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The Doctrine of Entrapment

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NOTES

THE DOCTRINE OF ENTRAPMENT

Entrapment has been defined as the inducement of one to commit a crime not contemplated by him, for the sole purpose of instituting criminal prosecution against him.[1] In general, the defense of entrapment appears to be the outgrowth of American judicial decisions rather than the result of constitutional or statutory provision.[2] The defense of entrapment ought to be distinguished from cases involving consent,[4] in which it is questioned whether or not the crime has in fact been committed. Entrapment is available as a defense when all the requisite elements of a crime have been proved.

Norden's Case[5] appears to have been the first case in which the defense was even remotely considered. *United States v. Whittier*,[6] decided in 1878, was the first case in the Federal courts in which the defense of entrapment was considered, but the court ignored the defense basing its decision on other matter. Following the case, the defense was raised and considered in subsequent cases, but in none of them was the defendant acquitted on the basis of the defense as the courts considered the defense inapplicable to the facts.[7] In *Woo Wai v. United States*,[8] decided in 1915 it was for the first time established that a defendant who had committed

1. Sorrells v. United States, 287 U.S. 435 (1932); State v. Marquardt, 139 Conn. 1, 89 A.2d 219 (1952). See Swallum v. United States, 39 F.2d 390 (8th Cir. 1930); Morei v. United States, 127 F.2d 827 (6th Cir. 1942); United States v. Wray, 8 F.2d 429 (N.D. Ga. 1925).

2. See United States v. Washington, 20 F.2d 160 (D.C. Neb. 1927) (Entrapment is not a common law doctrine.).

3. United States v. Becker, 62 F.2d 1007 (2d Cir. 1933); United States v. Washington, 20 F.2d 160 (D.C. Neb. 1927) (The defense is a creation of judicial indignation at the inciting of law enforcement officials of our innocent citizens into criminal conduct.).

4. People v. Mills, 178 N.Y. 274, 70 N.E. 786 (1904) (An example of a case in which the problems of consent and entrapment were confused); Carnes v. State, 134 Tex. Crim. 8, 113 S.W.2d 542 (1938) (In the crimes of robbery, theft, burglary and others, lack of consent is an essential element—there is no crime if there be a plan by the one whose property is involved); People v. Werner, 16 Cal. 2d 216, 105 P.2d 927 (1940) (On the distinction between consent and entrapment). No case has been found in which the defense of entrapment has been recognized against a charge of murder, rape, or a similar offense.

5. 2 East P.C. 666 (In that early case, one, knowing that a highway robber frequented a certain place, intentionally went there, and being attacked by the robber surrendered his money, and then overcame the robber and later prosecuted him. Held, robbery since the act was not procured by the prosecutor, but was the voluntary act of the robber.).

6. 28 Fed. Case 591, No. 16,688 (C.C.E.D. Mo. 1878).

7. United States v. Grimm, 156 U.S. 604 (1895) (In this case, a government inspector, on a tip that the defendant was engaged in dealing with obscene pictures, sent to the defendant what he termed a trial order for some "fancy photographs". The order was sent after defendant's response, to an original inquiry, stating that he could supply such pictures. On these facts, the defendant was convicted under a statute making it unlawful to give information by mail, where, how, or by whom such pictures could be obtained. The Supreme Court affirmed the conviction); Price v. United States, 165 U.S. 311 (1897).

8. 223 Fed. 412 (9th Cir. 1915).

the crime for which he was indicted was entitled to an acquittal on the ground of entrapment. This case appeared to clarify an earlier case[9] in which, although it was recognized that the accused might successfully plead entrapment, a confusing generalization had been made to the effect that the defense of entrapment would not be available unless the government made the guilty act appear innocent.

Finally, in 1932, in *Sorrells v. United States*,[10] the United States Supreme Court was confronted with a case that could have been the panacea to lift the doctrine from the depths of confusion. In this case, a prohibition agent gained defendant's confidence and after several requests for liquor the defendant complied. At the trial, defendant introduced evidence of his good character which was refuted by the government's evidence that he had the reputation of being a rum-runner.[11] Defendant relied on the defense of entrapment. The lower court refused to sustain the defense, denying a motion to direct a verdict in favor of defendant; and it also refused to submit the issue of entrapment to the jury, ruling that as a matter of law there was no entrapment.[12] The Supreme Court reversed the conviction on the ground that Congress did not intend the prohibition statute to apply where an officer instigated sale of liquor rather than the defendant.[13]

The law itself as established in the *Sorrells* case, and for the most part followed since that time, appears to offer credence for the following general principles: (1) Entrapment is a doctrine of substantive law—the act creating a crime will be construed by reading into it a condition or proviso that if the offender shall have been entrapped into the crime the law shall not apply to him, thus effectuating the intent of the legislature.[14] (2) The test of entrapment is to look to the origin of the criminal intent to see if it is with the officer and was implanted in the mind of the otherwise innocent person; if so there is entrapment.[15] (3) Entrapment is a question of fact for the jury.[16] (4) The defense comes

9. United States v. Healy, 202 Fed. 349 (D.C. Mont. 1913) (Government agents instructed an Indian to deal with defendant, who had been suspected of selling liquor to Indians. The only difficulty was that the Indian selected could not be distinguished from a white man. The court, quite logically, held that the accused might successfully plead entrapment since he had been deceived into believing that his acts did not violate the law. But, the court went beyond this statement and announced the generalization above.

10. 287 U.S. 435 (1932).

11. The matter of defendant's history is of some importance and will be treated subsequently.

12. See note 10 *supra* at 438.

13. *Id.* at 448.

14. *Ibid.*

15. *Id.* at 451.

16. *Id.* at 452.

in under a plea of not guilty and need not be pleaded in bar.[17]

Mr. Justice Roberts concurred in the decision, but contended that to read into the statute a condition that the statute was not to be applied to an entrapped defendant necessitated a strained construction, the addition of an element not contained in the legislation—judicial amendment.[18] He argued that entrapment is contrary to public policy. Also in his opinion, the test of entrapment would be based only upon the officer's conduct, disregarding the conduct of the accused. In this test guilt would be assumed by the court as a prerequisite to the defense; the defendant's future would then rest in a determination by the court of the officer's conduct. Lastly, it was contended that entrapment is a question of law for the court in that allowing jury determination of the issue results in the trial of a false issue—guilt to prior convictions—wholly outside the scope of the question at hand, which is the defendant's guilt in the particular fact situation.

The decision in the *Sorrells* case appears to deny the very existence of the defense of entrapment, for, in essence, they say that the defendant has committed no offense because the statute is read as though it contained a condition to the effect that its provisions are not violated by an act induced by an officer. Thus, if there is no offense, there need be no defense to the charge. This reasoning appears to the writer to be faulty for the nature of the defense of entrapment is such that it presupposes the existence of the crime and its every necessary element. It appears unwarranted to contend that one who has admittedly gone through every necessary mental and physical act to commit a crime is yet guilty of no offense and to reach this conclusion by reading into every applicable criminal statute a provision that it should not apply if the act complained of has been induced by an officer.

During 1958 two United States Supreme Court cases, *Sherman v. United States* and *Masciale v. United States,* added significance to the doctrine, if not especial new enlightenment or original approach.[19]

In the *Sherman* case a government informer made numerous entreaties for narcotics to relieve his alleged suffering; the defendant secured drugs for him. The Court was unanimous in its view that

17. *Ibid.*
18. *Id.* at 456.
19.. Sherman v. United States, 356 U.S. 369 (1958); Masciale v. United States, 356 U.S. 386 (1958). Both cases deal with narcotics violations, which along with liquor violations and other secretive types of vice, constitute the usual cases in which the defense is introduced.

the government's own evidence that the defendant obtained narcotics for the informer only after repeated persuasion, including an appeal to sympathy and the inducement of the defendant to return to the narcotics habit, established the defense of entrapment as a matter of law.

In the second of the two decisions, the *Masciale* case, the defendant was charged with the sale of narcotics and conspiracy to make such sale. The defendant was introduced to a government agent by an informer after which the defendant introduced the agent to the party who sold the drugs. The defendant denied he had any available source of narcotics, and stated that he contacted the seller only upon the inducement of the government agent. The trial court sent the issue of entrapment to the jury and the petitioner was convicted. The High Court affirmed the conviction, holding that the defense could be established as a matter of law only from the undisputed testimony of the prosecution's witnesses and not from the sole testimony of the defendant, though that testimony was undisputed. The court held that while the defendant presented enough evidence for the jury to find for him, they were not compelled to do so.

Both the *Sherman* and *Masciale* decisions involved, to a limited extent, a restatement and affirmation of the decision in *Sorrells*. However, in both cases, four judges joined in minority opinions, which restated the concurring opinion in *Sorrells*. In the *Sherman* case, a separate concurring opinion took the position that the *Sorrells* case represents an impractical approach because to speak of the "creative activity" (origination of criminal intent or setting in motion criminal activity) of law enforcement officials is nebulous, and because the doctrine of the *Sorrells* case causes the court to shirk its responsibility to meet the danger of over-zealous law enforcement. The concurring opinion in the *Sherman* case contended, as did the *Sorrells* concurring opinion, that the question is whether the court can countenance the methods employed by government officials in order to prosecute.

The concurring opinion in the *Sherman* case states a need for clarification of the entrapment doctrine and yet would continue to work it out on a case by case method with little guidance. The concurring opinion does suggest that the defendant's character and predisposition are not in issue and this suggestion appears inestimably meritorious. It would eliminate the highly prejudicial and questionable prosecution tactic of introducing the defendant's

past criminal record to show a willingness to commit the particular offense with which he is charged. A defendant's criminal record should not be weighed against the deplorable police tactics in such cases, for the defendant has but little opportunity to come out of the measurement in any condition other than wanting, especially in front of a jury. However, to avoid such a circumstance seems difficult once the defendant takes the stand, for past convictions then become a basis of impeachment.[20]

The dissenters in the *Masciale* case argued that the case should have been remanded to the district court so that the trial judge could rule on the adequacy of the defense as a matter of law,[21] which is in accord with the minority opinions in the *Sorrells, Sherman* and *Masciale* cases.

In accord with the decisions in the three above mentioned cases, it is the general rule that if there is evidence that the crime was committed at the institution or inducement of government agents, that the criminal intent originated with them, and that the defendant would not have committed the offense but for the conduct of the government agents, the availability of the defense is a question of fact for the jury.[22] In fact, since *Sorrells,* the Courts of Appeals, have unanimously concluded that the issue whether a defendant has been entrapped is for the jury unless, of course, the situation is one in regard to which reasonable men could not differ.[23] For instance, if entrapment becomes evident from the prosecution's own evidence, it should be dealt with by the court without regard to the stage of proceedings.[24] The entrapment defense may also be raised by a motion at the close of the evidence for a directed verdict of not guilty.[25] It may also be upheld, as a matter of law,

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20. But, the Uniform Rules of Evidence provide that if the accused does not offer evidence supporting his own credibility the prosecution shall not be allowed, on cross-examination or otherwise, to prove for impeachment purposes, his commission or conviction of crime. Uniform Rules of Evidence, R. 21.

21. The dissenting opinion admitted, however, that on a mere reading of the record the evidence for sustaining the defense appeared rather "thin", but that the trial judge, who had heard and seen the witnesses might attach different weight to the evidence than the record revealed.

22. See, *e.g.,* Jarl v. United States, 19 F.2d 891 (8th Cir. 1927); Driskell v. United States, 24 F.2d 525 (9th Cir. 1928); Hunter v. United States, 62 F.2d 217 (5th Cir. 1932); Ryles v. United States, 183 F.2d 944 (10th Cir. 1950); Demos v. United States, 205 F.2d 596 (5th Cir. 1953); Kivette v. United States, 230 F.2d 749 (5th Cir. 1956).

23. Louie Hung v. United States, 111 F.2d 325 (9th Cir. 1940); United States v. Lindenfeld, 142 F.2d 829 (2d Cir. 1944); United States v. Brandenburg, 162 F.2d 980 (3d Cir. 1947); Nero v. United States, 189 F.2d 515 (6th Cir. 1951). In the following cases the courts have reversed convictions where the issue of entrapment was not submitted to the jury: Wall v. United States, 65 F.2d 993 (5th Cir. 1933); Lufty v. United States, 198 F.2d 760 (9th Cir. 1952); United States v. Sawyer, 210 F.2d 169 (3d Cir. 1954).

24. See note 10 *supra* at 438.

25. See, *e.g.,* St. Clair v. United States, 17 F.2d 886 (8th Cir. 1927).

after verdict.[26] A writ of habeas corpus may entitle the prisoner to be discharged.[27]

As a general principle, applicable regardless of which approach is taken—*Sorrells* decision or concurring opinion—if the criminal intent originates in the mind of the accused and the offense is completed, the fact that government officers merely afforded opportunities or facilities for the commission of the offense will not defeat the prosecution.[28] The gist of entrapment consists of active persuasion on the part of an officer to induce one to commit a crime.[29] If the officer uses inducements that would overcome the reluctance of an innocent citizen, such as pleas of suffering,[30] or offers of great sums of money,[31] entrapment is usually in issue and upheld. It is submitted that such inducements should not be countenanced by the court even if the defendant has a record of violations.

Artifice and stratagem may be employed to catch those engaged in criminal offenses.[32] In other words, where there is nothing more than a simple request to make an unlawful sale of liquor or narcotics or to engage in some other type of vice, the defense of entrapment is not available.[33]

Another question which arises in connection with the doctrine is whether or not the accused's continued course of criminal activity, if any, could be used by the prosecution to show propensity to commit the crime. Evidently, according to the law of the *Sorrells* and *Sherman* cases, such a showing is permissible. Whether a showing by the prosecution of a continuing course of criminal conduct to establish reasonable suspicion would be limited to prior convictions is a somewhat moot point, although it would

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26. United States v. Healy, 202 Fed. 349 (D.C. Mont. 1913) (A judgment and sentence were set aside and the defendant discharged upon the court's ascertaining that the conviction was procured by entrapment).

27. United States *ex rel.* Hassel v. Mathues, 22 F.2d 979 (E.D. Pa. 1927).

28. Bloch v. United States, 226 F.2d 185, 188 (9th Cir. 1955) ("The defense of entrapment is not available to one standing ready to commit an offense given an opportunity."); Kivette v. United States, 230 F.2d 749 (5th Cir. 1956) (The mere fact that officer's disguise afforded defendant an opportunity to commit a crime which he was ready and willing to accept does not constitute entrapment). See Flynn v. United States, 57 F.2d 1044 (8th Cir. 1932); United States v. Hughey, 212 F.2d 896 (8th Cir. 1954).

29. Swallum v. United States, 39 F.2d 390 (8th Cir. 1930).

30. Wall v. United States, 65 F.2d 993 (5th Cir. 1933).

31. United States v. Wray, 8 F.2d 429 (N.D. Ga. 1925) (dictum).

32. Grimm v. United States, 156 U.S. 604 (1895); Andrews v. United States, 162 U.S. 420 (1896); Price v. United States, 165 U.S. 311 (1897); United States v. Reisenweber, 288 Fed. 520 (2d Cir. 1923).

33. Jordan v. United States, 2 F.2d 598 (5th Cir. 1924) (Offer to purchase liquor by "government witnesses"); Kendjerski v. United States, 9 F.2d 909 (6th Cir. 1926). See Olmstead v. United States, 277 U.S. 438 (1927) (Mere use by the government of traps and decoys does not render an indictment based upon such evidence a nullity nor does it call for the exclusion of evidence thus procured).

appear that such a showing would not be so limited. A further question which does not appear to have been discussed would be whether there must be a similarity between the continuing course of conduct and the crime charged. By a parity of reasoning, it is possible that such a similarity would be required.

In *Certain Quantities of Intoxicating Liquors*[34] it was held that two conditions must be present to warrant a conviction when the issue is entrapment: the officers must have suspicion that the party is engaged in criminal activity, and the original plan and initiation must come from the defendant. The requirement that there must be reasonable suspicion has been asserted in many cases.[35] Often reasonable suspicion means little more than the fact that the suspect has a criminal record.

There appear to be several well defined limitations to the usage of the doctrine. If the accused was provoked to commit an offense by a private person not working in conjunction with the government, the defense is not available. The defense is limited to situations where the offense was instigated by the police.[36] The doctrine is a personal defense and is not available to a defendant if his partner was entrapped.[37] In a Federal prosecution it is no bar to the defense that the entrapment was done by a state officer.[38]

North Dakota apparently has considered the defense of entrapment but once.[39] In that case a detective, in order to obtain evidence, accompanied the accused in the burglary of a store. The detective simply acquiesced in the defendant's plan and made no suggestions. The defendant himself removed marked bills from the store. In defense, the accused raised the following two contentions: the alleged consent to burglary of his store by the store owner and the detective's participation. The court denied both of the defenses and found him guilty. Obviously, the case also involved a question of consent, but the result as to entrapment appears sound.

Entrapment as a defense to criminal prosecution is comparatively

34. 290 Fed. 824 (D.C. N.H. 1921).

35. See, *e.g.*, Heath v. United States, 169 F.2d 1007, 1010 (10th Cir. 1948) ("It is well recognized that officers may entrap one into the commission of an offense only when they have reasonable grounds to believe that he is engaged in unlawful activities. They may not initiate the intent and purpose of the violation. In a case of entrapment, it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused.").

36. See, *e.g.*, Polski v. United States, 33 F.2d 686 (8th Cir. 1929); Henderson v. United States, 237 F.2d 169 (5th Cir. 1956).

37. United States v. Perkins, 190 F.2d 49 (7th Cir. 1951).

38. Henderson v. United States, 237 F.2d 169 (5th Cir. 1956).

39. State v. Currie, 13 N.D. 655, 102 N.W. 875 (1905).

prevalent in our day. However, the decisions reveal that definite guidance for the application of the doctrine is sadly wanting. The courts are generally in agreement on the importance that the origination of criminal intent is with the defendant, but there is little certainty as to whether the criminal record of the accused can be used in determining reasonable cause.

Extreme positions have been taken in regard to the defense. Tennessee has rejected the defense completely.[40] Colorado has held that authorities who entrap suspected violators can be convicted of conspiracy.[41]

It appears to the writer that the most realistic approach is that of Mr. Justice Roberts, as espoused in the concurring opinion of *Sorrells*. Acceptance of this view, which is not law today, would limit consideration of conduct solely to that of the police and thus give impetus to what the writer feels is the true meaning of entrapment; it would allow court determination of the issue as a question of law, and would not depend upon a defendant's record for conviction on a particular charge. Travel on the road to certainty must be made in the field and this view would provide at least a suitable road map.

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CONSTITUTIONALITY OF NORTH DAKOTA'S FEDERALIZED STATE INCOME TAX

INTRODUCTION

"Federalization" of state income tax law means that the provisions of the state law are made to conform, to a greater or lesser degree, to the provisions of the federal Internal Revenue Code of 1954.[1] The need for this conformity is but one facet of the

40. Thomas v. State, 182 Tenn. 380, 187 S.W.2d 529 (1945); Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1951).
41. Reigan v. People, 120 Colo. 472, 210 P.2d 991 (1949).

1. Generally, see Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, 5 Geo. Wash. L. Rev. 198 (1937); Kanter, *A Critique of Some Federal, State, and Local Tax Coordination Techniques*, 29 Ind. L.J. 28 (1953); King, *State Constitutions Forbidding Incorporation by Reference*, 16 B.U.L. Rev. 625 (1936); Lockyer, *Kentucky Income Tax Compared With Federal Income Tax*, 42 Ky. L.J. 368 (1954); Lockyer, *History of the Kentucky Income Tax*, 43 Ky. L.J. 457 (1955); Mermin, *"Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I*, 57 Yale L.J. 1, 19 (1947); J. Miller, *The New Iowa Income Tax Law*, 41 Iowa L. Rev. 85 (1955); P. Miller, *Proposal for a Federally-Based New York Personal Income Tax*, 13 Tax L. Rev. 183 (1958); Read, *Is Referential Legislation Worth While?*, 25 Minn. L. Rev. 261 (1941); Notes, 3 Geo. Wash. L. Rev. 482 (1935), 17 Montana L. Rev. 203 (1956); Annot., 42 A.L.R.2d 797 (1955); Annot., 166 A.L.R. 516 (1947); Address by Kenneth M. Jakes, Spec. Assistant Attorney Gen. for the N. Dak. State Tax Comm'r's Office, 1958 convention of the N. Dak. Soc'y of CPA's, October 4, 1958.