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The Defense of Entrapment: A Plea for Constitutional Standards

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be fully compensated by his employer in all cases. The fund could then be made capable of preventing discrimination by reimbursing the employer for all liability beyond the second injury.

A survey of Florida subsequent injury law vividly illustrates the need for the courts and the legislature to make a substantial reevaluation of their positions in this area. The court generally has effectuated the primary goal of workmen's compensation by allowing more complete compensation to the injured worker and yet persistently has ignored the clear legislative intent for apportionment and the Special Disability Fund. Further, by construing apportionment and the fund so as to place much of the burden of subsequent injuries upon the employer, the court has abrogated the chief purpose of both provisions — to prevent discrimination in hiring. The greatest wrong, however, in this complex area must be credited to the legislature for disregarding the ultimate social policy of workmen's compensation. It is submitted that a solution to Florida's second-injury problem can be accomplished satisfactorily only by recognition of *both* goals of full compensation and prevention of discrimination, and by coordination between the courts and the legislature. In a judicial-legislative tug-of-war, only the employer and the handicapped worker are losers.

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THE DEFENSE OF ENTRAPMENT: A PLEA FOR CONSTITUTIONAL STANDARDS

The criminal detection device of encouragement[1] has conceptually familiar roots in the ancient Christian theme of the temptation and fall of man. In the earliest case (involving Eve and a shrewd, beguiling serpent), the defense of entrapment was apparently rejected.[2] Today, however, the seductions of the serpent have taken more subtle and potentially dangerous forms. Officers in plain clothes frequent theaters and restrooms, unashamedly as bait for homosexuals.[3] Through paid informers (who themselves are often addicts), police actively induce the sale of narcotics.[4] Appeals to sympathy and long-

1. Encouragement involves active police participation in the crime, as a willing victim and at times as the instigator. Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 875 (1963).

2. Sorrells v. United States, 57 F.2d 973, 976 (4th Cir.), *rev'd*, 287 U.S. 435 (1932).

3. Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956).

4. Osborn v. United States, 87 S. Ct. 429, 440 (1966) (Douglas, J., separate opinion). *See generally* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951).

standing friendship,[5] offers of large sums of money,[6] and dogged persistence[7] are at times needed to achieve the solicitee's fall from innocence. Mr. Justice Douglas has recently noted the severity of the problem:[8]

> We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government . . . .
>
> [D]ossiers on all citizens mount in number and increase in size. Now they are being put on computers so that by pressing one button all the miserable, the sick, the suspect, the off-beat people of the Nation can be instantly identified . . . . Police are instructed to pander to the weaknesses and craven motives of friends and acquaintances of suspects, in order to induce them to inform. . . . In many cases the crime has not yet been committed. The undercover agent may enter a suspect's home and make a search upon mere suspicion that a crime will be committed. He is indeed often the instigator of, and active participant in the crime — an *agent provocateur*. Of course, when the solicitation by the concealed government agent goes so far as to amount to entrapment, the prosecution fails . . . . But the "dirty business" . . . does not begin or end with entrapment. Entrapment is merely a facet of a much broader problem. Together with illegal searches and seizures, coerced confessions, wiretapping, and bugging, it represents lawless invasion of privacy. It is indicative of a philosophy that the means justify the ends.

To an extent, built-in limitations prevent unconscionable exploitation of the device of encouragement. Active participation in the offense can vitiate an element of the crime solicited.[9] As a practical matter, police are often constrained because excessive encouragement tends to breed suspicion.[10] Moreover, it is theoretically possible to impose criminal liability upon the law

5. *E.g.*, United States v. Smalls, 363 F.2d 417 (2d Cir. 1966) (defendant knew the informer twenty-five years and the informer's mother helped to rear him); Trice v. United States, 211 F.2d 513 (9th Cir.), *cert. denied*, 348 U.S. 900 (1954) (solicitation of narcotics for an old friend dying of tuberculosis and in great pain).

6. Morei v. United States, 127 F.2d 827 (6th Cir. 1942).

7. *Eg.*, United States *ex rel.* Toler v. Pate, 332 F.2d 425 (7th Cir.), *cert. denied*, 379 U.S. 858 (1964) (over twenty solicitations for narcotics); United States v. Klosterman, 248 F.2d 191 (3d Cir. 1957) (ten or eleven solicitations to commit bribery over six weeks); United States v. Owens, 228 F. Supp. 300 (D.D.C. 1964) (gained defendant's confidence over a five-month period by attending parties, gambling, and violating other laws).

8. Osborn v. United States, 87 S. Ct. 429, 439-41 (1966) (Douglas, J., separate opinion).

9. *E.g.*, Brown v. United States, 367 F.2d 145 (5th Cir. 1966) (per curiam) (conspiracy does not lie where the co-conspirators were Government agents); Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956) (consent to homosexual touching vitiates assault, which requires a lack of consent); Sassnett v. State, 156 Fla. 490, 23 So. 2d 618 (1945) (lack of larcenous intent); State v. Neely, 90 Mont. 199, 300 P. 561 (1931) (police agent committed the asportation, a necessary element of the crime of larceny).

10. Bancroft, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U. CHI. L. REV. 137, 166 (1963). Further, research has shown, at least in narcotic enforcement, special police units develop a "remarkable ideal of honor and fairness" in day-to-day work. *Id.* at 165-66. Public pressure for convictions encourages officers to avoid more obvious entrapment situations. *Id.* at 166. And in cases in which arguably good claims of entrapment exist, the prosecution characteristically reduces charges, *id.* at 165-66, although in no case would the prosecution drop charges entirely. *Id.* at 159.

enforcement officer who uses unscrupulous tactics.[11] But these are merely occasional limitations. The only check on police solicitation sufficiently comprehensive to protect uniformly the rights of citizens is the defense of entrapment.[12]

Unfortunately, as currently applied, entrapment seriously fails to protect an individual from the more excessive violations of his integrity. The root of the problem is the theoretical basis of the defense. For over fifty years,[13] courts have ineffectually groped for a variety of legal pegs to justify release of a defendant who technically has committed a crime.[14] The hodgepodge of theories[15] that have been produced have a common failing — they seek justification for acquitting the entrapped defendant in legal niceties without frankly recognizing that a citizen should have a positive right not to be unduly tempted by police to violate the law. It is submitted that this right is of constitutional dimensions.[16] Punishment of an otherwise innocent citizen for a hidden propensity to commit a crime where the consummated criminal act is contrived and induced by police would seem to be a denial of liberty without due process of law. The privilege against self-incrimination appears to be infringed when a person is enveloped in a coercive atmosphere of temptation for the purpose of eliciting incriminatory conduct. Finally, unreasonable exploratory solicitation initiated without antecedent probable cause would seem to violate the fourth amendment. If premised upon existing constitutional sanctions, the proper legal test and procedural rules for the entrap-

11. *See* Reigan v. People, 120 Colo. 472, 476, 210 P.2d 991, 993 (1949). Prosecution of a police officer for honestly attempting to do his job would seem to be unwarranted; a better sanction would be suspension or transfer of the officer who uses excessive tactics. Bancroft, *supra* note 10, at 176. Moreover, prosecution of the offending officer would not adequately protect the entrapped citizen. *Cf.* Mapp v. Ohio, 367 U.S. 643, 670 (1961) (Douglas, J., concurring). " 'Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.' "

12. When proved, entrapment is a complete defense to the prosecution. Sorrells v. United States, 287 U.S. 435 (1932). The defense of entrapment is available, however, only if the one who solicited the crime was a government agent. *Id.* at 452.

13. The earliest federal case to recognize the defense was Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). The entrapment defense has neither been approved nor expressly rejected in England. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 782 (2d ed. 1961).

14. Entrapment is not a defense in the strict sense of the word for the defendant is guilty within the letter of the law. Whiting v. United States, 321 F.2d 72, 75 & n.6 (1st Cir. 1963). Entrapment is an excuse for a completed crime. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 255 (1942).

15. Sorrells v. United States, 287 U.S. 435, 448 (1932) (statutory intent); *id.* at 457 (Roberts, J., concurring) (to protect the purity of the judicial process); Cross v. United States, 347 F.2d 327, 330 (8th Cir. 1965) (public policy); United States v. Lemons, 200 F.2d 396, 397 (7th Cir. 1952) (estoppel); Woo Wai v. United States, 223 F. 412, 415 (9th Cir. 1915) (public policy).

16. Note, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. CRIM. L.C. & P.S. 447 (1959); *see* Comment, *Due Process of Law and the Entrapment Defense*, 1964 U. ILL. L.F. 821. *See generally* Note, *The Serpent Beguiled Me and I Did Eat. The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965) [hereinafter cited as Note, 74 YALE L.J. 942 (1965)], for an excellent discussion of the constitutional aspects of entrapment.

ment defense, currently in an unsettled state,[17] should be less difficult to formulate. At the same time, a defense of constitutional dimensions would be mandatory upon the states.[18] The net result would be a more consistent and just delineation of the line between permissible police participation in crime and improper tactics which violate personal integrity.

THE CURRENT THEORETICAL BASIS FOR ENTRAPMENT

The Supreme Court, on two occasions, has attempted to establish the authoritative legal basis for the entrapment defense.[19] On both occasions there was a sharp division of opinion. The leading case, *Sorrells v. United States*,[20] was decided in 1932. In that decision, a prohibition agent visited Sorrells posing as a tourist and as a World War I veteran from Sorrells' former unit and accompanied by three of Sorrells' friends. Over the course of several hours, the agent asked Sorrells to sell him some liquor. On the third request, Sorrells complied. There was no evidence that Sorrells had sold liquor previously. The Supreme Court reversed Sorrells' conviction, holding that there was sufficient evidence of entrapment to go to a jury. In discussing the theoretical basis for the entrapment defense, the majority in *Sorrells* concluded that the legislature could not have intended that the criminal statute apply to a defendant who committed the crime at the instigation of the Government.[21] Mr. Justice Roberts disagreed. For him, the defense required no statutory construction.[22] The true reason acquittal was proper was that the Court had the duty to protect the purity of the judicial process and should not lend its authority to consummate a wrong.[23]

The majority's statutory argument successfully disposed of three rather weak theories for entrapment: the public policy rationale could be attributed to the legislature, the appropriate policymaking branch;[24] the

17. *See generally* Mikell, *supra* note 14; Note, *Entrapment: An Analysis of Disagreement*, 45 B.U.L. REV. 542 (1965).

18. At least one court has argued that "federal intervention" is unnecessary since all states recognize the entrapment defense, United States *ex rel.* Hall v. Illinois, 329 F.2d 354 (7th Cir.), *cert. denied*, 379 U.S. 891 (1964). The liberty of persons, however, cannot be equated with the chastity of power. *See* note 30 *infra*. " 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' " Silverman v. United States, 365 U.S. 505, 512 (1961).

19. Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). Lopez v. United States, 373 U.S. 427 (1963), presented the entrapment defense but the Court refused to deal with the issues upon which the Court had sharply divided in the past.

20. 287 U.S. 435 (1932).

21. *Id.* at 448-49.

22. *Cf.* Sherman v. United States, 356 U.S. 369, 378 (1958) (concurring opinion). "A statute prohibiting the sale of narcotics is as silent on the question of entrapment as it is on the admissibility of illegally obtained evidence." *Id.* at 381.

23. 287 U.S. at 455 (concurring opinion).

24. The legislature often is deemed to be omnipotent in the realm of creating criminal sanctions. Thus, excuses from criminal penalties often have been rationalized on the ground of legislative policy. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of*

troublesome fiction of estoppel was discarded;[25] and the objection that entrapment was an invasion of the realm of executive clemency was obviated.[26] But the statutory argument had an obvious flaw: the Legislature might well express a contrary intention and thus entirely abolish the entrapment defense.[27] The reasoning of Mr. Justice Roberts stands upon a more sound legal basis. In the years since the *Sorrells* decision, the Supreme Court's supervisory power over the administration of criminal justice in lower federal courts has become an accepted doctrine in federal jurisprudence.[28] But the supervisory powers rationale suffers from much the same defect as the statutory intent theory. Both are premised upon vague notions of "public policy," and thus neither provides sharp guidelines for devising a legal test for entrapment.[29] Moreover, under neither theory is the entrapment defense necessarily applicable to the states.

Due Process as a Suggested Basis for the Entrapment Defense

To date, no federal court has yet been persuaded that entrapment violates due process.[30] Judging, however, from the language often used to describe

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Criminal Responsibility, 18 Stan. L. Rev. 322, 346 (1966).

25. 287 U.S. at 450.

26. *Id.* at 449. The judiciary may not exercise executive clemency. *Ex parte* United States, 242 U.S. 27 (1916).

27. Note, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. Crim. L.C. & P.S. 447, 449 (1959).

28. *See* McNabb v. United States, 318 U.S. 332, 340 (1942) (dissenting opinion).

29. No one would dispute with Mr. Justice Brandeis that the police must obey the law when they enforce the law. *See* Olmstead v. United States, 277 U.S. 438, 484 (1928) (dissenting opinion). But what is "the law" with regard to the device of encouragement? To say that the power of the court cannot be invoked to consummate a "wrong" (*see* note 23 *supra* and accompanying text) is only to introduce the problem. Standards must be shaped to determine when methods used by police, who are honestly attempting to enforce the law, become wrong. *See* Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 13-14 (1962). For this reason, existing constitutional standards become significant.

30. The issue has been raised. Banks v. United States, 249 F.2d 672 (9th Cir. 1957), squarely held entrapment to be demanded by due process, but apparently reversed itself after a hearing on the merits. Banks v. United States, 258 F.2d 318 (9th Cir. 1958) (per curiam). In United States *ex rel.* Hall v. Illinois, 329 F.2d 354 (7th Cir.), *cert. denied*, 379 U.S. 891 (1964), the court held that the entrapment defense was not a requirement of due process. The court reached this conclusion by asserting that since state and federal courts were applying the same standards, "the need for federal intervention was not apparent." *Id.* at 359-60. Certainly this is an odd notion of the nature of constitutional sanctions. "The [fourteenth] amendment purports to protect the liberty of persons, not the chastity of power. Denial of due process of law refers primarily to exceptional deviation from the regular course of judicial proceedings; the rarity of the abuse only emphasizes the deviation." Note, 74 Yale L.J. 942, 948 n.31 (1965).

Judge Mercer, concurring in United States *ex rel.* Toler v. Pate, 332 F.2d 425 (7th Cir.), *cert. denied*, 379 U.S. 858 (1964), indicated the circumstances of that particular case were "so offensive to the conscience of our society that it must be embraced within the fluid concept of the due process requirement." *Id.* at 427. The case involved "the spectacle of the police hounding a man, not shown to have had any connection with the narcotics trade for more than two months, with appeals to sympathy and friendship, to obtain the com-

entrapment, due process sanctions seem to be giving silent support to the defense.[31] Entrapment has been described as "shocking to the sense of justice,"[32] "unconscionable,"[33] and "unacceptable to a sense of justice and fair play."[34] Judge Learned Hand's characterization of the defense is typical: "The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist."[35]

Personal liberty has generous contours. It includes freedom of association and expression,[36] the right to travel,[37] to marry, to establish a home, and to rear a family.[38] Personal integrity and the right to be let alone are also embodied within the meaning of liberty.[39] A citizen suffers a deprivation of this liberty both when he becomes the target of police seductions and when the state judicial machinery imposes criminal sanctions.

When the state infringes upon personal liberty, due process exacts stringent standards. Generally the state must demonstrate a "subordinating interest which is compelling."[40] The state activity must be shown to be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[41] Certainly law enforcement is a legitimate state interest.[42] In the area where encouragement is used, the problems of law enforcement are uniquely difficult. Active legislatures and the common law have produced numerous offenses which occur privately, leaving no evidence, with a willing victim who does not complain.[43] The community conscience

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mission of a crime . . . ." *Id.* at 427-28. But Judge Mercer concluded that he would bow to the authority of United States *ex rel.* Hall v. Illinois, *supra*, a decision in which he took no part.

31. Note the language traditionally used to describe due process. *E.g.*, Hoag v. New Jersey, 356 U.S. 464, 467 (1957) ("fundamental fairness"); Green v. United States, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting) ("minimum standards of fairness"); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("fair play and substantial justice"); Palko v. Connecticut, 302 U.S. 319, 328 (1937) ("fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

32. Sorrells v. United States, 287 U.S. 435, 446 (1932).

33. Butts v. United States, 273 F. 35, 38 (8th Cir. 1921).

34. Waker v. United States, 344 F.2d 795, 796 (1st Cir. 1965).

35. United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933).

36. NAACP v. Alabama, 357 U.S. 449 (1958).

37. Kent v. Dulles, 357 U.S. 116, 125 (1958).

38. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

39. *Cf.* notes 65, 80, 81 *infra* and accompanying text. Though only a rule of evidence, the presumption of innocence has been held in high esteem by the Supreme Court: "[It] is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). The presumption of innocence was clearly established in Roman law, *id.* at 454, and was accepted early in our own common law. *Id.* at 455.

40. Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

41. McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

42. In addition to *just* law enforcement, personal liberty is protected by *effective* enforcement of law. "It must be remembered that interests in individual dignity and privacy are threatened not only by police interrogation but by the incidence of crime in our society as well." Robinson, *Massiah, Escobedo, and Rationales for the Exclusion of Confessions*, 56 J. CRIM. L.C. & P. S. 412, 424 (1965).

43. Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., concurring);

demands not only numerous "vice" arrests, but also a sufficient number of convictions from their prosecutors. Active police involvement in the commission of the offense often is the only effective method of satisfying public pressures to enforce these laws.[44] Yet it would be a *reductio ad absurdum* to justify all forms of encouragement on the basis of expedience. At the point when government participation in the offense becomes entrapment, the legitimate interest in crime detection turns chameleon-like into crime creation.[45] The need to detect crime is no justification for police tactics which are, in themselves, illegal.[46] Future obedience of laws in our system of justice

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Donnelly *supra* note 4, at 1094; Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 875 (1963). For example, the surveillance technique is inadequate in the enforcement of narcotic laws. Surveillance requires too many work hours. Evidence is nearly impossible to obtain because sales are difficult to detect at a distance, evidence is easily destroyed, and it is hard to prove that the alleged seller did not have cash in his pocket all the time, and the buyer, narcotics. Bancroft, *supra* note 10, at 140. Encouragement does not require the continued commitment of trained personnel, nor is the risk of losing evidence as great. *Id.* at 141-42.

44. Bancroft, *supra* note 10, at 137-40. "A good case can be made for the position that the problems dealt with by sumptuary legislation should not be within the scope of the criminal law; that they are primarily problems of public health and education." Donnelly, *supra* note 4, at 1114; *see* Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399, 404 (1959). For example, criminal law has not solved the problems of prostitution and narcotics. But as long as criminal law is the primary tool of correction in these areas, the need to use the device of encouragement and the resultant risk of entrapment will continue. One writer has suggested that, in Detroit, defendants charged with prostitution are released on the basis of entrapment solely because the judge feels that unorganized prostitution is not a serious social ill, that it is at an irreducible minimum, and that allocation of police resources to prostitution detection results in too little allocation of energies to crimes of a more serious nature. W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 458 (1965). More federal cases on entrapment today arise from narcotic prosecutions than for any other criminal offense. The United States Narcotics Bureau estimates there are 60,000 addicts in the United States. Ploscowe, *New Approaches to Gambling, Prostitution, and Organized Crime*, 38 NOTRE DAME LAW. 654, 657 (1963). Since addiction is a hunger that must be fed, this figure represents a relatively concrete consumer market for illegal drug traffic and has led at least one writer to note: "'[N]o matter how severe law enforcement may be, the drug traffic cannot be eliminated under present prohibitory repressive statutes.'" E. SCHUR, NARCOTIC ADDICTION IN BRITAIN AND AMERICA 51 (1962). Police enforcement by solicitation characteristically focuses on the street peddler, fails to detect the large area supplier, *id.* at 57-58, and thus degenerates into "a process of futile nibbling at the outermost fringes of the real evils . . . ." Matysek v. United States, 321 F.2d 246, 249 (9th Cir. 1963) (separate opinion).

45. Police solicitation has had the unfortunate result of inducing a person under treatment for narcotic addiction to return to the habit. Sherman v. United States, 356 U.S. 369, 373 (1958) (concurring opinion). Dope addiction is analogous to many forms of criminality. The causes of both in a person may be a complex interwoven pattern of environmental experiences. What may be said for the addict may also be said for the personality that has an above average propensity to commit antisocial acts: "[T]he addict who is so weak as to be unable to resist the temptation to use drugs . . . should not be encouraged and tempted by law enforcement officials to intensify his habit . . . . Such inducement merely compounds the serious implications of drug addiction." United States v. Owens, 228 F. Supp. 300, 305 (D.D.C. 1964).

46. *See* note 11 *supra* and accompanying text. "Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. . . . The

cannot be expected if the police themselves disregard the law.[47] Indeed, punishment of entrapped victims cannot be reconciled with any accepted theory of penology.[48]

An analogy to the void-for-vagueness doctrine suggests further due process limitations for the device of encouragement. Due process requires that a state clearly define all crimes so as to give fair warning of conduct which is proscribed.[49] Included in this responsibility is the negative burden to refrain from overt misrepresentations as to the scope of the criminal law. For example, in *Cox v. Louisiana*,[50] the Supreme Court reversed the conviction of a civil rights advocate for demonstrating too "near" the courthouse, where the "highest officials of the city" had suggested the place to hold the demonstration. The Court reasoned that such state conduct was "an indefensible sort of entrapment" to punish a citizen "for exercising a privilege which the State had clearly told him was available to him."[51] It is admitted that the entrapment situation is distinguishable in that the entrapper does not make pretensions that the solicited act will not be criminal; nor can it be said that an entrapped suspect relies upon *state* representations as to the law, for the relationship of the entrapper and the police is undisclosed. But the distinction ignores the core of the void-for-vagueness doctrine. Void for vagueness is a technique of judicial review whereby the federal courts may protect the rights of a citizen that are sub silentio deprived when the state entices the citizen, otherwise not amenable to control, into an area of apparently legitimate state sanctions.[52] In *Cox* the Court

contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet." On Lee v. United States, 343 U.S. 747, 758-59 (1952) (Frankfurter, J., dissenting).

47. *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). One might argue that since the entrapped defendant has committed every element of the crime, the state is justified in imposing punishment. But the judicial process embodies more than scrutiny of the end results; the government must justify its actions from detection through conviction. Note, 74 YALE L.J. 942, 946 (1965).

48. Under a retributive rationale, punishment is designed to strengthen the character of the individual lawbreaker; punishment thus is not justified in the entrapment situation because any weakness in the defendant's character was brought to fruition by the State. The utilitarian theory of criminal law justifies the use of punishment to maximize the general welfare through deterrence. It cannot be said that a person who would not have committed the crime without government inducement needs punishment to deter him from future crimes. At the same time, punishment of an entrapped individual would result in diminution of community respect for the law. Finally, under an individual liberty approach to the criminal law, punishment is not proper when entrapment occurs because the entrapped defendant could not have acted otherwise, and thus punishment in the particular case is purposeless both as a deterrent and as a tool of correction. *See* Dubin, *supra* note 24, at 337-47.

49. Bouie v. City of Columbia, 378 U.S. 347, 350-51 (1964); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

50. 379 U.S. 559 (1965).

51. *Id.* at 571; *cf.* Raley v. Ohio, 360 U.S. 423 (1959). In *Raley*, persons who were testifying before a state investigation commission refused to testify when told by the commission that they had the privilege not to testify. In fact, they did not have the privilege and were penalized under state law. The Supreme Court reversed.

52. "These considerations will suggest that the void-for-vagueness doctrine may be

did not scrutinize the reasonableness of the conduct of the petitioner. In fact, the Court hinted he might well have been guilty within the letter of the law[53] — just as the entrapped defendant is guilty. The basis for reversal in *Cox* was the *unfair conduct of the state* in misrepresenting the scope of the law for the apparent purpose of inducing the petitioner to commit a violation. At the point when solicitation to commit a crime becomes entrapment, the atmosphere of temptation has worked the same psychological magic as in overt misrepresentation: the fear of punishment and the sense of the legal and moral wrongness of the solicited act have become so diminished as to cause an otherwise innocent man to commit a criminal offense. In both cases, the state has lured a citizen otherwise beyond control into an area where "legitimate" sanctions may attach.

Due process seems also to indicate that only culpable acts can be made the subject of criminal penalties.[54] In *Robinson v. California*[55] the Court struck down a statute which criminally punished the status of narcotic addiction. Two related reasons for the decision were suggested: a state could not, consistent with due process, criminally penalize the bare desire to commit a criminal act,[56] especially where the mere status of addiction could occur involuntarily.[57] The act of the entrapped defendant, though technically criminal, lacks culpability for the same reasons. The act is not wholly voluntary, for it would not have been committed without official coercion. Thus, punishment for the solicited act is justified by the alleged propensity of the entrapped individual to commit a crime.[58] To a limited extent, a state may proscribe potential criminality, but this area of police power has narrow limits:[59]

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regarded less as a principle regulating the permissible relationship between written law and the potential offender than as a practical instrument mediating between, on the one hand, all of the organs of public coercion of a state and, on the other, the *institution* of federal protection of the individual's private interests. The doctrine determines, in effect, to what extent the administration of public order can assume a form which, first, makes possible the deprivation sub silentio of the rights of particular citizens and, second, makes virtually inefficacious the federal judicial machinery established for the vindication of those rights." Note, *The Void-for-Vagueness Doctrine*, 109 U. PA. L. REV. 67, 81 (1960).

53. 379 U.S. at 571-72.

54. The common law concept of culpability is *mens rea*. *Mens rea* and the intent to act are distinguishable. The intent to act is merely part of the mechanical act. *Mens rea* "is a community value, evidenced by law, of which the perpetrator . . . fails to appreciate despite the capacity and opportunity to do so. In short, it is the individual blameworthiness in a legally relevant and specified form." Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1101 (1958). Moral guilt that does not hurt society by a consummated act is also a questionable area for punishment. Note, 74 YALE L.J. 942, 946 (1965).

55. 370 U.S. 660 (1962).

56. "Since addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

. . . [This] exceeds the power that a State may exercise in enacting its criminal law." *Id.* at 678-79 (Harlan, J., concurring).

57. In many cases, narcotic addiction may be contracted innocently, as through necessary medication or even at birth, if the mother was an addict. *Id.* at 667 & n.9.

58. See notes 92-107 *infra* and accompanying text.

59. Scales v. United States, 367 U.S. 203, 224-25 (1961).

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

At the present time, scientific methods are too unreliable to ascertain criminal propensity and "dangerousness" with sufficient accuracy to meet the test of due process.[60]

The Privilege Against Self-Incrimination as a Suggested Basis for the Entrapment Defense

The fifth amendment's privilege against self-incrimination is another possible constitutional foundation for the entrapment defense.[61] The privilege is designed to protect the fundamental character of our accusatorial system of criminal justice.[62] To protect that system of justice, restrictions upon the use of solicitation would seem to be essential:[63]

> "[*A*]*ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. . . . If there is a right to an answer, there soon seems to be a right to the expected answer, — that is, to a confession of guilt."

Admittedly, the fifth amendment privilege does not extend to compulsory divulgence of "real evidence" such as the modeling of clothes, finger printing, or blood testing.[64] But a distinction between compelled incriminating *conduct* and coerced *testimony* is without merit. The historical purpose of the privilege against self-incrimination is to protect the "inviolability of the human personality."[65] When entrapment occurs, the incriminating act is merely the

60. Note, 74 YALE L.J. 942, 947-48 (1965).

61. *See* Comment, *Due Process of Law and the Entrapment Defense*, 1964 U. ILL. L.F. 821, 824-25. *Cf.* Lopez v. United States, 373 U.S. 427, 444 (1963) (Warren, C.J., concurring): "This Court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a suspect . . . . We have already struck down the use of psychological pressures and appeals to friendship to induce admissions or confessions . . . ."

62. Malloy v. Hogan, 378 U.S. 1, 7 (1964).

63. Escobedo v. Illinois, 378 U.S. 478, 489 (1964).

64. United States v. Wade, 87 S. Ct. 1926, 1930 (1967).

65. "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460 (1966).

outward manifestation of a mental state induced by extraordinary solicitation, and, as such, is clearly a violation of personality.[66]

The fifth amendment protects an individual only from compulsory self-incrimination.[67] Official compulsion can be mental as well as physical, however.[68] The landmark decision of *Miranda v. Arizona*[69] has indicated that appeals to sympathy and friendship, false accusations, promises of reward, and unrelenting persistence are methods commonly used to elicit confessions.[70] The similarity to encouragement tactics is apparent.[71] When the atmosphere of police seductions reaches the level at which the average citizen would succumb, the incriminating conduct of the citizen cannot be said to be "the product of any meaningful act of volition."[72] At this point, the entrapment defense should be available to bar the prosecution.

The Fourth Amendment as a Suggested Basis To Define the Limits of the Device of Encouragement

Several writers have proffered the fourth amendment as an additional constitutional basis for defining the limits of encouragement.[73] This suggestion encounters two serious obstacles, however: the Supreme Court has not yet extended fourth amendment protections beyond certain geographical areas; furthermore, even when a person is within a protected area, the fourth amendment is not available to him unless he *relied* upon the security of

66. Schmerber v. California, 384 U.S. 757 (1966), indicates that the fifth amendment privilege is designed to protect the inner personality. Blood-testing for evidence of alcoholic consumption does not draw forth inner thoughts or knowledge. But the use of lie detectors to test the physiological being for the purpose of ascertaining inner *thoughts* is distinguishable. "To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment." *Id.* at 764.

67. Hoffa v. United States, 87 S. Ct. 408, 414 (1966).

68. An incriminating statement is admissible only if free and voluntary; " 'that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' " Malloy v. Hogan, 378 U.S. 1, 7 (1964). *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966).

69. 384 U.S. 436 (1966).

70. Two interrogation techniques seem to be especially similar to more excessive encouragement methods. In the "Mutt and Jeff" act, false friendship is employed. Two officers interrogate. One, "Mutt," is harsh and relentless; "Jeff" is silent and at times demurs to Mutt's tactics. When the suspect and Jeff are alone, Jeff offers to fend off Mutt if the suspect will cooperate. *Id.* at 452. False accusations are also used to undermine the suspect's will to resist. The suspect is placed in a line-up; coached witnesses either select the suspect as the guilty party, or charge him with unrelated crimes. The suspect confesses when he thinks it is useless or to avoid false charges. *Id.* at 453. "The aura of confidence in his [the suspect's] guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed." *Id.* at 455.

71. *See* notes 5-7 *supra* and accompanying text.

72. Blackburn v. Alabama, 361 U.S. 199, 211 (1960).

73. Note, 74 YALE L.J. 942, 951 (1965); *see* Bancroft, *supra* note 10, at 173-74. One court has held that entrapment does not involve the fourth or fifth amendments, however. Sorrells v. United States, 57 F.2d 973, 978 (4th Cir.), *rev'd on other grounds*, 287 U.S. 435 (1932).

that area. In the recent decision of *Hoffa v. United States*[74] this was reiterated: "What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile."[75] The device of encouragement is just as much a police search as the more conventional search of persons, cars, or homes.[76] But the *area* searched by solicitation is the human personality — that complex of morals, intelligence, ambition, naiveté, and the unique personal weaknesses that, in sum, represents a human entity. Since the human personality is mobile, solicitations can often occur in public areas; such solicitations would be beyond the range of the fourth amendment. Moreover, by analogy to use of informers, *Hoffa* seems to indicate that the solicited citizen who "consents" to association with the informer-solicitor does not rely upon his fourth amendment security:[77]

> Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. . . .
> . . . "The risk of being overheard by an eavesdropper or betrayed by an informer or *deceived as to the identity of one with whom one deals* is probably inherent in the conditions of human society."

The time appears to be ripe, however, for the Court to reject the notion that the fourth amendment protects only certain geographical areas. In the recent decision of *Warden, Maryland Penitentiary v. Hayden*,[78] a broad and authoritative foundation was cast for future interpretation of the fourth amendment as a compromise between personal privacy and state law enforcement needs rather than as a compromise between private and public property interests.[79] Certainly a right to privacy should include the human

74. 87 S. Ct. 408 (1966). During the period of October 22 through December 23, 1962, the Test Fleet trial was conducted in Nashville, Tennessee. James Hoffa was sole individual defendant and was out on bail. An informer inveigled his way into Hoffa's confidence and was often present in Hoffa's hotel suite. The testimony of the informer later contributed to the conviction of Hoffa for the separate charge of jury tampering. Hoffa argued, among other things, that use of an informer in this manner violated his fourth amendment rights.

75. *Id.* at 413.

76. Verbal statements as well as physical evidence may be the subject of an unconstitutional search and seizure. Wong Sun v. United States, 371 U.S. 471, 485-86 (1963).

77. 87 S. Ct. at 413-14 (emphasis added). *Cf.* Lopez v. United States, 373 U.S. 427, 438 (1963): "[The agent] was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real . . . . He was in the office with petitioner's consent . . . . We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication."

78. 87 S. Ct. 1642 (1967). The case discarded the "mere evidence" rule.

79. The Court stated: "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." *Id.* at 1648. The Court then traced the series of cases that have, in piecemeal fashion, shifted the focus from property to privacy.

personality as a protected area of foremost importance. As two Justices have noted, this would seem to be the essential spirit of the fourth amendment:[80]

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Traditionally, the fourth amendment has been considered to be the complement of the fifth amendment's privilege against officially compelled self-incrimination.[81] The "person" who is protected by the fourth amendment from "unreasonable searches and seizures" would seem to be the entire human entity — the body and inner being that can be compelled to incriminate himself — and not merely the outer shell of skin and flesh.[82]

Furthermore, notwithstanding the broad language in *Hoffa* to the contrary, it cannot be honestly said that somehow by "electing" to live in modern society, a citizen "consents" to the risk that government informers will surround him with temptation, waiting to spring the trap when the otherwise law abiding individual yields.[83] The fourth amendment would be an empty promise if the only way to avoid arbitrary violations of integrity were to withdraw from human intercourse in fear of other persons. The avowed purpose of our society is rather to foster trust and freedom in human associations.[84] Moreover, there is a qualitative difference between the risk that a friend will turn informer and the risk that the state through an undercover agent will inveigle its way into the confidences of a citizen. "In the one case, the Government has merely been the willing recipient of information supplied by a fickle friend. In the other, the *Government* has *actively encouraged and*

80. On Lee v. United States, 343 U.S. 747, 764 (1962) (Douglas, J., dissenting) (quoting Mr. Justice Brandeis dissenting in Olmstead v. United States, 277 U.S. 473, 478-79 (1927)).

81. Mapp v. Ohio, 367 U.S. 643, 656 (1961); Boyd v. United States, 116 U.S. 616, 630 (1886).

82. The physical body is protected by the fourth amendment from *unreasonable* search and seizure. See Schmerber v. California, 384 U.S. 757, 767 (1966).

83. The theory of "consent" argued in *Hoffa* is bald fiction. "[W]hen a homeowner invites a friend or business acquaintance into his home, he opens his house to a friend or acquaintance, not a government spy." Osborn v. United States, 87 S. Ct. 429, 442 (1966) (Douglas, J., separate opinion).

84. "The assumption, manifestly untenable, is that the Fourth Amendment is only designed to protect secrecy. . . . The right of privacy would mean little if it were limited to a person's solitary thoughts, and so fostered secretiveness. It must embrace a concept of liberty of one's communications, and historically it has." Lopez v. United States, 373 U.S. 427, 449 (1963) (dissenting opinion). *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

participated in a breach of privacy by sending in an undercover agent."[85] When the powers of government come into play, the fourth amendment and the entrapment defense traditionally become applicable.

To recognize the fourth amendment grounds of the entrapment defense, however, does not completely outlaw the use of artifice, informers, or the device of encouragement. The fourth amendment, as due process and the privilege of the fifth amendment against self-incrimination, simply defines the constitutional boundaries for the device of encouragement,[86] the limits to which the average citizen may be submitted to the risk of solicitation.

THE CURRENT LEGAL TEST FOR ENTRAPMENT

The test for entrapment formulated by the *Sorrells* majority, widely used today,[87] seeks to ascertain the "origin of the criminal intent":[88]

> Artifice and stratagem may be employed to catch those engaged in criminal enterprises. . . . A different question is presented 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.

A year later, Judge Learned Hand added further embellishments. It would be presumed that the criminal intent originated with the accused where there was found an existing course of similar criminal conduct and a preconceived design to commit the crime as evinced by ready complaisance.[89]

To an extent, the origin-of-intent test reflects an accurate understanding of criminal psychology, for it attempts to distinguish between chronic and situational offenders.[90] But as applied, the test is woefully inadequate to protect the constitutional rights of the entrapped defendant.[91]

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85. Osborn v. United States, 87 S. Ct. 429, 442-43 (1966) (Douglas, J., separate opinion) (emphasis added).

86. *Cf.* Lopez v. United States, 373 U.S. 427, 465 (1963) (unlimited use of electronic eavesdropping, not police deception itself, is the constitutional violation).

87. For example, in C.J.S. the test is paraphrased: "One who is instigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of 'entrapment.' Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent." 22 C.J.S. *Criminal Law* §45 (1966). Several entrapment cases have quoted this test with approval. *E.g.*, Lashley v. State, 67 So. 2d 648, 649 (Fla. 1953); State v. Turner, 241 La. 94, 127 So. 2d 512, 514 (1961). The test is phrased somewhat more succinctly by one federal court: (1) Did the government initiate the crime by inducement? (2) Did the government "initiate the defendant's criminal state of mind, or only activate it?" Sagansky v. United States, 358 F.2d 195, 202 (1st Cir. 1966).

88. Sorrells v. United States, 287 U.S. 435, 441-42 (1932) (emphasis added).

89. United States v. Becker, 62 F.2d 1007, 1008 (2d Cir. 1933).

90. *See* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1113 (1951).

91. Taken literally, the origin-of-intent test would prevent the entrapment defense

Procedurally, the defense is potential disaster for the accused. *Sorrells* indicated that to determine the origin of intent, the defendant's prior criminal activity would be a proper subject for a searching inquiry.[92] Highly prejudicial evidence of previous convictions or even prior shady activities is thus presented for jury consideration.[93] In spite of cautionary instructions,[94] the jury will, in all probability, convict for prior activity[95] — activity for which the state did not even have probable cause to arrest. Due process is offended by punishment for crimes not charged[96] and for a mere propensity to commit a crime.[97] Further, the origin-of-intent test allows the use of more excessive seductions in the case of an individual who has committed a crime previ-

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from applying in *any* case. "[W]here one intentionally does an act in circumstances known to him, and the particular conduct is forbidden by the law in those circumstances, he intentionally breaks the law in the only sense in which the law considers intent." Sorrells v. United States, 287 U.S. 435, 445 (1932).

92. "[A]t trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence." Sherman v. United States, 356 U.S. 369, 373 (1958); *see* Sorrells v. United States, 287 U.S. 435, 451 (1932).

93. Concerning possible prejudice to the defendant, the *Sorrells* Court glibly remarked: "If in consequence he [the defendant] suffers a disadvantage he has brought it upon himself by reason of the nature of the defense." Sorrells v. United States, 287 U.S. 435, 451-52 (1932). Lower federal courts have shown a propensity for allowing a wide variety of prior unsavory activities into evidence for jury scrutiny. *E.g.*, Carson v. United States, 310 F.2d 558, 560 (9th Cir. 1962) (prior dealings with narcotics without any convictions or charges); Whiting v. United States, 296 F.2d 512, 517-18 (1st Cir. 1961), *cert. denied*, 375 U.S. 884 (1963) ("Any competent evidence of a continuing course of criminal activity or misconduct, whether previously punished or not"); United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952) (previous convictions). Two courts have allowed hearsay evidence on the matter of prior activities. Washington v. United States, 275 F.2d 687 (5th Cir. 1960); United States v. Siegel, 16 F.2d 134 (8th Cir. 1926). *Contra*, Whiting v. United States, *supra*.

Compare the Supreme Court's position on the introduction of the defendant's prior record as probative of *guilt* for the crime charged: "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. . . . The overriding policy of excluding such evidence . . . is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." Michelson v. United States, 335 U.S. 469, 475-76 (1948).

94. Several courts instruct the jury that evidence of the defendant's prior criminal activity is to be considered only for determining the entrapment defense and not as probative of guilt of the offense charged. *E.g.*, United States v. Morrison, 348 F.2d 1003, 1005 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965); Washington v. United States, 275 F.2d 687, 690 (5th Cir. 1960).

95. Allowing evidence of prior criminal activity to show origin of intent "in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment." Sorrells v. United States, 287 U.S. 435, 459 (1932) (Roberts, J., concurring); *see* Sherman v. United States, 356 U.S. 369, 382 (1958) (concurring opinion); Bancroft, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U. CHI. L. REV. 137, 171 (1963); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 252 (1942).

96. "Conviction upon a charge not made would be sheer denial of due process." Thornhill v. Alabama, 310 U.S. 88, 96 (1940).

97. *See* notes 54-60 *supra* and accompanying text.

ously.[98] Studies indicate that police often seek those with prior records because more coercive tactics are permitted and because such persons are close to the "underworld" so as to be useful as informers. Through blackmail tactics,[99] the entrapped can be compelled to become the entrapper,[100] and reformed criminals induced to return to former professions.[101] Baiting of rehabilitated criminals would seem to run counter to the ameliorative hopes of modern criminal law.[102]

"Ready complaisance" is also considered by courts to be highly probative of the fact that the intent originated with the accused.[103] This reasoning stands in sharp contrast to usual constitutional evidentiary requirements. Neither a search nor an arrest is validated by what it turns up.[104] An in-

98. "[O]fficials may press harder when a propensity to commit a crime is present." Lucas v. United States, 355 F.2d 245, 249 (10th Cir. 1966). The questionable reasoning apparently is that it does not harm the defendant to use more excessive seductions, because the defendant is "predisposed" to commit crime due to prior criminal activity and thus would have succumbed to lesser inducements. Bancroft, *supra* note 95, at 170-71; Rotenberg, *The Police Detection Device of Encouragement*, 49 VA. L. REV. 871, 898 (1963).

99. Arrestees are often offered leniency or dropped charges if they will "do themselves some good" and go to work for the police as a solicitor and informer. Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 565-67 (1960). *See* Hoffa v. United States, 87 S. Ct. 408, 419-23 (1966) (Warren, C. J., dissenting). At times, the reward for the addict-informer is a trip to the hospital for a medically administered narcotics injection. Goldstein, *supra* at 566 n.42. At other times, the informer is paid on a contingent fee basis. *See* Maestas v. United States, 341 F.2d 493 (10th Cir. 1965); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965).

100. United States v. Klosterman, 248 F.2d 191 (3d Cir. 1957) (an entrapped person used to entrap another to commit bribery).

101. Bancroft, *supra* note 95, at 171. *See* Sherman v. United States, 356 U.S. 369 (1958) (inducements caused a former narcotics addict to return to the habit).

102. "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not tolerated by an advanced society . . . . Surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition . . . . Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction . . . ." Sherman v. United States, 356 U.S. 369, 383 (1958) (concurring opinion). Moreover, a test that discriminates against prior criminals as a class would perhaps be an equal protection violation. *Id.*; Rotenberg, *supra* note 98, at 884.

103. *See, e.g.*, Maestas v. United States, 341 F.2d 493 (10th Cir. 1965) (willingness to sell narcotics vitiates the entrapment defense even though the informer-entrapper was paid on a contingent fee basis); Whiting v. United States, 321 F.2d 72 (1st Cir. 1963); United States v. Wallace, 269 F.2d 394 (3d Cir. 1959); Silvia v. United States, 212 F.2d 422 (9th Cir. 1954). *See generally* Donnelly, *supra* note 90, at 1113; Note, 74 YALE L.J. 942, 945 & n.15 (1965).

The *Whiting* case is typical. In *Whiting*, the court held that once the defendant has shown government inducement, "the government should establish that it engaged in no conduct that was shocking or offensive per se, and that the defendant was not, in fact, corrupted by the inducement." Whiting v. United States, *supra* at 79. Since it is not shocking per se to solicit without prior probable cause, *id.* at 76, the government need only show that the defendant readily complied to prove that the defendant was not in fact corrupted. Concerning probable cause prior to solicitation, see notes 112-17 *infra* and accompanying text.

104. The constitutional validity of an arrest is determined at the moment the arrest is

voluntary confession is not admissible, regardless of its trustworthiness.[105] A test which permits such after-the-fact justification in effect allows unlimited solicitation. Furthermore, "ready complaisance" is not always indicative of a lack of prior innocence. Hesitancy can be the response of both the otherwise innocent person whose will is slowly crumbling and the otherwise guilty individual who knows by experience that caution is the best policy.[106] Indeed, there is considerable doubt that any test which focuses upon the psyche of the solicited citizen can be defined with enough precision to prevent unlimited solicitation.[107]

In short, the origin-of-intent test does not provide adequate standards for *police conduct.* The only concern of the test is the relative innocence of the defendant. The test proposed by Mr. Justice Roberts in *Sorrells* and reiterated by the minority opinion in *Sherman* considered the entrapment defense to be primarily a check on police enforcement methods. The question the *Sherman* minority presented was "whether the police conduct revealed in the particular case . . . [fell] below standards, to which common feelings respond for the proper use of governmental power."[108] The test thus was objective, shifting "attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it [the solicitation] would entrap only those ready and willing to commit crime."[109] This test is much to be preferred, not only because it avoids the defects of the origin-of-intent test,[110] but also because it is in harmony with the constitutional dimensions of entrapment as outlined above. The constitutional standards in turn indicate the appropriate elements of the objective test.[111]

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made and depends upon the existence of probable cause prior to arrest. Beck v. Ohio, 379 U.S. 89, 91 (1964). "[A] search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." United States v. Di Re, 332 U.S. 581, 595 (1948).

105. Jackson v. Denno, 378 U.S. 368, 376 (1964).

106. Donnelly, *supra* note 90, at 1113; Rotenberg, *supra* note 98, at 898; Note, *Decoy Enforcement of Homosexual Laws,* 112 U. PA. L. REV. 259, 273 (1963).

107. See note 60 *supra* and accompanying text. It is submitted that nearly every human has a hidden weakness or repressed desire that could be discovered by the police. "Ready complaisance" might well be the attitude of the average citizen should the police bait his weakness by intense encouragement.

108. 356 U.S. at 382. To an extent, the majority in *Sorrells* also was disturbed by conduct of the police: "Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation." 287 U.S. at 441.

109. 356 U.S. at 385.

110. No test is perfect. The objective test may be difficult to recognize and apply in the heat of investigation. Rotenberg, *supra* note 98, at 900. Field research has shown that in most cases the police decision is whether or not to use the device of encouragement at all — the methods used are usually a matter of split second judgment and "playing it by ear." Bancroft, *supra* note 95, at 175. Field research has also demonstrated that where overly strict standards are required of the police, the police may devote less time to detection of that particular crime, may resort to spot harassment, or may cease detection efforts completely. Rotenberg, *supra* note 98, at 872.

111. Several specific considerations for an objective test have been suggested: (1) The nature of police inducements, objectively considered. Sherman v. United States, 356 U.S.

A SUGGESTED CONSTITUTIONAL TEST FOR THE ENTRAPMENT DEFENSE AND THE PROCEDURAL EFFECTS

The basic structure of a suggested constitutional test for the entrapment defense is derived from the fourth amendment: (1) probable cause should be a necessary prerequisite to the initial decision to solicit,[112] and (2) methods of solicitation should not be unreasonable under the circumstances.

(1) Probable cause to believe that the suspect has been or plans to be engaged in criminal activity is the time-honored check on police methods;[113] the purpose is to identify the criminal at the earliest possible stage with a minimum interference with the innocent.[114] The predisposition of the solicited person to commit the crime and his prior unsavory activity should have a bearing on the quality of the police conduct.[115] But such considerations would be confined to ascertaining the initial validity of the police decision to use the device of encouragement, rather than as an after-the-fact justification subsequent to random solicitation. Furthermore, "ready complaisance" no longer would be probative of a legitimate use of solicitation, for ambiguous conduct *induced* by police conduct would not be sufficient for probable cause.[116] Finally, a showing of probable cause would indicate that the state

369, 384 (1958) (concurring opinion); Note, *The Defense of Entrapment*, 73 HARV. L. REV. 1333, 1337 (1960). (2) The nature of the crime and the difficulty of detection without use of the device of encouragement. *Id.* (3) Reasonable cause to believe a past or future course of undetected criminal activity. Bancroft, *supra* note 95, at 174; Note, *The Defense of Entrapment*, *supra* at 1337.

112. Most courts consider it proper to use the device of encouragement where there is a mere reasonable suspicion that undetected criminal activity exists. *See, e.g.*, Whiting v. United States, 321 F.2d 72, 76 (1st Cir. 1963); Childs v. United States, 267 F.2d 619, 620 (D.C. Cir. 1958) (per curiam), *cert. denied*, 359 U.S. 948 (1959); Lunsford v. United States, 200 F.2d 237, 239 (10th Cir. 1952) (reasonable grounds). *But see* Silva v. United States, 212 F.2d 422 (9th Cir. 1954). In that case the court approved solicitation although there was no reasonable suspicion and, in fact, no knowledge of prior criminal activity or propensity to commit a crime. The court reasoned: "There is always a first time wilfully to engage in criminal conduct." *Id.* at 424.

113. "The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion." Henry v. United States, 361 U.S. 98, 100 (1959). The fourth amendment was designed to end this undesirable situation.

114. W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 495 (1965). Probable cause seeks "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. [Probable cause also attempts] to give fair leeway for enforcing the law in the community's protection. . . . The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests." Brinegar v. United States, 338 U.S. 160, 176 (1949).

115. *See* Bancroft, *supra* note 95, at 171.

116. In Wong Sun v. United States, 371 U.S. 471 (1963), a narcotics agent posed as a customer at the door of the suspect's laundry; when the agent revealed his true identity the suspect fled into the interior of the building. The Government argued that the suspect's flight was sufficient to constitute probable cause, but the Court rejected the argument stating in part: "A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct *which the*

is pursuing a legitimate interest and is not endeavoring to create crime or to punish for a mere propensity to commit crimes; thus, the prerequisite of probable cause would also satisfy the due process considerations embodied in the entrapment defense.[117]

(2) The reasonableness of police solicitation techniques should turn on the nature of the crime solicited and the intensity of coercive methods used. As noted above, police participation in the offense is practically essential to detect certain crimes which occur secretly.[118] The frequency of violations and the seriousness of the offense should also have a bearing on the reasonableness of police conduct.[119] Persons who commit crimes of serious social consequence, including crimes of bodily violence, should not have the entrapment defense available.[120] In these cases, the presumption is considerably stronger that an ordinary, reasonable citizen would never be unfairly seduced to commit the crime. The intensity of police seductions must be measured by fifth amendment standards for confessions. Entrapment would be available to the defendant when the atmosphere of coercion reached the point when the average law-abiding citizen would be induced to incriminate himself. The trustworthiness of the incriminating conduct — it is conceded that an entrapped defendant is technically guilty — thus would not be considered.

A further procedural limitation upon the device of encouragement should also follow from a recognition of the constitutional status of the entrapment defense. Like any other search, a warrant should be obtained prior to solicitation.[121] Though some doubt has been cast on the efficacy of warrants,[122] the requirement of a warrant before initiating police searches is still a fundamental fourth amendment restraint upon police methods:[123]

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its

arresting officers themselves have provoked." Id. at 484 (emphasis added).

117. *See* notes 54-60 *supra* and accompanying text.

118. Notes 43-44 *supra* and accompanying text.

119. Writers have suggested three considerations: (1) the frequency of violations, (2) the seriousness of the crime, and (3) the difficulty of detection. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 788 (2d ed. 1961); Note, *Entrapment by Government Officials*, 28 COLUM. L. REV. 1067, 1072 (1928). Research studies have shown that these same criteria are used generally by the police to aid in choosing the appropriate investigation technique. Rotenberg, *supra* note 98, at 872.

120. Donnelly, *supra* note 90, at 1111. In Cox v. Louisiana, 379 U.S. 559 (1965), the Court indicated that, in determining when the misrepresentations by the state as to the scope of the law become a violation of due process, the seriousness of the crime should be considered. "Obviously telling demonstrators how far from the courthouse steps is 'near' the courthouse for purposes of a permissible peaceful demonstration is a far cry from allowing one to commit, for example, murder, or robbery." *Id.* at 569.

121. English writers have recommended that police participation in the offense be allowed only on " 'written authority of the Chief Constable and in cases where there is good reason to believe that the offense is habitually committed in circumstances in which observation by a third party is *ex hypothesi* impossible.' " Donnelly, *supra* note 90, at 1114 n.65.

122. *See* W. LAFAVE, *supra* note 114, at 502-03.

123. Aguilar v. Texas, 378 U.S. 108, 111 (1964).

protection consists in requiring that these inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

The value of the warrant system has recently been reaffirmed by the Supreme Court in *Camara v. Municipal Court*,[124] which held that search warrants must be obtained for administrative inspections. Surely the device of encouragement, which may result in severe criminal penalties, should likewise be safeguarded by a warrant system. A warrant system not only would insure that probable cause existed prior to solicitation, but also would control the scope of the solicitation by setting a time limit and a return date, and by requiring the expected criminal conduct to be described with particularity prior to solicitation.[125]

A constitutional basis for entrapment would solve the current disagreement as to the procedural application of the defense.[126] Probable cause and reasonableness are both proper subjects for judicial determination.[127] By allowing the court to decide all issues, the defendant would not be deprived of a trial by jury, for the entrapment defense involves police conduct, not criminal guilt.[128] In this area, the court often must decide such mixed fact and law questions as the right to counsel, illegal search and seizure, illegal arrest, and coerced confessions.[129] Hearsay evidence and prior criminal record can both be weighed by the judge.[130] Thus the great risk of a prejudiced jury would be avoided. The judge, through years of experience, would be more familiar with commonly recurring crimes, and would be better able to consider the reasonableness of the conduct of both the police and the defendant, notwithstanding the fact that the standard of conduct is usually a jury question.[131] Furthermore, a judicial determination of entrapment would be desirable to insure that the defendant's constitutional rights be adequately

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124. 87 S. Ct. 1727 (1967).

125. The Supreme Court recently struck down a New York statute authorizing permissive eavesdropping by means of an ex parte order because the statute failed to require that the conversations to be seized be particularly described and because it permitted a two-month electronic surveillance upon a single showing of probable cause. Berger v. New York, 87 S. Ct. 1873 (1967).

126. See note 17 *supra* and accompanying text.

127. The Supreme Court presently considers entrapment to be completely a jury issue. Osborn v. United States, 87 S. Ct. 429, 434 (1966).

128. If the entrapment defense is rejected by the court, the trial should proceed to ascertain guilt or innocence of the offense charged. It is true that the exclusionary rule merely excludes evidence, and thus is not strictly analogous to entrapment, which is a *complete* defense to the crime charged. Comment, *Due Process of Law and the Entrapment Defense*, 1964 U. ILL. L.F. 821, 824. But the purpose of entrapment, like the exclusionary rule, is to discourage police methods without regard for the guilt of the defendant. " '[T]he considerations which call for the exclusion of a coerced confession are those which call for the protection of every citizen, whether he be in fact guilty or not guilty.' " Jackson v. Denno, 378 U.S. 368, 382 n.10 (1964).

129. Note, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. CRIM. L.C. & P.S. 447, 453 (1959).

130. *See* note 93 *supra* and accompanying text.

131. Bancroft, *supra* note 95, at 174.

reviewable by an appellate court,[132] and to provide a consistent precedent to guide law enforcement officers.[133]

CONCLUSION

In a generation challenged by rapidly expanding urban areas and an admittedly accelerating crime rate,[134] it is anticipated that a proposal which purports to place new constitutional "shackles" on law enforcement (in addition to recent broad developments in the law of custodial interrogation, arrest, and search and seizure) will meet with more than a little criticism. Although by no means barring the device of encouragement as a means of crime detection, a constitutionally orientated entrapment defense *would* impose more stringent standards on the police than currently exist. It is submitted, however, that crime is not an enemy that may be slain once and for all in the near future by all-out war, and that citizens therefore cannot be expected to live their lives under a war-time economy of diminished personal liberty. Law enforcement is only one facet of the administration of justice. Constitutional sanctions speaking through the entrapment defense, unlike current theories proffered, would give enduring recognition in this particular area to another competing interest in the administration of justice — the positive value of personal integrity. Protection of both interests is necessary in the evolution of a nation which seeks to approximate the desirable but distant ideal of ordered liberty.

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132. *Id.* at 171.

133. Sherman v. United States, 356 U.S. 369, 385 (1958) (concurring opinion); Note, *Entrapment by Government Officials*, 28 COLUM. L. REV. 1067, 1074 (1928).

134. *See* Robinson, *Massiah, Escobedo, and Rationales for the Exclusion of Confessions*, 56 J. CRIM. L.C. & P.S. 412, 428 (1965).