University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Copyright 1942, by the University of Pennsylvania

VOLUME 90

JANUARY, 1942

No. 3

THE DOCTRINE OF ENTRAPMENT IN THE FEDERAL COURTS

WILLIAM E. MIKELL †

In the zeal of officers charged with the investigation of crime to ferret out offenses and bring the perpetrators to justice, these officers have in many years past engaged first in enticing persons to commit crimes and then prosecuting them for the crime committed. This practice is known as "entrapment", and the question raised in each case is: does the act of the officer entitle the defendant to an acquittal of the crime committed by him? The prevalence of this practice in one field alone of law enforcement is shown by the statement made in 1927 by Judge Woodrough in *United States v. Washington*¹ in which he said, "As shown by the last report of the Attorney General there were some 44,000 liquor prosecutions brought in the federal courts during the fiscal year, and if I may estimate the proportion of them that are based on sales to agents [prohibition officers] by the cases brought before me, it would seem that at least 30,000 of them are of that kind." In view of the prevalence of the practice and of the confusion and inconsistencies in the decisions and in the theories on which the decisions are based, it seems worth while to inquire into the history and the principles governing entrapment as a defense to crime.

None of the English writers on criminal law, ancient or modern, mentions entrapment as a defense to a charge of crime. Hale, East, Hawkins, Stephen, Russell, Kenny, are silent in regard to it. It would

† B. S., 1890, South Carolina Military College; LL. M., 1915, J. U. D., 1929, University of Pennsylvania; LL. D., 1921, University of South Carolina; D. C. L., 1921, University of the South; Emeritus Professor of Law and Special Lecturer and formerly Dean of the Law School at University of Pennsylvania; author, *CASES ON CRIMINAL PROCEDURE* (2d ed. 1935), *CASES ON CRIMINAL LAW* (3d ed. 1933); co-reporter for American Law Institute of *CODE OF CRIMINAL PROCEDURE* (1930).

1. 20 F. (2d) 160-1 (D. C. Neb. 1927).

seem that the practice was rare in England notwithstanding the zeal and efficiency, or perhaps because of the efficiency, of "Scotland Yard", or else that solicitation of a crime by an officer is regarded in the same light as solicitation by a private person; the latter never having been considered a defense unless it disproved the element of non-consent necessary for the offense charged.² Insofar as English and American law is concerned, entrapment as an excuse to a charge of crime seems to be a purely American doctrine.

The life span of the doctrine of entrapment in the federal courts is a short one, having its genesis in *obiter*. The first case in the federal courts which the writer has found in which this defense was considered is *United States v. Whittier*.³ The case did not involve entrapment by an officer, but by an agent of the Society for the Suppression of Vice. It was decided not on the ground of entrapment, but on the ground that the defendant's acts did not bring him within the provisions of the statute under which he was indicted. The defense of entrapment having been advanced, however, in the course of his opinion, Judge Treat, concurring, said: "No case, after most diligent search has been found which disposes exactly of the point under consideration. In my judgment, it must be settled in the light of elemental principles—no court should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime. Although a violation of law by one person in order to detect an offender will not excuse the latter, or be available to him as a defense, yet resort to unlawful means is not to be encouraged."⁴ Several cases of entrapment followed⁵ but in none of them was the defendant excused on that ground, though the courts in dictum denounced the practice. It was not until the case of *Woo Wai v. United States*⁶ in 1915, that a federal court decided that a defendant who had committed the crime for which he was indicted was entitled to an acquittal on the ground of entrapment. In this case an agent of the Immigration Commission suspected, not the defendant, but certain officers of the Immigration Commission of the unlawful importation of Chinese women into the United States, and, believing that the defendant had information of such transactions, and with the object of extorting such information from him, to be used in convicting the suspected immigration officials,

2. The writer has found only one case in the English Reports in which entrapment was employed, *Regina v. Titley*, 14 Cox C. C. 502 (1880). In this case the entrapment was neither advanced as a defense, nor considered by the court.

3. 28 Fed. Cas 591, No. 16,688 (E. D. Mo. 1878).

4. *Id.* at 594.

5. *United States v. Grimm*, 50 Fed. 528 (E. D. Mo. 1892); *United States v. Adams*, 59 Fed. 674 (D. C. Ore. 1894).

6. 223 Fed. 412 (C. C. A. 9th, 1915).

employed a detective who persuaded the defendant to propose to immigration officials the illegal entry of Chinese. The defendant having been convicted of conspiracy to violate the immigration laws, an appeal was taken to the Circuit Court of Appeals.

The circuit court held that there were two grounds on which the conviction should be reversed: first, that the facts did not prove a conspiracy; second, "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 criminal statutes." Six cases are cited in support of the doctrine. While in all of the cases cited the court took occasion to condemn the entrapment of persons into crime, in none of them was the defendant held entitled to an acquittal because of entrapment by an officer. Two of these cases were convictions of burglary in which the convictions were reversed on the ground that the owner consented to the entry;⁷ one on erroneous exclusion of evidence.⁸ In another⁹ the court held that the trial court did not err in refusing to order an acquittal on the ground of entrapment. In another,¹⁰ a *nisi prius* case, the entrapment was done by a private person; and in the last¹¹ it was held that the defendant's act did not bring him within the spirit of the statutory provision under which he was indicted.

The subject of "entrapment" does not appear in any American text book until the eighth edition of Wharton in 1880, in which he says, entrapment is *no* defense, citing three federal cases,¹² in none of which, however, was the defense raised. No mention of the doctrine is found in Bishop's treatise until the ninth edition, published in 1923. In the tenth edition of Wharton, published in 1896, he says entrapment is a defense, giving the curious reason, "the government is precluded from asking that the offenders thus decoyed should be convicted. They are associates with the government in the commission of the crime, and the offense being joint, the prosecution must fail. If that which one principal does is not a crime, the other principal cannot be convicted for aiding him."¹³

There is much conflict in the decisions and inconsistency in the reasons for the decisions in entrapment cases. These begin with the procedure by which the defense should be presented. This confusion

7. *Love v. People*, 160 Ill. 501, 43 N. E. 710 (1896); *People v. McCord*, 76 Mich. 200, 42 N. W. 1106 (1889).

8. *Saunders v. People*, 38 Mich. 218 (1878).

9. *Commonwealth v. Wasson*, 42 Pa. Super. 38 (1910).

10. *Commonwealth v. Bickings*, 12 Pa. Dist. 206 (1903).

11. *O'Brien v. State*, 6 Tex. App. 665 (1879).

12. *United States v. Foye*, 25 Fed. Cas. 1108, No. 15,157 (C. C. Mass. 1853); *United States v. Cottingham*, 25 Fed. Cas. 673, No. 14,872 (C. C. N. D. N. Y., 1852); *United States v. Whittier*, 28 Fed. Cas. 591, No. 16,688 (E. D. Mo. 1878), cited note 3 *supra*.

13. I WHARTON, CRIMINAL LAW (10th ed. 1896) 166.

is the result of differences of theory on which the defense is based. Some courts hold that entrapment is a defense only when, and because, it proves that the defendant was not guilty of the offense charged; hence the defense must be raised by a plea of not guilty. Others hold that the defense may be raised by a motion to quash the indictment, by a plea in bar, or that the court itself of its own motion may, and indeed should, where entrapment exists, stop the prosecution and set the defendant at liberty, or free him on a writ of habeas corpus. In *Sorrells v. United States*,¹⁴ Mr. Justice Roberts, Mr. Justice Brandeis and Mr. Justice Stone took the second view, and the remainder of the court, with the exception of Mr. Justice McReynolds, who dissented, the first.

Passing from the procedure to the defense itself, we find the cases in equal confusion. The most frequent definition of the doctrine of entrapment in decisions prior to *Sorrells v. United States* is, that where an officer charged with the investigation of crime, suspecting that a certain person is engaged in the commission of crime, has made overtures of a certain kind (characterized variously in the definition) for the commission of such crime to the defendant, and the defendant has committed the crime because of such overtures, and would not have committed it except for such overtures, the defendant is entitled to a verdict of not guilty on the ground of entrapment. The cases assume that the officer was acting in his official character and not to share in the fruits of the crime. The conflicting results of the decisions on this phase of the doctrine begin first with the different characterization of the overture made by the officer to the defendant. Here one finds the decisions turning on supposed distinctions between words of similar meaning. Did the officer "solicit" the defendant to commit the crime, or "instigate" its commission; did he "induce" the defendant to commit it, or merely "lay a trap" for him; did he "decoy" the defendant into the commission of the crime or did he "ensnare" him; did he "incite" or "lure" him to commit it, or did the officer only "furnish facilities" for its commission? On the supposed differences in meaning between one or another of these expressions most of the decisions are based. The different descriptive characterizations given to the act of the officer by different judges as the test to determine the defendant's guilt (e. g. "provokes", or "incites") and the different meaning given by different judges to the act of the officer even when these different judges use the same characterization of the act as the test, cause much conflict. In *United States v. Lynch*¹⁵ the act of the officer that will excuse the defendant is characterized as one that "provokes or creates" the crime;

14. 287 U. S. 435 (1932).

15. 256 Fed. 983, 984 (S. D. N. Y. 1918).

in *United States v. Echols*¹⁶ it is one that "incites or induces and lures"; in *Gargano v. United States*¹⁷ it is "induced"; and in *Billingsley v. United States*¹⁸ it is "inducing the original intent" and "enticing" the defendant. In *Ritter v. United States*¹⁹ an instruction to the jury that it was for them to determine whether the act of the officer was a "fair decoy" or not was held "as fair to the accused as the law will warrant." In *Strader v. United States*²⁰ the court characterized the act of the officer which would entitle the defendant to an acquittal as a "decoy to ensnare" the defendant.

Not only do the courts differ in their characterization of the act of the officer which will serve to excuse the defendant, but when they use the same word to describe the nature of this act, for example the word "instigation", one court will hold that an act of the officer "instigated" the offense, a different court, and sometimes the same court in another case, will hold an identical act not to have "instigated" the crime.

In *Casey v. United States*²¹ Mr. Justice Holmes, who spoke for the majority of the Court, said, "We do not feel at liberty to accept the suggestion that the Government *induced* the crime,"²² and held that the acts of the officer did not excuse the defendant; while Mr. Justice Brandeis called the same act of the officer "instigation"—"the alleged crime was instigated by the officers of the Government"²³—and stated that the doctrine of entrapment applied, and that the defendant should be acquitted. On the differences in meaning given by judges and juries to these characterizations of the overtures made by the officer to the defendant, it comes about that on practically identical operative facts the defense is held valid in one case and denied in another, and the defendant held to be a criminal or an "innocent victim". The confusion does not end here. Many of the cases turn on whether or not the officer suspected or had grounds to believe that the defendant was engaged in the commission of similar crimes.²⁴ Yet Judge Woodrough says in *United States v. Washington* that "Neither suspicion or honest belief that the defendant committed the offense at other times has any place in the inquiry."²⁵ In other cases it is held that evidence of grounds for such suspicion or belief is

16. 253 Fed. 862 (S. D. Tex. 1918).

17. 24 F. (2d) 625 (C. C. A. 5th, 1928).

18. 274 Fed. 86 (C. C. A. 6th, 1921).

19. 293 Fed. 187 (C. C. A. 9th, 1923).

20. 72 F. (2d) 589 (C. C. A. 10th, 1934).

21. 276 U. S. 413 (1928).

22. *Id.* at 418. Italics added.

23. *Id.* at 423.

24. *United States v. Eman Mfg. Co.*, 271 Fed. 353 (D. C. Colo. 1920); *St. Clair v. United States*, 17 F. (2d) 886 (C. C. A. 8th, 1927).

25. 20 F. (2d) 160, 162 (D. C. Neb. 1927).

not hearsay and is admissible²⁶ in evidence. While most courts do not mention the motive which prompted the defendant to commit the crime as a factor, others make his innocence or guilt depend on it.²⁷ When, however, the character of overtures used by the officer fails to come within the magic word which, being current in the jurisdiction, makes available this defense, if the facts of the case are such as to excite sufficient pity of the court for the defendant, or sufficient indignation at the acts of the officer, the defendant may nevertheless be held entitled to an acquittal on the ground of "public policy," or the necessity of protecting "the purity of government and its processes,"²⁸ or because any such conduct in a civil action would be held to have been a "violation of the decencies of life"²⁹ and to be in "disregard of the rules . . . which formulate the ethics of men's relation to each other."³⁰

Judges have not been silent with regard to the unsatisfactory state of the law concerning entrapment. Judge Learned Hand in *United States v. Becker* says, "The decisions are plentiful, but the judges generally content themselves with deciding the case upon the evidence before them; we have been unable to extract from them any definite doctrine, and it seems unprofitable once more merely to catalogue the citations";³¹ and Judge Woodrough in *United States v. Washington* says in regard to the doctrine, "being based on no statute and developed without sanction or encouragement by the Supreme Court the most this court can do is to declare how the doctrine will be applied in the instant case and others like it on this docket. . . . I adhere to my opinion that the general question is political and not judicial."³²

Though the Supreme Court of the United States had adverted to the doctrine of entrapment in an earlier case,³³ the first case in which it had occasion to determine its validity, the reasons on which the doctrine is based, and the procedure applicable thereto did not reach that court until 1932.³⁴ The doctrine, as evolved by the lower federal courts, is defined in this case as follows: "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer. Federal and state courts have held that substantial proof of entrapment as thus defined calls

26. *Strader v. United States*, 72 F. (2d) 589 (C. C. A. 10th, 1934).

27. *Wall v. United States*, 65 F. (2d) 993 (C. C. A. 5th, 1933). See also *Hunter v. United States*, 62 F. (2d) 217 (C. C. A. 5th, 1932).

28. *Roberts, J.*, in *Sorrells v. United States*, 287 U. S. 435, 453 (1932).

29. *Ibid.*

30. *Ibid.*

31. 62 F. (2d) 1007, 1008 (C. C. A. 2d, 1933).

32. 20 F. (2d) 160, 161 (D. C. Neb. 1927).

33. *Casey v. United States*, 276 U. S. 413 (1928).

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

for submission of the issue to the jury and warrants an acquittal." ³⁵ The counterpart of the doctrine is thus stated: "the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime. Resort to such means does not render an indictment found a nullity nor call for the exclusion of evidence so procured." ³⁶

The typical factual situation in cases involving entrapment is that the officer, suspecting that the defendant has been engaged in some illegal practice, e. g., in the illegal sale of liquor or in sending obscene matter through the mails, approaches the defendant and offers to buy liquor from him, or sends a decoy letter to him requesting him to mail the obscene matter to the writer. The defendant, ignorant that the solicitor is an officer, sells him the liquor, or mails to him the matter requested. The defendant is then indicted and placed on trial for the offense which he was thus induced to commit.

In the application of the doctrine stated above, there seems to be a strange confusion of thought. When it is said that the defendant is entitled to an acquittal if the offense was conceived and planned by the officer, of what "offense" is the court speaking? Presumably the offense for which the defendant is on trial. But in practically every case of entrapment *that* offense was "conceived" and "planned" by the officer; that offense, that sale, that mailing, would never have taken place if the officer had not conceived it, planned it and instigated it, for the defendant was unaware even of the existence of the officer before the latter approached him, and therefore could not have "planned" or had the "conception" of dealing with him.

Proof that the conception and planning of the offense was that of the officer is not, however, alone, according to the formula, sufficient to prove entrapment. It must also appear that the defendant would not have committed the offense "except for the trickery, persuasion, or fraud of the officer." ³⁷ What has been said above applies equally to this statement. Of what "offense" is the court speaking? The defendant may have committed similar offenses in the past, but he is not on trial for those; or he might have committed an offense similar to the one for which he is on trial if the officer had not decoyed him into this one, but neither is he on trial for such as yet uncommitted offense. "The offense" for which he is on trial, however, would certainly not have been committed by him if it had not been "conceived and planned" by the soliciting officer; certainly there was no proof in any of the cases that it would have been committed without such conception and planning.

35. *Id.* at 454.

36. *Id.* at 453-454.

37. *Id.* at 454.

Therefore, since in all of the cases in which entrapment has been interposed as a defense the crime for which the defendant was being tried was "conceived and planned" by an officer, and also since the defendant would not have committed it "except for the trickery, persuasion or fraud of the officer", the defendant could never be convicted; yet, as a matter of fact, under the doctrine as stated the cases in which the defense has been allowed are comparatively few. Apparently what the courts have in mind in making the supposed fact that the defendant would not have committed the offense except for the trickery, fraud or persuasion of the officer an element of this defense, seems to be, not that he would not have committed the crime for which he was on trial if he had not been tempted to it by the officer, but that it did not appear that he had previously been engaged in committing crimes of a similar character. It is not clear, however, why this should be a consideration, even if it were admissible in evidence, which it would seem not to be.³⁸ It is a strange doctrine, that would make the guilt or innocence of an accused or his liability to punishment depend not on proof that he committed the offense charged, but on whether or not he had also committed other offenses of a similar character, or on a supposed fact that he would not have committed the one charged if he had not been tempted to do so (which fact is impossible of ascertainment), for the fact, even if proved, that he had committed similar crimes furnishes no proof that he would continue to commit them indefinitely. Even the criminal law knows the phrase *locus poenitentiae*.

Leaving the doctrine itself and coming to the ground on which it is based, one finds the decisions equally unsatisfactory. Most of the cases state no basis for the doctrine, merely saying that the defendant is entitled to an acquittal because he was "entrapped". The cases in which a rationalization is attempted differ widely as to the reasons on which the doctrine is founded. It was hoped, when the case of *Sorrells v. United States* reached the Supreme Court, that there would be an agreement on all phases of the doctrine—its validity, the reasons on which it is founded, and the procedure involved. In the minority opinion in the case, it was said, "the present case affords the opportunity to settle these matters as respects the administration of the federal criminal law."³⁹ Unfortunately, not only did members of the Court differ sharply with regard to the procedure, but also with regard

38. Evidence of the commission of other crimes by the defendant is sometimes admissible in criminal cases but generally only when it tends to prove some element of the crime such as that the proven act was not done by the accused or that the act was inadvertent, or not done with the necessary malice, knowledge, intent, or other mental state essential. In the entrapment cases all elements of the crime have been proved directly, or are admitted.

39. 287 U. S. 435, 454 (1932).

to the reasons on which both the procedure and the doctrine was based, and even on the existence of the doctrine itself. The facts involved in this case were typical. The offense charged was the illegal sale of liquor. The officer, a prohibition agent, visited the defendant's house with three other persons and was introduced by them as a furniture dealer. After some conversation, the agent asked the defendant to get him some liquor, stating that he wished to take it to his partner in Charlotte. Defendant at first denied that he had any liquor; but after further conversation, in the course of which the agent several times asked defendant to get liquor for him, and in which it developed that defendant and the agent had been soldiers in the same army division in the World War, defendant left, and in a few minutes returned with one half gallon of liquor which he sold to the agent for five dollars. The defendant was later indicted and tried for the illegal possession and sale of the liquor. He did not take the stand, but introduced a number of witnesses who testified that he was a man of good character. The government, in rebuttal, introduced testimony to the effect that defendant bore the reputation of being a rum-runner. Evidence was also introduced, over defendant's objection, that about six weeks after this sale, defendant at his home sold half a gallon of liquor to the same and another agent.⁴⁰ The agents' object in soliciting the sale was the prosecution of the defendant. The trial judge ruled that as a "matter of law" there was no entrapment, and refused to submit the issue of entrapment to the jury. A verdict of guilty followed. The Circuit Court of Appeals affirmed the conviction. A writ of certiorari was granted by the Supreme Court, limited to the question of whether the evidence on the issue of entrapment was sufficient to go to the jury. In order to decide this question, the Supreme Court found it necessary to consider the ground on which the defense of entrapment is founded.

The Chief Justice, speaking for the majority of the Court, reversed the judgment and remanded the case saying, "We are of the opinion that upon the evidence produced in the instant case the defense of entrapment was available and that the trial court was in error in holding that as a matter of law there was no entrapment, and in refusing to submit the issue to the jury."⁴¹ While the portion of the opinion just quoted states that under the evidence the "defense of entrapment was available," the remainder of the opinion is devoted to showing that there does not exist and cannot exist, either in the instant, or in any other case, a defense of entrapment.

40. This statement of facts is from the opinion of the Circuit Court of Appeals, *Sorrells v. United States*, 57 F. (2d) 973 (C. C. A. 4th, 1932).

41. 287 U. S. 435, 452 (1932).

The Court rests its decision, reversing the conviction, on the ground that Congress, in enacting the prohibition statute, did not intend it to apply to cases in which an officer instigated the sale of the liquor. This is, of course, to hold that the defendant in selling the liquor committed no crime; and it is of the essence of the doctrine of entrapment that the defendant committed the crime charged. It is only when that has been proved that resort is had to the defense of entrapment.

This denial of the existence of the doctrine is made clear by a further statement of the Court: "We are unable to approve the view that the court, although treating the statute as applicable despite the entrapment, and the defendant as guilty, has authority to grant immunity or to adopt a procedure to that end."⁴² Again, it is said: "when defendant has been duly indicted for an offense found to be within the statute, and the proper authorities seek to proceed with the prosecution, the court cannot refuse to try the case in the constitutional method because it desires to let the defendant go free."⁴³ And again, denying the validity of analogues from civil cases, occurs the statement, "in a criminal prosecution, the statute defining the offense is necessarily the law of the case."⁴⁴

The minority opinion characterizes the opinion of the Court as "a new method of rationalizing the defense of entrapment." It does more than rationalize it: it denies its existence. It is not an application of that doctrine, but the application of another—the most fundamental of the criminal law, namely, that one shall not be convicted of a crime when the act done by him was not unlawful—for if the statute did not apply to the facts of the case, the defendant was privileged to sell liquor to the officer and hence his act in so doing was not unlawful. This view, that the most flagrant abuse of authority by an officer in instigating a crime furnishes no excuse if the crime is committed, is undoubtedly in accord with the general principles of the criminal law. In the nature of things there can be no defense to a crime committed. The so-called "defenses" of the criminal law are not defenses to crimes; they do not furnish excuses for a crime which has been committed; if established, they disprove some necessary element of the crime charged and hence negative the commission of the crime by the defendant. "Alibi" when it is a "defense", is so when and because it proves that the forbidden act was not done by the accused; "self defense", "defense of others", or "of property", or in "prevention of crime" are defenses when they show that the act done was one privileged under the law; and "compulsion", because the act was not done of the will of the

42. *Id.* at 448.

43. *Id.* at 450.

44. *Ibid.*

accused.⁴⁵ "Infancy", "insanity" and "intoxication", are defenses when they show incapacity, or, like "mistake of law", "of fact", or "consent", when they disprove some necessary mental element of the crime charged, such as malice or intent. The other "defenses" such as "autre-fois acquit", "autre-fois convict", and "pardon" are not defenses to a crime but bars to a second conviction for a crime of which the accused has already either been acquitted or convicted. The defense based on laches of the state in prosecuting did not exist at common law. The principle at common law is: "time does not run against the state." The defense of entrapment, if it is a defense, is, therefore, *sui generis*. It is not pleaded against a second conviction but against a first. It excuses the defendant though his will was free and the act and mental state necessary to constitute the crime charged have been abundantly proved against him. It would seem, therefore, that the court was on solid ground in repudiating the doctrine of entrapment, a necessary element of that doctrine being that the defendant has committed the crime with which he is charged.

It might be thought that the view of the majority of the Court in this case, while it denies the existence of the doctrine of entrapment as a defense, serves the same purpose, that of excusing a defendant for an act, knowingly done by him, expressly forbidden by a statute, on the ground that the legislature did not intend the statute to apply to cases in which it appeared that the forbidden act was done at the instigation of an officer. But this is not true. All that the case decides is that the particular prohibition statute involved does not apply to defendants who were entrapped into violating its provisions. It furnishes no rule with regard to a person "entrapped" into violations of statutes forbidding the possession or sale of narcotics or poisons, sales by short weights and measures, the sending of obscene matter through the mails, using the mails to defraud, or the score of other prohibitory statutes for the violation of which the courts prior to *Sorrells v. United States* excused defendants under the doctrine of entrapment. Is a defendant hereafter indicted for violation of the statute prohibiting the sales of opium, as well as one indicted under the Prohibition Act, to be excused on the ground that the statute prohibiting the sale of opium was not intended by Congress to apply to sales made at the instigation of an officer? Prior to the *Sorrells* case, the court would have held that a sale of opium instigated by an officer was within the doctrine of entrapment. That doctrine is now no longer in

45. "No man can be guilty of a crime without the will and intention of his mind. It must be voluntary." Lord Mansfield, in Proceedings against Stratton, 21 How. St. Tr. 1046, 1223 (1779).

existence; the defendant can be excused only if it is held that Congress in enacting the statute against the sale of opium intended it not to apply to sales instigated by an officer.

In the case of *Balint v. United States*⁴⁶ the statute prohibiting the sale of opium was under consideration. In an opinion delivered by Chief Justice Taft, it was held that Congress intended the statute to apply to the case of a sale made by one who did not know that the article he sold was opium. Unless a court is to hold that though Congress intended the statute to apply to a sale inadvertently made, it did not intend it to apply to a sale intentionally made through instigation by an officer, the reasoning of the *Sorrells* case will not reach the same result as would the application of the doctrine of entrapment. That the conclusion arrived at in the *Sorrells* decision is not to be applied to every case in which the alleged offense was instigated by an officer, is shown by the statement of the Court that "The conclusion we have reached upon those grounds carries its own limitations. We are dealing with a statutory prohibition and we are simply concerned to ascertain whether in the light of a plain public policy and of the proper administration of justice, conduct induced as stated should be deemed to be within that prohibition. We have no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions. No such situation is presented here. *The question in each case* must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object."⁴⁷

The Court, justifying its reading into the statute the unexpressed exception that it shall not apply to cases of entrapment, says, "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned,"⁴⁸ and cites several cases as precedents—none, however, involving entrapment. It quotes⁴⁹ from *United States v. Kirby*, "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence";⁵⁰ and from *United States v. Katz*,⁵¹ "general terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be

46. 258 U. S. 250 (1922).

47. 287 U. S. 435, 450 (1932). Italics added.

48. *Id.* at 446.

49. *Id.* at 447.

50. 7 Wall. 482, 486 (U. S. 1868).

51. 271 U. S. 354, 362 (1926).

satisfied by a more limited interpretation,"⁵²; and "to the same effect," from a number of other cases.⁵³

While courts do occasionally read into criminal statutes a provision the effect of which is to make the statute inapplicable to a case when the facts of that case are within its expressed terms, it is difficult to see how any of the decisions cited—in none of which the defendant knowingly violated the provisions of the statutes under which he was indicted—or the governing principles of those decisions, apply to cases of "entrapment" in which a person, *sui juris*, who knows of the statute, believes that it applies to him, is unaware that he is dealing with an officer, and is under no compulsion or necessity or infirmity of reason, deliberately violates the law. The reasons given in the majority opinion for reading an unexpressed exception into the statute involved in the *Sorrells* case, would apply with greater force to many statutes to which no exceptions are allowed by the courts. The injustice involved in applying the statute in the *Sorrells* case would certainly be less than in the cases in which the accused did not know, and could not know, of the existence of the statute he violated; yet in those cases the courts have no hesitation in saying, notwithstanding the "hardship" and "injustice" resulting, that "ignorance of the law is no excuse". The same is true of that large class of cases in which the accused with innocent mind brought himself within the literal terms of a statute through non-negligent ignorance of some essential fact.

Chief Justice Taft said, in such a case, involving a sale of opium, "its manifest purpose [of the statute] is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him."⁵⁴ He recognizes also that Congress may realize that injustice may follow the application of a statute and still intend it to apply, notwithstanding the injustice, by saying, "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug and concluded that the latter was the result preferably to be avoided."⁵⁵ In *Rosen v. United States*⁵⁶ the defendant was indicted for mailing obscene matter. To his defense that he

52. 287 U. S. 435, 447 (1932).

53. *Id.* at 448. An argument to show that Congress did not intend the statute to apply to cases in which an officer entrapped the defendant to violate it might be made on the ground that as Congress was presumably aware that the courts excused entrapped defendants and did not expressly provide that the statute should apply in such cases, it intended it should not apply. This argument is, however, so obvious that the fact that the Court ignored it would seem to show that the Court did not consider it valid, particularly since the Court based its holding on other grounds.

54. *United States v. Balint*, 258 U. S. 250, 254 (1922).

55. *Ibid.*

56. 161 U. S. 29 (1896).

did not know the matter he mailed was obscene, the Court said, "Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States." ⁵⁷

Furthermore it must be asked, what are the limits, if any, to the class of prohibitions into which the Court will read an exception because of entrapment? The minority in the *Sorrells* case said, "no guide or rule is announced as to when a statute shall be read as excluding a case of entrapment, and no principle of statutory construction is suggested which would enable us to say that it is excluded by some statutes and not by others." ⁵⁸ The position of the majority was that "The question in each case must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object." ⁵⁹ If this is to be the test, what of such cases as *Grimm v. United States*,⁶⁰ *Rosen v. United States*,⁶¹ and *Price v. United States*?⁶² In the *Grimm* case an inspector of the Government, suspecting that the defendant was engaged in the business of dealing in obscene pictures, wrote to the defendant asking him how many "fancy photographs" the latter could furnish him, and saying the writer would send him a trial order. Upon receiving an answer stating that defendant could supply such pictures, the inspector sent the latter an order for them. On those facts the defendant was tried and convicted under a statute making it unlawful to give information by mail where, how, or by whom such pictures could be obtained. The Supreme Court affirmed the conviction. The *Grimm* case was approved and followed, on similar facts, in the *Rosen* case. In *Price v. United States*,⁶³ in which obscene matter was mailed in response to several decoy letters written by a Government inspector, the Supreme Court again held that entrapment was no defense. On what ground can it be said that Congress intended the statute to apply to the acts of Grimm and Price who violated the statute under which they were indicted on the solicitation of the officer and not to the act of Sorrells who, on like solicitation, violated the statute under which he was indicted? There seem to be no such differences in the "objects of the law," or in the "absurdity of the results" that would follow its application which are "foreign to the legislative purpose," or entailing "flagrant injustice" in these cases that would indicate that Congress

57. *Id.* at 41.

58. 287 U. S. 435, 457 (1932).

59. *Id.* at 451.

60. 156 U. S. 604 (1895).

61. 161 U. S. 29 (1896).

62. 165 U. S. 311 (1897).

63. *Ibid.*

intended the statute to apply in these three cases and not in the *Sorrells* case.

After all, the "object of the law" created by all criminal statutes is to prevent (by punishing those who violate their provisions) the conduct forbidden by them, whether the statute is directed against the sale of liquor, against homicide, larceny or the sale of opium.

If the injustice or absurdity resulting from the application of the provisions of a statute in entrapment cases is to be the test of the applicability of the statute, what of cases in which the acts of the officer are described by some word which in a particular jurisdiction does not entitle the defendant to an acquittal? Is the *Sorrells* case a mandate to the lower federal courts to free the defendant if they think a conviction would be unjust or absurd irrespective of the character of the overtures? If this is true, the present confusion is likely to become more confounded.

Prior to the *Sorrells* case there was one source of conflict, namely, was the defendant "entrapped"; now there are two sources: first, was the defendant entrapped; second, did Congress intend the particular statute on which the defendant was indicted to apply to cases in which the defendant was entrapped?

There has been, to date, no conflict in the decisions subsequent to the *Sorrells* case solely because of the new doctrine announced in that case; this however is for the reason that, strange to say, none of these cases so much as refer to that doctrine. Though nine of these cases involved statutes other than that involved in the *Sorrells* case, the courts did not construe these statutes to determine whether Congress intended them to apply in entrapment cases but rationalized their decisions on the basis of the tests in vogue prior to the *Sorrells* case.

The minority opinion in the *Sorrells* case, while agreeing with the majority that the defendant should not be convicted, denies in no uncertain terms what it characterizes as "this new method of rationalizing the defense" of entrapment, adopted by the majority in granting immunity to the defendant on the ground that the statute did not apply. "This amounts," says the minority, "to saying that one who with full intent commits the act defined by law as an offense is nevertheless by virtue of the unspoken and implied mandate of the statute to be adjudged not guilty by reason of someone else's improper conduct. . . ."⁶⁴ to afford him as his right a defense founded not on the statute, but on the court's view of what the legislature is assumed to have meant, is to grant him unwarranted immunity."⁶⁵ The minority opinion denies

64. 287 U. S. 435, 456 (1932).

65. *Id.* at 458.

that Congress did not intend the statute to apply to cases in which the act of the defendant was instigated by an officer. "His [the defendant's] action, so induced," says the opinion, "none the less falls within the letter of the law and renders him amenable to its penalties . . . his act, coupled with his intent to do the act, brings him within the definition of the law; he has no rights or equities by reason of his entrapment. . . . We cannot escape this conclusion by saying that where need arises the statute will be read as containing an implicit condition that it shall not apply in the case of entrapment."⁶⁶ This is, of course, to say that Congress did intend the statute to apply to cases of entrapment. Yet the minority of the Court, like the majority, refuse to apply it; the majority because they think Congress did not intend it to apply; the minority because, though they think Congress did intend it to apply, believe that they ought not to apply it.

If the defendant has committed the crime charged and is subject to the penalties therefor, on what doctrine is he granted immunity, for immunity he has if he is not to be convicted, and the minority also held that convicted he should not be?

"The doctrine rests, rather," says the minority opinion, "on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs 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."⁶⁷

That courts should refuse to enforce a constitutional statute, within the power of the legislature, and admittedly intended by the legislature to apply to the facts of a given case because its enforcement would be against public policy is a startling doctrine. Criminal statutes are enacted for the very reason that the legislature deems the prohibited conduct to be against public policy. To hold that the courts can set them aside because their enforcement would violate public policy, is to say either that Congress in enacting the statute was ignorant of the rules of such policy, or, knowing them, intended to violate them. The Supreme Court has heretofore invariably held that while the court had the power to refuse to apply a law if in its opinion it was unconstitutional, it was not concerned with its effect on public policy; that Congress, not the court, was the proper judge of such matters.

In *Chicago, Burlington and Quincy Railroad Company v. McGuire*⁶⁸ the Court said, "The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State.

66. *Id.* at 456.

67. *Id.* at 457.

68. 219 U. S. 549, 565 (1911).

While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law."

"If the court may construe an act of Congress," says the minority opinion in the *Sorrells* case, in controverting the opinion of the majority, "so as to create a defense for one whose guilt the act pronounces, no reason is apparent why the same statute may not be modified by a similar process of construction as to the penalty prescribed. But it is settled this may not be done. *Ex parte United States*, 242 U. S. 27." ⁶⁹ By a parity of reasoning it would seem that if the court may refuse to apply the admittedly applicable provisions of the statute because the court thought that to apply it would be against public policy, no reason is apparent why the court should not refuse to apply the penalty prescribed by the statute on the ground that it was too severe to be in accordance with public policy. Heretofore the courts have refused to do this so long as the penalty prescribed did not infringe the constitutional provision against cruel and unusual punishment.

The power of the courts would not end here. A statement of Chief Justice White, quoted in the majority opinion, is to this effect: "if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would necessarily seem to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal case because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power permanently to refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced." ⁷⁰

It is the function of the legislative branch of the government to determine, within the bounds of the Constitution, what acts are against public policy, stigmatize them as crimes, and prescribe the penalty for their commission; and as said by Judge Parker when this case was before the circuit court, "there is no higher public policy than that all men should obey the law." ⁷¹

The minority opinion states the doctrine of entrapment in criminal law is the analogue of the same rule that in civil cases requires the courts to refuse their aid to the perpetration and consummation of an

69. 287 U. S. 435, 458 (1932).

70. *Id.* at 449.

71. 57 F. (2d) 972, 977 (C. C. A. 4th, 1932).

illegal scheme: "Invariably they hold a civil action must be abated if its basis is violation of the decencies of life, disregard of the rules, statutory or common law, which formulate the ethics of men's relations to each other. Neither courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong."⁷² The majority opinion answers this by pointing out that: "When courts of law refuse to sustain alleged causes of action which grow out of illegal schemes, the applicable law itself denies the right to recover. Where courts of equity refuse equitable relief because complainants come with unclean hands they are administering the principles of equitable jurisprudence governing equitable rights. But in a criminal prosecution, the statute defining the offense is necessarily the law of the case."⁷³ A closer analogy than the equity rule would seem to be found in the cases in which the Government seeks to convict by means of evidence illegally obtained by an officer. In these cases, however, the particular item of evidence is merely excluded; the illegal act of the officer in obtaining it is not held to entitle the defendant to an acquittal.

The minority opinion, like the majority, places no limit on the type of case which comes within the ambit of its doctrine. Indeed, it says there is no such limit. The doctrine is equally applicable, says the opinion, "whether the offense is one at common law or merely a creature of statute. . . . This view calls for no distinction between crimes *mala in se* and statutory offenses of lesser gravity; requires no statutory construction, and attributes no merit to a guilty defendant. . . ."⁷⁴ This is indeed a broad statement of the doctrine of entrapment. The phraseology would indicate that if a government detective suspecting a person of previous murders should instigate a murder by him, should stand by and see him commit it, the defendant would be entitled to an acquittal. Would a court so hold? The writer has been unable to find any case in which a court has held entrapment to be a defense, except in indictments for statutory offenses. There are, it is true, many cases of indictment for common law crimes induced by overtures of an officer in which the court has held that the defendant was entitled to an acquittal. These have been, however, indictments for such crimes as larceny and burglary in which non-consent to the taking of the property or to the entry into the dwelling is an essential element. While such cases are treated in text books, and sometimes in the opinions of the courts, as cases of entrapment, entrapment was not the ground of acquittal. Entrapment assumes that the defendant committed the offense with which he is charged; in the classes of cases above men-

72. 287 U. S. 435, 454 (1932.)

73. *Id.* at 450.

74. *Id.* at 455.

tioned the defendant was held not guilty because the overtures of the officer made, as they were, with the cooperation of the owner of the property or of the dwelling, amounted to consent of the owner, and hence disproved the element of non-consent necessary for a conviction of the offense charged.

It is not surprising that the subject of entrapment should be in confusion both as to the results of the cases and the grounds on which they are decided. In truth there seems to be no rational basis for the doctrine. Its origin is to be found in the natural feeling, shared by judges, that a person should not be made the victim of what Mr. Justice Holmes called in speaking of evidence obtained by wire tapping by an officer, "dirty business".⁷⁵ There is scarcely a case sustaining the defense of entrapment in which such words as "detestation", "indecent", "to be deplored", "intolerable" do not occur to describe the acts of the officer in luring the defendant into the crime. Moved by this detestation and, in a lesser degree, by sympathy for the "unwary", "innocent" defendant, the courts have groped for some legal principle on which to render nugatory the acts of the officer or to excuse the entrapped defendant. Some have found it in estoppel;⁷⁶ some on the ground that entrapment destroys the voluntary character of the defendant's act;⁷⁷ some on the ground of public policy.⁷⁸ The majority opinion in *Sorrells v. United States*, repudiating all these grounds for the doctrine, as well as the doctrine itself, offers a new method of making effective this feeling of detestation and sympathy.

It suggests as a ground on which trial courts may still exercise their sympathy for entrapped defendants and their desire to discourage this practice, the possibility of excusing the defendant by holding that he committed no crime because of the injustice or absurdity resulting from applying the statute involved. In view of the vigorous and persuasive dissent from this view by Mr. Justice Roberts, Mr. Justice Brandeis, and the present Chief Justice, and of the uncertainty and conflict that will inevitably result from the differing views of judges as to when, if ever, a conviction of a defendant who voluntarily violated the plain prohibitions of a known statute, would or would not be unjust or absurd, it does not seem presumptuous to suggest that there is another and more effective method by which this practice of "entrapment" may be stopped.

Certainly the whole practice, whether it consists in the mere "laying of a trap or decoy" or of a scheme whereby the officer "conceives and

75. *Olmstead v. United States*, 277 U. S. 438, 470 (1927).

76. *United States v. Lynch*, 256 Fed. 983 (S. D. N. Y. 1918).

77. *Voves v. United States*, 249 Fed. 191 (C. C. A. 7th, 1918).

78. *Ritter v. United States*, 293 Fed. 187 (C. C. A. 9th, 1923).

plans" the offense, is a "dirty business" and should be ended. Of equal certainty, the method in use by the courts for sixty-three years, that of acquitting guilty defendants in cases of the grosser form of entrapment, has not ended even the practice in that grosser form.

It is sometimes stated in justification of the practice that an officer may decoy a person to commit a crime as distinguished from conceiving and planning it, that such activity is frequently essential to the enforcement of the law.⁷⁹ This is the argument formerly used for the employment of torture, and still used by detection officials to justify the "third degree". If the detection agencies of government are able to ferret out and bring to justice the perpetrators of really serious offenses without resorting to the practice of tempting suspected persons to commit an additional one, why can they not resort to less questionable methods to secure evidence of guilt in the class of the minor offenses in which this practice of entrapment is employed?

As far as the accused, himself, is concerned, he seems not to be deserving of more sympathy than many defendants, and less than some who are frequently convicted in our courts without redress, as the writer has attempted to show above. If the desire is to abate the practice of entrapment, a more effective method than the present one of excusing the defendant whose moral guilt, and whose legal guilt of violating the statute is clear, lies in the indictment and conviction of the officer. A few such convictions and the practice of entrapment would cease. There can be no doubt that under the principles of the criminal law the officer in these cases is guilty of a crime. If a private person solicits another to commit an offense, the former is guilty of the crime of solicitation if the latter refuses to commit the offense solicited, and as an accessory or principal to the offense if the other commits the offense solicited. There is no reason why an officer should not come within the same principle. That the officer has no legal authority to instigate the commission of a crime is shown by many statements of the courts and by the universal condemnation of such acts by the courts. No other defense would seem to exist. No other element of the offense is lacking; the act of solicitation is done; the knowledge is present that the act solicited will, if done by the person solicited, be a crime. It cannot be said that he did not have the "criminal intent"; he had the same intent that the solicitee has, namely, the intent that the forbidden act be done, knowing that if it be done it will be a crime, which is all the intent necessary for the offense of solicitation. The officer could not defend on the ground that the motive prompting his act was a good one. In the first place, it is universally held that the

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

fact that a defendant has a good motive in doing a forbidden act is no excuse; and in the second place, it cannot be said that the motive of the officer in inducing the defendant to commit the crime so that he may be prosecuted is a good one when the courts not only universally condemn the conduct of the officer, but hold, as they do, that it is because the solicitation was done with the motive of prosecution that the person solicited should be excused.