Bureau of Narcotics, it was estimated that 40% of all the country's addicts were located in New York City. At that time, the New York City Police Department estimated that there were over 21,000 drug users in New York City and that 40% were under 25 years of age. New York Joint Legislative Committee on Narcotic Study, Second Interim Report 22-23 (N.Y. Legislative Document No. 16, 1958). In 1957, there were 4,058 arrests for narcotic violations in New York City, and only 8 arrests in Albany. New York Joint Legislative Committee on Narcotic Study, Report 35 (N.Y. Legislative Document No. 7, 1959).

\textsuperscript{13} Cf. Winick, Narcotics Addiction and Its Treatment, 22 Law & Contemp. Prob. 9 (1957).
ment officer, in or out of uniform and standing on a street corner, to make an arrest for any of the crimes just enumerated. If the police force in New York City were doubled, it would still be impossible in this way to enforce the laws regarding narcotics, prostitution, gambling or racketeering effectively. Some other police method must be utilized if society is to be protected. Accusing the prosecutor of being lazy in resorting to the use of informers, undercover agents or plainclothesmen does not solve the problem. This same method of using informers and special employees is sometimes resorted to by other law enforcement agencies, including the Federal Bureau of Investigation. The Treasury Department, which has jurisdiction over the Federal Bureau of Narcotics, uses undercover agents as well as informers and so-called special employees.

One choice is between enforcement of those laws which inhibit conduct other than crimes of violence, which are usually observable or the effects of which are observable, and nonenforcement. The question may well be posed whether with respect to some acts, such as prostitution and gambling, society has gone too far in attempting to legislate them out of existence by making them crimes. There are reputable advocates for legalizing gambling and prostitution; and for years some prominent medical and legal authorities have proposed a radically different method of treating narcotic addiction. The answers to these questions determine in large measure opinions with respect to the defense of entrapment. For example, one who opposed the classification of prostitution, gambling and the possession of narcotics as crimes would be expected to support the broadest definition of entrapment and thus permit its more frequent invocation.

Another possible choice for those who would continue such criminal statutes on our books is closer police surveillance as, for example, the registration of all persons, arrests on suspicion, and other regulatory methods of a police state. This alternative would commend itself to few persons in this country, and certainly does not match the fabric of our law.

There can be no doubt that there is a possibility of law enforcement officers luring persons into the commission of offenses. Shall we permit this fact to destroy the entire system of enforcement? Or is it not rather a task for judges and prosecutors to weed out un-

14. A recent and outstanding example of a situation where espionage might have remained undetected, had it not been for the use of an informer working for more than ten years with the FBI, is United States v. Soble, Criminal No. 152-90, S.D.N.Y., 1957.

15. See, e.g., Sherman v. United States, 356 U.S. 369 (1958) (narcotics); Sorrells v. United States, 287 U.S. 435 (1932) (prohibition violation); Henderson v. United States, 261 F.2d 909 (5th Cir. 1958) (narcotics); Morales v. United States, 260 F.2d 939 (6th Cir. 1958) (narcotics); Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956) (sexual assault);
worthy cases and to refuse to prosecute, or to dismiss where such facts appear?

II. WEAPONS IN THE HANDS OF THE PROSECUTOR

There are only so many weapons in the arsenal of the prosecutor. Yet in the face of statistics, both state and federal, indicating a continuous and general rise in the rate of crime, there is an increasing tendency to take away or limit these weapons.

The most conspicuous example of this in the last twenty-five years has been to deny the federal prosecutors the right to use wiretap evidence. Not only is wiretap evidence barred in the federal courts when obtained by federal law enforcement agents, but recently such evidence has also been proscribed even where procured by state officers without the knowledge or concurrence of the federal prosecutor or any federal agent.


17. “The common law rule . . . that the admissibility of evidence is not affected by the illegality of the means by which it was obtained . . .,” Olmstead v. United States, 277 U.S. 438, 467 (1928), does not control unconstitutional searches and seizures, wiretapping, or involuntary confessions. Benanti v. United States, 355 U.S. 96 (1957). But see Walder v. United States, 347 U.S. 67 (1953) (permitting use of illegally obtained evidence on cross-examination to attack defendant's credibility). In Benanti, the Court stated that: “It has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment. . . . The instant decision is not concerned with the scope of the Fourth Amendment.” 355 U.S. at 102, n.10. See also Rea v. United States, 350 U.S. 214, 218, 220 (1955) (dissenting opinion); Lustig v. United States, 338 U.S. 74, 79 (1949); Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958) (stolen money found immediately after Maryland police made unlawful arrest evidence which should be excluded upon trial for larceny in federal court as a matter of sound judicial policy since search violated fourteenth amendment); Herrick, Evidence Obtained Pursuant to Illegal Arrests, Detentions and Searches, Prac. Law. 53 (November 1959); Comment, 64 Harv. L. Rev. 1304 (1951).

It should be noted that in Weeks v. United States, 232 U.S. 383, 393 (1914), the Supreme Court asserted that since the fourth amendment does not apply to the states, evidence illegally obtained by a state officer would be admissible in the federal courts. The
It had been the practice of the Federal Bureau of Narcotics in many cases not to reveal the names of informers in view of the fact that these men were often asked to work in more than one investigation. Furthermore, as informers and witnesses, they had to be protected against reprisal. This practice was severely affected by the decision of the Supreme Court in United States v. Roviaro.\textsuperscript{18}

Finally, even where there has been a confession to the commission of the crime, the confession may still not be used in evidence where it is deemed extorted from the defendant prisoner, or obtained under

\textsuperscript{18} 353 U.S. 63 (1956). Here the informer had testified before the grand jury and the indictment was necessarily based in part on the evidence which he had given. Federal grand juries now returning true bills or reporting "no true bill" are required to list the witnesses who have appeared before them. The writer does not question either the desirability of this rule or even the propriety of requiring the Government, at the trial, to reveal the names of persons, present at the time of the alleged crime or otherwise in possession of facts relating directly to the commission of the crime, which are known to the prosecuting authority but not to the defense.
such circumstances as where he is held without arraignment, questioned for an unreasonable period of time and deprived of counsel. The Supreme Court’s recent decision in Mallory v. United States extends the McNabb rule to the point where a confession obtained about twelve hours after arrest and two or three hours of actual police questioning may be excluded where the prisoner could have been more promptly arraigned before a United States commissioner or district judge. In Mallory the defendant was arraigned within twenty-four hours after arrest.

The district attorney is quite properly required to establish the defendant’s guilt beyond a reasonable doubt. This must be done pursuant to constitutional safeguards which require that the defendant is entitled to be confronted by witnesses who testify against him.

Traditionally, the prosecutor has been entitled to prove his case in one or more of the following ways:

1. By the direct testimony of witnesses;
2. By documentary evidence;
3. By wiretap evidence of telephone conversations;
4. By the testimony of informers;
5. By the testimony of co-conspirators;
6. By confessions or otherwise incriminating statements; and
7. By circumstantial evidence.

An examination of these categories in the light of cases which have

19. McNabb v. United States, 318 U.S. 332 (1943). See also Fikes v. Alabama, 352 U.S. 191 (1957). The Fikes case has been made famous by Mr. Justice Frankfurter’s reference to “the Plimsoll line of ‘due process.’” 352 U.S. at 199. His former law clerk has pointed out that there are Plimsoll marks for summer, for winter, for salt water and for fresh water. Field, Frankfurter, J., Concurring, 71 Harv. L. Rev. 77 (1957).


21. The sixth amendment to the United States Constitution reads in part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”
accorded fuller protection to constitutional or statutory rights indicates
that serious, though legitimate, curbs have been placed on the power of
the prosecutor to prove a person's guilt. It suggests that while a greater
burden is being placed upon the law enforcement official to protect so-
ciety, fewer weapons are made available to him. Federal authorities
would be well advised to recommend congressional legislation validating
the use of wiretapping techniques under proper court controls, as are
now written into the law of the State of New York.

An examination would also indicate that the practice of using in-
formers and undercover agents is one which ought to be continued, re-
lying, as is always true, on the fairness of the enforcement agencies and
the power of the courts to check any abuse of police power. The fact is
that rarely, if ever, are cases presented for indictment on the basis of
the testimony of informers alone. There is some kind of corroborating
testimony, either by government agents or other witnesses, for the very
practical reason that the judge or jury would be reluctant to convict
someone on the uncorroborated testimony of an informer, who may him-
self have a criminal record or a financial stake in the conviction.

III. DEVELOPMENT OF THE DOCTRINE OF ENTRAPMENT IN THE
SUPREME COURT

For many decades the defense of entrapment arose only where the
criminal nature of an act was vitiated by the consent of the injured party
or by a failure to prove one of the essential elements of the crime. Convic-
tions for criminal fraud cannot stand where the police are "victims,"
since they are not actually misled by fraudulent statements. Likewise,
where a man suspected that his house would be burglarized, and
opened the door to facilitate the defendant's entrance, it was held that
due to the absence of any breaking and entering, there had, in fact,
been no burglary. Again, when a property owner suspected the de-
fendant of being a thief and solicited him to steal the owner's goods, it
was ruled that no crime had been committed since there had not been a
taking against the will of the owner.

22. In a recent case decided by the New York Court of Appeals, People v. Dinan, 6
N.Y.2d 715, 158 N.E.2d 501, 185 N.Y.S.2d 806 (1959) (memorandum decision), affirming 7
App. Div. 119, 181 N.Y.S.2d 122 (2d Dep't 1958), it was held that evidence obtained
by a court-ordered wiretap is admissible in a New York court and that the state policy of admit-
ting such evidence, even if illegally obtained, does not contravene the Federal Communica-


In the past, courts have varied as to the grounds upon which the defense of entrapment should rest. Among these proposed have been that the Government is estopped by the conduct of its agents;\(^{27}\) that the Congress never intended to include in the category of crime defined by a statute situations where the defendant was induced to commit the crime by government agents;\(^{28}\) and that sound public policy denies the right of the Government, through its agents, to create crime for the purpose of prosecuting an offender.\(^{29}\)

Mr. Justice Frankfurter, concurring in the result but dissenting from the rationale of the majority opinion in *Sherman v. United States*,\(^{30}\) suggests that the real test is not the intention of Congress or even the test of the "creative activity" of the agent, but rather whether police conduct falls below the standard for the proper exercise of governmental power.\(^{31}\)

An analysis of the history of the cases before the Supreme Court with respect to the emergence of these respective doctrines, would here be appropriate.

*Sorrells v. United States*

In *Sorrells v. United States*,\(^{32}\) the defendant was indicted and convicted of a violation of the Prohibition Act.\(^{33}\) A man posing as a tourist called at the defendant’s house with some other people. He twice requested the defendant to procure liquor for him although the defendant stated that he had none. It appeared that both the defendant and the agent were war veterans who had served as members of the same regiment. After an exchange of reminiscences, the agent again renewed his request for

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27. United States v. Kaiser, 138 F.2d 219, 220 (7th Cir. 1943) (dictum). Only the entrapped person may raise the defense. It is not available to a defendant where his accomplice was the person entrapped. United States v. Perkins, 190 F.2d 49 (7th Cir. 1951). The entrapping person must be an agent or officer of the Government; inducement by a private person does not make this defense available. Jindra v. United States, 69 F.2d 429, 431 (5th Cir. 1934); Polski v. United States, 33 F.2d 688 (8th Cir. 1929), cert. denied, 280 U.S. 591 (1929); Newman v. United States, 28 F.2d 651, 652 (9th Cir. 1928) (dictum). Courts have considered paid informers and those granted personal immunity as government agents. Cratty v. United States, 163 F.2d 849 (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). Entrapment by a state officer is a valid defense in the federal courts. Henderson v. United States, 237 F.2d 169 (5th Cir. 1956). See also Note, Entrapment is a Valid Defense in Federal Courts When the Defendant has been Entrapped by a State Officer, 45 Geo. L.J. 501 (1957); Note, Entrapment by State Officers is a Defense to Federal Crime, 105 U. Pa. L. Rev. 753 (1957).


31. *Id.* at 382.

32. 287 U.S. 435 (1932).

liquor. The defendant left his house, returning shortly afterward with liquor which was sold to the agent.

Evidence of the defendant’s good character was introduced. In rebuttal, the Government offered testimony that the defendant had a reputation of being a “rumrunner.” There was no evidence introduced, however, that the defendant had previously violated the liquor laws of the United States. The trial court submitted the issue of entrapment, which was pleaded, to the jury, having ruled that the evidence was not so convincing that the court must hold that as a matter of law there was entrapment.

Chief Justice Hughes, speaking for a majority of five members of the Court, held that the evidence of entrapment was sufficient to warrant consideration by the jury. He declared that the sale of liquor induced by methods amounting to entrapment was not, in fact, a crime within the intent of Congress. In other words, under this interpretation of the law no crime was actually committed. This was not a case of a crime having been committed and a defense of entrapment upheld because the conduct of the government agents did not measure up to the required standards of fair dealing.

The majority of the Court held that “the predisposition and criminal design of the defendant are relevant,” and 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.”

Under the rule of the majority here, there are two principal considerations: police misconduct on the one hand, and the character of the defendant on the other. Both police misconduct and the initial innocence of the defendant must be proved in order to establish the defense of entrapment. Mr. Justice Roberts, in his concurring opinion, sharply disagreed with the majority in his definition of the defense:

Entrapment 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.

34. 287 U.S. at 448.
35. Id. at 451. The Court also observed that the defense is established “when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.” Id. at 442.
36. 287 U.S. at 454. Compare Stein v. United States, 263 F.2d 579, 581 (9th Cir. 1959): “The law is well settled that if all the Government agents or their agents do is to take advantage of the defendant’s predisposition and willingness it does not amount to entrapment.”
The fairness of any rule of law which permits the Government to counteract the defense of entrapment by proof of the history and past evil life of the defendant may well be questioned. Such proof tendered by the Government is wholly irrelevant to the issue of whether defendant committed the crime in issue. To allow the Government to offer proof of defendant's character, especially where the defendant may not even have taken the stand, gives the defendant the right to plead entrapment only at his peril and is inconsistent with those safeguards which courts have invoked to insure a fair trial.37

*Sherman v. United States*

The Supreme Court next dealt with the question of entrapment some twenty-six years later in *Sherman v. United States.*38 Here it was held that on the basis of undisputed testimony by government witnesses, entrapment was established as a matter of law. The Court expressly refused to reassess the doctrine of entrapment, to decide the case on the ground urged by the minority opinion in *Sorrells* that the Government should not be allowed to reply to a claim of entrapment by showing that the defendant's criminal conduct was due to his own readiness, or to determine whether "the factual issue of entrapment" should be decided by the judge and not the jury. Again the Court divided five to four.

The defendant had been charged with three sales of narcotics. A previous conviction had been reversed because of improper instructions as to the issue of entrapment.

In August 1951, a government informer met the defendant at a doctor's office where, apparently, both men were being treated for narcotics addiction. After several accidental meetings, either at the doctor's office or at a pharmacy, their conversations progressed to a discussion of mutual experiences and problems. Finally, the informer asked the defendant if he knew of a good source of narcotics. From the first, the defendant tried to avoid the subject, but after a number of repeated entreaties predicated on the informer's presumed suffering, the defendant acquiesced. Several times thereafter he obtained a quantity of narcotics which was shared with the informer. Each time the defendant told the informer that the total cost of the narcotics was $25 and that the informer owed him $15. The informer bore the cost of his share of the narcotics, plus other expenses necessary to obtain the drug. The informer apparently also induced the defendant to return to the habit. After several such sales, the informer reported to agents of the Bureau of Narcotics that he had

37. As to whether raising the defense of entrapment admits commission of the criminal acts, see Note, 70 Harv. L. Rev. 1302 (1957).
another seller, and on three occasions government agents observed the defendant giving narcotics to the informer in return for money supplied by the Government.

At the trial, the issue was whether the informer had convinced an otherwise unwilling person to commit a criminal act, or whether the defendant was already predisposed to commit the act. The question of entrapment was allowed to go to the jury and a conviction resulted. The Court of Appeals for the Second Circuit affirmed. The Supreme Court reversed.

Chief Justice Warren, speaking for the Court, declared that Congress could not have intended that its statutes be enforced by tempting innocent persons into violations:

[T]he fact that government agents ‘merely afford opportunities or facilities for the commission of the offense does not’ constitute entrapment. Entrapment occurs only when the criminal conduct was “the product of the creative activity” of law-enforcement officials. . . . To determine whether entrapment has been established a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.

Referring to the Sorrells case, the Chief Justice indicated that at a trial the accused may examine the conduct of the government agent and that the accused would himself be subjected to an “appropriate and searching inquiry into his own conduct and predisposition” as bearing on his claim of innocence.

The Government sought to counter the defense of entrapment in the Sherman case by claiming that the defendant evidenced a “ready complaisance” to accede to the informer’s request. It offered a record of two prior convictions, one in 1942 and one in 1946, for the illegal sale of narcotics and the illegal possession of narcotics respectively. The Court, however, did not find that the nine-year-old conviction for selling and the five-year-old conviction for possession were sufficient to prove that the defendant was ready and willing to sell narcotics at the time the informer approached him, especially where it appeared he was trying to overcome the narcotics habit.

Although he refused to decide an issue “not presented by the parties,” Chief Justice Warren seems to have rejected the contention of Mr. Justice Roberts that the Government should not be permitted to reply to the defense of entrapment by showing that the defendant’s criminal conduct was due to his own readiness and not to the persuasion of govern-

39. 240 F.2d 949 (2d Cir. 1957).
40. 356 U.S. at 372. (Italics supplied.)
42. In Accardi v. United States, 257 F.2d 168, 171 (5th Cir. 1958), the court construed the rationale of the Sherman case as throwing “the main emphasis on the ‘predisposition’ of the accused to commit the crime."
ment agents. The Court also refused to decide whether the factual issue of entrapment should be decided by the judge and not the jury, but stated that the federal courts of appeals since Sorrells have unanimously concluded that "unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." 43

Mr. Justice Frankfurter concurred in the result in a separate opinion which was supported by Justices Douglas, Harlan and Brennan. He pointed out that the basis of the defense of entrapment is as much in doubt today as it was when first recognized over forty years ago. Frankfurter criticized the majority for failing to give the doctrine of entrapment the solid foundation it needed. 44 He thus delineated the rationale of this doctrine:

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. 45

The minority opinion also urged that in the wise administration of criminal justice, the court should pass on the issue of entrapment, and not the jury. It pointed out that a jury verdict "cannot give significant guidance for official conduct for the future," and that "it is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." 46

Masciale v. United States

In a companion case to the Sherman decision, Masciale v. United States, 47 the Court dealt again with the issue of entrapment but arrived this time at a contrary result.

43. 356 U.S. at 377.
44. "It is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers or informers because 'Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.'" Id. at 379.
45. Id. at 380. Mr. Justice Frankfurter continued: "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. ... [I]t 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." Ibid.
46. Id. at 385.
47. 356 U.S. 386 (1958). The defendant was introduced to a narcotics agent by a government informer. The agent pretended to be a big narcotics buyer, and immediately made it clear that he wanted to talk about buying large quantities of high grade narcotics. Instead of leaving, the defendant questioned the agent on his knowledge of the narcotics traffic; boasted that while primarily a gambler, he knew someone whom he considered prominent in the narcotics traffic, and from whom he might get 85% pure heroin.
The defendant here was convicted on three counts of the illegal sale of narcotics and conspiracy. The defense of entrapment had been submitted to the jury and a conviction resulted.

The majority of the Court held that while there was enough evidence, if believed, to establish the defense of entrapment, there was no entrapment as a matter of law. The issue was thus properly submitted to the jury, which was entitled to disbelieve the defendant and find against him on the issue of guilt. The majority again declined to consider whether the issue of entrapment should have been determined by the trial judge since it had not been raised by the parties. While the minority seemed to agree on the result obtained below, they dissented again solely on the ground that the trial court itself should have ruled on the issue of entrapment and not left it to the determination of the jury.

The Sherman and Masciale cases thus represent the latest word of the Supreme Court on the issue of entrapment, and demonstrate that the majority of the Court still adheres to the now somewhat frayed doctrines enunciated twenty-seven years ago in Sorrells.

Still left unsettled, however, is what constitutes the basis of the defense of entrapment, and whether this defense may properly be submitted to a jury or should be decided by the court.

As the law now stands, it is still apparent that the Government can introduce into evidence, by way of meeting the issue of entrapment, the

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The defendant in his trial testimony admitted that he was a gambler; that he told the agent that because of his gambling contacts he knew about the narcotics traffic. However, he denied that he then knew any available source of narcotics or said that he could obtain narcotics. The Court, in an opinion by Chief Justice Warren, pointed out that nowhere in his testimony did the defendant state that either the narcotics agent or the informer tried to persuade him to enter the narcotics traffic during their conversations. There were ten conversations between the defendant and the narcotics agent in the six weeks following their introduction, and the defendant repeatedly told the agent that he was trying to make contact with the source. Finally, the defendant did introduce the agent to a man who sold heroin to the agent the next day. The defendant argued that the informer had engaged in a campaign to persuade him to sell narcotics by using the lure of easy money, and argued that this undisputed testimony explained why he was willing to deal with the agent.

48. 356 U.S. at 389 n.5. But see Sherman v. United States, 356 U.S. 369, 379 n.2 (1958) (dissenting opinion suggesting that the proper cause is to set the matter down for reargument).

49. It may not be out of place to note the recent comment of Professor Kauper of the University of Michigan Law School that the recent trend of the Supreme Court decisions "has considerably modified the historic relationship of judge and jury as it developed at the common law" and that "it seems safe to say that the court is exalting the jury's function at the expense of judicial functions that were recognized at the common law," Kauper, Supreme Court: Trends In Constitutional Interpretation, 24 F.R.D. 155, 170-71 (1959). See also Hart, Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 98-99 (1959).
defendant's past history, record and predisposition to commit the crime charged, however unsavory or unfair this may be.

Mr. Justice Frankfurter has strongly argued that this is unjust and irrelevant to the issue of whether the crime charged against the defendant was actually committed. He has indicated the danger in such a situation, particularly where the issue of entrapment has to be submitted to a jury. The defendant either has to forego the defense of entrapment or else run the risk of substantial prejudice because of the introduction of his prior criminal record or bad reputation.

IV. AMERICAN LAW INSTITUTE RECOMMENDATIONS

At a meeting of the American Law Institute on May 21, 1959, the two alternative principles of the law of entrapment were submitted for consideration in connection with Section 2.10 of the Proposed Model Penal Code. The Council had recommended the adoption of the so-called majority view expounded in Sorrells and Sherman which encompasses not only the character of the police inducement but also the predisposition of the actor, thus putting his character in issue.

This proposed section, as recommended by the Council, would read as follows:

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense he solicits, encourages or otherwise induces another person to engage in conduct constituting such offense when he is not then otherwise disposed to do so.

The Annual Meeting of the Institute rejected this view, however, and adopted instead an alternative formulation of subsection (1) which represents the minority view expressed in Sorrells and Sherman:

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he solicits or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

It must be assumed that the Institute intended to set up an objective, rather than a subjective, standard in using the clause "methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Otherwise, the Government might well introduce evidence of de-

50. 356 U.S. at 382 (dissenting opinion).
fendant's character and criminal record to show he was "ready to commit it." One is justified, moreover, in making this assumption when this language is compared with the clearly subjective standard embodied in the phrase, "where he is not then otherwise disposed to do so," found in the rejected subsection.

By an even closer vote, the Institute adopted subsection (2) which provided for trial of the issue of entrapment by the court in the absence of the jury.\textsuperscript{51} Subsections (2) and (3) read as follows:

(2) Except as provided in paragraph (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the court in the absence of the jury.

(3) The defense afforded by this Section is unavailable in a prosecution for a crime involving conduct causing or threatening bodily injury to a person other than the person perpetrating the entrapment.\textsuperscript{52}

This would seem to give rise to some important questions. Does the determination of the issue of entrapment involve the inherent power of the court to control the administration of justice and protect the integrity of the judicial process and, therefore, should be left solely to the court for determination? Or is it more desirable to say that the issue of entrapment is rather to be compared to the issue of the voluntariness of a confession or incriminating statement which, as a question of admissibility, is passed upon by the court in the first instance, but left to the jury when there is a fair issue of fact.\textsuperscript{53} If this be the distinction, the issue of entrapment should be decided with finality by the court, and counsel may not argue

\textsuperscript{51} At the Annual Meeting of the American Law Institute (1959) the argument was made in opposition to the adoption to subsection (2) that the proper administration of criminal justice is better served by letting the issue go to the jury, thereby obviating the delay necessitated by a trial within a trial.

\textsuperscript{52} In view of the devastating physical effects resulting from narcotic addiction, this language may not achieve the purposes underlying the adoption of the section, one of which is to facilitate the plea of entrapment in narcotic cases.

\textsuperscript{53} When an objection is made by counsel to the admission of a confession or incriminating statement, the only issue the court is called upon to decide is the admissibility of the statement into evidence. In such cases it would seem fair to allow the court to "cast the die against the prosecution but not the accused." Cf. Stein v. New York, 346 U.S. 156, 172 (1953). See also Sacher v. United States, 343 U.S. 1, 8 (1952). A court should reject a confession because involuntary either where the evidence of coercion is uncontradicted and believable, or if it would be against the weight of evidence for a jury to find that it was voluntary. Stein v. New York, 346 U.S. 156 (1953); People v. Leyra, 302 N.Y. 353 (1951). If there be a fair issue of fact, the jury, under proper instructions, should ultimately determine the issue of voluntariness. Stein v. New York, supra; People v. Leyra, supra. See also People v. Weiner, 248 N.Y. 118 (1928). If the confession is admissible because the evidence is insufficient to raise an issue as to voluntariness, then only the question of its weight is for the jury. People v. Meyer, 162 N.Y. 357 (1900).
entrapment to the jury thereafter. If it is only a question of the admissibility of evidence, then the court may, in the first instance, admit the evidence but reserve to the jury the ultimate determination of the weight to be attached to such evidence.

If the court is called upon to decide the issue, does not this require something in the nature of a preliminary trial or a trial within a trial from which the jury must be excused? Conceivably, the minority rule here seems to vest more power in the judiciary than when the issue is left to the jury to handle in a general verdict. Historically, American judges have not enjoyed or exercised some of the prerogatives of their English cousins. They are far more circumspect in commenting on the weight and credibility of evidence. This is true even in the federal courts where such comments in the course of a trial or in the charge to the jury are not prohibited. However, the courts have traditionally handled fact problems when deciding questions of jurisdiction or contempt, or excluding evidence illegally obtained, or when assessing the weight of evidence as a matter of law. It would seem that entrapment fits into a similar pattern. Are not judges more or less inclined to control dispassionately the exercise of police power than the average citizen sitting on a jury?

More consonant with the sound liberal tradition of the Supreme Court, and a closer approximation of fairness in dealing with defendants accused of crimes where some kind of solicitation is involved, would seem to be the doctrine advanced by the minority in the Sherman case.

CONCLUSION

To sum up, it would seem appropriate for the Supreme Court to re-appraise the defense of entrapment and to conclude, as did the majority of the members of the American Law Institute, that the objective standard is a sounder basis for the doctrine, and that its application is for the court rather than for the jury. The determination of the issue of entrapment involves the inherent power of the courts to supervise the administration of justice and should be decided by the court and not left to the jury. The test should not be that of the supposed intention of Con-


gress or of the creative activity of the agent, but whether police conduct falls below the proper standard for the exercise of Governmental power.\textsuperscript{57}

This itself, of course, is not an absolute standard or one susceptible of easy definition. It must necessarily differ in each case. What is quite clear is that while the use of government informers is not improper, nor is it improper for government agents to practice deceit and pretense in affording an opportunity for the commission of crime, the ultimate goal of the permitted police activity is only to reveal criminal design, and not to employ "methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."\textsuperscript{58}

Undue and repeated inducement, based on sympathy or greed, or the defendant's need, such as planting an informer in a doctor's office to lure persons seeking to overcome narcotic addiction into criminal activity, should be forbidden since it does not satisfy the standards of fair and decent police conduct.

Contrary view is expressed in Comment, Entrapment Reexamined by United States Supreme Court, 26 Wash. & Lee L. Rev. 72 (1959), which suggests that the sounder and orthodox rule is that where the evidence on the question of entrapment is in conflict, it presents an issue of fact for the jury on proper instructions. Under this view, of course, when there is no genuine issue of fact the defense is treated as a matter of law. Sherman v. United States, 356 U.S. 369, 377 (1958); United States v. Place, 263 F.2d 627, 629 (2d Cir. 1959).

57. Cf. Sherman v. United States, 356 U.S. 369, 382 (1958) (Frankfurter, J., dissenting). See also Mr. Justice Roberts in Sorrells v. United States, 287 U.S. at 457: "[The preservation of the purity of its own temple belongs only to the court.]" Miller v. United States, 357 U.S. 301, 313 (1959): "We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end." Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., dissenting): "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." Olmstead v. United States, 277 U.S. 438, 469-70 (1928) (Holmes, J., dissenting): "[A]part from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. . . I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Casey v. United States, 276 U.S. 413, 423-25 (1928) (Brandeis, J., dissenting): "The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature. . . This prosecution [of an attorney suspected of delivering narcotics by soaking towels in a solution of the drug to jalled clients and trapped into making a sale to a "stool pigeon"] should be stopped . . . in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts."