

Criminal Law: The Entrapment Doctrine as a Defense in Wisconsin: The case of *State v. Rice*¹ presents one of the Wisconsin Supreme Court's more recent comments concerning the doctrine of entrapment. In that case, the defendant had been convicted of both possession and use of narcotics. Among the ten issues raised on appeal was a challenge to the trial court's instruction to the jury that the defense of entrapment was not available to the defendant. The supreme court said that since there was no testimony indicating that the police informer who accompanied the defendant had in any way prompted or arranged a trip to Chicago to buy the narcotics the defendant was arrested with, the trial court's instruction was correct. The court then restated the definition of entrapment which had been set forth in *State v. Hochman*,² the most expansive the court has ever rendered on the doctrine:

Entrapment is the inducement of one to commit a crime not contemplated by him for the mere purpose of instituting criminal prosecution against him. . . .

There is a very clear distinction between inducing a person to do an unlawful act and setting a trap to catch him in the execution of a criminal design of his own conception. . . .³

Because the doctrine of entrapment is the subject of considerable controversy as to the rationale of the defense and the nature of its elements,⁴ and because the defense is beginning to be claimed on constitutional bases,⁵ it is desirable to consider how the Wisconsin concept compares with the federal concept and those of other states. It is also

¹ 37 Wis. 2d 392, 155 N.W.2d 116 (1967).

² 2 Wis. 2d 410, 86 N.W.2d 446 (1957). *State v. Hochman* is the clearest example of a potential entrapment case that the Wisconsin court has considered. The defendant was convicted for selling obscene material to a plain clothes officer. The officer had gone to the defendant's book shop and requested the items, but the defendant informed him that he only sold the "hotter stuff" to known customers and invited the officer to become a better customer. After several visits, the defendant sold the officer obscene material and was arrested. On these facts, the Wisconsin court held that there was no entrapment because the officer merely set a trap to catch the defendant committing a crime of his own design.

³ 37 Wis. 2d at 400, 155 N.W.2d at 120-21.

⁴ See the discussion of the majority and concurring opinions in both *Sorrells v. United States*, 287 U.S. 435 (1932), and *Sherman v. United States*, 356 U.S. 369 (1958); *infra*. See generally Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 890 (1963); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecutions*, 28 FORD L. REV. 399 (1959); Note, 1960 WIS. L. REV. 536; Note, 73 HARV. L. REV. 1333 (1960).

⁵ *United States ex rel. Hall v. Illinois*, 329 F.2d 354 (7th Cir. 1964), denied a writ of habeas corpus, stating that the due process clause does not apply to entrapment claims against state officers if the defendant is allowed to plead and prove the defense as recognized in the courts of the state. In *United States ex rel. Toler v. Pate*, 332 F.2d 425 (7th Cir. 1954), the United States Court of Appeals for the Seventh Circuit again faced the question and denied the petition. Mercer, J., concurred because of the previous decision in the *Hall case*, but said that an entrapment case may be "so offensive to the conscience of our society that it must be embraced within the fluid concept of

appropriate to consider the development of the Wisconsin concept, through statute and case law, to determine the strength of the foundation for the existing definition.

The Federal and State Doctrines of Entrapment

The defense of entrapment was clearly recognized by the United States Supreme Court in *Sorrells v. United States*,⁶ and was reaffirmed in *Sherman v. United States*.⁷ The majority in both cases held that the two basic elements required to constitute the defense are (1) conduct by the government agent which induces the defendant to commit the crime, and (2) a lack of predisposition to commit the crime on the part of the defendant.⁸ A minority in both cases recognized the doctrine and agreed in the reversals, but felt that the test of entrapment should be more objective. The proposal offered was to base the determination on the nature of the inducements, without regard to the predisposition of the *particular* defendant. Thus, the decision would be based on whether the government agent's conduct would be "likely to induce those not otherwise ready and willing to commit crime."⁹ If it is objectionable police conduct that is to be deterred by the doctrine of entrapment, the minority view is considered to be more appropriate. It sets a relatively fixed standard of conduct for officers and their agents, and it will not allow clearly objectionable conduct to be upheld by virtue of a finding that the defendant was predisposed to commit the crime.

The majority opinions in *Sorrells* and *Sherman*, however, are con-

the due process requirement." 332 F.2d at 427. See Note, 1964 U. ILL. L. F. 821; Note, 74 YALE L. J. 942 (1965).

A suggestion of future applications of due process to the entrapment doctrine may be inferred from *Cox v. Louisiana*, 379 U.S. 559 (1965), where the Court, on due process grounds, reversed a conviction for picketing "near" a courthouse after police officials informed appellant that picketing where he did would not violate the statute. The Court said that to sustain the conviction would be "to sanction an indefensible sort of entrapment by the State The Due Process Clause does not permit convictions to be obtained under such circumstances." 379 U.S. at 571.

⁶ 287 U.S. 435 (1932).

⁷ 356 U.S. 359 (1958).

⁸ In *Sorrells*, a federal prohibition officer posed as a tourist and visited defendant's home. While discussing common World War I experiences, the government agent repeatedly requested to purchase liquor from defendant, but defendant initially refused. Finally defendant obtained a half-gallon and sold it to the agent. There was no evidence that he had sold or possessed liquor in the past. The Supreme Court held that there were facts which might support a jury finding of entrapment and reversed and remanded the case for failure to submit the issue to the jury.

In *Sherman*, a police informer was under a doctor's care for recovery from narcotics addiction. Defendant was under the same doctor's care for the same purpose. The agent repeatedly asked defendant for a source of drugs, appealing to defendant's sympathy with reports of his suffering and claims of nonresponse to treatment. After several refusals, defendant acquired narcotics and shared them with the agent. Later sales were observed by federal narcotics agents and defendant was arrested and convicted. The Court reversed, finding entrapment as a matter of law.

⁹ 356 U.S. at 384.

trolling, and therefore the ultimate test is one of "origin of intent."¹⁰ If the intent should be found to have originated with the government agent—such finding to be made through the presence of inducements and the absence of predisposition—the defense of entrapment would be successful. The precise legal basis of the defense is somewhat confused. The majority view is that in passing criminal prohibitions, Congress did not intend the statutes to apply to such situations,¹¹ while the minority based its reasoning on public policy,¹² but under either view the defendant is acquitted upon a finding of entrapment.

Nearly all state courts accept the entrapment defense,¹³ and most of them follow the majority view of the federal Court.¹⁴ California follows the *Sorrells-Sherman* majority test, but uses as its rationale the supervisory power of the courts over standards of evidence and procedure. It also prohibits the use of evidence of prior crimes to prove predisposition.¹⁵ California has recently overruled part of its case law on entrapment and held that one can raise the defense of entrapment without admitting the facts alleged.¹⁶ The California view represents nearly as great a divergence from the *Sorrells-Sherman* majority as can be found among the states.

Illinois has a statutory defense of entrapment that parallels the *Sorrells-Sherman* majority definition.¹⁷ The Illinois court has also followed the dual test of *Sorrells* and *Sherman* without mentioning the statute.¹⁸ Unlike the California court, however, the Illinois court has held that the defense is not available if the defendant denies the allegations of facts constituting the offense.¹⁹ The Illinois view exemplifies a relatively strict adherence to the *Sorrells-Sherman* majority.

The Wisconsin Supreme Court agrees with the *Sorrells-Sherman* majority and with the Illinois court. The definition of entrapment stated in *State v. Rice* and quoted *supra* is very similar to the United States

¹⁰ Note, 73 HARV. L. REV. 1333, 1335 (1960).

¹¹ 356 U.S. at 372.

¹² *Id.* at 380. Since the minority bases its holding on policy, it feels the question of entrapment should be determined by the judge, whereas the majority submits it to the jury. *Id.* at 385.

¹³ Comment, 9 SW. L. J. 456, 465 n.44 (1955). New York and Tennessee are considered to be the only states not clearly recognizing the doctrine. *People v. Schacher*, 47 N.Y.S.2d 371 (Magis. Ct. 1944); *Roden v. State*, 209 Tenn. 202, 352 S.W.2d 227 (1961); Note, 1964 U. ILL. L. F. 821, 822.

¹⁴ *Rotenberg*, *supra* note 4, at 890-91.

¹⁵ *People v. Benford*, 53 Cal. 2d 1, 345 P.2d 928 (1959).

¹⁶ *People v. Perez*, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965).

¹⁷ ILL. REV. STAT. ch. 38 § 7-12 (1963): A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated.

¹⁸ *People v. Hall*, 25 Ill. 2d 297, 185 N.E.2d 143 (1962).

¹⁹ *People v. Anthony*, 28 Ill. 2d 65, 190 N.E.2d 837 (1963).

Supreme Court's view,²⁰ and the dual test of inducement and lack of predisposition is followed.²¹ It is considered an affirmative defense in the nature of confession and avoidance, and raised by a plea of not guilty. Therefore, entrapment is not a proper basis for a motion to suppress evidence under the Wisconsin view, but is merely a question for the jury.²² The Wisconsin court considers the question of entrapment an unfit subject for preliminary or collateral determination because it is "not a ground for excluding evidence. Evidence illegally obtained will be suppressed or excluded in a criminal case only upon a showing that it was obtained in violation of constitutional right."²³ Clearly, the Wisconsin concept of entrapment is unreceptive to the growing view that entrapment is a violation of due process, and that the *Sorrells-Sherman* minority's more objective test should be used, but it is consistent with the *Sorrells-Sherman* majority view and that of the greater number of states.

The Development of the Doctrine in Wisconsin

*Topolewski v. State*²⁴ is often cited as the first entrapment case decided by the Wisconsin Supreme Court. In *Topolewski*, the defendant conceived a plan to steal goods from a meat-packing company. Upon hearing of the plan, the intended victim sent an employee to feign participation in the theft with the defendant. At the time of actual execution of the plan, the company arranged for the goods to be available on a loading platform and instructed its employees not to interfere with the defendant's acquisition of the goods. In reversing the defendant's larceny conviction, the court held that the company's conduct came very near to solicitation, and with the fact that the company placed the goods on the platform with instructions to let the defendant take them, there were absent the essential elements of trespass and non-consent. The court said that by performing or rendering unnecessary some act in the transaction essential to the offense, the company made the defendant not guilty of all the elements.

Thus, although the court spoke of the propriety of setting a trap affording "the freest opportunity to commit the offense"²⁵ and commented on a "formal design" to commit crime,²⁶ *Topolewski* is not actually an entrapment case. Entrapment requires encouragement on the part of a government agent or one in his employ, and presumes per-

²⁰ As the Court stated in *Lopez v. United States*, 373 U.S. 427, 434 (1963): "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents."

²¹ *State v. Hochman*, 2 Wis. 2d 410, 414, 86 N.W.2d 446, 448 (1957).

²² *Id.* at 418, 86 N.W.2d at 451.

²³ *Id.* at 419, 86 N.W.2d at 451.

²⁴ 130 Wis. 244, 109 N.W. 1037 (1906).

²⁵ *Id.* at 253, 109 N.W. at 1040.

²⁶ *Id.* at 256, 109 N.W. at 1041.

formance of the acts essential to the crime. In *Topolewski* the intended victim did the encouraging, and the defendant was able to disprove the element of non-consent. Thus, *Topolewski* really presents a case of the prosecution's failure of proof, not a case of the defendant's successful affirmative defense.²⁷

The second Wisconsin case considered to have presented an entrapment issue was *Koscak v. State*.²⁸ Private detectives under the intended victim's employ acted as accomplices to the defendant in his alleged attempt to destroy his former employer's property. The court reversed a conviction under a statute making it a crime to possess explosives with the intent to use destructively *or* with knowledge that others so intended. The court said that the defendant could not be guilty of the second part of the crime if the others *in fact* had no intent to use the explosives. The reversal rested on ambiguous instructions on this point, and also on the court's view that where agents of the intended victim were active in prompting, urging and instigating the perpetuation of the offense, and the accused was only a passive participant through their incitement and intimidation,²⁹ he was not bound by their acts and was not guilty of the offense. The facts showed an inference of such a passiveness, and it was held error not to instruct. A dissenting opinion by Justice Barnes claimed that "consent" of the intended victim never gave immunity. He went on to say:

Furthermore, the fact that the party against whom a crime is contemplated suggests, aids, encourages, or abets the commission of the offense or sets a trap for the accused is not a defense where the accused has done every act essential to the completion of the offense.³⁰

Like *Topolewski*, *Koscak* is not an entrapment case. Here again the "trap" was set by agents of a private citizen rather than a government agent. The "passiveness" concept of the majority went to the failure of proof of the essential elements of the crime. And furthermore, the case was principally reversed on an error in instructing the jury. Justice Barnes' dissent only disagreed with the majority on the point of whether "consent" of the intended victim rendered one of the elements of the crime incomplete. He felt it did not. In his view, if the defendant actually performed the acts essential to completion of the offense, encouragement on the part of the victim or his agents did not negate any of these acts, except, perhaps, if the encouragement amounted to duress. No

²⁷ See *Brockman v. State*, 192 Wis. 15, 211 N.W. 936 (1927), holding that an essential element of larceny is that the state must prove the taking and use of property without the owner's consent, and citing *Topolewski* as authority. See also AM. JUR. 2D *Criminal Law* § 141 (1965); Note, *supra* note 10, at 1335 n.18.

²⁸ 160 Wis. 255, 152 N.W. 181 (1915).

²⁹ *Id.* at 268, 152 N.W. at 185.

³⁰ *Id.* at 270, 152 N.W. at 186.

question was presented as to the propriety of convicting one of a crime induced by a law enforcement officer or his agent, which the accused was not predisposed to commit.

The third encouragement case to come before the court was the first true entrapment situation. In *Piper v. State*,³¹ the defendant was convicted of practicing medicine without a license. A state inspector for the board of health came to him claiming venereal disease and seeking a cure. The defendant sold him a remedy and was arrested. The court rejected the entrapment defense and said of *Topolewski* and *Koscak*:

These cases are merely to the proposition that where a person, by himself or agent, in order to entrap a suspected person, does any act exculpating the accused from an essential element of the crime involved, the crime is not committed by the accused because of the exculpation.³²

The court then cited Justice Barnes' dissenting opinion in *Koscak* and said that it was the correct statement of the law in the *Piper* situation. "The conduct of the defendant, not the motive or deception of the inspector, is considered."³³

The court confused the doctrine of entrapment in this case. Although it was correct in implying that *Topolewski* and *Koscak* were not entrapment cases, it went on to cite Justice Barnes' dissent as the law on entrapment. Justice Barnes, however, also was clearly concerned with the factual situation in which a citizen-victim does the encouraging, and this does not constitute the accepted concept of entrapment. The fundamental misconception in *Piper* was the court's belief that entrapment questions are determined solely by the defendant's conduct. As the United States Supreme Court pointed out two years later in *Sorrells*, it is with the conduct of the government agent that entrapment is primarily concerned.³⁴ Thus, one who has committed every act essential to the crime may be acquitted precisely because of the unreasonable conduct of the government agent. The source of the confusion lies in the fact that after the court stated that *Piper* was not a *Topolewski* or *Koscak* situation—that is, there was encouragement by a government agent rather than exculpation by an encouraging intended victim—it proceeded to apply the reasoning and opinions in those cases.

The court again considered the defense in *State ex rel. Kowalewski v. Kubiak*,³⁵ but this time with the benefit of the *Sorrells* decision. The defendant was charged with accepting a bribe in his capacity as chairman of a board of town supervisors. He challenged the preliminary examination that resulted in his being bound over for trial, and one of

³¹ 202 Wis. 58, 231 N.W. 162 (1930).

³² *Id.* at 63, 231 N.W. at 165.

³³ *Id.* at 64, 231 N.W. at 165.

³⁴ 287 U.S. at 451-52.

³⁵ 256 Wis. 518, 41 N.W.2d 605 (1950).

the grounds alleged was entrapment. The court did not recite the facts because a trial was scheduled, but held that the magistrate could meet the "probable cause" burden of a preliminary so as to find no entrapment. The court said the standard of denying the entrapment defense would be a finding that the intent to commit the crime originated in defendant's mind and that he had done every act essential to completion of the offense. For this proposition, *Piper* was cited. Entrapment, said the court, is not condemned *per se*, but only when "officers of the law . . . lure or incite a person to attempt to commit crime."³⁶

The influence of *Sorrells* is clear. Although citing *Piper*, the court added the emphasis on origin of intent, and specifically stated that the doctrine of entrapment only applies to conduct of officers of the law. This exemplifies a shift in the court's reasoning to the real function of the entrapment defense—a deterrent to unreasonable conduct by law enforcement officers.

In 1953, the Wisconsin Legislature gave tentative approval to a statutory definition of the entrapment defense. The proposed criminal code was allowed to be published in the 1953 Statutes on tinted paper, subject to re-enactment in 1955.³⁷ Section 339.40 of that code, under the heading "Defenses to Criminal Liability" was the defense of entrapment:

The fact that the actor was induced or solicited to commit a crime for the purpose of obtaining evidence with which to prosecute him is a defense unless:

- (1) The idea of committing the crime originated with the actor or a co-conspirator and not with the person soliciting or inducing its commission; or
- (2) The crime was of a type which is likely to occur and recur in the course of the actor's business or activity, and the person doing the inducing or soliciting did not mislead the actor into believing his conduct to be lawful and did not use undue inducement or encouragement to procure the commission of the crime.

In 1955, however, a revised code³⁸ was adopted and the 1953 code was allowed to die for lack of re-enactment. Section 339.40 was not in the 1955 bill because the committee that formulated the code did not feel it properly stated the doctrine of entrapment.³⁹

Upon this foundation, *State v. Hochman* was decided. As has been shown, *Hochman* does state the law in accord with the majority concept of entrapment. However, it purports to be based upon the previously explained precedent.⁴⁰ This includes two cases that dealt with

³⁶ *Id.* at 521, 41 N.W.2d at 607.

³⁷ Wis. Laws 1953, ch. 623.

³⁸ Wis. Laws 1955, ch. 696.

³⁹ Platz, *The Criminal Code*, 1956 Wis. L. Rev. 350, 367.

⁴⁰ Wisconsin cases cited in *Hochman* included *Topolewski*, *Koscak*, *Piper*, and *Kowalewski*.

a failure to prove essential elements, a true entrapment situation that was decided on the basis of proving actual completion of the elements, another true entrapment situation which recognized origin of intent but emphasized completion of the essential acts, and a statute that admittedly did not state the law. Under the *Sorrells-Sherman* and *Hochman* tests, the completion of all the essential acts is admitted or the affirmative defense is not available. Thus, the major points in the Wisconsin precedents to *Hochman* are merely conditions precedent to any consideration of the real issue facing a court in entrapment claims: the reasonableness of the government agent's encouragement. *Hochman* is the first Wisconsin case to recognize this, and its ostensible reliance on prior Wisconsin cases must be disregarded in favor of non-Wisconsin authorities cited by the court that were really followed.⁴¹

Conclusion

Police encouragement practices are a very real necessity in those categories of conduct that society has deemed criminal but in which there is no complaining victim. Traffic in narcotics, sale of obscene materials, consensual sex offenses, prostitution and gambling are all such crimes. However, encouragement practices by government agents can be abused and used to such an extent as to go beyond the limits of lawful investigation and become unlawful entrapment. Should courts fail to impose standards of acceptable police conduct, it seems likely that the increasing challenges to encouragement practices as violative of due process will ultimately be successful. If the test of a court's effectiveness in controlling the problem is the general acceptance of its definition of entrapment, the Wisconsin court can find strength in numbers, for since *Hochman* in 1957, it has followed the majority view. If the test is how that definition has been applied to the fact situations presented, the Wisconsin court's situation is dubious, for of the cases presented to the appellate court, few have been actual entrapment situations and the defense has never been successful. If the test is consistency and clarity in development and expression of the concept, the Wisconsin position is in peril, for its foundation is shaky indeed.

THOMAS W. ST. JOHN*

⁴¹ Non-Wisconsin authorities cited in *Hochman* included *Sorrells*; *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933); *State v. Marquardt*, 139 Conn. 1, 89 A.2d 219 (1952); 15 AM. JUR. *Criminal Law* § 335 (1938); 22 C.J.S. *Criminal Law* § 45(a) (1961).

* Since the completion of this note, the author was inducted into the United States Army, and the Wisconsin Supreme Court has decisively dealt with the issue of entrapment in *Hawthorne v. State*, 43 Wis. 2d 82, 168 N.W.2d 85 (1969). The Wisconsin Supreme Court saw fit to footnote the *State v. Rice* case, 37 Wis. 2d 392, 155 N.W.2d 116 (1967), but felt that the facts of that opinion did not warrant discussion in the *Hawthorne* decision.

Two additional issues were raised in *Hawthorne*: (1) the evidentiary burden on the defendant to prove entrapment, and (2) the propriety of the defense of entrapment being determined in a pre-trial hearing to the court, that is, in a

proceeding similar to those used to determine the voluntariness of confessions. The Wisconsin Supreme Court, in re-affirming its reliance upon the "origin of intent" test, declared that the defendant must establish by a preponderance of the evidence an inducement or solicitation by the police officer. In citing authority for this proposition, the court attempted to distinguish between the degrees of inducement as relating to the burden of proof. Although this may well be a consideration in justifying the entrapment instruction, the court failed to distinguish adequately between the burden of defensive evidence in light of the presumption of innocence and the burden of proof on the state under Wisconsin Instructions—Criminal, No. 140.

The argument in *Sorrells v. United States*, 287 U.S. 435 (1932), that a defensive plea of entrapment is inconsistent with a general denial and constitutes a plea in bar to prosecution, was discussed and rejected on the prior precedent of *State v. Hochman*, 2 Wis. 2d 410, 86 N.W.2d 446 (1957), and because of the lack of cited authority for the proposition in the defendant's brief. However, the relegation of entrapment to its customary position in the factual presentation of the trial skirts the underlying conflict of the defendant's right to silence, as enunciated in *Malloy v. Hogan*, 378 U.S. 1 (1964), and the inconsistency of a trial on the facts, when the court has by its own definition caused the defendant to admit the superficial commission of the factual elements of the crime in order to present the subtle issue of intent as defensive matter. The elements of the corpus of the crime are always a part of the affirmative burden of the state.

The defendant's argument for a pre-trial determination of a plea of entrapment was likewise rejected by the Wisconsin court. But the court does not discuss the implications of forcing the defendant to take the stand to present his defense as being contrary to the Fifth Amendment rights to silence, the extension of the waiver doctrine under the rules of cross-examination to allow impeachment of the defendant, and the problem of the swearing match between the officer and the defendant.

The evident effect of *Rice v. State* and *Hawthorne v. State* is to place the defense of entrapment outside any previous characterizations and to force it into a *Topolewski v. State*, 130 Wis. 244, 109 N.W. 1037 (1906), format, i.e., that the defense is only cognizable by the court when the prosecution has failed in the presentation of the essential elements to constitute the corpus of the crime. If this is so, then the opinion of the court in *Hawthorne v. State* is negated, as the case should not be submitted to the jury, and the argument for a pre-trial plea characterization as a plea in bar is the rationale for sustaining the defense.

M.W.H.