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THE DEFENCE OF ENTRAPMENT

JOEL SHAFER AND WILLIAM J. SHERIDAN*

The exact position in law of the agent provocateur and the related defence of entrapment is, to say the least, unclear. There exist many diverse points of view with respect to the ingredients of the defence, its definition, theoretical foundation and entire scope of operation. One cannot even be sure if such a defence really exists at all in any jurisdiction, for while the United States Supreme Court is supposed to have firmly entrenched the doctrine, there have always been very vigorous and well received dissents to the reasoning of the majority; moreover, some authors have interpreted these very same majority decisions as completely obliterating the defence.¹ In England and Canada, judicial decisions have completely avoided the issue except for some *obiter* comments, even when it was potentially worthy of consideration on the facts and specifically pleaded by the accused.² These cases were resolved on other bases.

Not only is there uncertainty with respect to ingredients and theoretical basis, there is still dispute over whether entrapment is an issue for the judge or for the jury, whether it applies to all crimes, even those involving bodily harm and violence, the criminal culpability of the agent provocateur himself, the procedural consequences of raising the defence, and its effects, if any, on the primary and secondary burdens of proof at trial. The only real certainty in this area is that the courts, excepting those in the United States, consistently avoid formally recognizing the existence of a legal defence of entrapment, but in their decisions may effectively achieve a comparable solution. The impression one gets is that if a person is accused of a crime obviously manufactured by the police with only the prosecution motive in mind, that person will probably be acquitted in the U.S., England and Canada.

PART I— HISTORY OF ENTRAPMENT

A. GENERAL

The issue of entrapment almost invariably arises with respect to consensual crimes, the so-called "crimes without a victim". Once society has deemed certain actions criminal even if there is no complainant, the problem

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¹ William E. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. Pa. L. Rev. 245 at 254 (1942).

² see *Lemieux v. The Queen*, [1967] S.C.R. 492 and *Patterson v. The Queen*, [1968] 3 C.R. 23, discussed *infra*.

of enforcement is aggravated. As there will be, by definition, no civilian prosecutor, the police will be driven to adopt positive investigatory and detection measures should they decide these laws are to be rigorously enforced—an assumption which might well be the subject of another study. In these endeavours it will be necessary for them to seemingly participate in the offence in order to acquire proof of its committal and evidence against an ultimate accused. Thus comes into being the person known variously as the undercover agent, police spy or agent provocateur. Our present concern relates to the issue of what control, if any, a court will exercise over his activities.

It is universally conceded that the undercover agent may act so as to provide the opportunity for the commission of the offence; that is, he may be the catalyst for the transaction. But the problem inevitably arises of the overly zealous agent whose activities may be alleged to instigate the crime or to bring about an offence that would never have been otherwise committed. The liability of the agent provocateur for the commission of such an offence is considered below. What we wish to examine now is whether or not such conduct provides the ultimate accused a defence in law. Examples of judicial condemnation of unconscionable instigation may be found beyond number, but is the accused provided with a defence thereby?

Until the late nineteenth century no common law court had recognized a defence of entrapment at all. Instigation of any type was considered totally irrelevant to the issue of guilt or innocence, according to the rather overworked Biblical quotation of 3 Genesis 13:

“And the Lord God said unto the woman: What is this that thou hast done? And the woman said: The serpent beguiled me, and I did eat.”

An early American case concerning a liquor control regulation actually denied a defence of entrapment on this authority.³

B. ENGLAND

Entrapment has never really developed as a defence in its own right in England. Early cases ignore it completely and, for the most part, it is still remarkable only for its absence. Where there has been more flagrant abuse of instigating techniques an argument based on another issue may be accepted to provide *ad hoc* relief; but rarely will entrapment itself be faced head-on. Thus, where a number of persons procured another to rob a co-conspirator in order to arrest the robber for a reward, it was held there was no *actus reus* and the accused exonerated⁴ (unfortunately posthumously, for he had already been executed before the true facts appeared).

In *R. v. Mullins*,⁵ one of the Chartist criminal conspiracy cases, the only issue raised in an entrapment situation was the necessity of corroboration of an

³ *Bd. of Commissioners v. Backus* 29 How. Pr. 33 (N.Y. Sup.Ct.1864).

⁴ *R. v. Macdaniel*, 168 E.R. 124 (1754).

⁵ 3 Cox Crim. Cases 526 (1848).

agent provocateur in his role as an accomplice. It was held that the agent was not a true accomplice and did not require corroboration. Entrapment as a defence was evidently never mentioned. A similar omission occurred in *R. v. Titley*,⁶ a prosecution resulting from the solicitation of the services of an abortionist by the police. The facts show misrepresentation and strong inducement, including a finding that the woman involved was not even pregnant. Yet, the court considered that the only issues were the intent of the accused and the effectiveness of his methods; the jury convicted. In a rather remarkable Scottish case,⁷ a police spy induced the defendant to sell her some whisky, for which sale he had no permit, by strong pleadings that otherwise she would have to walk some distance. The defendant argued he was entrapped and the court acquitted without reasons, but it must be noted that he also contended there was a fault in the pleadings.

By 1909 the courts were still concerned only with the evidentiary value of the agent provocateur's testimony and ruled, following *Mullins*, that a police spy is not an accomplice so the rule that a jury should not act on the uncorroborated evidence of an accomplice does not apply to such a person.⁸ In *Brannan v. Peek*⁹ a police agent entered a pub and placed several bets with the accused, using repeated entreaties to overcome his hesitancy. At trial a conviction was entered, but on appeal the accused was set free on the grounds that a pub is not a public place. Lord Goddard, C.J., calling it a "point of much greater public importance", stated that the court observed with concern and strong disapproval that the police "committed an offence to catch a criminal. . . . It is wholly wrong to allow a practice of that sort to take place".¹⁰ Humphreys, J., said:¹¹

I think the most serious aspect of this case is that not only did the police constable commit an offence but . . . he encouraged and persuaded another person to commit an offence.

Thus, we find judicial disapproval of such practices but no indication that the accused may be accorded a defence thereby.

In a more recent and in some ways more disturbing case,¹² two spies stealthily entered upon a vehicle licenced to carry only members of a club. Even though no other passengers were shown to be non-members and the defendant company had no knowledge whatever of the spies' presence, a conviction was obtained on the doctrine of absolute liability. No sensitivity to entrapment as a defence was shown, although the practice was again disapproved of. A slightly different approach was taken in *R. v. Murphy*,¹³ a court-martial appeal, in which it was stated that improperly obtained evidence is not necessarily admissible. The court has some discretion to reject evidence

⁶ 14 Cox Crim. Cases 502 (1880).

⁷ *Blaikie v. Linton*, 18 Scot. Law Rep. 583 (1880).

⁸ *R. v. Bickley* (1909) 73 J.P. 239 (Ct. Cr. Appeal).

⁹ [1948] 1 K.B. 68.

¹⁰ *Ibid.* at p. 72.

¹¹ *Ibid.* at p. 73.

¹² *Browning v. Watson (Rochester) Ltd.* [1953] 1 W.L.R. 1172.

¹³ [1965] N.I. 138, Ct. M.A.C.

¹⁴ [1967] 1 W.L.R. 1051 (Q.B.).

if, though otherwise admissible, it would operate *unfairly* against the accused. This, however, is an extremely tenuous basis for any general conclusion.

Finally, in *Sneddon v. Stevenson*¹⁴ a police officer drove his car up to the accused and, when she opened the door, accepted her offer of prostitution. The court was of the firm opinion that the officer was not a party to the offence and did nothing reproachable by merely giving the suspect the opportunity to commit an offence. It is only where an agent provocateur encourages or incites the commission of an offence that the courts will be concerned — but exactly what they would do is not stated.

Glanville Williams¹⁵ observes that some undercover work is necessary for police effectiveness and that once a judicial restraint is imposed, it would be difficult to define its limits. Without necessarily approving the situation he concludes that the issue has not been squarely dealt with in England, and, as the law now stands, there is certainly no general defence of entrapment.

C. CANADA

The Canadian cases show a similar trend of pre-occupation with peripheral issues and a failure to come to grips with the main problem. As a result, there is no definitive rule available and the status of entrapment is totally uncertain.

In *Amsden v. Rodgers*¹⁶ a police agent made repeated false representations to the accused, a brakeman with a previously clean record, that he was ill and induced the latter to walk to the buffet car, buy him a drink and bring it back to him in his seat. When the brakeman accepted reimbursement of the price of the drink on his return the agent charged him with the illegal sale of liquor. Even more startling than these facts was the conduct of the court in treating the only issue as one of credibility: the agent testified the sale took place in one province, the accused said it occurred in another, and the court was concerned solely with whom to believe.

After holding that an agent provocateur is not an accomplice whose testimony need be corroborated the court said, regarding the false representations:¹⁷

. . . where the false statements are made not for the detection of crime committed but for the purpose of inducing its commission . . . in order that the person making these statements may be able to prefer a charge for the offence committed at his solicitation [the] evidence of such a witness must, in my opinion, be scrutinized with great care.

And further,¹⁸

. . . where the zeal . . . of an officer of the law leads him to make false statements . . . in order that he may be able to prosecute the offender, his evidence must be weighed in the light of the possibility that the same motives might have a tendency to induce him to color his testimony in order to secure a conviction.

¹⁵ *Criminal Law: The General Part*, pp. 782-89.

¹⁶ 26 C.C.C. 389 (1916).

¹⁷ at p. 391.

¹⁸ *Ibid.*

But the point we must note is that the matter is treated solely as one of evidence and the reliability of the agent as witness. There is no mention of a defence *per se* even in these extreme circumstances.

After the trial judge concluded that in his opinion the accused must be acquitted since the agent was not to be believed, he referred to an American case in which it was said:¹⁹

When in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime or instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be the capture of old offenders their conduct is not only reprehensible but criminal, and ought to be rebuked rather than encouraged by the Courts.

While agreeing that the above has "a great deal of force", he then specifically refused to adopt it as his own reasoning.

Again, in *R. v. McCranor*,²⁰ a case in which two "whisky detectives" were employed by the Ontario Liquor Licence Department solely to obtain evidence of liquor violations, the only issues referred to by both majority and dissenting judges were the weight to be given to the evidence of a complainant who invites the accused to commit the offence and the necessity of corroboration.

A case in which the issue of entrapment could have been dealt with squarely reached the Supreme Court of Canada in 1967.²¹ It was uncontroverted on the facts that the defendant was solicited by an informer working with the police to undertake a break-in. The agent "was to lead a man who at first had no intention of breaking and entering, who went to the scene of the crime at B's [the agent] instigation, and who was led into the trap by B". Thus, the entire scheme can be said to have originated with the police and those under their control.

As the police had obtained a key from the owner of the premises and received his consent for the set-up, the court held that no crime was, in fact, committed as there was no *actus reus*. But it went on to say:²²

Had Lemieux in fact committed the offence with which he was charged, the circumstance that he had done the forbidden act at the solicitation of an agent provocateur would have been irrelevant to the question of his guilt or innocence.

Unless it may be argued that the above is purely *obiter*, that the concession of the existence of *mens rea* which the defence made was crucial, or that the word "solicitation" does not include all possible instigating conduct, this decision may preclude further argument relative to entrapment as a defence in Canada.

In another case which reached the Supreme Court²³ accused was charged with keeping a common bawdy-house, a police agent having induced the conduct leading to the charge. The Court acquitted on the ground that no

¹⁹ *Connor v. People* (1893) 36 Am. St. R. 300.

²⁰ 44 O.L.R. 482 (1918).

²¹ *R. v. Lemieux*, [1967] S.C.R. 492.

²² at p. 496.

²³ *R. v. Patterson*, [1968] 3 C.R. 23.

frequent or habitual use of the house for immoral purposes had been shown, but no mention of entrapment was made; it does not appear it was even argued by the defence. The Annotation to the case deplors the fact that no such argument was made or accepted on the basis that no state can safely adopt a policy by which crime is artificially propagated.

The most recent Ontario case to mention entrapment is *R. v. Ormerod*.²⁴ Ormerod was approached by a person who, unknown to him, was an R.C.M.P. undercover agent and was asked if he wanted to sell drugs. Ormerod then took the initiative of contacting another R.C.M.P. agent and, under the impression he was now working for the latter, procured drugs for the undercover man. He was thereupon charged with trafficking in drugs notwithstanding these facts and his lack of prior involvement with drugs. The trial judge convicted him, holding that these facts did not establish any defence.

In the Court of Appeal, Laskin, J.A., writing the majority opinion states that the defence of entrapment²⁵

. . . goes not to the issue of whether the crime has been committed but to the issue of whether the methods employed by the police should be tolerated . . .

In another case,²⁶ the Ontario Court of Appeal recognizes that the court is not powerless to prevent abuse of its own process through oppressive proceedings and seems to suggest that a defence may be available where there is "calculated inveighing and persistent importuning" beyond ordinary solicitation; what this means is left open. Laskin, J.A., recognizes this principle and then quotes Judson, J., in *Lemieux*²⁷ and remarks that the effect of this passage depends on the meaning given the word "solicitation". Without going further on this issue he rejects the defences that the accused was immune from prosecution as an agent of the police and that there was no *mens rea*, thereby upholding the conviction. However, he then invokes the discretion of the court and suspends sentence. As a result, no effective support is given to the establishment of entrapment as a defence in its own right.

McGillivray, J.A., dissenting in part, said:²⁸

Had it been established that police officers had authorized or even encouraged the appellant to violate the law by trafficking in marijuana or other drugs, I would agree some modification in the sentences should be imposed.

But the conviction, of course, would still stand.

Therefore, in Canada as in England no substantial support has been given to the defence of entrapment. In obvious cases it would seem that the court may be more willing to acquit on other grounds or may reflect its disapproval of police conduct by lighter sentences; the defence has never been supported judicially *per se*, however. The only general principles which may be of aid to an accused in an entrapment situation are those of *Osborn* as referred to by Laskin, J.A., above and those of *R. v. Wray*²⁹ where the

²⁴ [1969] 2 O.R. 230.

²⁵ at p. 238.

²⁶ *R. v. Osborn* [1969] 1 O.R. 152.

²⁷ [1967] S.C.R. 492 at 496.

²⁸ [1969] 2 O.R. 230 at 232.

²⁹ Ontario Court of Appeal, October 1969 as yet unreported.

Ontario Court of Appeal, in supporting the discretion of a trial judge to refuse to admit illegally obtained evidence, held it more important to maintain the integrity of the judicial process by refusing to convict in extreme circumstances. It is a question of conflicting values and the court has power to prevent the implication of that which puts the entire judicial system into disrepute.

D. UNITED STATES

The position which the American courts have taken on the issue of entrapment is quite different from that of their English and Canadian counterparts. Judges at all levels of the state and federal court systems have discussed entrapment fully and have established it as a recognized defence which, when successfully argued, leads to an absolute acquittal. Even though the defence has been approved by the Supreme Court of the United States, however, the exact basis on which it rests has never been made clear and there is no comprehensive explanation of its theory. The definition universally accepted is that of Roberts, J., in *Sorrells v. U.S.*³⁰

Entrapment is the conception and planning of a crime 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.

As in England, there would appear to be no mention of such a defence in the American courts before the late nineteenth century; but once introduced in the United States it spread quickly throughout both federal and state court systems and gained widespread approval. In 1880 the eighth edition of Wharton³¹ mentions entrapment for the first time but denies that it is a defence; by 1896, however, the tenth edition³² concedes that it is a defence and that the government is precluded from prosecuting should it be established.

Entrapment was first recognized in the state courts³³ and by 1894 reported cases of its acceptance as a defence were quite common. It then was adopted by the federal courts as an established principle. In *U.S. v. Whittier*,³⁴ where the charge was sending obscene matter through the mails, it was held, relying on *Macdaniel*,³⁵ that no crime was committed against the statute setting out an offence in an entrapment situation. A concurring judgment said, "no court should . . . lend its countenance to contrivances for inducing a person to commit a crime".³⁶

In *U.S. v. Adams*,³⁷ another obscene mails prosecution, a conviction was quashed on appeal when it was shown there was continued solicitation

³⁰ 287 U.S. 435 at 454 (1932).

³¹ 1 Wharton, *Criminal Law*, p. 142 (8th ed. 1880).

³² 1 Wharton, *Criminal Law*, p. 166, (10th ed. 1896).

³³ *Michigan v. Saunders*, 38 Mich. 218 (1878) *O'Brien v. State*, 6 Tex. Cr. App. 665 (1879). For a full discussion of the early cases see Mikell, *Entrapment in the Federal Courts*, 90 U. Pa. L. Rev. 245 (1942).

³⁴ 5 Dill. 41.

³⁵ *Supra*, n.4.

³⁶ 5 Dill. 41.

³⁷ 59 Fed. 674 (1894).

by government agents and a reluctance by the defendant to commit the offence from the beginning. The court cited the concurring opinion in *Whittier*³⁸ and the decision in *Saunders*³⁹ as authority. Entrapment was first mentioned in the Supreme Court of the United States in *Grimm v. U.S.*,⁴⁰ yet another obscene mails case, but because the court decided that the actions of the police officer did not amount to an inducement to commit the offence the accused was convicted. There was no full discussion of the defence at that time.

One of the more grimly humorous cases is *U.S. v. Healy*.⁴¹ Government agents disguised an Indian as a white man and sent him into a liquor store with marked money after teaching him one English word, "whisky". When the proprietor served his innocent-looking customer he was charged with providing alcohol for an Indian. In acquitting the defendant the court said the government agents' invitation to crime "doth work an estoppel" to conviction and,⁴²

Though the seller 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.

The issue of entrapment was first dealt with fully at the circuit court level in *Woo Wai v. U.S.*⁴³ Immigration officials felt the accused had considerable information regarding the illegal smuggling of Chinese into the United States from Mexico, even if he did not actually partake in this. To get the information they set out to entrap him into committing an offence and then using the threat of prosecution to blackmail him. He refused to go along with any of a number of schemes proposed until repeated entreaties and pleas won him over. When he later refrained from giving any further information, a charge of conspiracy to violate the immigration laws was laid against him. In reversing the conviction the circuit court stated it would apply a test of who conceived the original criminal design. Here, the primary intention to commit crime was not in the defendant and he was induced to go along only by sustained pressure. The court went on to say,⁴⁴

. . . it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case. . . . 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.

This decision is all the more important because it was the first in a federal jurisdiction to expressly rule that, although defendant had committed the crime with which he was charged, he was still entitled to be acquitted on grounds of entrapment.

The defence was used extensively in liquor prosecutions during the Prohibition Era⁴⁵ but was slow to reach the Supreme Court. *Certiorari* was

³⁸ *Supra*, n. 34.

³⁹ *Supra*, n. 33.

⁴⁰ 156 U.S. 604 (1895).

⁴¹ 202 Fed. 349 (1913).

⁴² *Ibid.*, at p. 350.

⁴³ 223 Fed. 412 (1915).

⁴⁴ *Ibid.*, at 415.

⁴⁵ See Annot. 86 A.L.R. 263 (1933).

probably not readily granted because the nature of the crimes in relation to which entrapment usually arises involves inherent enforcement difficulties and necessitates reliance upon the agent provocateur. A conclusive judicial opinion before the issue was ripe might have led to an undesirable curtailment of police practice at a time when it was already seen as woefully inadequate. By 1928, however, Brandeis, J., in a very powerful dissent, had called for complete acceptance of the defence:⁴⁶

[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 [the] courts.

This dissent, the growing acceptance of entrapment in the lower courts and the unpopularity of the National Prohibition Act finally led to a complete analysis of the problem by the Supreme Court in *Sorrells v. U.S.*⁴⁷ The decision in this case firmly entrenched and authorized the defence, even though the basis for its acceptance was not made totally clear. M, a prohibition agent, posed as a tourist and visited accused in his home. A friendly conversation ensued during which M related that they were members of the same army division in the First World War and they reminisced about common experiences. M then asked if he could buy some whisky and accused replied he had none; a second request yielded the same result. Finally, after some talk about the army, M asked again. This time accused agreed and left his house, returning in a short time with a small quantity. M was the only one to mention whisky each time and the defendant was of good general character with no previous connections with alcohol. The Supreme Court held, reversing all lower court decisions, that conviction is improper where the acts alleged to constitute the offence were committed solely upon the instigation of an agent provocateur.

Here, the act was said to be the creature of the agent's purpose and he lured defendant, otherwise blameless, to its commission by persistent solicitation and resort to sentiment. The court was unanimous in the conclusion that a conviction must be set aside where the original criminal intent comes from a government agent who implants in the mind of an innocent person the disposition to commit an offence in order to prosecute him for it. On the other hand, the fact that an agent merely provides an opportunity for the commission of a crime would be no defence. Past this, however, the court split five to four on three major issues; the basis of the defence, how it arises in the context of a trial and whether it is a matter of fact or law.

It was universally hoped that when the problem next came before the Supreme Court these differences would be resolved. Such was not to be the case, however. In *Sherman v. U.S.*⁴⁸ an agent provocateur who met the accused at a narcotic addicts' treatment centre resorted to repeated appeals to sympathy and finally induced the latter to procure some drugs for him. In the process the accused was prompted to take up the habit again. The majority of the Court, in a decision written by Warren, C.J., followed the

⁴⁶ *Casey v. U.S.* 276 U.S. 413 (1928) at 425.

⁴⁷ 287 U.S. 435 (1932).

⁴⁸ 356 U.S. 369 (1958).

majority in *Sorrells*, while a strong concurring judgment supported the minority viewpoint.

Nothing further was added to this dichotomy in *Masciale v. U.S.*⁴⁹ decided by the Supreme Court on the same day as *Sherman*.

PART II — THEORETICAL BASIS IN LAW

If there is some uncertainty with respect to other aspects of entrapment, there is complete confusion over the theoretical basis on which to lay its foundation in law. The United States Supreme Court has articulated convincingly upon the subject, but there have been vigorous and well received dissents to the reasoning; in England and Canada, no judicial attempt to spell out a theoretical basis can be found.

In *Woo Wai (supra)*, the first "big" case in the U.S. concerned with entrapment, acquittal is based on a notion of pure public policy. Where an accused is enticed by an agent into a crime he would not otherwise have committed, he must be excused because: ". . . a served 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."⁵⁰

Other U.S. cases bring in the concept of estoppel. The headnote of *U.S. v. Lynch*⁵¹ reads in part:

The government *held* estopped from prosecuting a defendant for offering a bribe to secure a government contract for his firm on the ground that the offer was induced by an army officer at the instance of Military Intelligence Department for the purpose of entrapment.

While other support of estoppel as a theoretical basis for entrapment can be found,⁵² Glanville Williams disputes its applicability on the ground that estoppel against a prosecuting sovereign has never been judicially recognized.⁵³ Neither of the above two bases has been referred to by the U.S. Supreme Court and it appears that they are ignored in most current cases.

When the highest American court chose to speak out on entrapment, it found itself badly split on this question of theory. In *Sorrells*, Hughes, J., writing the majority decision held that, in an entrapment situation, no crime is committed because on the basis of statutory interpretation Congress cannot be said to have intended the law to cover such a situation. This conduct, induced as it was by the police agent, was not foreseen to be proscribed and the accused must be acquitted because his actions do not fall within the intend-

⁴⁹ 356 U.S. 386 (1958).

⁵⁰ *U.S. v. Woo Wai* 223 Fed. 412 (1915) at 415; see De Feo, *op. cit.*, p. 253.

⁵¹ *U.S. v. Lynch* 256 Fed. 983 (1918).

⁵² Mr. Justice Brandeis, dissenting, in *Cassey v. U.S.*, 276 U.S. 413 (1928), also used estoppel; estoppel put forth by Wharton, *Criminal Law*, (10th ed. 1896) p. 166.

⁵³ *op. cit.*, p. 785.

ment of the legislation. To the prosecution's contention that motive and inducement are irrelevant, the majority replied that it is the function of the court to ensure that the application of law is not foreign to its purpose:⁵⁴

Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned.

As it was not the law's intent that it should be abused to lure innocents and then prosecute them, the Government's case fails.

Hughes, J., went on to emphasize that, in the majority opinion, no court may find an accused guilty and then provide immunity. The basis of the defence is that the defendant's actions are not outlawed by the Act in the first place.⁵⁵

Fundamentally, the question is whether the defence . . . takes the case out of the purview of the statute because it cannot be supposed that Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose.

Furthermore, the defence is the same as any other and is raised by a plea of "not guilty". If facts are produced which may go to prove it, the trial judge must properly charge the jury and leave it to them as a question of fact whether or not the statute has been violated.

In a concurring opinion, Roberts, J., with whom Brandeis and Stone, JJ, agreed, based the defence upon other considerations. He rejected the statutory construction basis as being artificial, uncertain of application, and too liable to be defeated by legislative amendment. The reading into statutes of a provision which Congress did not put therein nor even vaguely hint at amounts to judicial amendment, and while Congress can overrule or alter a court judgment, a court must accept a statute as it stands. Furthermore, the majority basis could easily be viewed as analagous to clemency which is within the sole jurisdiction of the Executive branch of government.

The concurring judgment would rest the defence on a concept of judicial integrity, i.e. the inherent power of a court to refuse to be involved in disreputable conduct. Although the defendant has committed the acts alleged and otherwise falls within the Act, the court may refuse to convict on the basis that this would be less harmful to the judicial process than the sanctioning of such police conduct. Thus, the concurring judgment,⁵⁶

. . . frankly recognizes the true foundation of the doctrine in the public policy which protects the purity of government and its processes. . . . Neither courts of equity nor those administering legal remedies tolerate the use of their processes to consummate a wrong.

Again,⁵⁷

The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court.

The defence is therefore unique in that it is based principally upon the actions of the police. It is best raised before the trial begins by a motion to quash the

⁵⁴ *Ibid.* p. 446.

⁵⁵ *Ibid.* at p. 452.

⁵⁶ *Ibid.* at p. 455.

⁵⁷ *Ibid.* at p. 457.

indictment. If the facts are clear the judge must rule on them as a question of law and the case will only proceed before the jury for a determination of facts in dispute. Once those facts are found, the ruling still falls back on the judge.

Warren, C.J., writing the majority decision in *Sherman*, adopted the reasoning of Hughes and held entrapment to be a defence because Congress could not have intended that its statutes were to be enforced against persons, otherwise innocent, who were induced to commit the offence by government agents. He pointedly refused to support Roberts in *Sorrells* but went on to say that he did not necessarily reject the Roberts' view.

A concurring judgment written by Frankfurter, J., supports the minority in *Sorrells*. Entrapment is a matter of law according to which,⁵⁸

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.

The true issue, accordingly, is not whether the defendant falls within the statute but whether a conviction will bring disrepute to law enforcement.⁵⁹

The crucial question . . . 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.

Even though the above conflict exists, all United States' courts have been unanimous in holding that it is proper police practice to provide an opportunity for the unwary criminal to commit an offence; what must be guarded against is the ensnarement of an unwary innocent. For the difference between opportunity and enticement two cases have been generally accepted as providing some guidelines.⁶⁰ From *U.S. v. Becker*⁶¹ it is taken that *opportunity* only is shown by,

. . . an existing course of similar 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 from *U.S. v. Washington*⁶² *inducement* may be shown by,

any effective appeal made by the agents to the impulses of compassion, sympathy, pity, friendship, fear, or hope, other than the ordinary expectation of gain and profit incident to the traffic . . .

There is yet another approach which is not really an approach at all — that of conspicuously ignoring the entire issue and providing a remedy, where required, by some other means. To date, this has been the English and Canadian judicial policy. In *Amsden v. Rodgers*⁶³ the accused was acquitted on a jurisdictional issue; in *Lemieux*,⁶⁴ on a finding of no *actus reus*; and in *Patterson*⁶⁵ on a technicality of evidence. Thus, the remedy is informal,

⁵⁸ *Ibid.*, at p. 380.

⁵⁹ *Ibid.*, at p. 382.

⁶⁰ For a full discussion of the difference between opportunity and enticement see 18 A.L.R. 146 as supplemented by 66 A.L.R. 478 and 86 A.L.R. 263.

⁶¹ 62 F 2d 1007 at 1008 (1933).

⁶² 20 F 2d 160 at 163 (1927).

⁶³ (1916) 26 C.C.C. 389.

⁶⁴ [1967] SCR 492.

⁶⁵ [1968] 3 C.R. 23 (S. Ct. Can.).

selective, and totally at the discretion of the judge. It is just part of the more general theory that the court has all necessary powers to prevent the abuse and to maintain the integrity of its process.

As a result of this policy, entrapment is not formally recognized as a defence and no theoretical basis need be formulated. Perhaps there is some logic in this for several learned authors have decided that there is no theoretical justification for a formalized defence. Glanville Williams, in rejecting estoppel, says 'There is no other ready made doctrine to cover the situation'.⁶⁶ The basis may not even be too crucial, for as Professor Mikell points out:⁶⁷

In truth there seems to be no rational basis for the doctrine of entrapment. Its origin is to be found in the natural feeling, shared by judges, that a person should not be made the victim of what Mr. Justice Holmes called . . . "dirty business." Moved by this detestation and, in a lesser degree, by sympathy for the 'unwary' 'innocent' defendant the courts have groped for some legal principle on which to render nugatory the acts of the officer or to excuse the entrapped defendant.

PART III — THE APPLICATION IN COURT

A. TESTS

As we have seen, there is unanimity of opinion upon neither the existence of the defence of entrapment, nor its basis in law or theory. Yet, even if we wish only to consider whether or not it is desirable, some explanation of how it is to be applied in an actual trial court setting must be formulated. We must consider what charge the presiding judge could give to a jury or the direction he must himself follow, the evidentiary problems which would arise according to the test used, and the basic differentiation between matters of fact and those of law.

Three separate tests have been proposed in the American courts, two of which have been extensively used and have considerable support; the third is usually mentioned only for the purpose of rejecting it. Not only the verbal formulae of the two major tests differ. They present widely different considerations and the adoption of one over the other is a decision which goes to the root of all other issues including the purpose of the defence and its place in a legal system.

The test least often mentioned and, of course, less often supported is one which concerns itself with the reasons for the approach of the defendant by the agent provocateur and is usually called a "reasonable cause" test. According to it, one must determine the purpose for which the police or their agents first decided to concentrate upon the accused and then ask if they acted upon reasonable suspicion. If the answer is in the affirmative, the defence of entrapment fails and the trial proceeds as if it were not in issue. Only if the defence

⁶⁶ Glanville Williams, *op. cit.*, p. 785.

⁶⁷ Mikell, *op. cit.*, p. 263.

can show the police acted without reasonable cause will a defence be established. Suffice to say this test is realistic in neither basis nor purpose and we were able to find no reputable authority which supported it.

The first of the two tests relied on by theorists and judges is variously called one of "creative activity" or "origin of intent". It is highly subjective and seeks to enquire into the state of mind of the accused at the time he was first approached by a police agent. If he had a perfectly innocent intent and was induced to commit the offence only by virtue of the prodding of the agent provocateur, the defence is established. Put another way, it is sufficient to show that the crime would never have been committed *but for* the instigation of the government agent. Courts which have applied this test, however, have emphasized that if the accused was of a state of mind in which he already had a general criminal intent and was merely awaiting an opportunity for implementing that design, the furnishing of it by the police provides no defence whatever. This is most often referred to as his "pre-disposition" and the problems involved in determining such an elusive factor are considered below.

Those judges and writers who support the origin of intent test are usually, but not always, those who accept the majority decisions in *Sherman* and *Sorrells*. As these opinions are the ratios of the leading Supreme Court cases it is logical that this test is the one most frequently used in the American courts.⁶⁸ Its general characteristic is a concentration upon the accused himself and his actions rather than upon the methods of inducement. Only if he can show that the seed and nourishment of the criminal plan lay in the government's agent can the accused succeed; he must establish himself as merely an unwary innocent.

This test was first suggested in one of the earliest cases to accept entrapment as a defence, *O'Brien v. State*⁶⁹ in which it was held to be no crime,

Where the officer first suggests his willingness to a person to accept a bribe to release a prisoner in charge, and thereby originates the criminal intent. . . .

This case was approved and adopted in *Woo Wai v. U.S.*⁷⁰ It gained the status of authority when Hughes, J., in *Sorrells* considered that "the predisposition and criminal design of the defendant are relevant",⁷¹ and this position was followed by the majority opinion in *Sherman*.

An example of this test in practice is shown by *Lufty v. U.S.*,⁷² a narcotics case, in which it was held that if defendant's evidence that the original intent lay with the police officers and that he was induced to act by persistent solicitation is believed, he must be acquitted. Entrapment is established when the defence shows,⁷³

. . . the conception of the criminal design and the planning of the offence by the enforcement officers, the formation of the intent in their minds, and the pro-

⁶⁸ See American Jurisprudence—Drugs (rev'd) s.43 and 18 A.L.R. 146 as supplemented by 66 A.L.R. 478 and 86 A.L.R. 263.

⁶⁹ 6 Tex. Cr. App. 665 at p. 668 (1878).

⁷⁰ 223 Fed. 412 (1915).

⁷¹ 287 U.S. 435 at 451 (1932).

⁷² 198 F 2d 760 (1952), Annotated 33 A.L.R. 2d 883.

⁷³ *Ibid.*, at p. 762.

curement by misrepresentation and deceit of its commission by appellant, an otherwise law-abiding innocent person who had no intent to commit [it] until he was induced to do so by the enforcement officers.

It is usually emphasized that,⁷⁴

For the offence to originate in the mind of the defendant, it was not necessary that [he instigate] the particular sale or act, but only that he have the general intention to commit such an offence whenever the opportunity offered.

Somehow, he must show he,⁷⁵

. . . never would have been guilty if the officers of the law had not inspired, incited, persuaded and lured him to attempt to commit it.

The standard jury charge proposed in *American Jurisprudence, Model Trials*⁷⁶ accepts this subjective test for the most part, without actually saying so. It begins:

The law is that decoys are permissible to detect criminals but not to create them. An opportunity may be presented to those having an intent to, or who are willing to, commit a crime. Where a person has no previous purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is entitled to the defence of unlawful entrapment, for, as a matter of policy, the law forbids conviction in such a case. The law does not permit the police to ensnare law-abiding citizens into unconscious offending. No officer is permitted to ensnare a person into committing a crime and then prosecute him.

The other major test concerns itself not at all with subjective elements but looks only to the activities of the agent provocateur. If he goes past those standards generally acceptable as being reasonable in the circumstances and acts in a manner which cannot be condoned according to basic principles of justice, the defence of entrapment is established and one need not look to the disposition of the accused. Such a test follows from the concurring opinions in *Sorrells* and *Sherman* which state that the defence is allowed as a protection of the integrity of the courts and judicial process. An acquittal is demanded so that improper police conduct is not successful and will be discouraged thereby. This test has not gained widespread acceptance in the American courts although it is supported by many writers⁷⁷ and the suspicion exists that it has a profound if unspoken importance in the cases.

In *U.S. v. Williams*⁷⁸ the use of a contingent fee system whereby the informer was paid according to the number of convictions obtained was so repulsive that it was held to be grounds in itself for a defence of entrapment. And in *Waker v. U.S.*⁷⁹ there was the suggestion that government conduct which is outrageous will, without more, dictate a finding of entrapment.

After a detailed examination of the entire issue, Donnelly concludes that as,⁸⁰

Entrapment should have its footings in the policy of the courts to preserve their own integrity . . . the inquiry should be directed solely to the propriety of the officer's conduct.

⁷⁴ *Demos v. U.S.* 205 F 2d 596 at p. 599 (1953).

⁷⁵ *Butts v. U.S.* 273 Fed. 35 at p. 38 (1921), Annotated 18 A.L.R. 146.

⁷⁶ Volume 8, p. 573, Section 43.

⁷⁷ See, for example, R. C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs*, 60 Yale L.J. 1091 (1951).

⁷⁸ 311 F 2d 441 at 445 (1962).

⁷⁹ 344 F 2d 795 (1965).

⁸⁰ *Op. cit.* p. 1112.

He feels that the origin of intent test is a mere "shibboleth" and we should examine whether the agent's activities were such that only a chronic violator would be tempted:⁸¹

If the officer uses inducement that would reasonably overcome the resistance of one not a chronic offender . . . the court should find as a matter of law that there was entrapment.

This test, according to which intention is not in issue, has the advantage of at least apparent simplicity. The mind need not be explored and only objective facts are relevant. It has been expressly supported in preference to the origin of intent test by the American Law Institute⁸² and has been incorporated into the proper verbal formula of the defence in the Model Penal Code:⁸³

A public law enforcement official or a person acting in co-operation with such an official perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of an offence, he induces or encourages another person to engage in conduct constituting such offence 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 offence will be committed by other than those who are ready to commit it.

B. PROBLEMS OF REBUTTAL EVIDENCE

Should the latter objective test be adopted, no special problems of evidence will arise. The court need concern itself only with external facts arrived at using the normal rules of trial practice. There may well be difficulties sorting out conflicting versions of those facts and arriving at the true state of events but this puts the trier of fact in no different position than in any other case. The only major unique factor is the qualitative decision as to whether or not the facts so found are of such a nature as to require the court's disapproval by means of an acquittal. "The test shifts attention from the record and predisposition of the particular defendant to the conduct of the police",⁸⁴ and once this is determined, all else is irrelevant; the controlling issue is whether this conduct falls below standards which the community considers reasonable for the use of governmental power.

In the origin of intent test, however, the major issue is the defendant's subjective state of mind and when he raises entrapment as a defence he must submit himself to "an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue".⁸⁵ Thus, two new factors are introduced: the trier of fact must be concerned with subjective elements and all evidence tending to illustrate "predisposition" becomes admissible. The latter is a true Pandora's Box.

⁸¹ *Ibid.* p. 1114.

⁸² Proceedings, 36th Annual Meeting 1959 pp. 225-34.

⁸³ s. 2.13 (1962).

⁸⁴ De Feo, *Entrapment As a Defence to Criminal Responsibility*, U. of San Francisco L. Rev. Vol. 1, No. 2, April 1967, 243 at 266.

⁸⁵ Donnelly, *op. cit.* p. 1105.

The present Canadian law is that in a criminal trial the Crown may not introduce evidence of the accused's character in order to show him as a person more likely to have committed a crime. However, should the accused adduce evidence of his good reputation, the Crown is free to rebut this and may even bring in proof of previous convictions.⁸⁶ In the United States, "such testimony is properly confined to the mere fact of general reputation, the courts refusing to permit proof of particular acts".⁸⁷ In either jurisdiction, should the accused himself enter the witness box his character is relevant as to the issue of credibility, the same as for any other witness.

With respect to the determination of predisposition, on the other hand, the American courts are unanimous in holding that rebuttal evidence by the prosecution can go much further than the above, irrespective of whether or not accused gives testimony and regardless of its prejudicial effect as an attack upon his character.⁸⁸ Generally, all evidence tending to show his willingness to violate the law at any time is admissible including prior convictions, indictments on which he was acquitted, complaints and investigations concerning him, and, basically, all aspects of his previous conduct.⁸⁹ Even hearsay and opinion evidence are allowed.⁹⁰

The implications of this are evident. By raising what may well be a valid and honest defence, the accused leaves himself open to potentially damning character evidence on matters totally irrelevant to the charge. Even if it were relevant, the inflammatory effects may, by themselves, be sufficient to convict him. And as his character is already in issue he is virtually forced to abandon his rights against self-incrimination and give testimony on his own behalf. By some strange and inexplicable logic this is rationalized:⁹¹

If in consequence he suffers disadvantage, he has brought it upon himself by reason of the nature of the defense.

The real question becomes whether, considering the potential prejudice involved, raising the defence is more harmful than not. Only in a few cases has a court interjected a test of relevancy so that highly inflammatory but minimally relevant evidence is excluded.⁹²

C. FACT OR LAW: JUDGE OR JURY

Finally, it must be determined who will be the final arbiter of the defence, trial judge or jury. The minority opinion, based again on the concurring judgments in *Sorrells* and *Sherman*, contends that as it is a judicial device used to control the use of government power and protect the integrity of the courts it must be considered wholly a question of law to be ruled on by the judge alone. The supporters of this view point out that only the judge may

⁸⁶ Criminal Code, s. 573.

⁸⁷ *Commonwealth v. Castellana* 277 Pa. 117 (1932).

⁸⁸ *Washington v. U.S.*, 275 F2d 687 (1960).

⁸⁹ *U.S. v. Becker*, 62 F 2d 1007 at 1009 (1933).

⁹⁰ *Fisk v. U.S.* 279 Fed 12 (1922).

⁹¹ *Sorrells v. U.S.* 287 U.S. 435 at 451-452 (1932).

⁹² e.g. *Hansford v. U.S.* 303 F2d 219 (1962).

properly consider the matters of policy which will inevitably arise. In addition, a body of precedent can be established to guide future courts, inflammatory evidence is kept away from a supposedly vulnerable jury, and guidelines are created for the police in order that undesirable conduct not be repeated.

The more widely held opinion, however, is that the defence of entrapment is properly a question of fact to be determined, as are other defences, by the jury upon being properly charged. The onus falls to the judge on only two occasions: first, if there is no real evidence of entrapment he will rule it out and instruct the jury to ignore it; secondly, if there is overwhelming evidence to support the defence he may rule on it himself as a question of law. The actual result in *Sherman* was based on a finding that this latter situation existed and that a directed verdict of acquittal was required. Where there is doubt, however, the issue must be presented to the jury.

PART IV — LIABILITY OF THE AGENT PROVOCATEUR

The liability of an agent provocateur is only one segment of the total relationship between citizens and the police. Both must be controlled in our society by the criminal process; offenders from both sectors must be punished. On the other hand neither must be unduly hampered, for if this were the case we would be left with either uncontrolled violence or a police state. So, again, a balance must be struck. A citizen has the traditional civil remedies against unwarranted police conduct — assault, battery, malicious prosecution and false imprisonment. In addition, an accused has procedural safeguards: if a confession is not voluntary it is inadmissible in evidence against him; an accused is not compelled to give evidence.⁹³ Yet, physical evidence obtained during such police conduct as would render a confession inadmissible, is itself perfectly admissible and often proves fatal to an accused's defence.⁹⁴ There are, however, no special common law rules or procedural safeguards concerning agents provocateurs. The reason for this, it is submitted, lies in the fact that, traditionally, agents provocateurs have been considered liable to the same legal penalties as ordinary citizens. The best statement of this point of view is found in *Brannan v. Peek*, where Lord Goddard, in discussing the activity of an undercover policeman who purposefully enticed the defendant into an illegal bet, said:⁹⁵

It cannot be too strongly emphasized that, unless an Act of Parliament provides for such a course of conduct—and I do not think any Act of Parliament does so provide—it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person committed an offence.

⁹³ *Ibrahim v. The King*, [1914] A.C. 599.

⁹⁴ *Kuruma v. R.*, [1955] A.C. 197.

⁹⁵ [1947] 2 ALL E.R. 572 at 573-4.

This position of strict adherence to the letter of the law has been criticized by Glanville Williams, who would emphasize the other side of the coin:⁹⁶

If the letter of the law were applied too strictly, it would seriously hamper the action of the police in apprehending offenders.

Williams goes on to suggest that on certain occasions the police may infringe the letter of the law, where their conduct is "proper". If their conduct is "improper", the police should be held accountable, and in drawing this distinction between proper and improper conduct Williams employs the common law doctrine of necessity. Hence, where an officer must breach a law in order to capture an offender (e.g., possession of illegal drugs with a view to selling them to a suspected pusher), the law will, as a matter of public policy, excuse the officer, for otherwise there would be no meaningful, practical way to enforce statutes such as the Narcotic Control Act (Canada). To demonstrate Williams's position more forcibly, he considers the police techniques used in *Brennan* acceptable, and would excuse the undercover officer from criminal responsibility: this was "proper" action.⁹⁷

A recent English case appears to dilute Lord Goddard's strict adherence position and to support the Williams position. In *Sneddon v. Stevenson*, the prostitution case already discussed (*supra*), the court specifically refers to the passage from *Brennan* quoted above after commenting:⁹⁸

All that the officer did was to place himself and the car in such a position that if appellant desired to solicit there was full opportunity to do so. In my judgment that does not mean that the officer commits any offence at all.

Hence, Lord Goddard's position appears to have been weakened in England; these cases also represent convincing authority in Canada.

In Canada there can be found many examples where police officers and agents have been convicted for participating in the offence for which they were endeavouring to obtain a conviction. In *R. v. Petheran*, the head-note reads:⁹⁹

A police officer purchasing liquor from one unlawfully selling it in violation of the Government Liquor Control Act, 1924 (Alta.) c.14, in order to obtain evidence of law violation against the seller, commits an offense under s.84 of the Act . . . and he cannot justify the act because of a duty performed under instructions of a superior officer. . . .

One extremely important element, little discussed in the texts, is that the police have a large discretion in the decision whether to arrest or not, including arrests of fellow constables. This is not to suggest that officers are not charged when they exceed their powers, but surely it can be the only explanation for why the officers involved in both the *Lemieux* and *Patterson* cases (*supra*) were not brought to trial. Perhaps internal police discipline procedures were applied and considered adequate. Nevertheless, in charging a policeman or agent with exceeding his authority in law, the broad police discretion is always a first, and perhaps decisive, hurdle. This aspect of the issue must not be lost to sight in any overall conclusion.

⁹⁶ Glanville Williams, *op. cit.*, p. 796.

⁹⁷ *ibid.*

⁹⁸ [1967] 1W.L.R. 1051 at 1056.

⁹⁹ *R. v. Petheran*, (1936) 65 C.C.C. 151.

One argument often advanced in favour of excusing an agent from what would otherwise be a crime is that contained in the old U.S. case of *State v. Trophy*.¹⁰⁰ Here the mayor, endeavouring to stamp out gambling in his town, designated a detective to obtain evidence against certain suspects. The agent accomplished this task by participating in a poker game with the latter; he was charged but, on appeal, acquitted on the basis that the requisite intent was missing. That this reasoning carries little force, especially in Ontario, is aptly demonstrated in *R. v. Ormerod*, where Laskin, J.A., in considering *Trophy*, held:¹⁰¹

... I find it difficult to support the judgment [in *Trophy*] on the ground on which it was put, because a general want of intent to break the law is not a defense where a person carries out forbidden acts intending to do them or knowing what he is in fact doing. That he does them for a laudable purpose or from a high motive ... is beside the point.

The principle defense argued in *Ormerod* was that of public duty; that is, since Ormerod was acting as a police agent, he was immune from prosecution because the breach occurred in the enforcement of his public duty. This, of course, is the principle recommended earlier by Williams, extended on the doctrine of agency to cover police agents as well as actual constables. Once again Laskin, J.A., unequivocally and decisively proclaims that no such justification exists (at least in Canada):¹⁰²

In principle, the recognition of 'public duty' to excuse breach of the criminal law by a policeman would involve a drastic departure from constitutional precepts that do not recognize official immunity, unless statute so prescribes . . .

Legal immunity from prosecution for breaches of the law by the very persons charged with a public duty of enforcement would subvert that public duty.

Hence, in this jurisdiction, the Williams approach is rejected on the basis that, despite judicial distaste for agents provocateurs, recognition of an immunity "would mean the abandonment of legal control over them".¹⁰³

It is interesting to note that Laskin, in rejecting Williams' suggestion, does not come down in favour of strict adherence to the letter of the law, given earlier by Lord Goddard. He does not really supply a substitute, but hints implicitly at specific statutory exception and police discretion as being the only shield from prosecution for an agent provocateur, and in this he is probably close to Lord Goddard. *Brannan* is cited, but not commented on.¹⁰⁴ With respect to police discretion in making arrests and laying charges, the learned justice implies that this, as a source of immunity for police officers, is a matter best left to unwritten police discretion as opposed to formalizing any written rules of law. He says:¹⁰⁵

How far such immunity exists in the exercise of discretionary power [by the police] not to prosecute is unknown to me, but even if it be considerable, the fact that it does not reside in a settled rule is a safeguard.

The implication appears to be that if the police, in the discharge of their discretionary power to arrest or not, do arrest an agent provocateur, then

¹⁰⁰ *State v. Trophy*, 78 Mo App 206 (1899), (Kansas Court of Appeal).

¹⁰¹ *R. v. Ormerod*, [1969] 2 O.R. 230 at 244.

¹⁰² *ibid.*, p. 244.

¹⁰³ per Laskin J. A., *ibid.*, p. 244.

¹⁰⁴ *ibid.*, p. 240.

¹⁰⁵ *ibid.*, p. 244.

once past this hurdle, if there be no specific statutory exoneration, the agent will have only the customary defences available to him and no devices special or peculiar to his particular circumstance. Williams' doctrine of necessity is, then, defeated, unless of course this implication is a misinterpretation of the above decision.

The question of statutory exoneration now arises. Such a defence must be found either in the general statute — The Criminal Code (Canada) — or in a special enactment such as The Narcotic Control Act (Canada). Turning to the Code, s.407 concerns counselling, procuring, or inciting other persons to commit offences. Section 21 pertains to parties to offences. From the wording of these two sections, especially the former, there can be no doubt, at least in theory, an agent provocateur is included, for it is the essence of entrapment that the agent incite or counsel his prey to commit a crime. An agent cannot defend himself on the basis that he did not know he was acting improperly, for s.10 blocks this approach. Moreover, as we have just seen, there appears to be no recognized common law defence of immunity, and so s.7(2) is of no avail to the accused agent. Section 25 of the Code deals with justification of police actions or actions of persons "in aid of a peace officer". Clearly an agent provocateur is included within s.25, but just as clearly that section is not applicable as a defence for him. First, the section imposes the criteria of acting on "reasonable and probable" grounds, and considering the strong remarks against entrapping tactics by courts, *supra*, it is doubtful whether a court would classify such activity as "reasonable". Secondly, and more important, the tone of the entire section is to excuse police or their agents when the use of force or violence has been employed — this aspect is clearly not the issue with entrapment. Suffice it to say that neither *Ormerod*, *Lemieux* nor *Patterson* raised s.25 as a possible defence: it just doesn't meet the issue, and, therefore, is inapplicable. The only conclusion is, then, that an agent provocateur can potentially be charged under the Criminal Code, and there is no special exculpatory section therein on which he can rely as a defence.

With respect to specific statutes, the existence of a defence, of course, depends on the wording of the particular enactment. In *R. v. Ormerod*, the accused put forth s.49 of the Narcotics Control Regulations (Canada), which permits a peace officer, *inter alia*, "to be in possession of a narcotic for the purpose of, and in connection with, his employment therewith". Mr. Justice Laskin decided that this section would not excuse the agent provocateur (an undercover policeman) in this case for: "In context, s.49 does not cover possession as a direct consequence of trafficking which ensues from solicitation by a policeman."¹⁰⁶ Specific exoneration sections, then, appear to be narrowly construed and, depending on the wording, generally do not assist in the defence of an agent. Section 14(1) of the Alberta Police Act¹⁰⁷ seems to provide such a defense with respect to liquor

¹⁰⁶ *ibid.*, p. 240.

¹⁰⁷ R.S.A. 1955, C.236.

offences, but the Ouimet Committee comments: "No similar exemption is afforded by the criminal law of Canada in relation to *criminal* offences."¹⁰⁸

The end result, then, is that in Canada an agent provocateur has no special immunities or statutory exoneration unless such is made very clear in a specific statute.

PART V — CONCLUSION

From the foregoing it can be seen that very little in the area of entrapment is clear or certain. The theoretical basis has given rise to much dispute, but no one soundly articulated and fully accepted foundation has emerged. Even in the U.S. where the highest appellate tribunal has held that the defence exists, and on what basis it does, there have been vociferous dissenters even to the extreme of suggesting that the Supreme Court really obliterated the defence instead of founding it. Canadian and English courts have thoroughly avoided the issue, passing only occasional reference to it.

The liability of the agent provocateur, the actual instigator, is, in theory, well laid down in cases and general criminal legislation. Whether or not it is resorted to in practice depends in most cases (excluding those of public pressure) on the exercise of the police discretion: agents generally are not charged, though equally as culpable as the entrapped accused, but when a charge is laid, barring specific statutory exoneration, he has no special immunity or defence.

The ingredients of the concept are equally as mysterious, even to the proper test which should serve as a guide to whether or not entrapment exists in a given set of facts. The conflict of approach as to whether a subjective or objective point of view, supported by the majority and minority, respectively, in each of the two leading U.S. decisions on entrapment, should prevail has never been resolved. Perhaps the ultimate solution rests in a combination of both approaches; this is the position suggested in the recommendations of the recent Ouimet Report for adoption in Canada.¹⁰⁹ The resolution of this problem will, in turn, affect the evidentiary procedure at trial. Reliance wholly on the subjective approach could well leave the accused open to enquiries with respect to his character and reputation in the community of unprecedented thoroughness and, in many cases, of devastating impact upon a jury. The alternate, objective approach avoids this problem but does involve a potential basis for judicial review of police tactics, a procedure which, many argue, serves only to hamper the detection of crime by greatly increasing the desire of the police to minimize legal liabilities respecting their methodology of pursuit and capture. The issue of whether entrapment is a matter of law

¹⁰⁸ Report of The Canadian Committee on Corrections, 1967 (Queen's Printer), p. 79.

¹⁰⁹ *ibid.*, recommendation 2.

or a question of fact is also unsettled, and the arguments depend on which judges are to be followed in the *Sherman* and *Sorrells* cases. It should again be emphasized that courts in various jurisdictions have attempted to resolve these issues, but the feeling persists that each case depends solely on its own facts, and no precedential principles can be extracted despite deliberate judicial endeavours to accomplish just this. What may be the most certain result is that, at least in obvious cases, the accused is acquitted, although often on dubious legal reasoning.

It has been suggested that in permitting a defence of entrapment, the courts have found themselves in a paradoxical situation: while seeking to remedy one wrong they permit another wrong to go unpunished. That is, by excusing a criminal who has committed a crime on the basis that another person — the agent — has also breached the criminal law, the courts are offending the proverbial saying that “two wrongs do not make a right”. The real focus, perhaps, should be concentration on restraint of unwarranted police activities, and, accordingly, we might lay down more definite rules wherein entrapping manoeuvres would be set out and clearly prohibited, and all offenders — policemen or not — would be prosecuted. This approach would then remove entrapment as a complete defence for an accused, alternatively, we might hold all evidence secured by the agent while overstepping prescribed bounds inadmissible against the accused as not having been properly obtained.¹¹⁰ This is the approach popular at present in an analogous area, that of wiretapping and electronic surveillance. It has the benefit of being highly practical and avoiding much of the above theoretical uncertainty, while, at the same time, containing a substantial element of justice and fair play.

Another suggestion might be to build the whole area into the Canadian Bill of Rights, analogous to the U.S. constitutional notion of due process. It has been argued that U.S. courts do base entrapment on the Constitution, even though their judgments do not make reference to such a theoretical basis.¹¹¹ However, our Bill of Rights, as presently constituted, certainly would not be able to support this basis for entrapment.¹¹² The Canadian constitutional framework, so different from that in the United States, may well prevent the entrenching of a principle which would serve as a foundation for entrapment. These, then, are only suggestions; for the moment we are still left with a substantial amount of uncertainty.¹¹³

¹¹⁰ This connection between entrapment and coerced confessions was suggested in a note, 74 Yale L.J., 949-52 (1965).

¹¹¹ Orfield, *op. cit.*, p. 54 footnote 96, says of the U.S. position:

“It has been argued that, while the Courts in the U.S. do not employ constitutional bases in theory, they do in fact.” See Cowan, *The Entrapment Doctrine in the Federal Courts*, 49 J. Crim. L. & P.S. 447 at 449 (1959). With respect to the U.S. fourth amendment limiting the right of police to search for offences, see NOTE, 74 Yale L.J. 942 (1965).

¹¹² Graham Parker, *Legal Aid—Canadian Style*, 14 Wayne L. Rev., 471, (1968) footnote 6 points out that our present Bill of Rights has proved almost completely ineffectual in the judicial process.

¹¹³ Since the writing of this article, the decisions of *R. v. Drybones* [1970] S.C.R. 282, and *R. v. Shipley* [1970] 2 O.R. 411 have been reported.

