Entrapment As A Defense to Criminal Responsibility: Its History, Theory and Application

By Michael A. DeFeo*

I

INTRODUCTION

Though prosaic, it will be necessary for the sake of orderly development to begin by defining the object of our attentions, i.e. the defense of entrapment in criminal prosecutions both state and federal.

(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.¹

This is the authoritative statement of the concept first given by Justice Owen Roberts, concurring in Sorrells v. United States, the landmark United States Supreme Court case on entrapment. Variously phrased, Mr. Justice Roberts’ definition now appears in and is accepted by virtually all reference works as the classic description of the defense.²

This proscribed practice of entrapment typically occurs in the following manner: Officers charged with enforcement of various laws, (usually those directed against consensual crime in which no ready complainant is available, such as prostitution, gambling, or narcotics violations) will, because of suspicion based on varying degrees of reasonableness, approach a suspected violator and request his participation in the illegal activity or transaction. To illustrate Professor Donnelly of Yale Law School relates (his sources are not given) that the “invariable pattern” in narcotics cases is as follows:

An informer, employed by the government, is searched by a narcotics agent, given money (usually marked) and told to make a purchase of drugs. The agent follows the informer and observes the transaction be-

* B.S., Rockhurst (1950); LL.B., Univ. of Missouri, Kansas City (1962); LL.M., Northwestern Univ. (1963). Trial Attorney United States Dept. of Justice, Organized Crime and Racketeering Section. Member, Missouri Bar.

[The views expressed in this article are not intended to reflect an official position of the United States Department of Justice or any Division thereof. They are solely the personal views of the author.]


² See, for example, 22 C.J.S., Criminal Law, §45 (2) (1961); BLACK, LAW DICTIONARY (4th ed. 1951); CLARK & MARSHALL, LAW OF CRIMES, §5:13 (1958); I. BURDICK, THE LAW OF CRIMES, §195 (1946).
between the defendant and the informer. The agent then receives the in-
criminating packet from the informer.
Only too frequently the officer or the stool pigeon, in an excessive and
corrupt desire to obtain a conviction, has actually persuaded a thereto-
fore law abiding person to commit a crime.\(^3\)

This paper will treat the defense of entrapment in criminal prosecutions,
its development, theory and the major problems concerning its application.
By way of exclusion, all parties in only quasi-criminal proceedings who
have occasion to invoke this boon to the way-ward will be slighted. Any
party to a civil suit invoking a doctrine resembling entrapment will be
summarily ignored. Thus are excluded public officers or private employees
with the poor taste to claim entrapment in a discharge or disciplinary pro-
ceeding based on allegedly entrapped misconduct. Similarly, any question
of the criminality of entrapping conduct, i.e. the guilt of the entrapping
agent, will be excluded from consideration.\(^4\) Moreover all cases involving
lack of a factual element essential to guilt are to be distinguished from true
entrapment situations. Professor Perkins points out that many so-called
entrapment cases can be explained as failure to commit a crime due to
over-zealousness of the entrapper.\(^5\) Typical of this error is the consent of a
decoy victim to a crime requiring lack of consent, such as larceny or bur-
glary,\(^6\) and the supplying of a "fence" with property once stolen but which
has lost its contraband character.\(^7\) Having established just how narrow the
inquiry will be, we now proceed.

II
DEVELOPMENT OF THE DOCTRINE

Historically, entrapment must be described as a purely American anomaly,
and a recent one. Until the last quarter of the nineteenth century courts,
both English and American, felt themselves governed by 3 Genesis 13,
wherein Eve, under indictment for consumption of fruit from the Tree
of Good and Evil (possibly some crude form of early Pure Food and Drug
Law), offered as a defense the temptation to which she had been subjected
by the Serpent.\(^8\) It was held, as a matter of law, that the pleaded matter

\(^3\) Donnelly, Judicial Control of Informants, 60 Yale L. J. 1091, 1098 (1951).
\(^4\) A discussion of this matter can be found in Annot. 120 A.L.R. 1506 (1939), Criminal Re-
sponsibility of one who acts as decoy to detect commission of crime.
\(^6\) For a good collection of older cases on this point see Sorrells v. United States, 287 U.S.
\(^7\) People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906). People v. Zimmerman, 11 Cal.App. 115,
104 Pac. 590 (1909).
\(^8\) "Then the Lord God said to the woman, 'What is this that you have done?' The woman
constituted no defense to criminal responsibility. This attitude prevailed in the United States until late in the nineteenth century, the concept of entrapment being considered simply irrelevant to questions of guilt or innocence. In an 1864 liquor violation case, Board of Commissioners v. Backus, the New York Supreme Court first uttered the now hackneyed Eve analogy, and said regarding her plea:

That defense 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.9

When again a New York court had occasion to discuss the defense, raised this time in a prosecution for theft of public records, it there held:

We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it.10

And though this negative attitude toward the defense of entrapment no longer prevails in American courts it is still the rule in Great Britain. In that jurisdiction the defense has been regularly ignored, going completely unrecognized by the earlier authorities and being treated harshly by the modern writers and in the case law. No mention, either favorable, or unfavorable can be found in Hale,11 East,12 Hawkins,13 Russell,14 or Stephen.16

A. The English Approach

English precedent on the subject is quite limited. Norden's case in 1774 held it no defense to a robbery prosecution that the victim went armed in hopes of being robbed, and after completion of the crime arrested the highwayman.16 But where several persons procured others to rob one of their number, and the remainder of the conspirators then arrested the robbers for the reward, no crime of robbery was held to have been com-

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9 29 How.Pr. 33, 42 (N.Y. Sup. Ct. 1864) involved a violation induced by detectives hired by the licensing board. The court rejected the defense that the liquor commissioners were particeps criminis and therefore unable to recover on the bond, and also negatived any excuse of entrapment by citation of its biblical authority.
11 Hale, Pleas of the Crown (1716, 1778, 1847 eds.).
12 East, A Treatise of the Pleas of the Crown (1803).
13 Hawkins, A Summary of the Crown Law (1728); A Treatise of the Pleas of the Crown (1788).
14 Russell, A Treatise of Crimes and Misdemeanors (1819, 1910 eds.).
16 Norden's Case, Fost.Crim.Cas. 129 (1774).
mitted. On the other hand an indictment for disposing of forged bank notes was held proper notwithstanding the person to whom they were uttered was an agent of the involved bank and purchased them for purposes of detection and prosecution. And larceny was found to exist even though the coins stolen had been left unprotected by a servant pretending to cooperate with the thief but in fact acting under the owner's directions. In 1848 a situation arose in which factual entrapment was involved, though the point decided was the applicability of the accomplice testimony rule to evidence given by the entrapping agent. Holding such corroboration to be unnecessary, the charge to the jury stated:

The government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than pretending to concur with the perpetrators.

Basically then, it can be inferred that a permissive attitude toward use of decoys prevailed, as shown in 1880 by R. v. Thomas Titley, wherein admitted solicitation of an abortionist by a plainclothes detective was not even considered as a defense. Shortly after Titley the Scottish case of Blaikie v. Linton, an illegal liquor sale, brought acquittal because the officer was found to have induced a crime which would never have occurred but for his solicitation. Though the cases of the period reflect it poorly, this was a time of frequent comment and interest by the British bar in the entrapment problem, with criticism of police practices and praise of the Blaikie decision appearing in the lawyers' journals of that day. However this generally unfavorable attitude toward police use of entrapment tactics had little effect on the success of an entrapment in the courts. Bickley's case held requests to purchase an abortifacient did not invoke the accomplice testimony rule against the police decoy. Though the facts show misrepresentation and inducement by the agent entrapment is not even considered a defense. In Brannon v. Peak, conviction for violation of the Street Betting Act was reversed on other grounds, nothing being

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20 For the relationship of this accomplice testimony rule to the entrapment problem see Annot. 119 A.L.R. 689 (1939).
24 15 Irish Law Times 395, 410, 494, 583 (1881); 71 London Law Times 223 (1881); 1 Canadian Law Times 542 (1881).
said of the effect of the officer having suggested and requested that his bet be taken by the defendant. And *Browning v. J. W. H. Watson (Rotchester), Ltd.*[^27] upholds conviction under circumstances that might tempt any court to allow, or if necessary, create a defense of entrapment. In that case, as summarized by Glanville Williams:

> The use of a motor-coach by the defendants for the conveyance of members of a club would have been lawful but for the presence of two non-members who were in the employment of the licensing authority and who joined the party as "snoopers," without the knowledge of the defendants. The defendants were convicted of an offense solely because of the presence of the snoopers. It can only be said that this discreditable conclusion was arrived at on the basis of absolute responsibility . . .[^28]

The refusal to allow a defense of entrapment herein indicates that English courts are still not sympathetic toward the concept, no matter how deserving the circumstances.

According to Williams, this hostile attitude is largely due to the belief that there is no legal justification for upholding such defense.[^29] The legal bases on which American courts have rested the defense is a question to which we shall return in Part II-B below, but for the moment it is sufficient to note the British opinion that entrapment can be no excuse to criminal responsibility.

B. *The American Authorities.*

American authorities similarly ignored the possibility of entrapment constituting a defense until the last quarter of the nineteenth century. The topic "entrapment," or any of its synonymous manifestations of "agent provocateur," or "official instigation of crime" cannot be found in any American test until 1880, when the 8th edition of Wharton's stated that entrapment constituted no defense.[^30] By his 10th edition in 1896 Wharton recognized the defense on the basis of an estoppel: "... the government is precluded from asking that the offenders thus decoyed should be convicted. They are associated with the government in the commission of the crime, and the offense being joint, the prosecution must fail."[^31] Bishop, the other leading American text writer, did not recognize the defense in his work until 1923.[^32] A good survey of the early authorities appears in

[^27]: (1953) 2 All.E.R. 775 (Q.B.).
[^29]: Id. at 785.
[^30]: 1 WHARTON, CRIMINAL LAW, 142 (8th ed. 1880).
[^31]: 1 WHARTON, CRIMINAL LAW, 166 (10th ed. 1896).
[^32]: BISHOP, CRIMINAL LAW, §926 (9th ed. 1923).
Mikell's often cited article, *Entrapment in the Federal Courts*. In the United States, the concept of entrapment as a defense seems to have originated with the state courts. In 1878 the case of *Michigan v. Saunders* reversed a conviction for burglary in which evidence of entrapment had been excluded, a concurring justice taking the occasion to state a strong policy against conviction when entrapment had been employed by the government.

If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation. Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction.

In 1879, Texas held a prosecution for bribery of a jailor not within the spirit of the prohibiting Criminal Code section when "the officer first suggests his willingness to a person to accept a bribe to release a prisoner in his charge, and thereby originates the criminal intent..." Within twenty years the defense was common in state prosecutions.

This general acceptance by the state courts was gradually reflected in the federal system. In fact, virtually all the law on entrapment since the *Sorrells* decision in 1932 has been made in the federal courts and adopted by the states.

**Federal Cases**

The first federal case to consider the doctrine is usually said to be *United States v. Whittier* in 1878, a nonmailable matter case, (in which entrapment was not strictly applicable, the solicitation being done by an agent of the Society for the Suppression of Vice rather than by a government agent) wherein replying to a decoy letter was held not to be the giving of information within the statutory prohibition. A concurring opinion collaterally discussed the entrapment issue, and while admitting it to be no defense to criminal responsibility nevertheless suggested that "No court should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime." In 1894 *United States v. Adams* held no

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39 38 Mich. 218 (1878).
40 Id. at 222.
45 59 Fed. 674 (D. Ore. 1894).
conviction could stand in an entrapment situation wherein decoy letters and personal visits overcame the reluctance of a seller of contraceptive devices, even though the vendor had advertised her product in magazines and her reluctance was due solely to a desire to confine sales to married persons, which while morally commendable was legally immaterial. Adams cited as authority for its novel holding the concurring opinion in Whittier and the state case of Michigan v. Saunders. Finally, in 1915 an entrapment case reached the circuit court level, and its favorable reception there marked the beginning of widespread judicial acceptance of the new concept in the federal system. This clear recognition of the defense, and a square holding based thereon by a Federal appellate court, appeared in Woo Wai v. United States41 in 1915, roughly thirty-five years after state courts began to admit the plea. Citing a number of state cases as authority for the concept,42 Woo Wai held a defendant entitled to acquittal as a result of strong persuasion and repeated solicitation used to overcome his resistance to commit the offense charged. The somewhat complicated facts were as follows: the United States Immigration Commission suspected certain immigration officers of allowing illegal importation of Chinese. Believing Woo Wai to have connections with said officers, the Commission, by means of an undercover agent, convinced him to propose illegal importation to certain honest immigration officials, who arrested him for conspiracy to bribe and used the threat of prosecution to gain all information possessed by Woo Wai concerning the suspected officers. Under these circumstances it is little wonder the conviction was reversed. The basis of the defense was said to be “that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes.”43 After Woo Wai the defense was quickly accepted by the lower federal courts, particularly after the onset of Prohibition.44

41 223 Fed. 412 (9th Cir. 1915).
42 Six cases are cited, all of which speak disapprovingly of the entrapment of persons into crime. All are state cases, reflecting the earlier observation that the defense developed originally in the state courts and filtered through to the federal system.
43 Woo Wai v. United States, supra note 41 at 415.
44 Early federal cases are collected in Annot. 18 A.L.R. 146 (1922); Annot. 66 A.L.R. 478 (1930); Annot. 86 A.L.R. 263 (1933); O'Brien v. United States, 51 F.2d 678, note 1 (7th Cir. 1931); and Note 41 Yale L. J. (1932); 2 So. Cal. L. Rev. 283 (1929); 78 Colum. L. Rev. 1067 (1928).
 Probably the last judicial criticism of the basic entrapment doctrine itself was voiced in the 1927 case of United States v. Washington\(^{45}\) wherein Judge Woodrough stated that the defense, "being based on no statute and developed without sanction or encouragement by the Supreme Court the most this court can do is to declare how the doctrine will be applied in the instant case... I adhere to my opinion that the general question is political and not judicial."\(^{46}\) However this conservative approach to recognition of the new defense was already outmoded when the Washington case was decided, as Judge Woodrough realized in his reluctant application of the defense, though his criticism was vainly echoed by Mikell's 1942 article.\(^{47}\)

The United States Supreme Court had been slow to recognize the new defense, but even that was to change by the early 1930's. The career of entrapment in the Supreme Court reflects its comparatively late development and yet widespread acceptance in American courts, all within the span of fifty years. The cause of this phenomenon was basically the nature of the crimes in which entrapment practices are used by the police. America in the late nineteenth and early twentieth centuries witnessed the coming of Comstockery, the Mann Act, The Harrison Drug Act, Prohibition and sumptuary legislation generally to a degree unheard of at common law. Great Britain, on the other hand, has not gone so far as to outlaw prostitution per se, considered in America to be one of the most objectionable of the vice crimes.\(^{48}\) But in almost every American jurisdiction state or federal laws, or municipal ordinances prohibit such of life's simpler pleasures as the practice of prostitution, frequenting its practitioners, gambling, homosexual acts, sale or purchase of intoxicants to some degree, and unauthorized use, transfer or possession of narcotics.

The significance of all these new crimes is their inadaptibility to a prosecutory scheme based on private complaint. These welfare offenses, no longer based on force, fraud or stealth call forth no ready complainant, as all involved are willing participants and cannot be expected to complain. Consequently the creation of these new offenses brought unaccustomed difficulties of enforcement in the attempt to discover the existence of criminal activity and to gather evidence of same. Viewed in historical perspective, the whole problem of entrapment has stemmed from a judicial reaction to

\(^{45}\) 20 F.2d 160 (D. Neb. 1927).

\(^{46}\) Id. at 161.

\(^{47}\) 60 U. PA. L. Rev. 245 (1942).

the means used by police to achieve presence at such illegal transactions, either in person or through the agency of informers.\textsuperscript{49}

In 1928, Mr. Justice Brandeis wrote a powerful dissent, calling for acceptance of the doctrine of entrapment:

The prosecution should be stopped, not because some right (of the defendant) has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts.\textsuperscript{50}

The germ of this dissent, acting upon the accumulated experience of the Court regarding past prosecution, and particularly with abuses under the unpopular National Prohibition Act (an archtypical consensual crime) produced the result in Sorrells v. United States.\textsuperscript{51} A prohibition agent visited the home of Sorrells with other friends of the defendant. After introduction and conversation the agent asked to purchase illegal whiskey, which Sorrells refused to supply. Further conversation established the agent and Sorrells to have served in the same division in World War I, the sheer nostalgia of which induced Sorrells to procure the prohibited intoxicants. When indicted and tried for illegal possession and sale of liquor in violation of the prohibition laws the defendant requested an instruction allowing the jury to find entrapment on the aforementioned facts. The refusal of the instruction constituted grounds for reversal in the Supreme Court. Chief Justice Hughes, speaking for the majority reversed and remanded, stating:

We are of the opinion that upon the evidence produced in the instant case the defense of entrapment was available and the trial court was in error in holding that as a matter of law there was no entrapment, and in refusing to submit the issue to the jury.\textsuperscript{52}

The rationale of this majority opinion was that of statutory construction, determining that Congress, in enacting the National Prohibition Act had no intent to prohibit sales instigated by prohibition agents for the purpose of luring an otherwise innocent person into crime and prosecuting him for such a governmentally induced violation. This acceptance by the Supreme Court of the defense signaled its complete amalgamation into the modern

\textsuperscript{49} The United States Supreme Court has recently permitted wide latitude to law enforcement officers in their use of these techniques. See Hoffa v. United States, \ldots \ U.S. \ldots, 87 S.Ct. 408 (1966); Lewis v. United States, \ldots \ U.S. \ldots, 87 S.Ct. 424 (1966); Osborn v. United States, \ldots \ U.S. \ldots, 87 S. Ct. 429 (1966).

\textsuperscript{50} Casey v. United States, 276 U.S. 413, 425 (1928) (dissenting opinion).

\textsuperscript{51} 287 U.S. 435 (1932).

\textsuperscript{52} Id. at 452.
common law of crimes. In 1958 Sherman v. United States, and Masciale v. United States approved the Sorrells decision and reasoning. The current status of the doctrine would appear to be unchanged.

In summary entrapment is recognized as a defense in most fifty American states. The Supreme Court has affirmed its acceptance of the doctrine, and the lower federal courts regularly encounter and admit the plea. Leading text writers and case book authors discuss entrapment at length with ample case documentation, and the number of cases turning on the entrapment questions grows steadily. Thus, the concept of entrapment is today a well recognized and regularly employed defense. But, as will be seen, this general acceptance has not brought uniformity of opinion as to treatment of the pleading and practice aspects of the defense.

III
DOCTRINAL BASES OF THE ENTRAPMENT CONCEPT

The early authorities which discussed entrapment as a defense made little nonsense about theory. The concept was simply described as a strong public policy against what were considered unnecessary and therefore unjust prosecutions.

Human nature is frail enough at best, and requires no encouragement in wrongdoing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation.

63 356 U.S. 369 (1958), wherein an informer became acquainted with defendant in a doctor's office where both were ostensibly undergoing treatment for their addiction. Sherman was repeatedly solicited by the informer to procure additional narcotics to relieve his alleged suffering from the withdrawal process. Sherman yielded only after many requests and great persuasion, and despite the jury's rejection of an entrapment defense the United States Supreme Court reversed and remanded the case with instructions to dismiss the indictment, its finding being that entrapment existed as a matter of law.

64 356 U.S. 386 (1958), wherein defendant was introduced to a narcotics agent by a third party who was acting as an informer for the Bureau of Narcotics. Masciale testified that he was only trying to help the third party impress the supposed narcotics buyer, but that by promises of easy money and persistent solicitation, the third party eventually induced the defendant to supply narcotics to the government agent. The conviction was affirmed, entrapment not existing as a matter of law and the jury having been properly instructed on the issue.

65 Cf. Lopez v. United States, 373 U.S. 427 (1963) and Lewis v. United States, ...... U.S. ......, 87 S.Ct. 424, 426 (1966) (footnote 3 of the Court's opinion). Lopez and Lewis both concerned the use of government agents who "pretended to play along with" suspects who had attempted to bribe and sell narcotics (respectively). The Supreme Court was more concerned with electronic eavesdropping considerations than entrapment, but affirmed both convictions.

66 See, for example, the cases cited in footnote 42, supra.


... it is unconscionable, contrary to public policy, and to the law of the land to punish a man for the commission of an offense of the like of which he ... evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured him to attempt to commit it.\footnote{Butts v. United States, 273 Fed. 35, 38 (8th Cir. 1921).}

... a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of criminal statutes.\footnote{Woo Wai v. United States, 223 Fed. 412, 415 (9th Cir. 1915).}

It must be conceded that it would be violative of sound public policy and repugnant to good morals to uphold the conviction of a person who, being entirely innocent of any intention to commit a crime, was inveigled into its commission by an officer of the law ... \footnote{Ex parte Moore, 70 Cal.App. 483, 487; 233 Pac. 805, 806 (1924).}

Inevitably legal primitivism yielded to the demands of a precedent system for a clearly defined doctrine offering uniformity of application and predictability of result. Numerous theories have been advanced from time to time as being able to furnish such uniformity, but none has yet won general acceptance.

Proceeding chronologically, the original basis of public policy was so vague as to be useless in determining questions arising in the defense's application and in forecasting results in novel situations. Policy explanations, like interstate carriers, may not discriminate in what they carry, and thus can be invoked in support of any number of conflicting approaches to pleading and evidence problems. These of course are the real focal points of all this theoretical controversy, and here public policy offers no guides or solutions to such mundane problems as what constitutes proper rebuttal evidence or how the defense should be raised. Moreover the phrase "public policy" may explain why an entrapment defense is desirable, but it does not allow the plea. This was the difficulty raised by the landmark majority opinion in \textit{Sorrells}.\footnote{Sorrells v. United States, \textit{supra} note 51.}

Chief Justice Hughes reasoned that the Supreme Court lacked authority to create a hitherto unrecognized excuse to criminal responsibility,\footnote{Weeks v. United States, 232 U.S. 383 (1914) existed as authority for exclusion of illegally obtained evidence, but that decision proceeded under inherent judicial power over admissibility of evidence. Entrapment however involves an acquittal even though accused committed the proscribed acts, with no admissibility question involved. Also the McNabb v. United States, 318 U.S. 332 (1943) and Mallory v. United States 354 U.S. 449 (1957) cases were still in the future, and no broad "civilized standards" rule existed to justify creation of a new defense.} though it did uphold the defense on grounds of statutory construction. The majority felt that to simply acquit or dismiss the indictment even though the defendant had committed the alleged acts would be equivalent to an act of judicial clemency, a prac-
tice specifically forbidden by *Ex Parte United States*. There the Court denied the power of lower federal courts to suspend indefinitely sentences specifically provided for a crime, no matter how humane the reasons for such suspension:

... since its exercise in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution.

Hughes and the other members of the majority regarded a mere humane public policy to be similarly untenable as an explanation of the entrapment defense, holding:

We are unable to approve the view that the court, although treating the statute as applicable despite the entrapment, and the defendant as guilty, has authority to grant immunity, or to adopt a procedure to that end. It is the function of the court to construe the statute, not to defeat it as construed. Clemency is the function of the Executive.

Where defendant has been duly indicted for an offense found to be within the statute, and the proper authorities seek to proceed with the prosecution, the court cannot refuse to try the case in the constitutional method because it desires to let the defendant go free.

Public policy explanations thus were not only vague in application but failed to clear the hurdle of lack of authority, considered by Glanville Williams as the major reason England rejects the defense.

The first doctrinal tool proposed to replace the policy explanation was that of an estoppel, i.e., the basis for entrapment is found in an estoppel worked against the government on the ground it caused and created the crime for which it prosecutes. The concept developed from a cautious combination of public policy and estoppel in *United States v. Healy* wherein a conviction by means of entrapment was said to be "unjust and contrary to public policy" because the government's invitation was "of the nature of fraudulent concealment and deceit, and if not consent, yet doth work an estoppel. Though the defendant has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted." Another court likened

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64 242 U.S. 27 (1916).
65 *Id.* at 51.
67 *Id.* at 450.
70 202 Fed. 349 (D. Mont. 1913).
71 *Id.* at 350.
the situation to that in a civil suit between individuals wherein one insti-
gating damage to his own interests would be precluded from suing the
person induced to commit the injury.\textsuperscript{72} This view was upheld as late as
1943, when the Seventh Circuit ruled "The defense of entrapment is a con-
cession that the crime has been committed, but the law invokes an estoppel
against the government because of the conduct of its officers."\textsuperscript{73} Moreover,
Professor Perkins in his text on criminal law still maintains that "the true theory of the defense of entrapment is that of estoppel."\textsuperscript{74} However
this estoppel doctrine has several grave defects, for as Glanville Williams
points out, the doctrine has never been recognized in the criminal law, no
estoppel being possible against a prosecuting sovereign.\textsuperscript{75}

Next in order of appearance came an explanation of entrapment as a
function of judicial integrity protecting the purity of judicial processes.
The feelings of many judges were expressed by Mr. Justice Brandeis in
his important \textit{Casey} dissent:

This prosecution should be stopped, not because some right of Casey's
has been denied, but in order to protect the Government. To protect it
from illegal conduct of its officers. To preserve the purity of its courts.\textsuperscript{76}

It was this view urged by Justice Roberts in the separate opinion in \textit{Sor-
rells}:

The protection of its own functions and the preservation of the purity of
its own temple belongs only to the court. 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.\textsuperscript{77}

Though well argued, this judicial integrity explanation did not prevail in
\textit{Sorrells}. Advocated by the majority as its rationale was the premise that
Congress, in enacting the National Prohibition Act, did not intend to pro-
hibit sales instigated by prohibition agents for the purpose of luring an
otherwise innocent person into crime and prosecuting him for such a gov-
ernmentally induced violation.\textsuperscript{78} Theoretically speaking, this view explains
the defense as a lack of \textit{actus reus}, i.e. that the act done by defendant was
not criminal because the legislature intended governmentally instigated acts to be excepted from the general statutory prohibition.

\textsuperscript{72} \textit{Voves} v. \textit{United States}, 249 Fed. 191 (7th Cir. 1918).
\textsuperscript{73} \textit{United States} v. \textit{Kaiser}, 138 F.2d 219 (7th Cir. 1943), \textit{cert. den.} 320 U.S. 801 (1944).
\textsuperscript{74} \textit{PERKINS, CRIMINAL LAW}, Chap. 10, §9, p. 925 (1957).
\textsuperscript{75} \textit{WILLIAMS, op. cit. supra} note 71 at 785.
\textsuperscript{76} \textit{Casey} v. \textit{United States}, 276 U.S. 413, 425 (1928) (dissenting opinion).
\textsuperscript{77} \textit{Sorrells} v. \textit{United States}, \textit{supra} note 51 at 456.
\textsuperscript{78} \textit{Donnelly, Judicial Control of Informants}, 60 \textit{Yale L. J.} 1091, 1101 (1951) presents a
good account of the reasoning used to achieve this conclusion.
Mr. Justice Roberts in his concurring opinion was severely critical of this majority attempt as "a new method of rationalizing the defense" which obscured entrapment's true nature as an implementation of the old public policy theory, justified as a judicial refusal to participate in palpable injustice. Seen by Roberts as the major faults of the majority rationale were its hypocrisy in naming this purely judicial offspring after some suspected legislative intent, and its inadequacy to control the pleading and proof of the defense in the way he thought necessary. Recalling the historical development of the entrapment defense by the courts without precedent or legislative encouragement, the hypocrisy criticism commands some agreement. It may also be pointed out that this lack of actus reus theory, because of supposed legislative intent, is workable only in the federal system, wherein all crimes must be of statutory origin. Regarding common law crimes no legislative intent can be posited, and any explanation must admit the defense to be a judicial creation, contrary to Hughes' theory.

Since Sorrells in 1932, little drastically different has been offered in the way of theoretical justification for the defense. The commentators have very markedly favored Roberts' judicial integrity explanation and criticized the majority reasoning. Federal and state cases have simply permitted the defense without analysis of its foundation. And though the Sorrells majority spoke in terms of determining statutory intent on a case by case basis, the lower courts have again and again relied on Sorrells in allowing entrapment as a defense to other statutory crimes without any discussion of the particular legislative intent involved.

Despite scholarly criticism and failure of the lower courts to follow its reasoning, the Sorrells majority explanation was seemingly approved in the only two cases involving entrapment to be decided by the Supreme

79 Sorrells v. United States, supra note 51 at 459.
80 Id. at 456. "This amounts to saying that one who with full intent commits the act defined by law as an offense is nevertheless by virtue of the unspoken and implied mandate of the statute to be adjudged not guilty by reason of someone else's improper conduct. It is merely to adopt a form of words to justify which ought to be based on the inherent right of the court not to be made the instrument of wrong."
81 See Part IV below in regard to pleading and evidence problems and Robert's pronounced views in those matters.
84 Sorrells v. United States, supra note 51 at 451.
Court since 1932. Sherman v. United States\textsuperscript{86} and Masciale v. United States\textsuperscript{87} both narcotics violations, were heard in 1958 and in both cases the Sorrells majority was approved. However the language of Chief Justice Warren in Sherman that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations,"\textsuperscript{88} as opposed to the Sorrells position "We have no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions,"\textsuperscript{89} indicates the legislative intent is no longer presumed to apply only to particular statutes but rather to criminal legislation generally, a position very near to the old public policy explanation, save for blaming that policy on the legislature rather than the courts.

Once again, in Sherman as in Sorrells, a strong minority\textsuperscript{90} spoke for the judicial integrity basis. This time the spokesman was Justice Frankfurter, and his statement that:

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.\textsuperscript{91}

Though not presenting any radically newjustifications for the defense, Frankfurter's opinion does express a changed orientation of the judicial integrity theory. Mr. Justice Brandeis in Casey and Mr. Justice Roberts in Sorrells spoke of the court's reaction to entrapment as defensive in nature, designed to prevent use of the courts as instruments of injustice. Mr. Justice Frankfurter on the other hand speaks of disciplining the police and using the defense as a means of improving police procedures, of frustrating those methods employed on behalf of the government which cannot be countenanced. This difference of emphasis is immaterial within the federal system, as the Supreme Court under the "civilized standards" rule\textsuperscript{92} can apply its minimum standards of judicial integrity to all inferior federal courts, whether those minimums be seen as passively preserving judicial dignity or actively improving police administration. However judicial integrity in Mr. Justice Roberts' version would not justify exten-

\textsuperscript{86} 356 U.S. 369 (1958).
\textsuperscript{87} 356 U.S. 386 (1958).
\textsuperscript{88} Sherman v. United States, supra note 86 at 372.
\textsuperscript{89} Supra note 51 at 451.
\textsuperscript{90} Justices Frankfurter, Douglas, Harlan and Brennan in Sherman; Justices Roberts, Brandeis and Stone in Sorrells.
\textsuperscript{91} Supra note 86 at 380.
\textsuperscript{92} McNabb v. United States, 318 U.S. 332, 340 (1943).
sion of Supreme Court standards regarding entrapment to a case coming from the state courts, or justify their retention in federal cases should Congress limit or restrict the defense in particular crimes. For the Supreme Court to enforce recognition of the defense in such cases would require a conversion into due process. And indeed as long ago as 1921 the case of Butta v. United States used language strongly reminiscent of due process in its historical sense of *per legem terrae*:

It is unconscionable, contrary to public policy, and to the law of the land to punish a man for an offense the like of which he . . . evidently never would have been guilty of if the officers of the law had not inspired, persuaded, and lured him to attempt to commit it.\(^93\)

Such a constitutional transition would be simple indeed under Mr. Justice Frankfurter's view in the Sherman case that:

A statute prohibiting the sale of narcotics is as silent on the question of entrapment as it is on the admissibility of illegally obtained evidence. It is enacted, however, on the basis of certain presuppositions concerning the established legal order and the role of the courts within that system in formulating standards for the administration of criminal justice when Congress itself has not specifically legislated to that end. Specific statutes are to be fitted into an antecedent legal system.\(^94\)

Similarly one of the leading state cases on entrapment, People v. Benford,\(^95\) clearly states that the entrapment defense rests upon the same considerations of a court’s regard for its own dignity as an agency of justice as does the exclusionary rule. Of course since *Mapp v. Ohio*\(^96\) we know the exclusionary rule to be due process, which would lead a suspicious mind to infer that freedom from entrapment may possibly bloom into due process also should a case with sufficiently sordid facts arise to offend the judicial conscience. At least one federal case has stated conviction by entrapment would violate due process, and one commentator has urged this constitutional basis as "the surer ground" on which to base the defense.\(^97\)

To recapitulate, the proffered explanations have come to a full circle. Starting with an unsophisticated denunciation of entrapment as against basic public policy, the explanations have traveled through estoppel, lack of actus reus, and now back to public policy, this time of the sophisticated "civilized standards" type, which vaguely threatens to crystallize into a

\(^{93}\) 273 Fed. 35, 38 (8th Cir. 1921).

\(^{94}\) Supra note 86 at 381.

\(^{95}\) 345 P.2d 928, 937 (Cal. 1959).


constitutional necessity through due process. But no theory commands sufficient acceptance to have determined the practical controversies over pleading and evidence, which must consequently now be dealt with.

IV

PROBLEMS IN TRIAL ADMINISTRATION

A. Tests of Entrapment

Having seen something of the development and theory of the entrapment defense, it is now necessary to consider its application. In applying any defense some verbal formula is needed to serve as the test or instruction by which judge or jury determines existence of the defense. For many years the primary tests used to implement the entrapment defense were simply restatements in lay language of Justice Roberts' definition of entrapment as "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." 98

Expressions most often used to convey this concept have been the "origin of intent" and "creative activity" tests. The origin of intent formulation is traceable to O'Brien v. State wherein it was held no crime "if the officer first suggests his willingness to a person to accept a bribe to release a prisoner in his charge, and thereby originates the criminal intent ..." 99 This characterization of the test of entrapment was approved and adopted in Woo Wai, 100 the first federal appellate decision accepting the defense, and has been used frequently since. 101 When instructing on this test trial judges ordinarily explain that the question for the jury is whether the defendant was predisposed to commit crimes of the general nature of that into which he was entrapped, for obviously the particular intent to initiate the specific illegal transaction originated with the entrapping officers. 102

The creative activity criterion is of uncertain origin. Its modern popularity derives directly from its use by Chief Justice Hughes in the Sorrells opinion:

100 223 Fed. 412 (9th Cir. 1915).
102 United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933), 28 Colum. L. Rev. 1067, 1069 (1928).
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.\textsuperscript{103}

However the true origin may antedate \textit{Sorrells}, as indicated by the language of \textit{Butts v. United States}, decided eleven years earlier:

The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite and create crime for the sole purpose of prosecuting and punishing it . . . (I)t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for an offense the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.\textsuperscript{104}

\textit{Sherman} affirmed the use of this creative activity test\textsuperscript{105} and today much of the discussion of entrapment is phrased in terms of creative activity.\textsuperscript{106}

At the trial level these standard formulations of origin of intent and creative activity are often combined in such instructions as the one common in California courts.

The law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of the person so entrapped as his acts do not constitute a crime. If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose, but the crime was suggested by another person acting with the purpose of entrapping and causing the arrest of the defendant, then the defendant is not criminally liable for the acts so committed.\textsuperscript{107}

Both of these formulations, as well as Roberts' classic definition, express a subjective element which must be found by the jury if it is to acquit for entrapment, i.e. the state of mind or prior disposition of the defendant is the determining factor. "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."\textsuperscript{108} That is the significance of the often repeated statement that what is forbidden is not furnishing of opportunity

\textsuperscript{103} \textit{Supra} note 98 at 451.
\textsuperscript{104} 273 Fed. 35, 38 (8th Cir. 1921).
\textsuperscript{105} 356 U.S. 369, 372 (1958).
\textsuperscript{106} 22 C.J.S. \textit{Criminal Law} §45 (1), (2).
but creation of the criminal disposition, which is the necessary subjective element distinguishing the innocent from the criminal individual. This is analyzed psychiatrically by Professor Donnelly as a means of discriminating between chronic and situational offenders, between an antisocial individual and a weakling. To accomplish this discrimination a great deal of evidence has traditionally been admitted in rebuttal of entrapment which would be admissible neither as substantive evidence nor in impeachment, e.g. arrests without conviction and criminal reputation. Such evidence is however material to the issue of defendant’s prior disposition to commit the offense charged and therefore admissible when entrapment is an issue.

It was primarily this matter of rebuttal evidence which led to the proposal of a new and completely different test, which in effect redefines the defense, eliminating the subjective question of prior disposition and the attendant rebuttal evidence. This new definition was put forward by Professor Richard Donnelly, who suggested that the proper criterion be:

Was the officer’s (or stool pigeon’s) conduct of such a nature that only a chronic violator would be tempted if the officer uses inducement that would reasonably overcome the resistance of one not a chronic offender, such as pleas of desperate illness, continued and persistent coaxing, appeals to sympathy, pity or friendship or offers of inordinate sums of money, the court should find as a matter of law, that there was entrapment.

Donnelly’s dissatisfaction with the orthodox definition and formulations was echoed by Mr. Justice Frankfurter’s Sherman opinion in 1958. His feeling was that

... it is wholly irrelevant to ask if the “intention” to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of “creative activity” of law-enforcement officials.

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109 See Part IV-B below, Rebuttal Evidence, for the scope of rebuttal evidence allowed to an entrapment defense.

110 United States v. Becker, supra note 102 at 1008, contains an excellent analysis by Judge Learned Hand of the subjective nature of the entrapment defense. Interpreting the Sorrells decision he held that mere inducement or solicitation by police did not establish the defense, as the Government might rebut by evidence of ready compliance, similar conduct, or preformed design, all of which go to the subjective question of defendant’s prior state of mind or disposition.

111 Part IV-B below details why the traditional rebuttal was considered objectionable. Basically it was feared the jury would be prejudicially inflamed by knowledge of a defendant’s past disposition, if it were criminal, and tend to punish him for bad character generally rather than for the crime charged.

112 Donnelly, Judicial Control of Informants, 60 Yale L. J. 1091, 1114 (1951).

113 Supra note 86 at 382.
Rather entrapment should mean:

...that in holding out inducements they (the police) should act in such a manner as is likely to induce the commission of crime only those persons (ready and willing to commit further crimes) and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits, and will give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised.114

This then is the proposed but yet unaccepted test of Frankfurter and Donnelly—a general objective definition of entrapment as unreasonably tempting police conduct rather than an individualized subjective definition as the luring into crime of an otherwise innocent person.

In addition to these well known rival tests of entrapment there remains a third criterion, that of reasonable cause, which is rarely discussed and then only to be criticized.115

Once again this test of entrapment constitutes in effect a whole new definition, for under its standards the question is neither the orthodox inquiry whether the government induced the commission of a crime which would not otherwise have occurred, nor the Donnelly-Frankfurter test whether only chronic violators would be tempted by the particular police conduct. Rather the question is whether the police acted reasonably under the circumstances, that is upon reasonable suspicion.116 Though rarely articulated, existence of this test is demonstrated by allowance of rebuttal evidence of reasonable suspicion through hearsay complaints117 or information,118 hearsay being traditionally inadmissible as substantive evidence but admissible in proof of probable cause and reasonableness.119

In summary, three criteria of entrapment have been advanced. Tra-

114 Id. at 384.
116 22 C.J.S. Criminal Law §45(2) (1961), 44 Iowa L. Rev. 578, 584 (1959), 16 Wash. & Lee L. Rev. 72, 75 (1959), 60 Yale L. J. 1091, 1104 (1951) contain cases on what constitutes reasonable grounds. Also Annot. 55 A.L.R.2d 1322, 1339 (1957), entrapment to commit offense against laws regulating sales of liquor.
117 Heath v. United States, 169 F.2d 1007 (10th Cir. 1948), I.R.S. agent acting on numerous complaints re defendant.
118 Cratty v. United States, 163 F.2d 844 (D.C. Cir. 1947), Bureau of Narcotics agent acting on “reliable information.”
119 Draper v. United States, 358 U.S. 307 (1959), Reliable hearsay may constitute probable cause for arrest; indeed an occasional jury instruction will even expressly adopt the criterion of reasonable suspicion, as in Ryles v. United States, 183 F.2d 944, 945 (10th Cir. 1950).
tionally a subjective ascertainment of whether the particular entrapped defendant be an unwary innocent or an unwary criminal has been the federal and majority rule. Since the 1950's some pressure has been felt for an objective test of whether the police conduct would tempt only chronic violators regardless of its effect on the particular defendant. And cropping up now and then is a third test of "reasonable suspicion" which has been little noticed or discussed.

Which among these three tests is preferrable is of course a value question and therefore determined by one's own prejudices. The author in this section has attempted to confine himself to a descriptive function; his value judgments concerning these criteria will be set forth in the Conclusion below.

B. Rebuttal Evidence

To understand this problem one must review briefly the trial of a typical entrapment situation. Ordinarily the prosecution's case in chief will detail the illegal transaction and defendant's part therein without mention of any inducement or persuasion used to secure his participation. Either on cross-examination or by his own witnesses defendant will then raise the defense, showing persuasion or inducement to have been used by the government officers or their agents. Instances of police conduct which may be shown as evidence of inducement raising the entrapment issue are appeals based on sympathy, friendship, sickness, offers of money, repeated or persistent solicitation.

120 Government instigation is the essence of the entrapment concept; inducement by a private person thus cannot make the defense available. Papadikis v. United States, 208 F.2d 945 (9th Cir. 1953). Similarly there is no defense if a citizen approached with a counterfeiting scheme reports it and leads on the defendant at the government's request. United States v. Spadafora, 181 F.2d 957 (7th Cir. 1950), cert. denied 340 U.S. 897 (1950). But the government must accept responsibility for paid informers and those promised immunity. Cratty v. United States, 163 F.2d 849 (D.C. Cir. 1947), Hayes v. United States, 112 F.2d 676 (10th Cir. 1940). Entrapment is also a valid defense in federal courts even though the inducement was done by state officers. Henderson v. United States, 237 F.2d 169 (5th Cir. 1956). And when one defendant is induced to plan a crime with another who is not personally solicited by the government some courts hold both defendants entrapped, the second defendant on the theory the one personally solicited was the government's unwitting agent. Klosterman v. United States, 248 F.2d 191 (3rd Cir. 1957). Others deny an agency can be so implied. United States v. Perkins, 190 F.2d 49 (7th Cir. 1951).

121 Sherman v. United States, supra note 86; Lutfy v. United States, 198 F.2d 760 (9th Cir. 1952).


123 State v. McKeehan, 48 Idaho 112, 279 Pac. 616 (1929); Butts v. United States, 273 Fed. 35 (8th Cir. 1921); Price v. United States, 56 F.2d 135 (7th Cir. 1932).


125 State v. Marquardt, 139 Conn. 1, 89 A.2d 219 (1952); People v. Benford, 345 P.2d 928 (Cal. 1959); People v. Kozaklis, 102 Cal.App.2d 662, 228 P.2d 58 (1951).
The prosecution then naturally desires to rebut the defense's evidence of entrapment, which it has traditionally been allowed to do with proof of prior criminal disposition, i.e. that the defendant was an unwary criminal rather than an unwary innocent.

As was seen in discussing dealing with the various tests of entrapment, the majority criterion involves a subjective determination, the ultimate question being not whether the Government used persuasive activity but whether that activity corrupted a mind and caused a needless crime:

For the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises. The predisposition and criminal design of the defendant are relevant . . . The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of his defense.126

In the federal system this rule allowing subjective rebuttal evidence prevailed both before and after the Sorrells case and was explicitly reaffirmed in the Sherman majority opinion that: "The accused may examine the conduct of the government agent: and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence."127 Nearly all states follow the federal rule admitting this type of subjective rebuttal evidence.128

As for exactly what evidence is allowed to refute defendant's claim of entrapment under this view, the classic formulation comes from Learned Hand in the Becker case decided in 1933.129 Therein it was stated that rebuttal evidence might go to prove "an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so, as evidenced by ready complaisance." And as was previously mentioned this includes evidence of past criminal conduct130 not necessarily limited to felonies131 nor convictions,132

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126 Sorrells v. United States, supra note 51 at 451.
127 Sherman v. United States, supra note 86 at 372.
129 United States v. Becker, supra note 102 at 1009.
131 Carlton v. United States, 198 F.2d 795 (9th Cir. 1952).
132 44 IOWA L. REV. 578, 584, note 29 (1959) contains representative cases.
or criminal reputation. Proponents of this orthodox position point out that such rebuttal evidence is essential to any proper determination under either the origin of intent or creative activity formulations of the entrapment definition, for both involve ascertainment of the subjective effect on defendant of the entrapment conduct. This subjective effect is of course not relevant to any issue in the prosecution until defendant raises the defense of entrapment, and therefore must come in, if at all, in reply to the defense’s evidence of persuasion or inducement establishing entrapment. Hand believes that this rebuttal to defendant’s proof of entrapping conduct is vital, for “it would seem probable, that if there were no reply, it would be impossible ever to secure convictions of any offenses which consist of transactions that are carried on in secret.”

In addition to subjective rebuttal evidence bearing on the defendant’s state of mind another type is occasionally found. Though the view is much in dispute some courts allow proof of reasonable suspicion by the officers to be used in rebuttal, or even require such showing to be made lest entrapment be found as a matter of law.

Some however are not favorably impressed by any sort of rebuttal evidence: witness Professor Donnelly of Yale and Justice Frankfurter in his Sherman opinion. These gentlemen maintain a third view that once

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134 Though some courts allow such evidence during the case in chief when it merely anticipates an entrapment defense sure to be raised. Reece v. United States, 131 F.2d 186 (5th Cir. 1942), cert denied 318 U.S. 759 (1943).
138 Sherman v. United States, 200 F.2d 880, 882 (2nd Cir. 1952).
137 Some of the cases allowing such proof are found in 22 C.J.S. Criminal Law §45(2), p. 145 note 98.5 (1961); 55 A.L.R.2d 1322, 1339 (1957); also People v. Finkelstien 98 Cal.App. 2d 545, 220 P.2d 934 (1950); State v. Good, 165 N.E.2d 28 (Ohio 1961); Johnson v. State, 36 Ala.App. 634, 61 So.2d 867 (1952); Trice v. United States, 211 F.2d 513 (9th Cir. 1954); C. M. Spring Drug Co. v. United States, 12 F.2d 852 (8th Cir. 1926).
138 “It is well recognized that officers may entrap one into the commission of an offense only when they have reasonable grounds to believe that he is engaged in unlawful activities... (1) it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused.” Heath v. United States, 169 F.2d 1007, 1010 (10th Cir. 1948); United States v. Certain Quantities of Intoxicating Liquors, 290 Fed. 824 (D. New Hamp. 1923); Swallum v. United States, 39 F.2d 390 (8th Cir. 1930); Ryles v. United States, 183 F.2d 944 (10th Cir. 1950), cert. denied 340 U.S. 877 (1950).
139 Donnelly, Judicial Control of Informants, 60 Yale L. J. 1091 (1951).
140 Supra note 86 at 378.
unusual inducement is shown a defense exists to which there can be no reply. This refusal of rebuttal evidence proceeds on two principal grounds, one theoretical and one practical. Theoretically, all this rebuttal evidence bearing on the subjective element of entrapment is irrelevant if one follows the purely objective test advanced by Donnelly in his 1951 article and advocated in Frankfurter's 1958 Sherman opinion. According to that criterion the controlling question is whether the police conduct "falls below standards, to which common feelings respond, for the proper use of governmental power." 141

This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits ... 142

Again and again throughout his Sherman opinion Justice Frankfurter reiterates the opinion that rebuttal evidence is wholly irrelevant and immaterial because a

... test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reasons for the defense of entrapment. ... Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities. 143

Practically, objection is made against allowing, even under the majority test including a subjective inquiry, the prosecution to prove willingness of the defendant to indulge in the crime charged by evidence of similar crimes, criminal reputation or ready compliance. It is claimed that:

The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged. 144

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141 Id. at 382.
142 Id. at 384.
143 Id. at 383.
144 Ibid.
In truth this fear expressed by Mr. Justice Frankfurter and others\(^{145}\) is not unfounded, and the potential danger has moved California to exclude rebuttal evidence of past crimes or criminal reputation, even while following a subjective "origin of intent" test of entrapment that requires determination of the defendant's prior disposition and inclinations.\(^{146}\) Though relevant, this evidence is held to be inherently prejudicial and therefore inadmissible. With all such evidence excluded the determination of pre-existing criminal intent, which is essential to application of California's origin of intent test, would seem to be nearly impossible and subject to Hand's criticism that prosecutions for consensual crimes must practically cease. However the California courts meet this difficulty by allowing pre-existing criminal intent to be inferred from a number of factors, none dealing with an individual defendant's shortcomings of character. Among these non-prejudicial means of determining the origin of intent are readiness to commit the crime charged, \(^{147}\) defendant's own admissions, \(^{148}\) court's view that the offense is one habitually committed.\(^{149}\)

Summarizing, then, orthodox belief favors admission of any evidence relevant to determining where the criminal intent originated, including evidence of past similar criminal conduct and criminal reputation so long as it bears on defendant's predisposition to commit the specific crime involved. A strict minority objects to this as not only prejudicial in effect on a jury but also necessarily to be excluded as immaterial. This position reflects Donnelly and Frankfurter's purely objective definition of entrapment as police conduct which would tempt even one not habitually engaged in crime, an issue to which criminal reputation, prior crimes and reasonable suspicion are simply unrelated. Another body of opinion tests entrapment by the reasonableness of the police conduct under the particular circumstances and therefore admits rebuttal evidence of reasonable suspicion based on hearsay or criminal reputation.

A compromise alternative to these jarring sects is offered by the California courts. This approach follows the orthodox subjective inquiry (i.e. whether the police action caused a needless crime or merely controlled the


\(^{146}\)People v. Benford, 345 P.2d 928 (Cal. 1959).


precipitation of one ready to happen). However evidence of past criminal conduct or reputation, and of reasonable suspicion is excluded because prejudicial, though some evidence of prior disposition (e.g. ready compliance) is admissible because free from overly prejudicial connotation.

C. Question of Law or Fact

Concluding our list of disputes over trial administration of the defense is the question whether entrapment be a matter of law to be determined by trial and appellate judges, or a question of fact for the jury.

Traditionally, availability of entrapment as a defense has been regarded as a jury question whenever some evidence tends to show the crime was a result of governmental instigation.\(^{150}\) All states follow this rule of jury submission, as do the federal courts.\(^{151}\) The elements of the defense should therefore be explained to the jury in proper instruction, adapted to the particular crime charged. What constitutes proper jury instruction varies little among jurisdictions, an extremely common form being that used by the California courts.

The law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of the person so entrapped as his acts do not constitute a crime.

If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose, but the crime was suggested by another person acting with the purpose of entrapping and causing the arrest of the defendant, then the defendant is not criminally liable for the acts so committed.

It is important in considering the defense of entrapment to ascertain whether the acts charged as constituting the offense were the result of the intent of some other person to place the accused in a position where he might be charged with the offense, in which event the defendant may not be convicted or whether the defendant, acting in pursuance of his own intent, committed the acts, such other person merely affording him the opportunity of doing so, in which latter event the defense of entrapment would not relieve the defendant of responsibility.\(^{152}\)

\(^{150}\) Discussions of the necessity for jury submission appear at Annot. 69 A.L.R.2d 1397 at 1433 (1960) Entrapment to commit bribery or offer to bribe; Annot. 55 A.L.R.2d 1322 at 1372 (1957), Entrapment to commit offense against law regulating sales of liquor; Annot. 33 A.L.R.2d 883 at 902 (1954), Entrapment to commit offense with respect to narcotics law.

\(^{151}\) Sorrells v. United States, supra note 51 at 452 and Sherman v. United States, supra note 86 to 377.

\(^{152}\) People v. Finkelstin, 98 Cal.App.2d 545, 552; 220 P.2d 934, 941 (1950).
Instructions in federal courts are much the same:

What do we mean by entrapment in the law? Of course, in every arrest there is a certain amount of entrapment in order to outwit the persons who are violating the law or who are about to violate the law. A certain amount of deception has to be exercised in most cases. The law does not forbid that. The type of entrapment that the law forbids is the entrapment which involves originating in the mind of someone a violation of the law, instead of inducing that person already having in mind to violate the law to violate it again. In other words, the question as to whether or not there has been the entrapment that is forbidden by the law depends upon whether or not what is done leading up to the violation amounted to putting it in the mind of a person who had no notion or intent of violating the law, who had no inclination heretofore to do it, and leading him into doing it for the first time. That is the entrapment that is forbidden. But as you find in this case that this man already had in his mind the desire to violate the law, regardless of whether there is proof that he had previously violated it or not, then the law says that this inducement is not improper, even though the actual incident or incidents in question, these various sales, would not have occurred if the Government agent had not been present and asked whether he could make a purchase. That is all a question of fact, Members of the Jury, and it is one for you to decide.153

Within this general acceptance of entrapment as a jury question there are the usual leeways within which a judge may rule on matters of law, either as to insufficiency of proof to show entrapment or as to establishment of entrapment as a matter of law. Thus a trial judge should refuse a requested instruction when it is wholly unsupported by the proof, entrapment being an affirmative defense which defendant has the burden of raising.154

On the other hand, situations may arise wherein all evidence points to the sole conclusion that the defendant was illegally entrapped, and the issue may then be decided as a matter of law by the court. At the appellate level the clearest example of this is the Sherman reversal with instruction that the district court dismiss the indictment, based on a finding that the Government's uncontradicted testimony showed inducement of an unwilling and reforming addict.155

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153 Butler v. United States, 191 F.2d 433 (4th Cir. 1951). For other typical instructions see 60 YALE L. J. 1091, 1104 (1951), and 44 IOWA L. REV. 578, 580 (1959).


155 Sherman v. United States, supra note 86. But see Masciale v. United States, 356 U.S. 386 (1958) to the effect that a defendant's undisputed testimony of solicitation will not establish entrapment as a matter of law as the jury may disbelieve said undisputed testimony.
Basically, then, entrapment must be conceded to be a jury question subject only to the ordinary possibilities of judge determination in cases of extremely one-sided evidence. The primary arguments offered for jury determination seem to be three in number. First, that the entrapment issues involve close questions of fact, turning on credibility of the defendant or of the alleged entrapper, and such weighing of credibility is traditionally considered to be within the jury’s peculiar competence. Second, that the subjective way in which entrapment is traditionally defined involves determination of the defendant’s motivation and intent which require the collective objectivity of a jury, resulting in the composite judgment of a “reasonable man” as to what those motives were. Third, that the juries in entrapment cases express community standards, acquitting whenever police practices shook the common conscience, regardless of the legal technicalities involved.

Though never explicitly stated, it also seems likely that the entrapment defense was left to the jury because of innate judicial responsibility for the new defense. Creating a new common law defense to criminal responsibility was a difficult enough innovation, and it is not surprising that judges should shift some of the responsibility for administering that defense to the jury. However neither this reason nor the three mentioned previously, nor the universal practice favoring jury submission convince certain authorities. Substantial dissents, by Justices Roberts, Brandeis and Stone in Sorrells, and by Justices Frankfurter, Douglas, Harlan and Brennan in Sherman strongly urged determination of the entrapment issue by the judges, and the same minority based their dissent in Masciale solely on that ground. Numerous commentators have concurred in this recommendation; indeed scholarly writing overwhelmingly favors judicial determination. Offered in support of this view have been the following arguments. First, judicial decisions unlike general verdicts are controlling and explicit precedents, giving enforcement officials definite and approved rules as to what degree of deception and persuasion may be used. This argument was asserted in Sherman by Mr. Justice Frankfurter as a conclusion to his minority opinion.

Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give

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156 This list is compiled from discussions found in the Model Penal Code, §2:10 Comments, (Tent. Draft No. 9, 1959); 49 J.C.L., C. & P. S. 449 (1959); 16 Wash. & Lee L. Rev. 72 (1959); 73 Harv. L. Rev. 1333 (1960) as well as the offhand references and brief allusions to the jury issue found in the cases researched for this paper.

significant guidance for official conduct for the future. Only the court, through the evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands.158

Second, that admission of rebuttal evidence either to show reasonable suspicion or prior criminal inclination is dangerously prejudicial before an untrained and emotional jury. It is feared legally unsophisticated minds are unable to confine the effect of reputation and criminal activity to the narrow question of prior intent, and will unavoidably use it as substantive evidence of guilt, or in punishing defendant for a bad character rather than the specific crime charged.159 Third, in answer to any argument that entrapment involves conflicting stories and difficult determinations of disputed facts, it is pointed out that questions of jurisdiction involve the same problems but are resolved by a judge without a jury. This point is theoretically extended to analogize entrapment to a jurisdictional question under Robert's judicial purity theory.

The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. 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.160

To sum up, arguments can be made for both sides of the controversy, but practice has to date decided in favor of jury determination. Whether this is for the best, and what future developments are probable in this matter will be discussed below in the Conclusion.

V

CONCLUSION

A reaction to abuses of the type revealed in Sherman is working toward the looser construction advocated by the minority opinions of Justice Roberts in Sorrells and Justice Frankfurter in Sherman. At its 1959 meeting the American Law Institute chose Frankfurter's objective test in direct preference to the traditional subjective test.161 Considerable law review agitation for this change is evident.162

158 Supra note 86 at 385.
160 Id. at 457; 28 Fordham L. Rev. 399, 417 (1959); 49 J.C.L., C. & P. S. 447, 452 (1959).
162 Representative of the clamor for a strictly objective test of "civilized police conduct" are the following: 8 U.C.L.A. L. Rev. 463, 467 (1961); 28 Fordham L. Rev. 399, 417 (1959); 33 N.Y.U. L. Rev. 1033, 1039 (1958); 49 J.C.L., C. & P. S. 447, 449 (1959); and most recently, 1 U.S.F. L. Rev. 177 (1966).
However, my own personal analysis and observations proceed from somewhat different premises. First, it must be accepted that entrapment is purely judicial creation, a product of the modern common law and neither a statutory nor constitutional necessity. We should recognize the defense as what Learned Hand described as a "spontaneous moral revulsion" on the part of the judiciary against prosecutorial harshness, and realize that all theories are merely means of legitimating this emotion. The many rationalizations that have been advanced to justify the entrapment defense should not be allowed to obscure the undeniable truth, that an entrapped defendant has knowingly and voluntarily committed a criminal act. We torture theory to deny his responsibility, as demonstrated by the admitted presence of all elements of guilt when the entrapping conduct is done by a private person:

Although there is an instinctive sympathy for the originally well-intentioned defendant who is seduced into crime by persuasion and artifice, such a defendant is just as guilty where his seducer is a police officer as he would be if persuaded by a hardened criminal accomplice. Entrapment is a defense not because the defendant is innocent but because as stated by Justice H. Holmes (dissenting in Olmstead v. U.S., 277 U.S. 438, 470, 1928, an illegally obtained evidence case) "it is a less evil that some criminals should escape than that the Government should play an ignoble part." 163

The entrapment device does not disprove the commission of crime, it merely implements the common feeling that innocent people should not be tricked into unnecessary criminal acts. "The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise avoid." (L. Hand in Becker v. United States164). Acquittal for entrapment is simply a projection of the common desire that prosecutions of this sort not be brought, a humane abberation in the criminal law. At first blush this may seem an oversimplification. Yet an historical perspective supports this drastic analysis; such judicial adjustment of the criminal process to relieve against prosecutorial or legislative harshness is neither novel nor alarming. Thus Leon Radzinowicz, in his HISTORY OF THE ENGLISH CRIMINAL LAW, cites numerous instances of criminal legislation being given a reasonable meaning by the courts when they deem a literal meaning too severe,165 or a literal meaning when reasonable interpretation would require an undesirable result.166 Similar examples of in-

164 62 F.2d 1007, 1009 (2nd Cir. 1933).
165 1 RADZINOWICZ, HISTORY OF THE ENGLISH CRIMINAL LAW, p. 97, 434 (1948).
166 Id. p. 78, 86–8, 660, 685.
genius interpretation are approved in Hughes' *Sorrells* opinion,\textsuperscript{167} Holds-
worth lists many examples of strict, even ridiculous, reading of indictments
due in great part to the severity of the then potential punishments.\textsuperscript{168} Benefit of clergy to felons clearly not of clerical inclinations constituted a
blanket judicial commutation of unpopular mandatory death sentences. The *McNabb-Mallory* civilized standards rule\textsuperscript{169} interposed the federal
judiciary between defendants and what was considered investigatorial abuse, as does the exclusionary rule generally.

These illustrations indicate what ample precedent exists for judicial
adjustment of unwelcome statutes or prosecutorial practices; it is the
author's conviction that the whole problem of entrapment revolves around
what form that judicial adjustment should take. The three tests or criteria
of entrapment discussed above are but attempts to work out a satisfactory
means of channeling and implementing the judicial determination to pre-
vent convictions obtained by entrapment.

To accomplish that end the traditional approach, exemplified by Chief
Justice Hughes' *Sorrells* opinion, defines entrapment as a common law de-
fense, substantively categorizing defendants as innocent or guilty on the
basis of their readiness to commit the crime regardless of inducement. To
arrive at this subjective, individualized determination it is necessary to
have rebuttal evidence revealing prior disposition, such as reputation or
previous criminal activity. And this question is to be submitted to the jury
not only because substantive defenses are traditionally jury questions, but
also because the many disputed facts and conflicts regarding credibility
are, according to accepted belief in the jury system, questions best decided
by the collective objectivity of a jury.

Another approach, initiated by Justice Roberts in *Sorrells* and perpet-
uated by Donnelly\textsuperscript{170} and Justice Frankfurter in *Sherman*, implements
judicial hostility toward entrapment practices by a bolder technique. Irked
by potential prejudice involved in weighing prior disposition these gentle-
men would have judged the nature of police activity and free a defendant
whenever police act in a way that would tempt a situational offender, i.e.
the only permissible police conduct is that which would tempt chronic
violators and no others. Moreover they demand pretrial judge determina-
tion on the basis that the civility of police conduct goes to the very juris-
diction of the court, traditionally an issue for the judge, who should with-

\textsuperscript{167} Supra note 51 at 446 et seq.
\textsuperscript{168} 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, p. 616–23 (1923).
\textsuperscript{169} McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449
(1957).
\textsuperscript{170} Donnelly, *Judicial Control of Informants*, 60 YALE L. J. 1091 (1951).
hold said jurisdiction and dismiss the prosecution if offended by police impropriety.

Finally, if an outright proponent of the reasonable suspicion test could be found, it would be argued that entrapment is simply one form of judicial supervision of police conduct through the power of review, that the traditional and constitutional standard of reviewing police conduct is that of reasonableness, and accordingly, that the proper test is whether the police acted upon reasonable grounds. This view requires evidence to show reasonable suspicion, which often is the same potentially prejudicial stuff of past criminal activity and reputation considered by many as objectionable when admitted under the majority subjective test. Moreover hearsay information and complaints are material to this determination. Under this approach the decision whether the police acted reasonably is made by the jury, which is an innovation in the sense other forms of judicial review of police action have in the past been decided by judges without aid of a jury. However dismissal of a prosecution for entrapment is a more comprehensive question than legality of search or seizure, and perhaps allowing it to merge into the general verdict is not overly incongruous. And the right of judges rather than juries to review police conduct is due more to the now abdicated magisterial role as instigator and director of pretrial investigation, before a jury had been assembled, than to any inherent superiority over jury review of police reasonableness.

Before offering my opinion as to the respective worth of these approaches let me detail my bias. I personally have no use for the entrapment defense. Every man has an obligation to obey the law. If he cannot resist temptation, the law will not ordinarily excuse his ventures into antisocial activity, whether they be chronic or situational. Entrapping tactics by the police were not considered disagreeable enough to warrant a defense at common law or even today in Great Britain, and I agree with that reactionary position.

Unfortunately such nostalgia for the rigors of the common law is impractical. Occasionally a state will limit the scope of the entrapment doctrine, as did Florida in 1949, but there is simply no likelihood the defense will be abolished anywhere that it now exists. Consequently, making the best of a bad situation, I have no objection to either the orthodox subjec-

tive test or that of reasonable suspicion, as either way the present relatively narrow coverage of the defense would not be appreciably expanded. Indeed it would even be possible to combine the two and acquit for entrapment either if the police conduct were unreasonable or if reasonable but found to have induced an otherwise innocent person. But the proposed objective test must be rejected. On first looking into the Donnelly and Frankfurter proposals of acquitting for any conduct that might tempt a situational offender I felt two reactions. First, that the real purpose of the objective test was to make rebuttal evidence of prior disposition or reasonable suspicion immaterial. Those familiar with the workings of the entrapment defense must realize that this would vastly improve chances for acquittal. And to again invoke Learned Hand, "Indeed it would seem probable that, if there were no reply, (i.e. rebuttal evidence) it would be impossible ever to secure convictions of any offenses which consist of transactions that are carried on in secret." \(^{172}\) Such a reduction in the rate of conviction in entrapment situations seems a luxury better not indulged in our present condition of social insecurity. Second, besides eliminating necessary rebuttal evidence, the new test itself unwisely broadens the defense because it draws the line of permissible police conduct far short of what social necessity and protection demand. The hallmark of permissibility according to Frankfurter, as taken from Professor Donnelly's article, is that the activity would tempt only chronic violators. But what would tempt only a chronic violator? Possibly mere requests to make an illegal sale or indulge in an illegal transaction fit this description but little else. "On the other hand, if the officer uses inducements that would reasonably overcome the resistance of one not a chronic offender, such as pleas of desperate illness, continued and persistent coaxing, appeals to sympathy, pity, or friendship, or offers of inordinate sums of money, the court should find as a matter of law that there was entrapment." \(^{173}\)

Yet the tavern keeper selling to minors, the bellboy or taxi driver taking bets, the escort service furnishing prostitutes require reassurance, gratuities, and lies to overcome their criminal caution, all of which would be outlawed because tempting to some situational violator with inhibitions weakened by drink or financial need. I cannot but feel that those things which would attract professional criminals and no others are so few as to make enforcement of legislation against consensual crime nearly impossible. The core of my objection to the Donnelly-Frankfurter objective test is that its reform is built upon oversimplification. Errant mankind does not

\(^{172}\) United States v. Sherman, 220 F.2d 880, 882 (2nd Cir. 1952).

\(^{173}\) Donnelly, supra note 170 at 1114. (Footnotes in quotation omitted.)
neatly divide into two classes, situational or chronic violators; rather the spectrum shades gradually from hardened professional through occasional petty larcenists to the most accidental of traffic offenders. When determining what violators should receive judicial clemency through the entrapment defense it seems an excess of sympathy to design a criterion protecting all but the most reckless of criminals, those who require no persuasion or inducement. There is proverbially a little larceny in each of us, and a great deal in some. To deny the police use of certain tactics solely because they might tempt those with only a little larceny, even though said tactics are necessary to catch the more larcenous, is inferior to judging those techniques by a standard of reasonableness, or under the orthodox test allowing a jury to express a community judgment on whether the defendant deserved protection from such entrapping tactics.

The issue of whether entrapment should be a question of law or fact, for judge or jury, is an easier one to answer—let experience decide. No matter what the test used, if some jurisdictions find jury submission to work so poorly as to require change no one should object. But it simply has not yet been demonstrated that such change is necessary and I am therefore willing to endorse the status quo of jury determination.

Actually this entire inquiry represents an endorsement of the status quo. In summary, the research involved in preparing this study has led me to the definite opinion that the present defense operates well enough, that possible evidence of reasonable suspicion could be profitably admitted, but that no other adjustment is particularly desirable.