

The Defense of Entrapment

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has been put in issue. But where a specific guarantee of the Constitution is alleged the present day courts will probably make inquiry concerning its violation.

The attitude that all citizens except those in the military forces shall have their substantial rights protected seems inconsistent with the spirit of the Constitution. In this area a serious reappraisal of the consequences of this view seems necessary. One remedy might be a post-conviction hearing act similar in principle to the statute recently enacted in Illinois.³⁴ The Illinois act originated from the confusion generated by the inability of the courts to adjudicate properly the claims of prisoners that constitutional rights had been violated at their trial. This method of review provides a simple, direct hearing and obviates the limitations of habeas corpus.

THE DEFENSE OF ENTRAPMENT

It is well known and well settled that a criminal act and intent are essential elements for the commission of a crime, and want of either of these elements is fatal to criminal prosecution. A successful defense to criminal prosecution is entrapment, the seduction or improper inducement by officers of the law to commit a crime,¹ when it can be shown by the accused that the original intention was not his, or that there was lacking on his part some act necessary to complete the crime.

If the criminal intent originates in the mind of the law enforcer or entrapping person and the accused is lured into the commission of the offense, there can be no conviction.² *Rex v. Martin*,³ an old English case, readily illustrates such entrapment wrongful because of the origin of intent. A prisoner of war, in England, was directed by his keepers to go beyond the parole limits merely so that he could be prosecuted for escape. The prisoner, once beyond the limits, was promptly arrested. The court, however, held that he could not be convicted for escaping or attempting to escape because he had not intended to escape.

Generally, courts have no difficulty in refusing to convict a person where the genesis of the idea or real origin of the criminal act clearly springs, not from the accused, but from the entrapper, and his purpose is to arrest merely for the sake of arresting. Such over-zealous behavior by law officers is not tolerated by the courts in most jurisdictions.⁴ Some jurisdictions, however, refuse to excuse the commission of a crime when the initiative or intent did not spring from the accused, and the entrapper's

³⁴ Ill. Rev. Stat. (1951), c. 38, §§ 826-832.

¹ *Morei v. United States*, 127 F. 2d 827 (C.A. 6th, 1942).

² 15 Am. Jur., Criminal Law § 336 (1938).

³ 168 Eng. Rep. 757 (1811).

⁴ *Love v. People*, 160 Ill. 501, 43 N.E. 710 (1896); *Browning v. State*, 31 Ala. App. 137, 13 S. 2d 54 (1943).

purpose was only to prosecute.⁵ Such cases usually involve a prohibitory statute which does not make criminal intent a necessary element.⁶ The Supreme Court of Iowa in *State v. Abley*,⁷ upheld the conviction of a man who had been counseled, urged and aided by a town marshal to commit burglary, a crime which he would not have committed otherwise. The court, though it emphatically disapproved of the marshal's conduct, thought that one who has committed a criminal act should not be shielded from its consequences merely because he was induced to do so by another. Iowa thus allows little more in the defense of entrapment than Tennessee, where the defense is not available at all.⁸ Florida also has hobbled the use of the defense by statutory abolition of entrapment in cases of bribery of officials.⁹

The difficulty in determining whether there has been an entrapment seems to be in establishing in whose mind, the accused's or the entrapper's, the original intent to commit a crime arose. If the criminal design arises in the accused's mind, and he is merely furnished an opportunity by an officer to carry that design out, the defense of entrapment can be of no avail,¹⁰ even if the officer has employed artifice, stratagem, and trickery in furnishing that opportunity.¹¹

In *United States v. Abda*,¹² the defendant sold a pint of rubbing alcohol to a federal agent for beverage purposes. The agent made the purchase for evidence in prosecuting the defendant for the sale, which was a violation of a federal law. The court ruled that the defendant could not be convicted because the intention on the part of the defendant to violate the law and sell the rubbing alcohol for beverage purposes must have been shown to exist at the time of the sale, and he must have sold it without the knowledge or reasonable ground of believing that the agent bought it for the purpose of entrapment.

Illustrations of criminal intent arising in the minds of the accused who are tested by trickery or deceit of officers and entrapped are numerous. Usually, the entrapped individuals are known to be of criminal propensities and actively engaged in some unlawful activity. Common examples are

⁵ *Bauer v. Commonwealth*, 135 Va. 403, 115 S.E. 514 (1923).

⁶ For an interesting comment on intent, see *The Intent Element in Statutory Crimes*, 2 De Paul L. Rev. 86 (1952).

⁷ 109 Iowa 61, 80 N.W. 225 (1899).

⁸ *Goins v. State*, 192 Tenn. 32, 237 S.W. 2d 8 (1950); *Palmer v. State*, 187 Tenn. 527, 216 S.W. 2d 25 (1948); *Thomas v. State*, 182 Tenn. 380, 187 S.W. 2d 529 (1945).

⁹ Chapter 26325, Acts of 1949, Extraordinary Session, F.S.A. § 838.11.

¹⁰ *Nero v. United States*, 189 F. 2d 515 (C.A. 6th, 1951); *City of Seattle v. Gleiser*, 29 Wash. 2d 869, 189 P. 2d 967 (1948); *In re Davidson*, 64 Nev. 514, 186 P. 2d 354 (1947).

¹¹ 22 C.J.S., Criminal Law § 45 (1940).

¹² 32 F. Supp. 23 (M.D. Pa., 1940).

where an officer of the law, incognito, or a decoy, has a hotel bellboy procure an immoral woman,¹³ or where liquor, the possession and sale of which is prohibited, is sold to an officer or decoy,¹⁴ or where narcotics, under the same circumstances are sold.¹⁵

Because there is the possibility that some innocent, law-abiding person might be induced by an officer offering an attractive allurement, to commit crime, courts, and especially the federal courts, usually demand that there be reasonable grounds for the testing of a person by entrapment.¹⁶ 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.¹⁷

In *Morei v. United States*,¹⁸ agents, in persuading the accused to sell and pass dope, told the accused that the dope was to be used in certain race horses, the names of which would be disclosed to him before the horses ran. The court felt that the accused, who was fond of wagering on race horses, was wrongfully entrapped by improper inducement.

Federal courts are very careful not to allow the prosecution of entrapped persons who possibly could be above suspicion, and it is incumbent on the government, when prosecuting, to prove reasonable grounds for believing that the intent and purpose to violate the law existed in the mind of the accused.¹⁹ Of course, if a person had been witnessed in a similar course of criminal conduct in which he was presently entrapped, the efforts of the entrapping government agent are above reproach.²⁰

Generally, state courts, being fully aware that it is not impossible for an innocent person to be enticed into committing a crime by some over-zealous law officer, require a showing by the entrapper of good faith in the honest belief that the accused was engaged in an unlawful business, and that the purpose of the entrapment was not to induce an innocent man to commit crime, but to secure evidence upon which a guilty man can be brought to justice.²¹

¹³ *City of Seattle v. Gleiser*, 29 Wash. 2d 869, 189 P. 2d 967 (1948).

¹⁴ *Bienert v. State*, 85 Ga. App. 451, 69 S.E. 2d 300 (1952); *Callahan v. State*, 163 Md. 298, 162 Atl. 856 (1932); *Terrell v. State*, 89 Ind. App. 125, 166 N.E. 8 (1929); *City of Evanston v. Meyers*, 172 Ill. 266, 50 N.E. 204 (1898).

¹⁵ *People v. Schwartz*, 240 P. 2d 1024 (Cal., 1952); *People v. Lee*, 9 Cal. App. 99, 48 P. 2d 1003 (1935); *State v. Lovell*, 127 Kan. 157, 272 Pac. 666 (1928).

¹⁶ *People v. Makovsky*, 3 Cal. 2d 366, 44 P. 2d 536 (1935); *People v. Ficke*, 343 Ill. 367, 175 N.E. 543 (1931); *People v. Cherry*, 39 Cal. App. 2d 149, 102 P. 2d 546 (1940).

¹⁷ *Andrews v. United States*, 162 U.S. 420 (1896); *Heath v. United States*, 169 F. 2d 1007 (C.A. 10th, 1948); *Price v. United States*, 165 U.S. 311 (1897).

¹⁸ 127 F. 2d 827 (C.A. 6th, 1942).

¹⁹ *Heath v. United States*, 169 F. 2d 1007 (C.A. 10th, 1948).

²⁰ *Nero v. United States*, 189 F. 2d 515 (C.A. 6th, 1951).

²¹ *People v. Lewis*, 365 Ill. 156, 6 N.E. 175 (1936); *People v. Ficke*, 343 Ill. 367, 175 N.E. 543 (1931); *Sutton v. State*, 59 Ga. App. 198, 200 S.E. 225 (1938).

Where a person is, on good and reasonable grounds, suspected or known to be engaged in some unlawful activity, and there is no question of his having a criminal intent, he, of course, cannot be convicted if he does not perform the act or acts necessary to constitute the crime or at least participate in all the essential elements.²² In *Scott v. Commonwealth*,²³ a police officer, knowing that the defendant had unlawful possession of liquor on his premises, seized the liquor without a search warrant and arrested the defendant. Because the seizure was illegal, the defendant was released and the officer ordered to return the liquor to the defendant's premises. When the officer returned the liquor, he thereupon seized the liquor once more, having had a search warrant made out before returning the liquor. The court held that the defendant had been illegally entrapped, and although the defendant certainly had the criminal intent, he did not participate in all the acts necessary to constitute the crime because he could not participate in the officer's act, getting the liquor back to him.

Usually, as in the *Scott* case, the failure of the entrapped person to participate in all the acts necessary to constitute the crime may be attributed to the anxiety of the over-zealous entrapping person. A lucid example of such behavior may readily be seen in *Love v. People*,²⁴ where the entrapping person, a private detective, not only incited a burglary, but after setting a trap by putting marked money in a safe and having officers lying in wait, assisted the accused by opening the outer door of the premises. The court held that there could be no conviction on a burglary charge, because there had been no "breaking" by the accused, and so he had not participated in all of the constituent elements of the crime. The same proposition also applies where an "accomplice" under the direction of an entrapping law officer, breaks and enters, takes money and marks it, and then delivers it to the "burglar" waiting outside.²⁵

In cases of this nature, where the accused or entrapped person is aided by an informer or decoy or entrapping person, and so is prevented from participating in all the necessary elements of the crime because of the entrapping person's assistance, the acts of such entrapping person cannot be imputed to the accused for the same reason that the entrapping person could not be found guilty of the crime in which he has participated—he has not the criminal intent.²⁶

A somewhat surprising result occurs when a third person, of his own volition, and not at the direction of any law enforcing agents or

²² *York v. Commonwealth*, 314 Ky. 445, 235 S.W. 2d 1007 (1951); *State v. Neely*, 90 Mont. 199, 300 Pac. 561 (1931).

²³ 303 Ky. 353, 197 S.W. 2d 774 (1946).

²⁴ 160 Ill. 501, 43 N.E. 710 (1896).

²⁵ *People v. Collins*, 53 Cal. 185 (1878).

²⁶ *State v. Neely*, 90 Mont. 199, 300 Pac. 561 (1931); *State v. Hayes*, 105 Mo. 76, 16 S.W. 514 (1891).

officers, induces the accused to commit a crime, intending to betray him. This situation arose in *Polski v. United States*,²⁷ and the court asserted that there was no illegal entrapment because:

An essential element of entrapment is that the acts charged as crimes were incited directly or indirectly by officers or agents of the government. It is not entrapment that one has been induced by someone other than a person acting for the government to commit a crime, even if he would not have otherwise committed it, and even if the person inducing him to commit it intended later to betray him to the government. The very heart of the doctrine of entrapment is that the government itself has brought about the crime.²⁸

It is well settled that there can be no crime where there is consent to wrongs to individual rights. When a person is aware or suspects that a crime, which will affect him or his property, is to be committed, he may, without being deemed to have consented thereto, remain passive or indifferent and do nothing to further induce or prevent its commission so that the criminal may be apprehended. The line of cleavage seems to be whether his inducement has been active or passive. If active, it may amount to a consent, and there could be no conviction.²⁹ In *State v. Snider*,³⁰ a shepherd learned from his hired hand that the defendant planned with the hired hand's assistance, to steal some of the shepherd's sheep. The shepherd allowed the plan to be executed without any further enticement, and had the defendant arrested after he had carried off the sheep. The Supreme Court of Montana ruled that there had been no wrongful entrapment because the acts of the shepherd had not amounted to a consent to the theft of his sheep.

One of the basic ideas of the entrapment rule is that the wrongful instigation of a crime by an officer of the law is for the purpose of arrest and prosecution. If, however, an officer suggests the violation of the law, not with an arrest in view but merely as "friendly advice," the wrongdoer will not escape punishment because he took such advice.³¹

Of course, if no crime has actually been committed there is no need for invoking the doctrine of entrapment. When this defense is raised, however, the commission of a criminal act is admitted.³² Justice Roberts of the United States Supreme Court, in a separate opinion in *Sorrells v. United States*,³³ indicated that though the commission of a crime is confessed by raising entrapment as a defense, the law itself will work

²⁷ 33 F. 2d 686 (C.A. 8th, 1929). ²⁹ 15 Am. Jur., Criminal Law § 336 (1938).

²⁸ *Ibid.*, at 687.

³⁰ 111 Mont. 310, 111 P. 2d 1047 (1940).

³¹ *State v. Berry*, 200 Wash. 495, 93 P. 2d 782 (1939).

³² *People v. Roberts*, 255 P. 2d 784 (Cal. App., 1953); *People v. Lee*, 9 Cal. App. 2d 99, 48 P. 2d 1003 (1935).

³³ 287 U.S. 435 (1932).

an estoppel against the government if there has been misconduct on the part of its officers.

Entrapment by officers approaches impropriety only when the innocent are affected. It may seem undignified for officers of law enforcement agencies to resort to deceit and trickery in order to apprehend criminals, but because of the surreptitious conduct of lawbreakers, entrapment may in many instances be the only practical means to bring them to justice. The law abiding are in no danger because of such practices, as long as the defense of entrapment exists, for courts will not as a matter of good policy sanction a conviction where a person, not justly an object of suspicion, is through undue temptation or pressure by an officer induced to become a criminal.³⁴ The law does not frown upon the entrapment of a criminal, but upon the seduction of the innocent by its officers to commit crime.³⁵

SOME ASPECTS OF ARRAIGNMENT

Discussing arraignment Blackstone said, "To arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment,"¹ and Lord Coke said, "The arraignment of the prisoner is to take order that he appear and, for the certainty of the person, to hold up his hand, and to plead a sufficient plea to the indictment or other record."²

Arraignment at common law involved a formal ceremony which consisted of four parts.³ (1) The defendant was called to the bar by name and ordered to hold up his hand. (2) The indictment was read to him distinctly so that he might clearly understand the charge being brought against him.⁴ (3) It was then demanded of the defendant whether he was guilty or not guilty of the crime for which he stood indicted. (4) The plea generally being "not guilty" he was asked in which manner he wished to be tried, by ordeal or by jury.

The modern practice is, in all essential particulars, the calling of the prisoner, his identification as the person charged, the question addressed to him personally whether he is guilty or not guilty of the charge contained

³⁴ See *Weathers v. United States*, 126 F. 2d 118 (C.A. 5th, 1942).

³⁵ *Kott v. United States*, 163 F. 2d 983 (C.A. 5th, 1947).

¹ 4 Bl. Comm. 317 (2d ed., 1769).

² Co. Litt. 558*

³ Perkins, *Criminal Law and Procedure*, c. X, § 3 (1952).

⁴ During the early days of the common law all courtroom proceedings were conducted in Latin but the reading of the indictment to the accused was in the vernacular. "There was no thought of giving him a copy [of the indictment] because usually he would not have been able to read it." *Ibid.* at 734.