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## CASE NOTES

### *PEOPLE v. DOLLEN AND UNITED STATES v. RUSSELL: NEW DEVELOPMENTS IN THE DEFENSE OF ENTRAPMENT*

Police encouragement of a crime, or the affirmative trap as it has been called,<sup>1</sup> is used to detect such crimes as prostitution, gambling and narcotic sales—those “vice crimes” that are prohibited by laws protecting the general health and welfare of the public. Since these crimes are committed in private with a willing “victim” they defy detection by conventional police methods. Private or “victimless” crimes that have been the focus of this practice have involved intoxicating liquors,<sup>2</sup> explosive sales,<sup>3</sup> larceny,<sup>4</sup> practicing medicine or dentistry without a license,<sup>5</sup> narcotic sales,<sup>6</sup> unethical practice of law,<sup>7</sup> and other crimes such as bribery, burglary, gambling, perjury, receiving stolen goods, arson, extortion and conspiracy.<sup>8</sup>

Detection of these secret criminal acts and apprehension of the violators necessitates that the police be present at the time and place the crime is committed. After the police or their agents have a reasonable suspicion that a person is currently, or about to become, engaged in the

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1. Comment, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U. CHI. L. REV. 137 (1963).

2. *People v. Steig*, 258 Ill. App. 447 (1930); *People v. Schell*, 240 Ill. App. 254 (1926); *Evanston v. Myers*, 172 Ill. 266, 50 N.E. 204 (1898). See also 55 A.L.R. 2d 1322.

3. *People v. Ficke*, 343 Ill. 367, 175 N.E. 543 (1931).

4. *People v. Smith*, 251 Ill. 185, 95 N.E. 1041 (1911).

5. *People v. Boyden*, 400 Ill. 409, 81 N.E.2d 142 (1948); *People v. Mattei*, 381 Ill. 21, 44 N.E.2d 576 (1942); *People v. Paderewski*, 373 Ill. 197, 25 N.E.2d 784 (1940); *People v. Beach*, 266 Ill. App. 272 (1932).

6. *People v. Clay*, 32 Ill. 2d 608, 210 N.E.2d 221 (1965); *People v. Hall*, 25 Ill. 2d 297, 185 N.E.2d 143, cert. denied, 374 U.S. 849 (1962); *People v. Clark*, 7 Ill. 2d 163, 130 N.E.2d 195 (1955); *People v. Guagliata*, 362 Ill. 427, 200 N.E. 169 (1936); *Chicago v. Brendecke*, 170 Ill. App. 25 (1912). See also 33 A.L.R.2d 883.

7. *In re Horwitz*, 360 Ill. 313, 196 N.E. 208 (1935).

8. Cases on areas covered are collected in Annot., 61 A.L.R.2d 677 (1951); Annot., 66 A.L.R. 478 (1930), supplementing 18 A.L.R. 146 (1922); Comment, *The Doctrine of Entrapment and Its Application in Texas*, Sw. L.J. 456, 463 (1965); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs*, 60 YALE L.J. 1091 (1951).

commission of a crime, they will "encourage"<sup>9</sup> the suspect's commission of the crime by acting as a willing participant. Narcotics law enforcement is one major area in which police encouragement is used since the affirmative trap is the only effective means of penetration. The nature of the crime—its secrecy and clandestine methods of operation—makes it impossible for a policeman or narcotics agent to infiltrate a drug ring or make a street purchase without using an informer or undercover agent.<sup>10</sup>

From the police practice of encouragement and the affirmative trap many problems arise.<sup>11</sup> The major controversy surrounds entrapment—where police encouragement sometimes goes to the extent of inducing an otherwise innocent person to commit a crime. The limits to which the courts are willing to go in acknowledging the defense of entrapment are exemplified in *United States v. Russell*<sup>12</sup> and *People v. Dollen*.<sup>13</sup> In *Russell*, the United States Supreme Court was presented with an opportunity to reconsider the federal test of entrapment,<sup>14</sup> which has seen a gradual expansion in interpretation through several lower federal court decisions.<sup>15</sup> The Illinois Supreme Court, in *People v. Dollen*, dealt with another aspect of entrapment—the necessity of establishing that an entraper is a public officer or employee or agent of either. In *Dollen* the court held for the first time that the supplying of narcotics by an informant could be established by inference from the surrounding circumstances.

The purposes of this note are to trace the development of the entrapment defense in federal and Illinois law, and to distinguish the elements recognized in each judicial system.

#### ENTRAPMENT IN FEDERAL LAW

The defense of entrapment was not recognized at early common law;<sup>16</sup>

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9. Encouragement is really a process of persuasion. See Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 875 (1963).

10. Approximately 90% of narcotic sales detections involve the use of an informer in the selection and encouragement of a suspect. Rotenberg, *supra* note 9, at 875 n.15.

11. For example, it has been estimated that the average "controlled buy" requires anywhere from fifty to seventy-five hours to engineer. See Comment, *Administration of the Affirmative Trap and the Doctrine of Entrapment; Device and Defense*, *supra* note 1.

12. 41 U.S. 423 (1973).

13. 53 Ill. 2d 280, 290 N.E.2d 879 (1972).

14. There is presently no federal statutory provision for the defense of entrapment. The federal test is derived from the holdings of *Sorrells v. United States* and *Sherman v. United States*. See note 22 *infra*. A bill is now before the United States Congress which would give the defense an expressed formulation. S.1, 93d Cong., 1st Sess. § 1-302 (1973).

15. See notes 40, 41 and 43 and accompanying text *infra*.

16. *Board of Commissioners v. Bakus*, 29 How. Pr. 33 (N.Y. Sup. Ct. 1864).

it is a development of twentieth century law.<sup>17</sup> The possibility of entrapment was mentioned in *Grimm v. United States*,<sup>18</sup> but *Woo Wai v. United States*,<sup>19</sup> was the first federal court case to recognize and sustain a defense claim of entrapment. Justice Brandeis, dissenting in *Casey v. United States*,<sup>20</sup> considered the defense but it was not until *Sorrells v. United States*<sup>21</sup> that the Supreme Court considered in depth the doctrine of entrapment as a affirmative defense in criminal prosecution. In *Sorrells*, the Court said:

[Entrapment occurs] when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.<sup>22</sup>

The members of the Court disagreed on the rationale of the doctrine of entrapment. The majority based its decision on the premise that Congress, in enacting the National Prohibition Act, did not intend it to apply

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17. For the general historical development and analysis see Rotenberg, *supra* note 9, at 890; Note, *Contingent Fee For Informer Not Entrapment Where Justification Exists*, 16 SYRACUSE L. REV. 143, 144 (1964); *The Doctrine of Entrapment and its Application in Texas*, *supra* note 8, at 456; Mikell, *The Doctrine of Entrapment in Federal Courts*, 90 U. PA. L. REV. 245 (1942); Comment, *Due Process of Law and the Entrapment Defense*, 1964 U. ILL. L.F. 821, 822 (1964); Donnelly, *supra* note 8, at 1098; Note, *Entrapment by Government Officials*, 28 COLUM. L. REV. 1067 (1928).

18. 156 U.S. 604 (1895). A post-office inspector who "suspected defendant was engaged in the business of dealing in obscene pictures" wrote and received from the defendant packages of obscene pictures under an assumed name. The Court stated: "It does not appear that it was the purpose of the post office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business." *Id.* at 610.

19. 223 Fed. 412 (6th Cir. 1916).

20. 276 U.S. 413 (1928). Justice Brandeis stated:

The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature.

*Id.* at 423. He went on to say: "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." *Id.* at 425.

21. 287 U.S. 435 (1932). Martin, a federal prohibition agent posing as a tourist visited with the defendant. During their conversation it was discovered they were both war veterans of the same division. While discussing their common war experiences Martin asked defendant twice for liquor but was refused. After the third request the defendant agreed; he was prosecuted for violation of the National Prohibition Act.

22. 287 U.S. at 442.

to those situations where an otherwise innocent person was lured into the commission of a crime.<sup>23</sup> Thus the Court took the position that the defense of entrapment was available only when the intent to commit a crime originated with a government official.

The minority felt the defense should be a tool of judicial procedure rather than of statutory construction. Rather than focusing on congressional intent derived from the language of the statute, the Court regarded the doctrine of entrapment as a "fundamental rule of public policy."<sup>24</sup> The minority also focused on reprehensible methods<sup>25</sup> of police conduct rather than congressional intent in defining entrapment.<sup>26</sup> Mr. Justice Roberts, in a separate opinion, defined 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.<sup>27</sup>

Twenty-five years after *Sorrells* the Supreme Court again dealt with

23. The Court held: "We are unable to conclude that it was the intention of Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation of government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." 287 U.S. at 448.

24. 287 U.S. at 457. Justice Roberts stated: "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." See also *Strader v. United States*, 72 F.2d 589, 591 (10th Cir. 1934); *Billingsley v. United States*, 274 F. 86 (6th Cir. 1921); *Woo Wai v. United States*, 223 F. 412, 415 (9th Cir. 1915); *United States v. Echols*, 253 F. 862 (S.D. Tex. 1918); *People v. Crawford*, 105 Cal. App. 2d 530, 536, 234 P.2d 181, 185 (1951); *In re Horwitz*, 360 Ill. 313, 196 N.E. 208 (1935); *Rotenberg*, *supra* note 9, at 897.

25. 287 U.S. at 453. See also 356 U.S. at 380; *People v. Cahan*, 44 Cal. 2d 434, 447, 282 P.2d 905, 913 (1955); MODEL PENAL CODE, Art. 2, para. 2.13, Comment (Proposed Official Draft, 1962).

26. Many theories have been offered over the years to explain the basis of entrapment. Besides those mentioned in *Sorrells*—congressional intent, purity of the courts and preventative measures to police conduct—other theories are: (1) estoppel—the government cannot be permitted to prosecute an individual for a crime where it is the instigator of his conduct and the criminal act is not the direct result of the accused's intentions (*United States v. Kaiser*, 138 F.2d 219 (7th Cir. 1943), *cert. denied*, 320 U.S. 801 (1945); *United States v. Cerone*, 150 F.2d 382, *cert. denied*, 326 U.S. 756 (1945); *United States v. Healy*, 202 F. 349, 350 (D.C. Mont. 1913); *State v. Marquardt*, 139 Conn. 1, 89 A.2d 9 (1952) ); (2) the right to be free from temptation (Note, *Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63, 65 (1967) ); (3) constitutional validity (see notes 50 to 53 and accompanying text *infra*, and (4) self-incrimination. See generally, *Rotenberg*, *supra* note 9, at 620-24; Comment, "The Serpent Beguiled Me and I Did Eat—The Constitutional Status of the Entrapment Defense, 74 YALE L.J. 942, 949-52 (1965); Note, 20 U. FLA. L. REV. 63 *supra*, at 72-73; Comment, 1964 U. ILL. L.F. 821, 822 (1964), *supra* note 17, at 824-25).

27. 287 U.S. at 454.

the defense of entrapment in *Sherman v. United States*.<sup>28</sup> In *Sherman* the Court was divided on the same issue. The majority again defined the defense on the basis of the origin of intent while the minority relied on police conduct. The majority in framing the issue as "whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act . . ." <sup>29</sup> reflected their belief that Congress had not intended the statute to apply to cases in which the conduct was instigated by the police.<sup>30</sup> The Court held: "Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law enforcement officials."<sup>31</sup> Merely affording an opportunity for the commission of the crime did not constitute entrapment.<sup>32</sup> The majority in both *Sorrells* and *Sherman* focused on the origin of criminal intent—if the criminal design originated with the police officer and was implanted in the mind of a person otherwise innocent, there was entrapment.<sup>33</sup>

The minority in *Sherman* followed the concurring minority opinion of *Sorrells*. Entrapment is a valid defense whenever police conduct in a particular situation falls below a certain objective standard.<sup>34</sup> The minority looks to police conduct rather than origin of intent. Thus the shift is from the conduct of the defendant to the conduct of the police.

*United States v. Russell*<sup>35</sup> is the latest United States Supreme Court

28. 356 U.S. 369 (1958). Kalchinan, a government informer, met defendant at a doctor's office where both were being treated to be cured of narcotics addiction. After several discussions, Kalchinan asked defendant about a source of narcotics indicating that he was suffering and the cure was not working. Defendant tried to avoid the issue, but after repeated requests on several occasions he secured a supply which he shared with Kalchinan.

29. 356 U.S. at 371.

30. *Id.* at 372; *Sorrells*, 287 U.S. at 450.

31. 356 U.S. at 372 citing *Sorrells*, 287 U.S. at 441, 451.

32. The Court held that since Kalchinan used sympathy and repeated requests to achieve his ends this was entrapment and not merely affording the defendant an opportunity to commit a crime.

33. Innocent in this context is the absence of a predisposition or a willingness to readily respond to the opportunity afforded by the officer to commit a criminal act, that is, the defendant would not have perpetrated the crime with which he is presently charged but for the enticement of the police official.

34. Mr. Justice Frankfurter in the concurring opinion stated: "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." 356 U.S. at 380. The focus is not the predisposition of the defendant but rather "whether the police conduct revealed in the particular case falls below the standards, to which common feelings respond, for the proper use of governmental power." *Id.* at 382.

35. 411 U.S. 423 (1973).

decision to affirm the entrapment test formulated in the *Sorrells* and *Sherman* decisions. In this case, Joe Shapiro, undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs, met with Russell and the latter's codefendants. Shapiro stated that he represented an organization desirous of controlling the manufacture and distribution of methamphetamine ("speed") in the Pacific Northwest. An agreement was reached whereby the agent was to supply the defendant with phenyl-2-propanone, an essential chemical ingredient, in return for one-half of the drug produced. During this meeting, Russell's codefendant Patrick Connolly told the agent that since May, 1969, they had produced three pounds of the drug.<sup>36</sup> Connolly also gave the agent a bag of methamphetamine claiming it to be part of a quantity produced earlier.

On December 10, 1969, the manufacturing process was completed and the agent was given his half. He also purchased an additional amount. A month later Shapiro contacted Connolly and asked him if he was still interested in their arrangement. Connolly said he was and would have another batch of methamphetamine ready in a couple of days because he had obtained an additional two bottles of phenyl-2-propane. Shapiro returned later with a search warrant and seized the contraband including a bottle of propane which he had not supplied. Russell was convicted of having unlawfully manufactured, processed, sold and delivered methamphetamine.

The appellate court reversed the conviction<sup>37</sup> on the ground that even if the defendant was predisposed to commit the crime there was an intolerable degree of governmental participation in the criminal transaction.<sup>38</sup> The court held an entrapment defense could be established on one of two alternate theories: (1) an entrapment rationale—entrapment exists as a matter of law regardless of the accused's predisposition to commit the crime whenever the government supplies the contraband to the accused; or (2) a non-entrapment rationale—when the government becomes so enmeshed in criminal activity as to be repugnant to American

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36. At trial Connolly admitted making the statement but said it was false. *Id.* at 425 n.2.

37. *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972).

38. The court said: "[R]egardless of the significance of 'predisposition' as an element in entrapment, we conclude that there is merit in Russell's contention that a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise." *United States v. Russell*, 459 F.2d 671, 673 (9th Cir. 1972). See also the concurring opinions of Justices Frankfurter and Roberts in *Sherman v. United States*, 356 U.S. 369, 378-85 (1958) and *Sorrells v. United States*, 287 U.S. 435, 453-59 (1932) notes 24 to 34 and accompanying text *supra*.

criminal justice a conviction will be barred.<sup>39</sup>

The first theory is derived principally from the decisions of *United States v. Bueno*<sup>40</sup> and *United States v. Chisum*.<sup>41</sup> The appellate court reasoned that the agent, by supplying the essential ingredient of the drug to Russell, was supplying contraband—a practice the courts in *Bueno* and *Chisum* held to be entrapment as a matter of law.<sup>42</sup> The second theory was deduced from *Greene v. United States*.<sup>43</sup> The court acknowledged the unique circumstances involved in *Greene* but said the *Russell* case, if not so unique, was “equally repugnant, if not more so, than the conduct of the Agent in *Greene*.”<sup>44</sup> The court concluded that under either rationale reversal was required. It said:

Apparently, the only difference between *Bueno* and *Chisum*, as distinguished from *Greene*, is the label affixed to the result. Both theories are premised on fundamental concepts of due process and evince the reluctance of the judiciary to contenance “overzealous law enforcement.” We do not choose to affix a label to our result; hence, we need not select between the alternate theories. Here, both compel the same disposition.<sup>45</sup>

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39. 459 F.2d at 673-74.

40. 447 F.2d 903 (5th Cir. 1971). The court held the defendant could not be convicted of possession and sale of heroin where there was no rebuttal of defendant's testimony that a government informer purchased heroin in Mexico, imported it to the United States and induced him to make a sale to a government agent.

41. 312 F. Supp. 1307 (C.D. Cal. 1970). Defendant told a reputed counterfeiter that he wished to purchase counterfeit money. A government agent was informed of this scheme and supplied the defendant with the counterfeit money and then arrested him for receiving counterfeit money with intent to pass the same as genuine. The court held there was entrapment as a matter of law though the intent to commit the crime originated solely with the defendant without government inducement.

42. It should be noted that two different conclusions were reached concerning the same factual situation in *Russell*. The majority opinion of the appellate court stated that the drug could not have been manufactured but for the government supply of the essential ingredient: “Russell would have been powerless to ‘commit’ the charged offenses without the Government's pervasive intervention.” 459 F.2d at 673. The sole dissenting opinion at the appellate level and the Supreme Court, on the other hand, said that this drug could have been manufactured without the agent's intervention. This different interpretation of the factual situation was one factor that led the Supreme Court to reverse the appellate court. See 459 F.2d at 675 (Trask, J., dissenting).

43. 454 F.2d 783 (9th Cir. 1971). A government agent contacted defendants and urged and aided them in the production of bootleg whiskey by supplying equipment, an operator for the still, sugar and acting as its only customer. The court held that although this was not an entrapment case the government's involvement in the creation and maintenance of this bootlegging operation so enmeshed itself in the criminal activity that it barred prosecution.

44. 459 F.2d 674 (1972).

45. *Id.* at 674 (footnotes omitted).



The United States Supreme Court reversed the decision of the appellate court.<sup>46</sup> Again, as in *Sorrells* and *Sherman*, the Court was divided on the rationale of the entrapment defense.<sup>47</sup> The Court reconsidered the theory behind the entrapment defense set forth in *Sorrells* and *Sherman*<sup>48</sup> as it dealt with the two principle contentions of the defendant: first, the constitutional validity of entrapment; and second, the rationale followed by the appellate court—entrapment as a matter of law, without regard to the accused's predisposition, if there is "an intolerable degree of governmental participation in the criminal enterprise."<sup>49</sup>

It has been suggested that due process forbids the conviction of any person for a solicited offense unless he had been engaged in criminal conduct or had a criminal design because this, in effect, is a denial of liberty without due process.<sup>50</sup> One court has held that a conviction procured by entrapment is in violation of the due process clause of the fifth amendment.<sup>51</sup> Fundamental fairness and decency invoked under the due process clause<sup>52</sup> would appear applicable to entrapment. However, most courts reject the contention that freedom from entrapment is a right protected under the fourteenth amendment due process clause.<sup>53</sup>

Russell contended that the agent's involvement in the manufacturing of the drug was so great that prosecution violated the fundamental principles of due process.<sup>54</sup> This argument, analogized to the exclusionary

46. *United States v. Russell*, 411 U.S. 423 (1973).

47. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Blackmun, and Powell joined. Justice Douglas filed a dissenting opinion, in which Justice Brennan joined. Justice Stewart filed a dissenting opinion, in which Justices Brennan and Marshall joined.

48. 411 U.S. at 428-30.

49. 459 F.2d at 673.

50. See Comment, "The Serpent Beguiled Me and I Did Eat"—*The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965); Rotenberg, *supra* note 9; Note, *Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63 (1967).

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

52. See, e.g., *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970) where the court stated:

Entrapment is indistinguishable from other law enforcement practices which the courts have held to violate due process. Entrapment is an affront to the basic concepts of justice. Where it exists, law enforcement techniques become contrary to the established law of the land as an impairment to due process.

*Id.* at 1312; *Banks v. United States*, 249 F.2d 672, 674 (9th Cir. 1957) ("A conviction so procured is in violation of the due process provision of the Fifth Amendment. . . .")

53. See, e.g., *United States ex rel. Hall v. Illinois*, 329 F.2d 354 (7th Cir. 1964).

54. 411 U.S. at 430.

rule of illegal searches and seizures<sup>55</sup> and confessions,<sup>56</sup> was rejected by the Court:

Unlike the situations giving rise to the holdings in *Mapp* and *Miranda*, the Government's conduct here violated no independent constitutional rights of the respondent. Nor did Shapiro [agent] violate any federal statute or rule or commit any crime infiltrating the respondent's drug enterprise.<sup>57</sup>

The Court later said:

The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.<sup>58</sup>

The Court, however, did not rule out the possibility that it may eventually face a situation where the entrapment defense based on due process would be a valid defense.<sup>59</sup>

The Court also declined to accept Russell's second contention that entrapment is a valid defense even if the government supplied the contraband.<sup>60</sup> The Court, referring to the decisions of *Bueno*, *Chisum* and *Greene* stated:

Several decisions of the United States district courts and courts of appeals have undoubtedly gone beyond this Court's opinions in *Sorrells* and *Sherman* in order to bar prosecutions because of what they thought to be, for want of a better term, "overzealous law enforcement." But the defense

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55. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). Other attempts to analogize this defense to illegal searches and seizures emphasize probable cause—since searches and seizures require probable cause, the police should have reasonable grounds for suspecting such criminal conduct or design before they engage in solicitation or encouragement. Also analogous to search and seizure cases is the preventative function behind it—the purpose is to curtail reprehensible police activity. The exclusionary rule under search and seizure and the valid defense under entrapment are both means to attain this function.

56. *Miranda v. Arizona*, 384 U.S. 436 (1966).

57. 411 U.S. at 430.

58. *Id.* at 432, citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960).

59. *Id.* The Court stated: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, . . . the instant case is distinctly not of that breed." (citation omitted). *Id.* at 431-32.

60. This essentially was the position taken by the appellate court citing the decisions of *Bueno*, *Chisum* and *Greene*. See notes 40, 41 and 43 *supra*. The *Bueno* and *Chisum* decisions cited with approval the Illinois decision of *People v. Strong*, 21 Ill. 2d 320, 172 N.E.2d 765 (1961), which held that entrapment exists as a matter of law where the government supplies the narcotics. Thus it appears the Supreme Court in *Russell* has *not*, at least indirectly, sanctioned (as having gone beyond the *Sorrells* and *Sherman* rationale adopted by the Illinois statute, note 71 *infra*) the Illinois decision of *Strong*. See note 88 *infra*.

of entrapment enunciated in those opinions was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve.

. . . .

We think that the decision of the Court of Appeals in this case quite unnecessarily introduces an unmanageably subjective standard which is contrary to the holdings of this Court in *Sorrells* and *Sherman*.<sup>61</sup>

The Court took the position that these lower federal court decisions so expanded the narrowly defined entrapment defense they were, in effect, giving the judicial branch of government authority it did not possess.<sup>62</sup> As in *Sorrells* and *Sherman* the Court refused to base the defense on the type and degree of government conduct. Since Russell was involved in the manufacturing of illicit drugs before and after the government agent supplied the necessary ingredient, his predisposition was fatal to his claim of entrapment.<sup>63</sup>

Two dissenting opinions were given. The first, a brief opinion, authored by Justice Douglas, cited the concurring opinions of *Sorrells* and *Sherman* as well as the decisions of *Greene*, *Bueno* and *Chisum* to support the view that a conviction could not be sanctioned in *Russell* due to the extent of government participation in the manufacturing of the drug. Justice Douglas stated:

[T]he fact that the chemical ingredient supplied by the federal agent might have been obtained from other sources is quite irrelevant. Supplying the chemical ingredient used in the manufacture of this batch of "speed" made the United States an active participant in the unlawful activity.<sup>64</sup>

61. 411 U.S. at 435.

62. The Court said:

[*Sorrells* and *Sherman*] establish that entrapment is a relatively limited defense. It is rooted not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement" but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense but who was induced to commit them by the government.

*Id.* at 435.

63. The Court reasoned that since the record disclosed that the propane ingredient was obtainable elsewhere and since the defendants had admitted making other batches without the ingredient supplied by the agent, the agent was merely "affording an opportunity" rather than inducing the defendants to commit a criminal act.

64. 411 U.S. at 437. Justice Douglas went on to say:

Federal agents play a debased role when they become the instigators of the crime, or partners in its commission, or the creative brain behind the illegal scheme. That is what the federal agent did here when he furnished the accused with one of the chemical ingredients needed to manufacture the unlawful drug.

*Id.* at 439.

Mr. Justice Stewart wrote the second dissenting opinion. He reviewed the "subjective" and "objective" dichotomy that has plagued the courts since *Sorrells* and *Sherman* and concluded:

In my view, this objective approach to entrapment advanced by [the concurring opinions in *Sorrells* and *Sherman*] is the only one truly consistent with the underlying rationale of the defense. Indeed, the very basis of the entrapment defense itself demands adherence to an approach that focuses on the conduct of the governmental agents, rather than on whether the defendant was "predisposed" or "otherwise innocent."<sup>65</sup>

Thus "predisposition" and "otherwise innocent" become irrelevant if one views the defense as a means of prohibiting unlawful governmental activity rather than protecting those "otherwise innocent."<sup>66</sup>

Justice Stewart rejected the test that makes entrapment dependent on the predisposition of the defendant. First, the purpose of the defense was not to protect persons otherwise innocent but rather to prohibit unlawful government activity.<sup>67</sup> Second, such a test had prejudicial possibilities.<sup>68</sup> He offered a test similar to the concurring opinions in *Sorrells* and *Sherman*:

[W]hen the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred.<sup>69</sup>

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65. *Id.* at 441 (footnotes omitted).

66. "Otherwise innocent" is misleading because since one has committed an unlawful act he cannot be innocent of it; one may be "predisposed" even if he did not originate the intent in the sense he has shown his capability of committing a crime. *Id.* at 442.

67. *Id.* Justice Stewart reasoned that since the defense applies only if the temptor is a government agent and not a private person, the focus must be on the conduct of agents and not the predisposition of the defendant.

68. Pointing out the use of hearsay, suspicion, rumor, evidence of defendant's bad reputation or past criminal activities to prove predisposition is often unreliable and highly prejudicial:

[F]or, despite instructions to the contrary, the jury may well consider such evidence as probative not simply of the defendant's predisposition, but of his guilt of the offense with which he stands charged. . . .

Stated another way, this subjective test means that the Government is permitted to entrap a person with a criminal record or bad reputation, and then to prosecute him for the manufactured crime, confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway.

See also Mr. Justice Frankfurter's concurring opinion in *Sherman*, 356 U.S. at 382: "[There may] be 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 for which he stands charged."

69. *Id.* at 445.

After analyzing the theoretical basis of entrapment, Justice Stewart applied his reasoning to the facts presented. Disregarding the defendant's predisposition, the questions became one of determining whether or not the government agent had exceeded permissible government conduct. He felt that the supplying of the necessary ingredient in order to prosecute Russell for the manufacturing of an illicit drug was the type of government conduct that the entrapment defense was meant to prevent.

The court of appeals concluded that the drug could not have been manufactured were it not for the agents supplying the necessary ingredient. The majority of the Supreme Court rejected this as contrary to the finding of facts that Russell and his codefendants were able to produce the drug before and after receiving the agent's supply—thus the Court concluded the agent merely afforded an opportunity to commit the offense. The dissent rejected this argument because the defendant was prosecuted for the particular batch for which the government agent had supplied the necessary ingredient.<sup>70</sup>

Thus the Supreme Court in *Russell* failed to mend the dichotomy that developed in *Sorrells* and *Sherman*.

#### ENTRAPMENT IN ILLINOIS LAW

The origin of intent test formulated in *Sorrells* and *Sherman* and confirmed in *Russell* provides the basis for both the statutory formulation<sup>71</sup> and judicial decisions<sup>72</sup> in Illinois. If the criminal intent originates with the state official or his agent who seeks to entrap the accused in order to arrest and prosecute him, the defense of entrapment will bar conviction.<sup>73</sup> However, there is no entrapment if a public officer or employee

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70. *Id.* at 449:

The Government . . . prosecuted that person for making the drug produced with the very ingredient which its agent had so helpfully supplied. This strikes me as the very pattern of conduct that should be held to constitute entrapment as a matter of law [footnote omitted].

71. ILL. REV. STAT. ch. 38, §§ 7-12 (1971):

A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated.

72. See, e.g., *People v. Hall*, 25 Ill. 2d 297, 185 N.E.2d 143 (1962), cert. denied, 374 U.S. 849 (1962); *People v. Outten*, 13 Ill. 2d 21, 147 N.E.2d 284 (1958); *People v. Clark*, 7 Ill. 2d 163, 130 N.E.2d 195 (1955); *People v. Guagliata*, 362 Ill. 427, 200 N.E. 169 (1936); *In re Horwitz*, 360 Ill. 313, 196 N.E. 208 (1935).

73. *People v. Wells*, 25 Ill. 2d 146, 182 N.E.2d 689 (1962); *People v. McSmith*, 23 Ill. 2d 87, 178 N.E.2d 641 (1961); *People v. Lewis*, 80 Ill. App. 2d 101, 224 N.E. 2d 647 (1967).

or agent of either merely affords the opportunity or facility for committing an offense in furtherance of a criminal purpose which an accused has originated.<sup>74</sup>

In Illinois, certain elements must be present before the statutory defense of entrapment can be claimed by the defendant. The first part of the statute reads:

A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person.<sup>75</sup>

How is conduct "incited or induced?" Prohibited police conduct may include inducement, solicitation, coercion, deception, trickery, fraud or appeals to friendship or sympathy. To establish entrapment it must appear that the accused had no intention or predisposition of committing a crime.

Police action cannot be passive—police must actively encourage the suspect to commit the offense. Merely affording an opportunity to commit a crime is not sufficient to establish incitement or inducement.<sup>76</sup> Thus, an essential element for entrapment is that the accused is by inducement, or excessive persuasion, lured into the commission of a crime he had not contemplated.

A second element of entrapment is that the entrapper must be a "public officer or employee, or agent of either."<sup>77</sup> There are no Illinois cases holding purely private action sufficient to provide an entrapment defense—when the encouragement or an affirmative trap comes from a private individual rather than an official or his agent, the state is no longer

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74. *People v. Clay*, 32 Ill. 2d 608, 210 N.E.2d 221 (1965); *People v. Anthony*, 28 Ill. 2d 65, 190 N.E.2d 837 (1963); *People v. Morgan*, 98 Ill. App. 2d 435, 240 N.E.2d 286 (1968); *People v. Johnson*, 66 Ill. App. 2d 465, 214 N.E.2d 354 (1966).

75. See note 71 *supra*.

76. See *People v. Wright*, 27 Ill. 2d 557, 190 N.E.2d 318 (1963); *People v. Strong*, 21 Ill. 2d 320, 172 N.E.2d 765 (1961) ("trickery, persuasion or fraud" of the entrapper); *People v. Gonzales*, 125 Ill. App. 2d 225, 260 N.E.2d 234 (1970) ("incite, induce, instigate or lure" accused into committing an offense); *People v. Beach*, 266 Ill. App. 272 (1932) (offense charged was procured through "solicitations and false representations"). But see *People v. Luna*, 69 Ill. App. 2d 291, 216 N.E.2d 473, *rev'd on other grounds*, 37 Ill. 2d 299, 226 N.E.2d 586 (1966) (friendship with an informer does not raise question of entrapment); *People v. Lewis*, 26 Ill. 2d 542, 187 N.E.2d 700 (1963); *People v. Hall*, 25 Ill. 2d 297, 185 N.E.2d 143, *cert. denied*, 374 U.S. 849 (1962) (appeal to sympathy not sufficient to establish defense of entrapment); *People v. Hatch*, 49 Ill. App. 2d 177, 199 N.E.2d 81 (1964) (appeals to sympathy and friendship are not sufficient to establish defense of entrapment).

77. See note 71 *supra*.

the cause of the offense. Without this element, the basis of the defense, to censure improper governmental conception of a criminal offense and implanting the idea in an otherwise innocent person, is no longer present.<sup>78</sup> However, persons not governmental officials who act with official sanction should be treated as governmental agents for purposes of entrapment.<sup>79</sup> If the state profits from the affirmative trap, it should also be accountable for its detriments.

*People v. Dollen*<sup>80</sup> is the latest Illinois Supreme Court decision dealing specifically with this element. In *Dollen*, the defendant, on January 28, 1969, during a routine inspection of taxicabs at the garage he managed, found a small box containing morphine in the back seat of a cab driven by informer Donald Wright. Wright, who was present along with another driver, Elmer Davis, asked to see the box and immediately said he could find a buyer for it. Defendant refused and said the box contained someone's medicine and that it would be claimed.

Wright made repeated requests to sell the box but defendant refused. On February 4th, the defendant finally assented to Wright's request after he approached the defendant in an emotional state and told him he was in trouble and the defendant could help him by selling the narcotics.

On the following day, February 5th, an Illinois narcotics agent and informer Wright went to the taxicab garage. The defendant sold the box to the narcotics agent for seventy-five dollars. After the sale the agent on three different occasions sought to buy more drugs but each time the defendant refused, the last time telling the agent he had found the box under the back seat of a cab. The defendant was arrested on February 19th.

Testimony revealed that on February 6th, informer Wright was fired by the defendant. Richard Pass, another employee, testified that on the same day Wright said he had "fixed" the defendant. The president of the cab company testified that also on February 6th, Wright told her she had better look for a new manager because the defendant would soon be arrested for selling narcotics to a state agent.

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78. *But see* Mr. Justice Stewart's dissenting opinion in *Russell*, 411 U.S. at 442: "That he was induced, provoked, or tempted to do so by government agents does not make him any more innocent or any less predisposed than he would be if he had been induced, provoked, or tempted by a private person—which, of course, would not entitle him to cry 'entrapment.'"

79. *Sherman*, 356 U.S. at 373-75 (1958). *Cf.*, 18 U.S.C. § 242 (1970) which provides criminal sanctions against anyone acting "under color of any law" who deprives another of his civil rights. *See* *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Williams*, 341 U.S. 70 (1951).

80. 53 Ill. 2d 280, 290 N.E.2d 879 (1972).

Elmer Davis, another driver, testified that a few days after the sale, Wright, in his presence, told the defendant that he had received money from the state and he could end this matter if the defendant would rehire him. Both Davis and Pass testified as to the animosity that had existed between the defendant and Wright because of the latter's treatment of customers.

Informer Wright was not available at the time of trial. The defendant was tried and convicted for the unlawful sale of a narcotic drug. The appellate court affirmed. The Supreme Court reversed the judgments holding the evidence presented created an inference that Wright acting independently may have deposited the box so that the defendant might find the drugs and be encouraged to sell them to a narcotics agent. There was a possibility of entrapment, and the failure of the state to produce Wright at the trial or otherwise present evidence to refute defense testimony and establish beyond a reasonable doubt that defendant was not entrapped warranted reversal.

Defendant argued the defense of entrapment as set forth in *People v. Strong*<sup>81</sup> and *People v. Jones*.<sup>82</sup> In both of these cases, unrefuted testimony of the defendant disclosed that the narcotics which the accused was alleged to have sold were supplied by an informer. This, and the unexplained failure to produce the informer as a witness to controvert the defendant's testimony,<sup>83</sup> gave rise to an inference of entrapment which warranted reversal of the narcotic conviction.

The appellate court distinguished *Strong* and *Jones* from *Dollen*. In *Strong* and *Jones* the defendant testified that the state supplied the narcotics; from this and the failure of the state to call its informer the court then inferred the truth of such testimony. However, the appellate court pointed out:

In the case at hand defendant's un rebutted testimony was not that the informer supplied the drugs, but that he found the box in the informer's

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81. 21 Ill. 2d 320, 172 N.E.2d 765 (1961).

82. 73 Ill. App. 2d 55, 219 N.E.2d 12 (1966).

83. In *Dollen* informer Wright, upon request, was given fifty dollars by the narcotics agent so that he could leave town. Appellant argued that such supplying of funds to leave the area was prejudicial and a denial of constitutional rights. See Brief for Appellant at 17 and Brief for Appellee at 15, *People v. Dollen*, 53 Ill. 2d 280, 290 N.E.2d 879 (1972). The appellate court held it was not prejudicial: "[D]efendant made no motion to produce the witnesses and there was testimony that Wright had in fact returned and been seen in the area during the period before trial." *People v. Dollen*, 2 Ill. App. 3d 567, 573, 275 N.E.2d 446, 450 (1971). See also *People v. Williams*, 38 Ill. 2d 150, 230 N.E.2d 214 (1967) and *People v. Wilson*, 24 Ill. 2d 425, 182 N.E.2d 683 (1962). The supreme court did not deal with this contention.



taxicab. Were we to apply the rule of *Strong* and *Jones* to these facts, we would first have to infer that the informer placed the drugs in the cab. Then in order to find entrapment, we would be required to use that inference as a basis for a second inference regarding the truth of defendant's testimony. We will not engage in speculating on the existence of entrapment where the evidence merely "suggests" the informer supplied the drugs.<sup>84</sup>

The Illinois Supreme Court, however, did go one step further. They held for the first time that the supplying of narcotics by an informer or agent could be established by inference from the totality of the surrounding circumstances. The court stated:

We do not imply that any law enforcement official was involved in a plan to place the narcotics in the vehicle, but we believe that the totality of the evidence was sufficient to indicate that Wright, acting independently, may have deposited the package so as to result in its detection by defendant, thus establishing the possibility of entrapment.<sup>85</sup>

The court further said:

The State, for example, may have easily rebutted defense testimony concerning the manner in which the drugs were found or the inference of their possible source by calling the informer to testify. However, it chose not to, explaining that Wright has disappeared. . . .<sup>86</sup>

Based on the evidence presented, along with the principles that the state is responsible for the conduct of its informers<sup>87</sup> and a conviction for

84. 2 Ill. App. 3d 567, 572, 275 N.E.2d 446, 449 (1971). See Brief for Appellee at 11-12, *People v. Dollen*, 53 Ill. 2d 280, 290 N.E.2d 879 (1972):

In the few cases where entrapment has been held to be a defense, the distinction seems to rest on the fact that the drug itself was actually furnished by the state and sold to the defendant by an informer so the defendant could sell it back.

. . . .

Here in our case nobody testified that the drug which was sold by Dollen was supplied by the State.

85. 53 Ill. 2d at 284, 290 N.E.2d at 882.

86. 53 Ill. 2d at 285, 290 N.E.2d at 882. See note 82 *supra*. The state contended that it did not pay informer Wright to leave town to avoid process, but rather when local police officials had tried to locate Wright it was discovered he had "mysteriously disappeared." Brief for Appellee at 13, *People v. Dollen*, 53 Ill. 2d 280, 284, 290 N.E.2d 879, 882 (1972).

Illinois decisions have repeatedly held that the state is not under an obligation to produce an informer as a witness. *People v. Aldridge*, 19 Ill. 2d 176, 180, 166 N.E.2d 563, 565 (1960). The state has a right to rely upon the argument of credibility alone as an effective rebuttal to entrapment; this failure may give rise to an inference against the state but it remains an issue of credibility for the jury. *People v. Strong*, 21 Ill. 2d 320, 325, 172 N.E.2d 765, 768 (1961); *People v. Gonzales*, 125 Ill. App. 2d 225, 235, 260 N.E.2d 234, 239 (1970); *People v. Jones*, 73 Ill. App. 2d 55, 58, 219 N.E.2d 12, 13 (1966).

87. *People v. Strong*, 21 Ill. 2d 320, 326, 172 N.E.2d 765, 768 (1961).

the unlawful sale of narcotics will not stand if the informer supplied the drugs,<sup>88</sup> the court concluded that "no evidence was presented to refute defense testimony and establish beyond a reasonable doubt that defendant was not entrapped into the commission of the offense charged. . . ."<sup>89</sup>

Thus, for the first time the Illinois Supreme Court held that the supplying of drugs by an official could be established by inference. Although the state is not required to produce an informer at trial, it must meet its burden to rebut the testimony establishing entrapment and prove beyond a reasonable doubt that a defendant was not entrapped.

The third element, following inducement by an official or employee or agent of either, necessary to establish a valid defense of entrapment focuses on the purpose: "obtaining evidence for the prosecution of such [entrapped] person."<sup>90</sup> Involved in this element are the grounds necessary in order to obtain this evidence. Must there be probable cause, or is mere suspicion sufficient in order to obtain evidence under police encouragement? Two terms that have been used are "substantial reason to suspect,"<sup>91</sup> and "reasonable grounds to believe."<sup>92</sup> It appears the courts feel that there must be "reasonable grounds to believe" that the accused is engaged or intends to engage in unlawful activities. Thus reasonable suspicion,<sup>93</sup> rather than probable cause,<sup>94</sup> is sufficient for purposes of po-

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88. In the *Strong* case the court said: "We know of no conviction for sale of narcotics that has been sustained when the narcotics sold were supplied by an agent of the government. This is more than mere inducement. In reality the government is supplying the sine qua of the offense." *People v. Strong*, 21 Ill. 2d 320, 325, 172 N.E.2d 765, 768 (1961) cited with approval in *People v. Jones*, 73 Ill. App. 2d 55, 59, 219 N.E.2d 12, 13 (1966).

In *Dollen*, the Illinois Supreme Court also cited *Russell* and *Bueno*, *People v. Dollen*, 53 Ill. 2d 280, 290 N.E.2d 879 (1972). The *Russell* decision relied in part on *Bueno* and also *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970), both of which cited with approval the *Strong* case to support the contention that entrapment exists as a matter of law, regardless of the accused's predisposition to commit the crime for which he is charged, where the government supplies the contraband. As seen, however, the United States Supreme Court has since overruled *United States v. Russell*. See note 60 and accompanying text *supra*.

89. 53 Ill. 2d at 285, 290 N.E.2d at 882 (1972). Defense evidence of entrapment places the burden on the state to disprove it beyond a reasonable doubt.

90. See note 71 and accompanying text *supra*.

91. *People v. Wells*, 25 Ill. 2d 146, 149, 182 N.E.2d 689, 691 (1962).

92. *Ryles v. United States*, 183 F.2d 944, 945 (10th Cir.), *cert. denied*, 340 U.S. 877 (1950); *People v. Washington*, 81 Ill. App. 2d 162, 225 N.E.2d 673, 675 (1967), *cert. denied*, 390 U.S. 991 (1968).

93. See *Morales v. United States*, 260 F.2d 939 (6th Cir. 1958) and *People v. Gonzales*, 125 Ill. App. 225, 260 N.E.2d 234 (1970) where the court held there was no reasonable suspicion necessary for police encouragement.

94. Although the courts have held probable cause is not necessary, there must be "reasonable grounds to believe." The problem is that the standard of "probable

lice encouragement of a crime. The rationale and necessity behind this requirement is the possibility that an innocent law abiding person may succumb to a law enforcement official's persistent and attractive enticement to commit a crime. What needs to be acknowledged is the fact that the sole purpose of the affirmative trap is not to induce or allure an innocent person to commit a crime, but to secure evidence for the prosecution of a guilty person.<sup>95</sup>

The entrapment definition in Illinois reads:

However, this Section is inapplicable if a public officer or employee or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated.<sup>96</sup>

There is a clear distinction between affording an opportunity rather than inducing or inciting a criminal act. There is no entrapment if the state furnishes an opportunity for the commission of an offense in furtherance of a criminal purpose which the accused has originated.<sup>97</sup> A person may be tested, upon reasonable suspicion, by being offered an opportunity to transgress the law. The opportunity afforded must relate to the accused who has originated the criminal intent, that is, if "the criminal design originates with the officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute"<sup>98</sup> then entrapment shall be a valid defense.<sup>99</sup> This element necessarily involves

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cause" and "reasonable grounds to believe" are often used interchangeably. Both really mean something less than evidence which is necessary for a conviction but is more than mere suspicion. See BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES, 337-41 (1969). It is a question of probabilities which must take into consideration the totality of the circumstances based on reasonableness. Somewhere between no grounds for suspicion or mere suspicion and probable cause the courts have tried to establish the grounds necessary to afford an opportunity to commit a crime.

95. *People v. Lewis*, 365 Ill. 156, 6 N.E.2d 175 (1936); *People v. Ficke*, 343 Ill. 367, 175 N.E. 543 (1931).

96. See note 71 and accompanying text *supra*.

97. *People v. Clay*, 32 Ill. 2d 608, 210 N.E.2d 221 (1965); *People v. Anthony*, 28 Ill. 2d 65, 190 N.E.2d 837 (1963); *People v. Lewis*, 26 Ill. 2d 542, 187 N.E.2d 700 (1963); *People v. Van Scoyk*, 20 Ill. 2d 232, 170 N.E.2d 151 (1960); *People v. Morgan*, 98 Ill. App. 2d 435, 240 N.E.2d 286 (1968). See, e.g., *People v. Brown*, 95 Ill. App. 2d 66, 238 N.E.2d 102 (1968) where the court held that a narcotics agent who went with informer and made purchase from defendant did nothing more than provide defendant with an opportunity to commit a crime, thus no entrapment.

98. *Sorrells*, 287 U.S. at 442.

99. *People v. Hall*, 25 Ill. 2d 297, 185 N.E.2d 143 (1962), *cert. denied*, 374 U.S. 849 (1963); *People v. Wells*, 25 Ill. 2d 146, 182 N.E.2d 689 (1962) ("[I]f a criminal design or intent to commit the offense originates in the mind of the one

two inquiries. Did the accused originate the idea of committing this particular offense and was he otherwise predisposed to commit the crime?<sup>100</sup> Although the accused may not have originated the criminal idea, he still will not be permitted to invoke the defense of entrapment if he was otherwise predisposed because he is not an "innocent person" induced or lured to commit an offense he would not otherwise commit.

It should be noted that the defense of entrapment is not available unless the accused himself is responsible for each element necessary to establish a criminal act.<sup>101</sup> If the government official or his agent performs any of such essential elements of the crime, the defense shall be valid.<sup>102</sup> This problem generally arises where criminality of the act is affected by the question of consent. It has been held that entrapment must not be under such circumstances as will amount to the consent of the person affected, since in such an instance one of the essential elements is missing.<sup>103</sup> In narcotics cases the courts have not been confronted with this problem because consent does not vitiate the offense.

In summary, then, certain elements should be present for the Illinois defense of entrapment. First, the offense committed must have been induced by the police or their agents, that is, the idea of committing the offense must originate with the state and not with the accused. This involves three inquiries: Did the idea of committing the criminal act originate with the accused, and did the accused have any predisposition to commit such an offense prior to the inducement? Second, the officer must induce, incite, or actively encourage its commission and not merely afford an opportunity. Third, the purpose must be for obtaining evidence for prosecution.

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who seeks to entrap the accused, and who lures him into its commission merely for the purpose of arresting and prosecuting him, no conviction may be had." 25 Ill. 2d at 148, 182 N.E.2d at 691); *People v. Gonzales*, 125 Ill. App. 2d 225, 260 N.E.2d 234 (1970).

100. *United States v. Sherman*, 200 F.2d 880, 882 (2nd Cir. 1952); Note, *Defense of Entrapment*, 28 N.Y.U.L. REV. 1180 (1953).

101. *People v. Calcaterra*, 33 Ill. 2d 541, 213 N.E.2d 270 (1965), *cert. denied*, 385 U.S. 7 (1966); *People v. Lewis*, 80 Ill. App. 2d 101, 224 N.E.2d 647 (1967).

102. *Brown v. United States*, 367 F.2d 145 (5th Cir. 1966) (*per curiam*) (conspiracy does not lie where co-conspirators are government agents); *Love v. People*, 160 Ill. 501, 43 N.E. 710 (1896) (the element of breaking-in missing in burglary where entrapper opened the door to an office and the safe); *State v. Neely*, 90 Mont. 199, 300 P. 561 (1931); *Finley v. State*, 84 Okla. Crim. 309, 181 P.2d 849 (1947).

103. *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956); *People v. Jenkins*, 210 Ill. App. 42 (1918); *Stanley v. State*, 25 Okla. Crim. 195, 212 P. 734 (1923).

## CONCLUSION

The United States Supreme Court continues to reject the "objective," police conduct, test of entrapment in favor of the "subjective," origin-of-intent test. The Court, viewing the purpose of the entrapment defense as a means of protecting an "otherwise innocent" person, has refused to use the defense as a sanction against reprehensible police conduct. The Illinois statute and judicial decisions have followed the subjective test; however, Illinois has expanded the defense to encompass situations where entrapment may exist as a matter of law, that is regardless of one's predisposition, entrapment will exist if there is improper state conduct in the encouragement of a crime such as supplying the narcotics the accused is charged with possessing.

Unlike the United States Supreme Court decision in *Russell*, the Illinois Supreme Court has cited with approval several lower federal court decisions establishing entrapment as a matter of law.

The effect of the *Russell* decision on Illinois development remains to be seen. Illinois' gradual evolution reflects a persistent question—must there necessarily be an unavoidable dichotomy in the theory of entrapment? The theories behind entrapment, apparently mutually exclusive, should become inclusive—entrapment should be a defense to protect an otherwise innocent person and act as a means of sanction against unlawful government activity in instigating crime.

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