THE NATURE OF THE DEFENSE OF ENTRAPMENT

The case of *Sorrells v. United States*[1] is the most recent of a growing line of decisions in which the Supreme Court has found occasion to define the legal consequences—with respect to prosecution for federal crimes—of the use of methods by federal law-enforcement officers which are unlawful or contrary to sound morals. Sorrells was indicted for violation of the National Prohibition Act.[2] He entered a plea of not guilty and upon his trial relied upon the defense of entrapment. The evidence showed that one Martin, a prohibition agent, while posing as a tourist, called at the home of the defendant. During their conversation it was discovered that both were war veterans and had served as members of the same Division. Martin twice requested the defendant to procure him some liquor, but defendant stated he had none. After some further exchange of war reminiscences, Martin again renewed his request, whereupon defendant left his house and returned shortly with some liquor which he sold to Martin. Martin admitted that he persuaded the defendant to secure the liquor with the purpose of prosecuting him for procuring and selling. Defendant introduced evidence of good character at the trial, and the government in rebuttal introduced testimony that the defendant had the general reputation of a rum runner.

The trial court denied a motion for a directed verdict for the defendant, and also refused to submit the issue of entrapment to the jury, ruling that "as a matter of law" there was no entrapment. Defendant was found guilty and sentenced to imprisonment, which judgment was affirmed by the Circuit Court of Appeals for the Fourth Circuit.[3] The Supreme Court granted a writ of certiorari limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment.[4] *Held*, judgment reversed. The trial court erred in holding that as a matter of law there was no entrapment. The issue should have been left to the jury. Mr. Justice Roberts, with whom concurred Mr. Justice Brandeis and Mr. Justice Stone, agreed in result but argued that the Supreme Court ought to remand with instructions to the court below to quash the indictment and discharge the defendant. Mr. Justice McReynolds alone favored the affirmance of the judgment.

The instant case is interesting chiefly for the difference of opinion which developed between the judges as to the legal effect of proof of entrapment. The availability of entrapment as a defense or as a bar to prosecution in the federal courts had not been squarely passed upon by the Supreme Court,[5] but in a con-

[1] 53 Sup. Ct. 210 (1932).

[2] 41 Stat. 305 (1919), 27 U.S.C. § 1 (1926), as amended, 46 Stat. 1036 (1931), 27 U.S.C. Supp. VI § 91 (1933).

[3] 57 F. (2d) 973 (1932). [4] 53 Sup. Ct. 19 (1932).

[5] See Casey v. United States, 276 U.S. 413, 48 Sup. Ct. 373 (1928), where the Supreme Court touched upon the question but found it unnecessary upon the facts presented to decide it. A dissenting opinion by Mr. Justice Brandeis foreshadowed the position adopted in the principal case in Mr. Justice Roberts' concurring opinion.

siderable number of cases in the lower courts, involving for the most part alleged violations of the narcotic and liquor laws and with facts substantially similar to those of the present case, the defense had in one form or another been sustained.[6] In the state courts there had been more difference of view.[7] It seems sufficiently clear that Martin's activities herein went further than those of an under-cover operative creating a favorable occasion for the defendant to offer to sell liquor, if such were his business or natural inclination. By his own testimony and that of others present at the time, it is apparent that the criminal intent or design originated in his mind, and that, if he had left defendant to his own devices, the latter would not have committed any violation of the statute. It is probable that there will be little disposition to question the desirability of the result that the Supreme Court reached in the case, for sound policy seems to demand that the courts should within the proper limits of the judicial power discourage those forms of official conduct which are calculated to create crime and disrespect for law rather than to promote its proper enforcement.

In this, all of the judges, save possibly Mr. Justice McReynolds, are agreed. Their difference is as to the theory and method by which the result shall be reached. Mr. Chief Justice Hughes, speaking for five members of the Court, argues that entrapment is a defense under the general issue because a sale of liquor induced by methods amounting to an entrapment is not a crime within the purview of the Prohibition Act. While it is true that the general language of the Act is broad enough to comprehend such a case, the Court ought not to at-

[6] Woo Wai v. United States, 223 Fed. 412 (C.C.A. 9th 1915); Butts v. United States, 273 Fed. 35 (C.C.A. 8th 1921); Lucadamo v. United States, 280 Fed. 653 (C.C.A. 2d 1922) (semble); Zucker v. United States, 288 Fed. 12 (C.C.A. 3rd 1923) (semble); Cermak v. United States, 4 F. (2d) 99 (C.C.A. 6th 1925); Capuano v. United States, 9 F. (2d) 41 (C.C.A. 1st 1925); Gargano v. United States, 24 F. (2d) 625 (C.C.A. 5th 1928); O'Brien v. United States, 51 F. (2d) 674 (C.C.A. 7th 1931). The Circuit Court of Appeals of the Fourth Circuit in deciding the principal case expressly declined to follow the rule laid down in an earlier case in accord with the decisions in the other circuits. See Newman v. United States, 299 Fed. 128, 131 (1924).

[7] An exhaustive annotation to the case of Butts v. United States, *supra* note 7, in 18 A.L.R. 146 collects both the federal and state decisions on entrapment. The leading case in a state court refusing to follow the doctrine of entrapment where the element of want of consent was not an essential constituent in the crime is People v. Mills, 178 N.Y. 274, 70 N.E. 786, 67 L.R.A. 131 (1904).

The opinion of Mr. Chief Justice Hughes properly distinguishes the principal case from three other types of cases where entrapment has been held a defense because it in some way negatives the existence of some element necessary by definition to the existence of crime. In cases of the first type the trap negatived the existence of knowledge that the person to whom liquor was sold was an Indian. United States v. Healy, 202 Fed. 349 (D.C. 1913); Voves v. United States, 249 Fed. 191 (C.C.A. 1918). In the second group the entrapment negatived the want of consent which was an essential element of the crime. Connor v. People, 18 Colo. 373, 33 Pac. 159 (1893) (larceny); Williams v. Georgia, 55 Ga. 391 (1875) (larceny); State v. Adams, 115 N.C. 775, 20 S.E. 722 (1894) (larceny). In the third class are cases where physical conditions essential to an offense are absent if there be a trap, such as the element of breaking in burglary. Regina v. Johnson, Car. & Mar. 218 (1841) (burglary); Love v. People, 160 Ill. 501, 43 N.E. 710 (1896) (burglary); People v. McCord, 76 Mich. 200, 42 N.W. 1106 (1889) (burglary).

tribute to Congress an intent to accomplish a result contrary to what seems to be the sound policy unless specific and unequivocal language leaves no room for a different interpretation. There is no such language here. It is a recognized function of courts so to construe statutes, penal and otherwise, as to avoid absurd consequences or flagrant injustice. The Chief Justice intimates that cases might arise where because of the enormity of the defendant's act an otherwise applicable statute would not receive this restrictive interpretation. His opinion also asserts that the defense of entrapment does not consist simply in the fact that the particular act was committed at the instance of federal officials, but that evidence of predisposition and criminal design of the defendant is admissible for the purpose of showing that his act was not altogether the product of creative official activity.

The majority treats as a misconception the view that the defense is in the nature of a plea in bar, involving not a denial of guilt but rather an assertion that the defendant is entitled to go free whether he be innocent or guilty. Instead it operates to show that defendant was not guilty of the sort of conduct which is made criminal by the statute. The Chief Justice asserts, though without citation of authority, that this view accords with the practice followed by the lower federal courts.

Mr. Justice Roberts regards as unwarranted this reliance upon statutory construction and insists that the applicable principle is that "the courts must be closed to the trial of a crime instigated by the government's own agents." He regards the doctrine of entrapment in criminal law as an analogue to the rule applied by courts in civil proceedings by virtue of which judicial aid is refused "to the perpetration and consummation of illegal schemes" and the use of legal processes for the consummation of wrongs is denied. He regards as involving an irrelevant balancing of equities between government and the accused the doctrine approved by the majority under which the defendant's previous course of conduct or bad reputation is permitted to be proved, asserting that the government has no equity, and under any sound policy will be denied all advantage whenever the offense is instigated by its own official. The implication seems to be that there will be no such estoppel of the government where its agent's conduct amounts to something less than instigation or inducement. His opinion asserts that the view of the minority renders unnecessary any distinction based upon the seriousness of the crime. He insists that, since the issue of entrapment has no connection with guilt or innocence, it may be raised at any point in the proceeding, even by writ of habeas corpus;[8] also that it is the duty of the court at any stage of the case, if proof of entrapment appears, to quash the indictment and set the defendant at liberty.

If the decision of this controversy is made to turn solely upon the moral aspects of the whole matter, Mr. Justice Roberts' analysis would seem entirely convincing. It is difficult to see what bearing the instigation of defendant's act by Martin has upon his guilt or innocence, if those terms are used in the ethical

[8] United States ex. rel. Hassel v. Mathues, (D.C.) 22 F. (2d) 979 (1927).

sense. Such instigation becomes legally material only when the instigator is a government officer. Since the defendant was ignorant of Martin's true character, it can scarcely be maintained that such character had any effect upon the moral quality of his act. In this respect, the present case differs materially from that situation where a court imports the requirement of scienter by construction into a penal statute in order to save a defendant who is morally innocent.[9] But guilt or innocence in a legal sense depends upon whether or not defendant's conduct falls within the legal definition of a crime, and the above considerations do not militate decisively against the propriety of reading an exception covering cases of entrapment into a statute.

The position of the learned justice is not itself free from difficulties. Like the Chief Justice he asserts with doubtful justification that the practice in the lower courts is in accord with his views.[10] His opinion seems highly unsatisfactory in its treatment of *Ex parte United States*,[11] which is cited as supporting his position, though interestingly enough it is also cited by the Chief Justice as a supporting authority. If the case is in point at all, its tendency seems to the writer contra to Mr. Justice Roberts' view. The assertion that the minority position has the merit of avoiding the necessity of any distinction based upon the gravity of the crime with which a defendant is charged seems a highly questionable one. The same considerations of policy which would cause the majority to refrain from reading entrapment into a penal statute as a defense would in all probabil-

[9] There are a number of instances in which courts have avoided a literal interpretation of a penal statute by importing common law defenses into it by construction. See 1 Bishop, Criminal Law (9th ed. 1923), § 291b. The leading case is Regina v. Tolson, 23 Q.B.D. 168 (1889).

[10] As a matter of fact little attention has been given in the cases in the lower courts to the issue which gives rise to the disagreement between the judges here. Mr. Justice Roberts is able to cite cases where proof of entrapment resulted in dismissal of prosecution and liberation of the defendant before verdict. But in the bulk of the cases the trial court has left the matter to the jury under instructions permitting an acquittal.

[11] 242 U.S. 27, 37 Sup. Ct. 72 (1916). In this case the Supreme Court decided, perhaps unfortunately, that the federal courts did not possess inherent power to suspend indefinitely the execution of a sentence imposed following a plea of guilty to an indictment charging a federal crime upon considerations extraneous to the legality of the conviction. Mr. Chief Justice Hughes relies on this case to support his argument that the Court is without power to interfere with the prosecution in an entrapment case if the defendant has in fact violated the federal statute, merely because of views as to policy which the Court entertains. (See p. 215). Mr. Justice Roberts argues that the power to construe which the majority rely upon here should equally apply to enable the penalties prescribed by federal criminal law to be modified, but that the decision in the above case settles that this may not be done.

The weakness in Mr. Justice Robert's argument is that the analogies the majority rely upon in their process of construction herein had no application to the situation in Ex parte United States, once it had been decided that the federal judicial power did not *per se* include the power to suspend which was there exercised. The case on its facts does not necessarily exclude the position taken by Mr. Justice Roberts and his colleagues, but that position is difficult to reconcile with much of the reasoning of Chief Justice White's opinion. See 37 Sup. Ct. at p. 78.

ity cause a court which had adopted the minority view to restrict its definition of entrapment in such manner as to exclude a plea in bar or a motion to quash.[12]

It is possible that the policy underlying the entrapment doctrine will be better effectuated by a rule which leaves the question to the court. Perhaps juries will be prone to be influenced unduly by the popularity or unpopularity of the statute with the violation of which a defendant is charged if it is left to them to pass upon the defense. As against this rather speculative merit, the minority view faces the criticism that its rationale involves the assumption of a new constitutional doctrine. Once it is admitted that the statute was violated by Mr. Sorrells, then it follows from the position adopted that Congress is without power to bring a defendant who has been entrapped into a violation of an otherwise valid penal statute to the bar of justice. Conceivably that is a defensible position, but it seems a rather inconsistent one to be taken by judges who have in other cases properly insisted that courts should go to any reasonable extreme to avoid deciding an issue of the constitutional power of Congress. If there were no reason other than this, it would seem that the majority of the Court were justified in disposing of the present case by construction of the statute.

The question may well be raised, however, as to what constitutional basis there would be for the implication of this new limitation. It is true that the Supreme Court has refused to permit the use of evidence in criminal prosecutions, provided a timely objection is made, where it has been obtained by methods which violate the express constitutional guaranties against unlawful search and seizure.[13] But it must be remembered that the Court, though by a bare majority, refused to extend this protection by analogy to a case where the methods used, while clearly unlawful, were not regarded as violating these constitutional prohibitions.[14] The instant case seems in one aspect weaker than the wiretapping case, since it is difficult to see within what constitutional prohibition entrapment might be held to fall by analogy. Possibly it might be argued that an attempt by Congress to control this matter in a manner contrary to the Supreme Court's own view of sound policy would be a legislative invasion of the field of judicial power. But even under a constitutional system such as ours where the content of constitutional doctrine is so largely dependent upon the views of the judges as to policy, sound discretion would seem to suggest that such a position should not be taken, if it is to be taken at all, until such time as necessity requires.

ARTHUR H. KENT*

[12] It seems unlikely that the doctrine of entrapment could be availed of under either view if the crime with which defendant is charged were atrocious in character or threatened the safety or vital interests of the government. It is significant that the great majority of the federal cases have involved liquor and narcotic violations.

[13] Weeks v. United States, 232 U.S. 383, 34 Sup. Ct. 341 (1914); Agnello v. United States, 269 U.S. 20, 46 Sup. Ct. 4 (1925).

[14] Olmstead v. United States, 277 U.S. 438, 48 Sup. Ct. 564 (1928).

* Professor of Law, the University of Chicago Law School.