Entrapment in Criminal Cases

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preferred claims of those states in which the courts have held that they have a common law preferential right, is that the surety will be subrogated to the general right of the state to collect losses from the assets of the depository. This seems to be the overwhelming weight of authority. A few courts, however, are disposed to a dislike for a rule which permits a surety, who has been paid to assume the risk, to assert a right of priority to the prejudice, or exclusion, of general depositors and creditors, and have held that the state's prerogative right of priority is not a right to which a surety can be subrogated.

Clemens H. Zeidler

Entrapment in Criminal Cases.—Out of the struggles between the forces of law and order and the criminal elements in our society have developed many legal problems. Not the least interesting of these is the question of what inducements to and opportunities for the commission of crime may be offered by agents of the government to those suspected of violations of the criminal law, without such "entrapment" being judicially regarded as a defense to prosecution for the alleged offense. There is, of course, rather general agreement that the fact that officers of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategem may be used to catch those engaged in criminal enterprise. Courts are also, however, in substantial accord, although there is some judicial disapproval of the doctrine, that where the officers
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instigate, incite, and induce the crime in question, such allurement will be considered a defense. It is to determining what the courts will regard as a sufficient degree of allurement to constitute a defense to prosecution that any analysis of the cases in this field of law should be dedicated.

Early authorities indicated and only recently a federal judge felt that the defense of entrapment could be maintained only where as a result of inducement the accused is placed in the position of having committed a crime which he did not intend to commit or where by reason of the consent implied in the inducement, no crime has in fact been committed. As a matter of fact, it is true that until recent years an overwhelming proportion of the cases in which the defense of entrapment was upheld involved crimes in which lack of consent of persons affected was an essential element of the offense or where the rights

4 "Of late the term 'entrapment' has been adopted by the courts to signify instigation of crime by officers of the government. The cases in which such incitement has been recognized as a defense have grown to an amazing total." Roberts, J., in Sorrels v. United States (1932), 53 S. Ct. 210. See also O'Brien v. United States (1931), 51 F. (2d) 674, footnote 1, p. 678.

5 ** mere fact that one who commits an offense was induced to do so by another is not a defense except in those cases where the criminality of the act is shown to be absent by the fact of the inducement, and hence it is not a defense in cases where the primary offense is against the public and is one which no public officer or other person would have the power to consent to do so as to bind the state." I Brill, Cyclopedia of Criminal Law, p. 338. "I confidently assert that the rules of law which have been announced by the various judicial pronouncements which constitute entrapment into crime a defense to its prosecution are limited to that class where an individual right is primarily involved and the penalty of the law imposed as a deterrent to crime." State v. Diegle (1911), 21 Ohio Dec. 557, affirmed in (1912) 86 Ohio St. 310, 99 N.E. 1125.

7 Entrapment by means of a decoy of concealed disability (Indian disguised so as to mislead accused as to his identity) held defense to prosecution so as "not to ensnare the law abiding into unconscious offending." United States v. Healy (1913), 202 Fed. 349. Otherwise where two full blooded Indians purchased liquor "without any deceit or persuasion whatever. They simply approach the bar and say, 'Whiskey,' which may be the only English word they know (and as one of the Indians said, that is enough to know.) ** They merely gave the defendant the opportunity to violate the law without any persuasion to or deception of a willing lawbreaker." United States v. Amo (1919), 261 Fed. 106. "If however the decoy is one whose appearance or otherwise conveys knowledge of his disability or is sufficient to put the seller on inquiry, any sale is a voluntary establishing of guilt and warrants conviction." Voves v. United States (1918), 249 Fed. 191.

8 But see State v. Dougherty, supra, "We do not approve the distinction attempted between an injury to a private citizen as in the case of highway rob-
violated were of such a character that their invasion might be consented to. Of such nature are entrapment cases involving larceny, receiving stolen goods, burglary, robbery. As to these crimes any conduct which evidences consent on the part of the party injured removes an essential element of the alleged offense, and prevents conviction therefore. A distinction is maintained, however, between one person inducing or aiding another to commit the crime of larceny, for example, or aiding in the commission of an offense by doing some act essential to such offense, and merely setting up a trap to catch the would be criminal by affording him the freest opportunity to commit the offense. This latter does not sacrifice the element of nonconsent.

But the recent trend of judicial opinion clearly indicates that it is error to conclude that the application of the doctrine of entrapment to larceny, burglary, or larceny, and an injury to the public as in the case of bribery. All crimes alike under our legal theories are crimes against the public and all are classified as public wrongs by Blackstone.


*People v. Hanseman* (1888), 76 Cal. 460, 18 Pac. 425; *Low v. State* (1902), 44 Fla. 449, 32 So. 956; *People v. Jenkins* (1918), 210 Ill. App. 42; *State v. Hull* (1898), 33 Ore. 56, 54 Pac. 159; *Topolewski v. State* (1906), 130 Wis. 244, 109 N.W. 1037, 7 L.R.A. (N.S.) 756.


Thus, in the leading Wisconsin case of *Topolewski v. State*, supra, in a prosecution for larceny it was held that employee's arranging with defendant to consummate crime, and company's instructing agent that property was placed there for a man who would call for it, took from transaction element of trespass or nonconsent essential to the crime.

As in *Koscak v. State* (1915), 160 Wis. 255, 152 N.W. 181, where defendant was indicted for crime of selling explosives "* * * knowing that such compounds were intended to be used by any other person or persons for such (unlawful) purposes" and it was held that sale to detectives who had in fact no intent to use compound unlawfully was not such sale as was within purview of the statute.

"It seems to be settled law that traps may be set to catch the guilty, and the business of trapping has with the sanction of the courts been carried pretty far. Opportunity to commit crime may be rendered the most complete and if the accused embrace it he will still be a criminal. Property may be left exposed for the express purpose that a suspected thief may commit himself by stealing it. The owner is not bound to take any measures for security. He may repose upon the law alone and the law will not inquire into his motive for trusting it. But can the owner directly through his agent solicit the suspected party to come forward and commit the criminal act, and then complain of it as a crime, especially where the agent to whom he has intrusted the conduct of the transaction puts his own hand into the corpus delicti and assists the accused to perform one or more of the acts necessary to constitute the offense? Should not the owned and his agent wait passively, and let the would be criminal perpetrate the offense for himself in each and every part of it? It would seem to us that this is the safer law, as well as the sounder morality, and we think it accords with the authorities." *Williams v. State* (1873), 55 Ga. 391, 1 Am. Crim. Rep. 413.
these particular crimes restricts either in effect or upon principle the application of the defense to crimes more exclusively involving the general welfare. For, although at first blush it might seem that where one intentionally does an act in circumstances known to him, and the party's conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law considers intent; the courts have held that the defense of entrapment may be available despite such technical commission of the offense charged. Thus the right of the defendant to have the issue of entrapment submitted to a jury under a plea of not guilty was recently upheld where the proof showed that a prohibition agent, posing as a furniture dealer, after two previous requests had gone unheeded, induced defendant to procure for him a half-gallon of liquor, defendant being influenced by the plea that "one war buddy would get liquor for another." The application of the defense under somewhat similar circumstances has been recognized in other decisions, although it remains the law that under ordinary circumstances the person making an unlawful sale is not excused by the fact that the sale was induced for the purpose of prosecuting the seller. To visit the opprobrium of the courts upon the conduct of governmental agents in any particular case it is probable that some inducement more powerful than a mere offer to purchase, or the sending of decoy letters to entrap embezzlers and those using the mails to defraud, must characterize the agent's conduct. The necessity of some such powerful inducement is emphasized in the "extraordinary temptation" standard adopted by at least one court. There seems to be no entirely

27 "It is made a crime against the state to sell whiskey; and it will not avail defendant to say, 'I had no intention of violating the law.' A sale of intoxicants is a violation of the law regardless of the intent of the seller." French v. State, supra.

18 Sorrell v. United States (1932), 53 S. Ct. 210; Silk v. United States (1927), 16 F. (2d) 568; Capuano v. United States (1925), 9 F. (2d) 41; Lucadamo v. United States (1922), 280 Fed. 653; Gargano v. United States (1928), 24 F. (2d) 625; Cernah v. United States (1925), 4 F. (2d) 99; Butts v. United States (1921), 273 Fed. 35; Woo Wai v. United States (1925), 223 Fed. 412; Newman v. United States (1924), 299 Fed. 128.


23 "A suspected person may be tested by being offered the opportunity to transgress in such manner as is usual therein, but may not be put under extraordinary temptation or inducement. Thus a morphine peddler usually deals with addicts. An officer in testing a suspected peddler may properly pretend to be an addict with their common discomforts and craving for the drug, thus giving color to the ruse, and he may offer a liberal price for the drug,"
objective test for determining what is and what is not objectionable "temptation." Other tribunals have stated the test to be whether the sale was made in the due course of business, whether an innocent offender without prior evil intent was entrapped, whether the defendant was "more induced to make this sale than he would have been induced to make any sale in his place of business," or whether the criminal design originated with the accused rather than in the minds of the government agents. Some courts also insist that the agents must have reasonable grounds for believing the suspected person to be a law violator before they may entrap him. All of these criteria are essen-
and manifest considerable persistence for these things are common in such dealings. But he could not pretend to be in excruciating pain, or to have a wife or friend in extremity of suffering, to appeal thus to humanity, or offer any fabulous price for the drug. So one desiring to test a supposed liquor dealer might represent himself to be such a person as could be trusted in such a transaction, and do and say such things as would not be unusual in such dealings, but he could not pretend sickness or put extraordinary pressure upon his victim to get him to break the law." United States v. Wray (1925), 8 F. (2d) 429.

Charge to jury that, "In the present case you are instructed that if the defendant was in the business of selling intoxicating liquor, to wit, alcohol, and that in due course of such business he made the sale or sales to the government officers this would not constitute an entrapment," was sustained in Weiderman v. United States (1926), 10 F. (2d) 745. "Ready, able, and willing to make sale" as test in People v. Heusers (1922), 58 Cal. App. 103, 207 Pac. 908. See also, Ybor v. United States (1929), 31 F. (2d) 42; State v. Abraham (1925), 158 La. 1021, 105 So. 50; Cain v. United States (1927), 19 F. (2d) 472.

"But it is unnecessary to due administration of the criminal laws and it shocks the court's sense of justice to permit a prosecution where the evidence shows the offender was innocent of wrongdoing prior to his acquaintance with the government or state representatives, who in the professed cause of law enforcement, proceed, first, to corrupt the accused's mind by the possibility of gain and profit through violation of the statutes, and then surrounded by accomplices as witnesses awaits the downfall and ignominy of the victim." O'Brien v. United States, supra.

While it may be conceded that the particular sale in question would not have been made if the two officers had not asked to purchase the liquor, yet, in view of the facts and circumstances, the appellant was not more induced to make this sale than he would be induced to make any sale in his place of business." Salt Lake City v. Robinson (1912), 40 Utah 448, 125 Pac. 657. "** ordinary degree of temptation" as test in Scriber v. United States (1925), 4 F. (2d) 97. "** any conduct of enticement, beguilement, deception, procurement, or aiding and abetting that goes further," (than merely presenting the victim with an opportunity and a price) "and so effects the sale introduces the issue of entrapment. Further it may be state, any effective appeal made by the agents to the impulses of compassion, sympathy, pity, friendship, fear or hope, other than ordinary expectation of gain and profit incident to the traffic, introduces the issue." United States v. Washington (1927), 20 F. (2d) 160.

Newman v. United States, supra; Woo Wai v. United States, supra; Sam Yick v. United States (1917), 240 Fed. 60; Butts v. United States, supra; Luterman v. United States (1922), 281 Fed. 371; Neapolitano v. United States (1925), 3 F. (2d) 994; People v. Tomovich (1922), 56 Cal. App. 520, 206 Pac. 119.

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Objectively subjective in that they require the courts to attempt to determine where an intent to do evil originated and whether or not the accused was unduly tempted; and they have been criticized for possessing this fault. It is quite probable, however, that no more satisfactory standard will be devised; if courts disagree even as to the foundation of the doctrine of entrapment, (some feeling that the defense is founded upon a judicial duty to construe statutes so as to avoid unjust results; others preferring to approach the problem via public estoppel or public policy) disagreement as to standards is almost inevitable. There seems to be no Moses to lead the judges into a promised land of judicial clarity.

If, however, the practicing attorney is more interested in knowing exactly how and when the defense of entrapment can be successfully introduced into a criminal case, it might be said that the decisions indicate that the defense may be raised under a plea of not guilty as an issue of fact for the jury, or the defendant may be discharged by the court under a writ of habeas corpus, or the court may quash the indictment or entice and try a plea in bar, or the court may of its own motion after a plea of guilty has been entered examine the prisoner and officers concerned in the arrest and, being satisfied that these officials instigated the offense, dismiss the case, probably even though judgment has been entered. And, although the above analysis should indicate that there is little unanimity in judicial definitions of what constitutes entrapment, it probably may be concluded without error that the defense may be interposed where by reason of the consent implied in the inducement some element essential to the crime charged has been removed, or where the accused was trapped into the commission of a crime he did not intend to commit, or where the agents of the government suggested the crime and induced its commission.

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29 See 28 Col. Law Rev. 1067 (1915); 44 Harv. Law Rev. 109 (1930); 2 So. Cal. Law Rev. 283 (1929).
30 "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute." Sorrels v. United States, supra.
31 Natural and logical approach to the subject of entrapment held to be through doctrine of entrapment in O'Brien v. United States, supra.
32 "The doctrine rests rather upon a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belong only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." Sorrels v. United States, supra. (Roberts, J., concurring as to result, but dissenting as to justification of defense of entrapment.)
33 Sorrels v. United States, supra; Peterson v. United States (1919), 255 Fed. 433.
34 United States ex rel. Hassell v. Mathues (1928), 22 F. (2d) 979.
35 United States v. Pappagoda (1923), 288 Fed. 214; Spring Drug Co. v. United States (1926), 12 F. (2d) 852.