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THE LAW OF ENTRAPMENT IN NARCOTICS ARRESTS

Illegal traffic in narcotics is a secret and nonviolent business which usually involves only two or three persons who are all willing participants. Even at the final retail level, where narcotics are distributed to the real victims of the illegal business, sales still usually involve only two or three parties. Thus, in the usual case, an offender need only fear accidental dealings with a law enforcement officer or an informer for the interested authorities — a stool pigeon. This raises special problems for law enforcement officers, because to check the illegal narcotics commerce they must of necessity fit themselves deceptively into its patterns of operation. They must participate in illegal sales and rely heavily on informers, in order to detect and apprehend narcotics violators. As a practical consequence of these methods, entrapment is often asserted as a defense to prosecutions for violations in this area of the law, the question being, have the law enforcement officials stepped beyond their proper bounds?

Probably the first case in which the defense received any discussion was *United States v. Whittier*,¹ a mail fraud case, in which a concurring judge formulated a definition which distinguishes between the permissible and the forbidden, a formula which has remained basically unchanged:

No court should . . . lend its countenance . . . to contrivances for inducing a person to commit a crime. . . . [But] when the guilty intent to commit has been formed, any one may furnish opportunities, or even lend assistance, to the criminal, with the commendable purpose of exposing and punishing him.²

The United States Supreme Court gave its assent to the defense in *Grimm v. United States*,³ also a mail fraud case. In *Grimm* the Court held that the mere ordering of forbidden materials through the mails by a government agent under an assumed name was no defense in a prosecution of the shipper, because "he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such government official."⁴ Likewise, the use of decoy letters is permissible in narcotics cases.⁵

The limits of permissible participation have since been further elucidated. In *Woo Wai v. United States*,⁶ involving charges of unlawful importation of Chinese into the United States, the Court held that because government agents "coaxed, persuaded, and urged"⁷ defendant to commit the crime, his conviction could not stand. An agent of the Immigration Commission, suspecting that the defendant, a merchant, possessed information as to previous unlawful importations of Chinese women into San Francisco, coaxed defendant for over a year, by letters and conversation with him, before he agreed to enter into a scheme for bringing Chinese across the Mexican border. The inspector explained to him the means to be used, routes to follow, and ways to avoid arrest, until his resistance was overcome. The Court said that

a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes . . . [because] the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them.⁸

Although the earlier cases did not discuss the problem, a divided Supreme

1 28 Fed.Cas. 591 (No. 16,688) (C.C.E.D. Mo. 1878).

2 *Id.* at 594-595.

3 156 U.S. 604, 611 (1895): "The fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt."

4 *Id.* at 610.

5 *Mitchell v. United States*, 143 F.2d 953 (10th Cir. 1944).

6 223 Fed. 412 (9th Cir. 1915).

7 *Id.* at 414.

8 *Id.* at 415.

Court in *Sorrells v. United States*,⁹ made explicit the theoretical basis on which the defense of entrapment rests. A prohibition agent, posing as a tourist, accompanied three friends of defendant to his house. The agent told defendant they were former members of the same division in the war. After at least three requests by the agent during their conversation, the defendant finally procured and sold him a half gallon of liquor. According to Mr. Chief Justice Hughes and the majority,

The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct.¹⁰

The minority, however, speaking through Mr. Justice Roberts, thought that the decision "ought to be based on the inherent right of the court not to be made the instrument of wrong,"¹¹ rather than on the basis of statutory construction involving reading an exception into the applicable statute "in the light of what may fairly be deemed to be its object."¹² Although it is euphemistic to call the majority's act one of statutory construction or interpretation, they seem to have grasped the most fundamental justification and underlying basis for the defense — that the laws are not meant to punish persons whose guilt is significantly diminished because of a sufficiently great temptation offered by the very persons whose mission is to prevent crime.¹³ If this were not the reason for the defense, why would strict application of the law in an entrapment situation be "so contrary to the purpose of the law and so inconsistent with its proper enforcement,"¹⁴ where it is conceded that the defendant has violated the letter of the law;¹⁵ why would conviction in these cases be a wrong consummated by the use of the court's process; and why would the prohibited police conduct be illegal or at all improper?¹⁶ Thus a conviction will not be permitted in cases where

. . . 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.¹⁷

In the *Sorrells* case it was held that a jury could find that this "otherwise innocent" defendant was "lured" to the commission of the crime in question "by repeated and persistent solicitation in which he [the government agent] succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War."¹⁸ The crime was merely the "creature of his [the agent's] purpose,"¹⁹ not the sort of activity against which the criminal laws are arrayed. Despite intelligent criticism of the view,²⁰ saying that the guilt of entrapped persons is significantly lessened according to the kind of police participation in the offense seems to justify the admittedly vague formulation used, along with the consequent necessity for a case-by-case determination of the issue by juries.

Sherman v. United States,²¹ the only other extended discussion by the Supreme Court on the subject, reaffirmed the *Sorrells* theory of entrapment. In the *Sherman*

9 287 U.S. 435 (1932).

10 *Id.* at 452.

11 *Id.* at 456.

12 *Id.* at 451.

13 See Note, 73 HARV. L. REV. 1333 (1960).

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

15 *Id.* at 445-446.

16 This question challenges the view expressed in the concurring opinion in *Sorrells* at 457, *supra* note 14.

17 *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

18 *Id.* at 441. (Material in BRACKETS added.)

19 *Ibid.* (Material in BRACKETS added.)

20 Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1107-1109 (1951).

21 356 U.S. 369 (1958).

case, the government informer took advantage of a new friendship with defendant and the latter's sympathy for him as a fellow addict who needed drugs because he was not responding to treatment for addiction. Entrapment was found as a matter of law because the undisputed testimony of the prosecution's own witnesses supported the claim of entrapment.²² The defense was not overcome by claiming that defendant evinced a "ready complaisance" to sell to the informer, where there was no evidence to support the claim, nor was evidence as to a nine-year-old sales conviction and a five-year-old possession conviction sufficient to prove he had a readiness to sell narcotics at the time he was approached.²³ The Court did not make this point clear, but it seems plain that if there were evidence that the accused were himself in the trade, or that there were narcotics in his apartment, or that he had made a profit on his sale to the informer, circumstances that might tend to show a "ready complaisance," these circumstances would not justify an otherwise illegal entrapment, but would merely go to discredit any account of government conduct amounting to entrapment.²⁴

When the defense of entrapment is held good, the government agent or informer involved has usually employed "extraordinary temptations or inducements"²⁵ to persuade, lure, or, as it is usually put, to induce the accused to commit the crime in question. In one case,²⁶ the informer induced the accused to purchase heroin by telling him that they were members of the same fraternal organization and persuading him that he could make money by betting on horses injected with heroin. However, in most cases where the defense is good, the informer or "agent" appeals to the sympathies or misdirected humanitarianism of the defendant. Usually the defendant will have yielded only after repeated requests,²⁷ and only to help out a friend or supposed friend,²⁸ or even the fictitious mistress of a friend of the informer, who is represented to be sick,²⁹ or a friend who needs narcotics to effect a cure,³⁰ or to alleviate his suffering,³¹ or to enable him to work and support his family.³² Although the defendant is not usually motivated by a desire for monetary gain, it is not necessarily fatal to the defense that the crime was committed for the purpose of making money, rather than to help another, as long as there is inducement.³³

There seems to be no reason why this inducement should have to consist entirely of oral persuasion. In *United States v. Silva*,³⁴ the defense was sustained where defendant claimed he was led into drug use by the informer, who at first gave him drugs free of charge, later charged him five dollars per shot, which the informer injected into his bloodstream for him, and finally when he ran out of money tricked him into making a sale to a narcotics agent by promising him an

22 *Id.* at 373.

23 *Id.* at 375. But a criminal record of similar crimes or evidence of previous criminal activity is relevant to rebut a claim of entrapment. See *infra* footnotes 73 and 74 and accompanying text.

24 See *Young v. United States*, 286 F.2d 13, 15 (9th Cir. 1960); *infra* notes 63 and 64 and accompanying text.

25 *Hamilton v. United States*, 221 F.2d 611 (5th Cir. 1955).

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

27 *Sherman v. United States*, 356 U.S. 369 (1958); *Lutfy v. United States*, 198 F.2d 760 (9th Cir. 1952); *Cline v. United States*, 20 F.2d 494 (8th Cir. 1927); *Cermak v. United States*, 4 F.2d 99 (6th Cir. 1925).

28 *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932); *Cline v. United States*, 20 F.2d 494 (8th Cir. 1927); *Cermak v. United States*, 4 F.2d 99 (6th Cir. 1925); *Newman v. United States*, 299 Fed. 128 (4th Cir. 1924).

29 *Lutfy v. United States*, 198 F.2d 760 (9th Cir. 1952).

30 *Newman v. United States*, 299 Fed. 128 (4th Cir. 1924).

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

32 *Cermak v. United States*, 4 F.2d 99 (6th Cir. 1925).

33 *Morales v. United States*, 260 F.2d 939 (6th Cir. 1958); *Hamilton v. United States*, 221 F.2d 611 (5th Cir. 1955); *Morei v. United States*, 127 F.2d 827 (6th Cir. 1942).

34 180 F. Supp. 557 (S.D.N.Y. 1959).

injection in return. The court correctly stated that this criminal activity was "the product of the creative activity" of law enforcement officials.³⁵

One decision that seems clearly wrong is *Henderson v. United States*,³⁶ where the Fifth Circuit held that if the testimony of government agents who observed the meetings of the informer and defendant were sufficient to show sales of narcotics, this established "without more that the defendant was induced by government agents to engage in the proscribed activity and no conviction may be had."³⁷ This is inconsistent not only with the Supreme Court cases³⁸ and other circuits,³⁹ but also with a 1955 decision of the same circuit, which sets forth the correct rule, that "a suspected criminal may be offered an opportunity to transgress in such a manner as is usual . . ." ⁴⁰ in similar circumstances. It is well settled that the "inducement" which must be asserted by the accused is that which will tend to show that the criminal conduct was the "product of the creative activity" of the law-enforcement officials,⁴¹ that he was "lured" into its commission,⁴² and would not otherwise have committed the crime,⁴³ or that the government agent's conduct is acceptable if he merely affords an opportunity to a person of ready willingness and complaisance to enter into the unlawful transaction.⁴⁴

Government agents may only do enough to "reveal the criminal design"⁴⁵ of would-be violators of the law. Courts have held that there is no entrapment as a matter of law, and that the issue will therefore not be submitted to the jury where the only allegation is that the defendant sold narcotics to government agents,⁴⁶ or that he made the sale to government agents without asking any questions immediately after the agent asked him if he had any narcotics.⁴⁷ The suspect may be offered an opportunity to transgress in such manner as is usual in the given type of violation,⁴⁸ and this must involve no more persuasion than is necessary in the course of an ordinary sale.⁴⁹ There is no quarrel with the use of a "decoy" or so-called "special employee," usually an addict himself, who, in the usual case, contacts the suspect and purchases from him narcotics with marked money furnished by the authorities.⁵⁰ In all such cases, it is apparent that there is already formed in the mind of the defendant an intent and purpose to violate the law, and that no more than an "opportunity" is being furnished. For this reason, it would not be correct to say that the crime itself is the result of the creative activity of the police.

There is no entrapment where a defendant joins a conspiracy to smuggle

35 See *United States v. Silva*, *supra* note 33 at 558; *People v. Strong*, 21 Ill.2d 320, 172 N.E.2d 765 (1961).

36 261 F.2d 909 (5th Cir. 1959).

37 *Id.* at 911, citing *United States v. Sherman*, 240 F.2d 949, 951 (2d Cir. 1957).

38 *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

39 See *United States v. Markham*, 191 F.2d 936 (7th Cir. 1951).

40 *Hamilton v. United States*, 221 F.2d 611, 614 (5th Cir. 1955). See *Rodriguez v. United States*, 227 F.2d 912, 914 (5th Cir. 1955):

It is not important . . . that the Government sets the stage and provides the aid, incentive and opportunity for the commission of the crime, for the defense of entrapment fails unless it appears that the defendant has done that which she would never have done had it not been for the urgings and encouragements of the Government's agent.

41 *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

42 *Ryles v. United States*, 183 F.2d 944 (10th Cir.), *cert. denied* 340 U.S. 877 (1950); *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921).

43 *Butler v. United States*, 191 F.2d 433 (4th Cir. 1951).

44 *Park v. United States*, 283 F.2d 253 (5th Cir. 1960).

45 *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

46 *United States v. Markham*, 191 F.2d 936 (7th Cir. 1951).

47 *Sandoval v. United States*, 285 F.2d 605 (10th Cir. 1960).

48 *Hamilton v. United States*, 221 F.2d 611 (5th Cir. 1955).

49 *Ibid.* See *People v. Hutcherson*, 197 Cal. App.2d, 17 Cal. Rptr. 636 (1961).

50 *Louie Hung v. United States*, 111 F.2d 325 (9th Cir. 1940); *People v. Branch*, 119 Cal. App.2d 490, 260 P.2d 27 (1953).

narcotics into the country after acquiring full knowledge of the criminal plan from an agent posing as a man of some wealth interested in buying large quantities of narcotics.⁵¹ The mere use of deceitful "artifice and stratagem"⁵² is not objectionable, since the law does not mean to "protect the guilty from the consequences of subjectively mistaking apparent for actual opportunity to safely commit crime."⁵³ Thus an agent may fabricate a complete and plausible story about his identity, occupation, and dealings in narcotics, and also create an atmosphere of social friendship by conversation unrelated to narcotics as a prelude to soliciting the commission of a narcotics offense.⁵⁴ There is clearly no entrapment when the accused is the one who solicits the commission of the crime, for inducement cannot then be seriously alleged.⁵⁵

Once the defendant sustains the burden of raising the issue, of showing some evidence of illegal entrapment, then the burden shifts to the prosecution to prove beyond a reasonable doubt that the government's activity did not amount to entrapment,⁵⁶ by testimony of its agents and an examination of the accused. Usually the product will be a question of credibility to be answered by the trier of fact—the word of the accused against the word of the government agents and informers as to what actually took place.⁵⁷ If the version of the prosecution's witnesses is uncontradicted, however, the jury will not even be instructed on the defense,⁵⁸ nor if defendant's counsel merely claims there is entrapment, without offering any evidence.⁵⁹ But whenever there is conflicting testimony and credibility is involved, the trial court must submit the issue to the jury.⁶⁰ One state has said that entrapment is not established as a matter of law where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused.⁶¹

When the burden has been shifted to the government to show that the defendant has not been entrapped, it may, according to *Sorrells*, subject the defendant to an "appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue," since his "predisposition and criminal design . . . are relevant" to show that he is not one who is "otherwise innocent."⁶² The government must show that it has trapped an unwary criminal rather than an unwary innocent. On this point the opinion of the Ninth Circuit in *Young v. United States*⁶³ has apparently clarified the *Sherman* decision. The court rejected the contention that entrapment is established as a matter of law where there is no evidence that defendant was ever a user, or had a criminal record, or made any profit from the sales in question. The court said,

Although there is language in *Sherman v. United States*, *supra*, and *Morales v. United States*, 1958, 260 F.2d 939, which would indicate that such evidence or lack of it is important in considering whether there is entrapment, we do not feel that we can say that such a record establishes

51 *Walker v. United States*, 298 F.2d 217 (9th Cir. 1962).

52 *Sorrells v. United States*, 287 U.S. 435, 441 (1932).

53 *Marshall v. United States*, 258 F.2d 94, 97 (10th Cir. 1958), *rev'd on other grounds*, 360 U.S. 310 (1959).

54 *Marshall v. United States*, *supra* note 53.

55 *United States v. Parker*, 217 F.2d 672 (2d Cir. 1954); *Rosso v. United States*, 1 F.2d 717 (3d Cir. 1924). See *United States v. Sizer*, 292 F.2d 596 (4th Cir. 1961), holding that where defendant solicited the first sale, and the government thereafter afforded him opportunities to make further sales, conviction on subsequent sales was not precluded where defendant's arrest was not unduly delayed and delay was due to an attempt to discover his source of supply.

56 *Sherman v. United States*, 356 U.S. 369 (1958).

57 *Masciale v. United States*, 356 U.S. 386 (1958); *Lufty v. United States*, 198 F.2d 760 (9th Cir. 1952).

58 *Hester v. United States*, 303 F.2d 47 (10th Cir. 1962).

59 *Fletcher v. United States*, 295 F.2d 179 (D.C. Cir. 1961).

60 *Walker v. United States*, 298 F.2d 217 (9th Cir. 1962).

61 *People v. Terry*, 44 Cal.2d 371, 372-3, 282 P.2d 19, 20 (1955).

62 *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

63 286 F.2d 13 (9th Cir. 1960).

entrapment as a matter of law. Most of this evidence is negative evidence. It can be argued that it might tend to show that there was entrapment. If, however, this court should hold that it is necessary for the government to show some or all of these facts (prior addiction, criminal record, sales profit) in order to escape the defense of entrapment, it would in effect give the narcotic peddler "one free shot" before he could be convicted for his crimes.⁶⁴

The lower federal courts have developed a number of tests to aid in the determination of whether or not the defendant is an "unwary criminal" whose claim of entrapment has no merit. First, courts may say that the offense can be found to have originated in the mind of the defendant, and that the government is merely affording him an opportunity to commit a particular violation in a course of proscribed conduct in which he is continuously engaged.⁶⁵ There are a number of cases involving doctors giving illegal prescriptions for narcotics where it is shown that the doctor has often done so before for other persons,⁶⁶ or for the person who becomes a government informer for the purpose of a particular purchase with marked money.⁶⁷ Such previous activities will tend to discredit the defendant when he claims that he has been illegally entrapped in the case at bar.

Secondly, and closely related, is the test of the defendant's "predisposition" to commit the crime. It is said that there is no illegal entrapment where the defendant is found to have had a general intention to commit such an offense as the one charged whenever the opportunity was presented.⁶⁸ Such a finding by the jury warrants its rejection of the defense of entrapment,⁶⁹ because such a general intention and a claim of entrapment are inconsistent. The defendant's predisposition may be apparent or inferable from the facts, as, for example, where he already has possession of narcotics, and the action of the government is little more than arranging to have agents present to detect the commission of a crime,⁷⁰ or where, even though the informer represents to the accused that he is ill and needs narcotics, the accused readily gets them for him.⁷¹ A previous illegal sale may be shown to demonstrate this predisposition, and to explain defendant's hesitancy as only that which is natural to one acquainted with the narcotics trade.⁷² This need only be similar criminal conduct, however, and not identical, in order to be relevant.⁷³ Likewise, a criminal record⁷⁴ is relevant to a showing of "predisposition"

64 *Id.* at 15.

65 *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947); *United States v. Brandenburg*, 162 F.2d 980 (3d Cir.), *cert. denied*, 332 U.S. 769 (1947).

66 *United States v. Abdallah*, 149 F.2d 219 (2d Cir.), *cert. denied*, 326 U.S. 724 (1945).

67 *United States v. Brandenburg*, 162 F.2d 980 (3d Cir.), *cert. denied*, 332 U.S. 769 (1947). But it is not true that simply because a defendant has been guilty of narcotics violations before, he may be entrapped. *Cf. Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962). However, it may be that in an extreme case "the conceded volume of the defendant's business of this type is so conclusive of his intent that the entrapment defense does not call for serious consideration." *Simmons v. United States*, 300 Fed. 321, 322 (6th Cir. 1924). See *Fisk v. United States*, 279 Fed. 12 (6th Cir. 1922).

68 *Demos v. United States*, 205 F.2d 596 (5th Cir. 1953).

69 *Ibid.*

70 *Stein v. United States*, 166 F.2d 851 (9th Cir.), *cert. denied*, 334 U.S. 844 (1948).

71 *Price v. United States*, 56 F.2d 135 (7th Cir. 1932).

72 *Trent v. United States*, 284 F.2d 286 (D.C. Cir.), *cert. denied*, 356 U.S. 889 (1961). For a different and stronger rule see *Sullivan v. United States*, 219 F.2d 760, 761 (D.C. Cir. 1955), holding that where defendant delivered narcotics in the morning to an addict who became an "agent" of the government for purposes of a sale in the afternoon, "this precludes any finding of entrapment with respect to the afternoon transaction." (But there is no reason why the two factors, sale in the morning and entrapment in the afternoon, should be absolutely mutually exclusive.)

73 *United States v. Perkins*, 190 F.2d 49 (7th Cir. 1951); *Nero v. United States*, 189 F.2d 515 (6th Cir. 1951); *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947).

74 *Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962).

to commit the crime, though it certainly is not so weighty as to preclude the defense of entrapment.⁷⁵

A third often-repeated formula is that there is no illegal entrapment by the police where the manner in which the sale is made indicates a "ready complaisance" on the part of the defendant.⁷⁶ Easy acquiescence or ready complaisance appears to be by definition incompatible with a claim of being induced to commit a crime that would never otherwise have been committed.⁷⁷

Some courts have said that the government must have reasonable grounds to suspect that the defendant is engaged in or about to engage in an illegal act before he may be invited by a government agent to do so.⁷⁸ Thus, in *Mitchell v. United States*⁷⁹ the court said that where the government has reasonable cause to believe that defendant is violating the law, he may be legally entrapped by decoy letters or pretended purchases. One objection to this statement is that the mere use of decoy letters or pretended purchases is not in and of itself sufficient to establish entrapment.⁸⁰ And, by definition, entrapment is never legal. It is submitted that the reason for the reasonable cause requirement is not a conscious rejection of the approach of the Supreme Court in both *Sorrells* and *Sherman*, which viewed the defense of entrapment as an assertion going more to the extent of the defendant's culpability than to police methods. It seems likely, rather, that courts began to think of "reasonable cause" as an absolute requirement only after having at first viewed it as merely one factor which would rebut a claim of entrapment. Such confusion appears in the following language from *Heath v. United States*,⁸¹ a case involving illegal sales of liquor:

It is well recognized that officers may entrap one into the commission of an offense only when they have reasonable grounds to believe that he is engaged in unlawful activities. They may not initiate the intent and purpose of the violation. In a case of entrapment, it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused.⁸²

But "the crux of the issue is not the reasonableness of the suspicion by the police, but the methods used."⁸³ The better rule is stated in *Silva v. United States*:

Even though an accused had no previous criminal record and the officers were not shown to have knowledge of a predisposition on his part to commit a crime, still if the jury believed that the felonious intent and purpose were present at the time of the act they would be free to reject the accused's claim of entrapment. There is always a first time wilfully to engage in criminal conduct.⁸⁴

75 *Id.* at 222: "[R]eadiness or predisposition is not established by evidence that the person is not 'innocent' in that he has a criminal record," although it is relevant. In *Sherman v. United States*, 356 U.S. 369 (1958), other facts enabled the Court to hold that there was entrapment as a matter of law. Defendant's criminal record was relevant but not conclusive.

76 *Masciale v. United States*, 356 U.S. 386 (1958); *Fletcher v. United States*, 295 F.2d 179 (D.C. Cir. 1961); *People v. Toler*, 26 Ill.2d 100, 185 N.E.2d 874 (1962).

77 The unfortunate wording of the tests in a number of cases may be traceable to Judge Hand's opinion in *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933), where he spoke of these tests as "excuses" that somehow justify entrapment. Whereas these factors (an existing course of similar criminal conduct, an already-formed design to commit the crime, and a ready complaisance to commit the crime) properly go to show that the defendant was not "induced" but only "afforded opportunities," somehow in *Jasso v. United States*, 290 F.2d 671 (5th Cir.), *cert. denied*, 368 U.S. 858 (1961), it is held that the offering of inducements is proper where these elements are found. Hearsay is admissible on these matters. *Trice v. United States*, 211 F.2d 513 (9th Cir. 1954).

78 *Childs v. United States*, 267 F.2d 619 (D.C. Cir.), *cert. denied*, 359 U.S. 948 (1959); *Trice v. United States*, 211 F.2d 513 (9th Cir. 1954).

79 143 F.2d 953 (10th Cir. 1944).

80 *Ibid.*

81 169 F.2d 1007 (10th Cir. 1948).

82 *Id.* at 1010.

83 *People v. Wells*, 25 Ill.2d 146, 182 N.E.2d 689, 691 (1962).

84 212 F.2d 422, 424 (9th Cir. 1954).

In showing this "reasonable cause," evidence as to former convictions,⁸⁵ reputation,⁸⁶ complaints,⁸⁷ and personal observations by government officials⁸⁸ are all relevant. These are circumstances which other courts have said go to rebut a claim of entrapment, since they are relevant in showing a "predisposition" to commit the crime.

Although the defense of entrapment is raised when the defendant pleads not guilty,⁸⁹ if he denies the doing of the very act which constitutes the crime, the defense is not available.⁹⁰ In *Crisp v. United States*,⁹¹ however, the accused testified that he received no money and did not hand the narcotics to the officers, but that they were snatched from his hand by the officers. It was held that this assertion did not preclude the accused from claiming the defense of entrapment, and that it was proper to submit to the jury these alternative defenses.⁹² The holding seems sound. Where the defendant does not deny participation in the alleged act, but claims that the transaction was not a sale, and that even if it was, he was entrapped because of the encouragement of police officers, he is not being inconsistent or illogical. He is merely insisting that even though he was induced to act as he did, there is still a question as to whether his conduct would be criminal in the absence of entrapment. But a defendant impeaches himself when he claims 1) that he had no part in the alleged crime, and 2) that he was entrapped and therefore ought not be punished for its commission.

Finally, it is essential to establishing the defense of entrapment that the inducement be through or because of the acts of a government "agent" or "officer."⁹³ But it is not necessary that the law enforcement officials have knowledge of the methods being employed by these "agents" or informers.⁹⁴ The courts have treated as government agents both paid informers and those acting under promise of immunity from prosecution.⁹⁵

There is no doubt that the possibilities of abuse inherent in the use of informers in narcotics arrest cases are great. However, it seems they are a necessary part of law enforcement techniques in such secret crimes as narcotics laws violations. Rather than dispensing with them, it is preferable to secure greater control over the actions of informers and law enforcement officers, who may often care only about securing the arrest and conviction of the person suspected, and may use any and all means at his disposal to effect the arrest. An officer or informer may coax and attempt to persuade a suspect to commit a crime in any of the various ways that have been held to constitute entrapment. He may even be the cause of the ad-

85 E.g., *Carlton v. United States*, 198 F.2d 795 (9th Cir. 1952).

86 See *United States v. Valdes*, 229 F.2d 145 (2d Cir.), cert. denied, 350 U.S. 996 (1956).

87 *Heath v. United States*, 169 F.2d 1007 (10th Cir. 1948).

88 *Nero v. United States*, 189 F.2d 515 (6th Cir. 1951); *Mitchell v. United States*, 143 F.2d 953 (10th Cir. 1944).

89 *Rodriguez v. United States*, 227 F.2d 912 (5th Cir. 1955). See *Fed. R. Crim. P.* 12(a): Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty, and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

90 *Brown v. United States*, 261 F.2d 848 (9th Cir. 1958); *Rodriguez v. United States*, 227 F.2d 912 (5th Cir. 1955); *People v. Johnson*, 99 Cal.App.2d 559, 222 P.2d 58 (1950).

Contra: Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962).

91 262 F.2d 68 (4th Cir. 1958).

92 *Id.* at 70.

93 *Ivy v. State*, 161 Tex.Crim.App. 371, 277 S.W.2d 712 (1955).

94 *Sherman v. United States*, 356 U.S. 369 (1958).

95 See *Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 *YALE L. J.* 1091, 1109 (1951), note 53 and accompanying text. See also the dissent in *Jones v. United States*, 266 F.2d 924, 928 (D.C. Cir. 1959).

diction of the accused, as in *United States v. Silva*.⁹⁶ The dissent in *Jones v. United States*⁹⁷ makes these facts clear:

. . . [I]t is to be expected that the informer will not infrequently reach for shadowy leads, or even seek to incriminate the innocent. The practice of paying fees to the informer for the cases he makes may also be expected, from time to time, to induce him to lure non-users into the drug habit and then entrap them into law violations.⁹⁸

As the Supreme Court has said, "law enforcement does not require methods such as this."⁹⁹

One state, Colorado, holds that entrapping authorities are guilty of conspiracy.¹⁰⁰ Other judicial weapons may be now being forged to help deal with the problem. In *United States v. Place*,¹⁰¹ the court found there was no evidence of entrapment and upheld the conviction. The defendants contended that the government's informer, in providing defendant with narcotics for his personal use precluded prosecution for the crimes committed by defendants which followed so shortly. The court held that the doctrine that "the government ought not to use evidence obtained and only obtainable by a criminal act" did not apply here because there was no close causal relationship between the illegal conduct and the evidence obtained.¹⁰² Defendant attempted to show on trial that he would have been physically unable to bring about the sale prosecuted for without the stimulation of the narcotics which the agent provided for him. But the Court of Appeals said that there was enough other uncontradicted evidence so that it would have been capricious to find that this act by the agent caused defendant's \$300 sale less than 24 hours later or was a clue that led to the evidence of that sale. In a proper case, however, this rule, if applied, could provide an additional effective check to improper police action which may or may not have any bearing on the defendant's culpability, but is at least totally unnecessary and abhorrent in itself.

Another court has undertaken to regulate the qualifications of informers used by the police. Over a dissenter's objection that since, in almost all cases, informers are on a contingent basis, the holding will "rob the Government of one of its most effective weapons in detecting crime and bringing to the bar of justice those who commit it,"¹⁰³ the Fifth Circuit held that:

Without some such justification or explanation [that "Government investigators had such certain knowledge" of the criminal activities of the defendants or "carefully instructed" the informer on the rules against entrapment], we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a "frame up," or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration.¹⁰⁴

The courts have done a great deal to curtail the evils which may arise from the use of the police methods necessitated by the nature of the illegal narcotics traffic in this country. The rules concerning entrapment are generally reasonable and consistent with the theoretical basis of the defense as the Supreme Court has stated it, although some cases have involved a misunderstanding of the concept of "inducement"¹⁰⁵ in the formula, and others have said that before the police may

96 180 F. Supp. 557 (S.D.N.Y. 1959). See *supra*, note 33 and accompanying text.

97 266 F.2d 924 (D.C. Cir. 1959).

98 *Id.* at 928.

99 *Sherman v. United States*, 356 U.S. 369, 376 (1958).

100 *Reigan v. People*, 120 Colo. 472, 210 P.2d 991 (1949).

101 263 F.2d 627 (2d Cir. 1959).

102 *Id.* at 630, quoting the dissent of Holmes in *Olmstead v. United States*, 277 U.S. 438, 469-470 (1928).

103 *Williamson v. United States*, 311 F.2d 441, 446 (5th Cir. 1962).

104 *Id.* at 444. (Material in BRACKETS added.)

105 *Cf.*, *supra* note 36 and accompanying text.

secure arrests through the use of informers they must have "reasonable cause" to suspect that a person is engaged in or about to engage in criminal activity, or else there is entrapment.¹⁰⁶ Although this may be a reasonable and desirable requirement with which to limit police activity, it cannot be said to be a necessary part or corollary to the theory of entrapment, which turns on the nature of the defendant's conduct primarily, and only on police conduct insofar as it reveals the probable nature of the act of the accused. Rather than an unwise overreaction to the problems of control over police activity, such as, for example, barring prosecution whenever the Government is a party to one of these illegal transactions, judicially created limitations will emerge and develop, slowly and in appropriate instances,¹⁰⁷ as courts come to apprehend the defense of entrapment to be alone insufficient to protect defendants and to curtail improper police activity.

Lawrence J. Gallick

¹⁰⁶ *Cf.*, *supra* note 77 and accompanying text.

¹⁰⁷ *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962); *United States v. Place*, 263 F.2d 627 (2d Cir. 1959); *Reigan v. People*, 120 Colo. 472, 210 P.2d 991 (1949).