

JUDICIAL CONTROL OF INFORMANTS, SPIES, STOOL PIGEONS, AND AGENT PROVOCATEURS

By RICHARD C. DONNELLY†

FROM early times law enforcement authorities have utilized informers. Their value in ferreting out crime was recognized in the ancient practice of English medieval law called *approvement*. Being arraigned on a charge of treason or felony the *approver* confessed his guilt and, in order to obtain a pardon, offered to appeal and convict other criminals called the appellees.¹ If the appellees were found guilty the approver was pardoned. If the appellees were acquitted, the approver was hanged.² The approvement was open to obvious abuses and Sir Matthew Hale observed that "this course of admitting of approvers hath been long disused, and the truth is, that more mischief hath come to good men by these kind of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders, gaolers for their own profits often constraining prisoners to appeal honest men."³

During this period there was no organized police force. Except in the central courts, the administration of justice was in the hands of amateurs whose probity was not infrequently open to suspicion. To create public interest in law enforcement a common expedient was the statutory informer's suit which gave any member of the public the right to sue for, and retain a part of, the penalty imposed for statutory violations. The number of these statutes was large and they greatly increased during the 16th and 17th centuries as a technique for implementing the economic and commercial policy of the times.⁴ The informer's suit was also subject to many abuses and Coke classed informers with "the monopolist, the concealer, and the dispencer with public and profitable penal laws" as the four varieties of "viperous vermin, which endeavoured to have eaten out the sides of church and commonwealth."⁵ The informer's suit has survived without mutation to the present day.⁶

†Associate Professor of Law, Yale Law School.

1. Pollock and Maitland characterized the approver as "a convicted criminal who had obtained a pardon conditional on ridding the world of some half dozen of his associates by his appeals." 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 631 (1899).

2. The practice of *approvement* is discussed in 4 BL. COMM. *330 and the following decisions: Whiskey Cases, 99 U.S. 594 (1878); Guthrie v. Commonwealth, 171 Va. 461, 198 S.E. 481 (1938); People v. Swift, 161 Misc. 851, 293 N.Y.Supp. 378 (Sup. Ct. N.Y. County 1936), *aff'd without opinion* 251 App. Div. 808, 298 N.Y.Supp. 188 (1st Dep't 1937), *aff'd without opinion* 277 N.Y. 618, 14 N.E.2d 190 (1938).

3. HALE, PLEAS OF THE CROWN 226 (1778).

4. See 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 355-8 (2d ed. 1937).

5. COKE, THIRD INSTITUTE *194.

6. Some of the federal statutes with provisions for awarding informers a share of fines are: 21 U.S.C. § 183 (1946) (narcotics); 8 U.S.C. §§ 139, 140 (1946) (importa-

Since the beginning of organized law enforcement several progeny of the informer have become familiar figures. Although the term "informer" is still used generically to include them all, it will assist analysis to designate, somewhat arbitrarily, these offspring as follows: An *informant* is one who, having participated in an offense, turns against his partners and discloses information to the police. Quite often, under a promise of immunity,⁷ he testifies against them at their trial. The *police spy* enters into conspiratorial plans for the purpose of obtaining information. His connection with the police antedates his participation. His role is primarily that of an observer and reporter. The *stool pigeon* acts as a decoy to draw others into a trap. He solicits the commission of a crime. His part is that of a catalyst. The *agent provocateur* is a specialized and sophisticated stool pigeon traditionally employed by the political police.⁸ He joins an organization such as a labor union or politi-

tion of contract laborers); 25 U.S.C. § 201 (1946) (protection of Indians); 31 U.S.C. § 232 (1946) (fraudulent claims against the United States).

For a discussion of the *qui tam* action see United States *ex rel* Marcus v. Hess, 317 U.S. 537 (1943).

7. The enforceability of promises of immunity are discussed in Nocosa, *Enforceability of Prosecutors' Agreement not to Prosecute*, 24 J. CRIM. L. & CRIMINOLOGY 600 (1934).

The Kefauver Committee has recommended that the Attorney General be given the formal power to grant immunity from prosecution to witnesses "whose testimony may be essential to an inquiry conducted by a grand jury, or in the course of a trial or of a congressional investigation." THIRD INTERIM REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME, SEN. REP. NO. 307, 82d Cong., 1st Sess. 17 (1951). The purpose of this recommendation, as stated by the Committee, is to provide a "means of obtaining needed testimony from one who might otherwise hide behind the constitutional protection against self-incrimination." On the necessity to testify when immunity is offered and is enforceable, consult *Ex Parte* Copeland, 91 Tex. Cr. 549, 240 S.W. 314 (1922), 1 TEX. L. REV. 108 (1922).

The informer's motivations are legion. In addition to promises of immunity or leniency he may be prompted by revenge, money, fear, jealousy, friendship with members of the police force, or—in the case of the apostate—a desire to reestablish his value position in the community.

The paid informer may be compensated directly out of police contingency funds, out of resultant fines, or under express statutory authorization. For example, 21 U.S.C. § 199 (1946), authorizes the Commissioner of Narcotics "to pay to any person, from funds now or hereafter appropriated for the enforcement of the narcotics laws of the United States, for information concerning a violation of any narcotic law of the United States, resulting in a seizure of contraband narcotics, such sum or sums of money as he may deem appropriate, without reference to any moiety or rewards to which such person may otherwise be entitled by law. . . ."

Recently, Representative Henry J. Latham, Republican of New York, urged Congress to crack down on the illegal drug traffic by authorizing a \$500 "beast of prey" reward to anyone providing information leading to the conviction of a narcotics peddler. "Bounties have worked well throughout American history in ridding communities of wolves, coyotes, snakes, and other public enemies," Mr. Latham said. N.Y. Times, July 30, 1951, p. 8, col. 3.

8. More particularly he is the notorious type employed by the Ochrana of the Czarist regime. One of the most infamous agent provocateurs was Azeff "to whom the

cal group in order to destroy it. By pretended sympathy with its aims he leads its members to commit crimes so that they may be apprehended and punished.

Notwithstanding such euphemistic characterizations as "confidential informant" and "special employee", the informant, the police spy, the stool pigeon, and the agent provocateur have been generally regarded with aversion and nauseous disdain.⁹ Nevertheless, these characters are used widely by police forces the world over. They are particularly effective in the enforcement of sumptuary legislation proscribing such behavior as gambling and prostitution and regulating the sale and use of liquor and narcotics.¹⁰ Vice repression laws create special problems for the police. Except, perhaps, for the narcotics laws they do not command the general and convinced support of public opinion. A considerable segment of the community regards them as an unnecessary interference with the lives of individual citizens or as penalizing behavior that is not the legitimate concern of government. Others insist upon rigid enforcement while still a third group, often the most numerous, views them with complete indifference. The behavior denounced is likely to be of frequent occurrence and rather widespread. It may be representative of the mores or the countermores.

The task of the police is thus one of great difficulty. If rigorous enforcement is attempted, public sympathy is apt to be shown detected offenders and expressed by the failure of juries to convict. Criticism, which should be directed at the law itself, is aimed at the police. If, on the other hand, a tolerant attitude is adopted, another section of the community inveighs against police inactivity or even hints at collusion or corrupt dealing between the offenders and the police.

Furthermore, there is a marked difference between the enforcement of social and economic regulatory statutes, of which vice legislation is an ex-

enduring reputation of the Ochrana owes its deeper shades of infamy." ROWAN, *THE STORY OF SECRET SERVICE* 374 (1937).

9. The historian Sir Erskine May expressed a view which is rather typical:

"The relations between the government and its informers are of extreme delicacy. . . . [T]o retain in government pay and to reward spies and informers, who consort with conspirators as their sworn accomplices and encourage while they betray them in their crimes, is a practice for which no plea can be offered. No government, indeed, can be supposed to have expressly instructed its spies to instigate the perpetration of crime; but to be unsuspected, every spy must be zealous in the cause which he pretends to have espoused; and his zeal in a criminal enterprise is a direct encouragement of crime. So odious is the character of a spy, that his ignominy is shared by his employers, against whom public feeling has never failed to pronounce itself, in proportion to the infamy of the agent and the complicity of those whom he served."

2 MAY, *CONSTITUTIONAL HISTORY OF ENGLAND* 277 (1863).

10. For the views of a professional policeman regarding the enforcement of vice laws and the necessity for using stool pigeons consult VOLLMER, *THE POLICE AND MODERN SOCIETY* 81 *et seq.* (1936).

ample, and the traditional type of criminal law, such as the law of murder, rape, larceny, robbery, arson, and the like. The regulatory statutes condemn behavior directed, not against particular individuals, but against public order. Violation is deemed a wrong against society as a whole and is generally unattended with any particular harm to a definite person. These offenses are carried on in secret and the violators resort to many devices and subterfuges to evade detection. It is rare for any member of the public, whatever his attitude may be in principle towards these offenses, to be willing to assist in the enforcement of the law. It is necessary, therefore, that government in detecting and punishing violations of these statutes rely, not upon the voluntary action of aggrieved individuals, but upon the diligence of its own officials. This means that the police must be present at the time the offenses are committed either in an undercover capacity or through spies and stool pigeons.

Though considered essential by the police in enforcing vice legislation, the stool pigeon system breeds abominable abuse. Frequently a person who will accept payment from the police to assist in the apprehension of prostitutes, gamblers, and liquor or narcotics violators will also accept payment from these persons to deceive the police. The stool pigeon himself may be a drug addict,¹¹ pickpocket, pimp, or other petty criminal. The spectacle of government secretly mated with the underworld and using underworld characters to gain its ends is not an ennobling one. The employment of stool pigeons by the police probably arouses more resentment and hatred than any other non-violent abuse. Even confirmed law-breakers have their standards of "squareness." To them the stool pigeon situation is the outstanding proof that law enforcement is not square. Contempt for law is thus encouraged. In addition, the temptation to "frame" a case is great.¹²

The courts have reacted to this state of affairs by fashioning various controls which strive to accommodate the value conflict involved. For instance, the public interest in the efficient administration of the criminal law raises an obligation on the part of the citizen to report any information he has of the commission of crimes. This is not to say that there is an obligation to become a sleuth. To encourage the citizen to perform this obligation it is considered necessary to protect his anonymity. Consequently, the government is usually privileged to withhold from disclosure both the identity of the informer and

11. For example, in *United States v. Ginsburg*, 96 F.2d 882 (7th Cir.), *cert. denied* 305 U.S. 620 (1938) the informer had been a drug addict for 15 or 20 years. See also *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933) (informer an addict and former mistress of the defendant); *United States v. Lindenfeld*, 142 F.2d 829 (2d Cir. 1944), *cert. denied* 323 U.S. 761 (1945) (informer an addict). In *Cratty v. United States*, 163 F.2d 844 (D.C.Cir. 1947) the chief witness for the government was "Ralph B. Mullis, alias Jack Goodman, a Bureau of Narcotics informer, with a record of convictions for white slavery and grand and petit larceny."

12. For example, of 150 prostitution cases in which a stool pigeon named Chile Acuna assisted the Vice Squad in New York, 40 were admittedly framed. *HOPKINS, OUR LAWLESS POLICE* 105 (1931).

the contents of his communication.¹³ Nor does the failure to call an informer as a witness violate the defendant's right to be confronted with the witnesses

13. Although some authorities assert that the privilege protects only the identity of the informer. 8 WIGMORE, EVIDENCE § 2374(1) (3rd ed. 1940); A.L.I., MODEL CODE OF EVIDENCE, Rule 230 (1942); *Scher v. United States*, 305 U.S. 251 (1938), a number of cases have held that the contents of the communication are privileged as well. *Worthington v. Scribner*, 109 Mass. 487 (1872); *Dellastatious v. Boyce*, 152 Va. 368, 147 S.E. 267 (1929); *Lewis v. Roux Trucking Corp.*, 222 App. Div. 204, 226 N.Y.Supp. 70 (2d Dep't 1927); *Vogel v. Gruaz*, 110 U.S. 311 (1884); *In re Quarles and Butler*, 158 U.S. 532 (1894). By so holding these courts have confused this privilege with the substantive privilege in the law of defamation which makes communications to government officials conditionally privileged. *Foltz v. Moore McCormack Lines*, 189 F.2d 537 (2d Cir. 1951) (correctly observing the distinction). They have also confused it with the so-called "Secrets of State" and "Official Information" privileges which are based upon different considerations and are much broader in scope. A.L.I., MODEL CODE OF EVIDENCE, Rules 227 and 228; 8 WIGMORE, EVIDENCE, § 2378 (3d ed. 1940); Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73 (1949); Berger & Krash, *Government Immunity from Discovery*, 59 YALE L.J. 1451 (1950); Notes, 58 YALE L.J. 993 (1949); 60 YALE L.J. 736 (1951). Also see *United States v. Ragen*, 340 U.S. 462 (1951) and *Parsons v. State*, 251 Ala. 467, 38 So.2d 209 (1948). For these reasons any adequate treatment of the informer privilege would involve a consideration of the other governmental privileges as well.

The privilege is not applicable where both the identity of the informer and the contents of his statement are known. *Pihl v. Morris*, 319 Mass. 577, 66 N.E.2d 804 (1946). And even though strictly applicable, the trial court may compel disclosure if necessary to avoid the risk of false testimony or to establish the innocence of the accused. *Reg. v. Richardson*, 3 F. & F. 693, 176 Eng. Reprint 318 (1863); *Centoamare v. State*, 105 Neb. 452, 181 N.W. 182 (1920). And where the legality of a search without a warrant is in issue and the communications of an informer are claimed as establishing probable cause the government will be required to disclose the name of the informer. *Wilson v. United States*, 59 F.2d 390 (3d Cir. 1932); *United States v. Keown*, 19 F.Supp. 639 (D.Ky. 1937) unless there is sufficient evidence of probable cause apart from any confidential communication. *Scher v. United States*, 305 U.S. 251 (1938); *United States v. Bianco*, 189 F.2d 716 (3d Cir. 1951); *United States v. Li Fat Tong*, 152 F.2d 650 (2d Cir. 1945).

But where the informer has done more than merely supply information and has acted as a decoy or stool pigeon, the government may be required to disclose his identity. Thus in *Sorrentino v. United States*, 163 F.2d 627 (9th Cir. 1947), the defendant was charged with violating the narcotics laws by selling to an informer. At the trial, a Federal Narcotics agent was asked on cross examination the name of the informer. In holding that the informer's identity must be disclosed the court pointed out that he was the person to whom the defendant was alleged to have sold the drug and that information as to his identity was "therefore material to appellant's defense, and appellant was entitled to a disclosure thereof."

The government has been held to have waived the privilege by bringing into light the transaction to which the communication related. *United States v. Krulewitch*, 145 F.2d 76, 78 (2d Cir. 1944), 156 A.L.R. 337, 45 Col. L. Rev. 461 (1945). "[I]n any event it must be a condition upon the continuance of any such privilege that the prosecution—its possessor—shall not adduce testimony touching the subject matter communicated." But compare *United States v. Ebeling*, 146 F.2d 254 (2d Cir. 1944).

The applicability of the privilege is independent of the informer's motivations. Whether he acts from motives of good citizenship, under a promise of immunity, for hire, or otherwise, is immaterial. While a privilege is usually for the benefit of the one making a

against him.¹⁴ If the informer has acted as a spy and has merely uncovered information relating to a crime, his evidence is admissible on the same basis as that of any other witness. He may, of course, be impeached,¹⁵ and, as will be discussed later, his testimony may require corroboration or the defendant may be entitled to a cautionary instruction regarding its weight. Other forms of control will now be examined.

FREEDOM FROM POLICE SURVEILLANCE

A question requiring brief comment now but which will be raised again in connection with political offenses is whether there is any right to be free from police surveillance. Apparently there is not, provided the police have reasonable grounds for believing that the law is being violated.¹⁶ However, if it

communication and is waivable only by him this privilege is that of the government and not of the party litigant or the witness.

14. *Dear Check Quong v. United States*, 160 F.2d 251 (D.C.Cir. 1947).

15. The informer privilege does not protect an informer who takes the witness stand from being cross-examined as to his connection with the prosecution. In *King v. United States*, 112 Fed. 988, 996, (5th Cir. 1902) the defendant was charged with receiving a bribe. Hobson, who paid the money to the defendant, was the main witness for the government. On cross examination Hobson was asked whether he had been promised immunity. The trial judge sustained the government's objection. On appeal this was held to be error.

"[W]e are clear that the conversations of government detectives and other agents with witnesses, with the purpose and effect of inducing and influencing the evidence of such witnesses, do not rise to the dignity of state secrets, and, when a witness so induced or influenced appears on the stand and testifies, he may be cross-examined as to any and all inducements made to him on the part of any one in connection with his evidence; and we think it would be intolerable for government agents to be allowed to give inducements to witnesses, and not have the same freely exposed on the witness stand, so as to inform the court and jury as to the proper weight of the evidence given."

Also see *District of Columbia v. Clawans*, 300 U.S. 617, 630 (1937): "Common experience teaches us that the testimony of such witnesses, [detectives] especially when uncorroborated, is open to the suspicion of bias . . . and that their cross examination should not be curtailed summarily. . . ." And consult 3 WIGMORE, EVIDENCE § 969 (3d ed. 1940).

16. In *Weiss v. Herlihy*, 23 App. Div. 608, 49 N.Y.Supp. 81 (1st Dep't 1897), the plaintiff, a restaurant operator, sought an injunction against a precinct police captain to restrain him from stationing a policeman in plain clothes in plaintiff's place of business from noon until closing time each day. An injunction was denied since it was shown that defendant was acting upon numerous complaints and the results of his own investigations that gambling was being carried on in a back room. A dissent admitted the power of the police to observe and inspect but denied that "permanent occupation" was authorized. Also see *Delaney v. Flood*, 45 Misc. 97, 91 N.Y.Supp. 672 (Sup.Ct. N.Y. County 1904) (policeman stationed on sidewalk in front of plaintiff's hotel and informed persons entering that hotel would likely be raided. Injunction denied); *Kahan v. Wallander*, 193 Misc. 190, 83 N.Y.S.2d 570 (Sup.Ct. N.Y. County 1948) (where there had been numerous arrests and convictions for prostitution it was proper to maintain a patrolman in hotel lobby); *Leib Restaurant Corporation v. Wallander*, 65 N.Y.S.2d 479 (Sup.Ct. N.Y. County 1946): "Since the Police Department is duty-bound to prevent the commission

appears that "unlawful trespasses are continually committed under the guise of law enforcement, or that no claim is made that the law has ever been violated on the premises, or that there is nothing more than the mere suggestion of a suspicion that the law is being violated, and if, in either event, it is made to appear that the illegal acts of the police officers will result in irreparable damage to the property rights of the complainant if an injunction is not issued, then injunctive relief may be available to the injured party coming into court with clean hands. . . ."17

of crimes, as well as to detect and arrest law breakers, courts will not interfere with the discharge of that duty where a reasonable ground exists for the Police Commissioner's belief that premises must be kept under surveillance. Only if it is shown that the police are not acting in good faith and that their action is arbitrary and capricious, will injunctive relief be granted."

17. *Russo v. Miller*, 221 Mo.App. 292, 3 S.W.2d 266, 268 (1928). In *Hale v. Burns*, 44 Misc. 1, 89 N.Y.Supp. 711 (Sup.Ct. Kings County 1904), *aff'd* 101 App.Div. 101, 91 N.Y.Supp. 929 (2d Dep't 1905), an injunction was granted where the evidence of gambling in plaintiff's place of business was slight, plaintiff did not have an unsavory reputation, and it appeared that defendant had a standing grudge growing out of past political contests.

The burden on a plaintiff seeking injunctive relief is great. The courts talk in terms of "clean hands" which apparently means that the plaintiff must show not only that he is not violating the law and that his premises are not being used for an illegal purpose but also that there are no reasonable grounds to justify a belief on the part of the police that the law is being violated. *Monte Vulture Social Club v. Wallander*, 189 Misc. 162, 68 N.Y.S.2d 657, 659 (Sup.Ct. N.Y. County 1947). "Reasonable grounds" is a formula having slight positive content. In the context of police surveillance it obviously means something less than what is required to make an arrest and something more than "the mere suggestion of a suspicion."

Even though equitable relief is not available an action for damages against the police officer who exceeds the scope of proper surveillance may be available on the theory of trespass or invasion of privacy or wilful interference with business. Presumably lack of reasonable grounds would have to be made out. No cases directly in point have been found but those involving private detectives have some affinity. In *Schultz v. Frankfort Marine Accident and Plate Glass Insurance Company*, 151 Wis. 537, 139 N.W. 386 (1913) it was held that "rough shadowing" by private detectives, being done so openly that the subject, or the general public, may know of it is an unlawful act resulting in legal injury to the reputation of the person shadowed, and proof of it makes a case for the jury so that a verdict directed for defendant was erroneous. In *Chappell v. Stewart*, 82 Md. 323, 33 Atl. 542 (1896), however, upon the ground of adequate remedy at law an injunction was refused a plaintiff who charged another with employing detectives to follow him and watch him wherever he should go, thus causing him great inconvenience and annoyance, interfering with his social life and business, and causing grave suspicion to be entertained about him. The court explicitly refrained, however, from expressing any opinion on the merits. The question of criminal liability for shadowing another was raised in *People v. Weiler*, 179 N.Y. 46, 71 N.E. 462 (1904) where it was held that a private detective who was hired to keep another under secret surveillance and who conducted himself so that the other person was unaware that he was being shadowed until told so by others, was not guilty of an "offensive or disorderly act" within the meaning of a statute making such act a misdemeanor.

Suppose, however, that a police officer or police spy is not content to be a mere observer; that, in his zeal to suppress crime and apprehend offenders, he participates in the commission of an offense. For example, a police officer, suspecting that a person is engaged in illegally selling liquor or in sending obscene matter through the mails, approaches the suspect and offers to buy liquor from him, or sends a decoy letter requesting obscene matter. The suspect, ignorant that the solicitor is an officer, sells him the liquor or mails to him the material requested. The suspect is then charged with and placed on trial for the offense he was induced to commit.

The invariable pattern in narcotics cases is as follows: An informer, employed by the government, is searched by a narcotics agent,¹⁸ given money (usually marked) and told to make a purchase of drugs. The agent follows the informer and observes the transaction between the defendant and the informer. The agent then receives the incriminating packet from the informer.

Only too frequently the officer or the stool pigeon, in an excessive and corrupt desire to obtain a conviction, has actually persuaded a theretofore law abiding person to commit a crime. Conduct of this type is naturally deplored by any court obliged to try the accused and the question arises whether there is any legal protection for one so victimized.

ENTRAPMENT

"Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare 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 thereafter found a nullity nor call for the exclusion of evidence so procured. But the defense here asserted involves more than obtaining evidence by artifice or deception. 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."¹⁹

Although the availability of entrapment as a defense was suggested as early as 1878,²⁰ it was not until 1915 in *Woo Wai v. United States* that a

18. As to how thorough the search must be before sending the informer forth on his mission, see *Dear Check Quong v. United States*, 160 F.2d 251 (D.C.Cir. 1947), also holding that the testimony of the government agent who witnessed the transaction is enough to justify a verdict of guilty.

19. Mr. Justice Roberts in *Sorrells v. United States*, 287 U.S. 435, 453 (1932).

20. *United States v. Whittier*, 28 Fed. Cas. 591, No. 16,688 (E.D.Mo. 1878) (decoy letters recognized as a proper detection technique). Some state courts had looked with disfavor on the doctrine. For example, in *Commissioners v. Backus*, 29 How. Pr. 33, 42 (N.Y. 1864), an action for a penalty for the unlawful sale of liquor, the court resorted to a biblical analogy:

"Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as

federal court acquitted a defendant because he was entrapped.²¹ This decision plus the adoption of federal narcotics and liquor legislation and the correlative establishment of special enforcement bodies gave a strong impetus to its assertion by defendants. During the next seventeen years it was urged in hundreds of cases which reached the state and federal appellate courts.²²

The Supreme Court briefly considered the problem in 1895²³ and Mr. Justice Brandeis had written an adumbrative dissent in 1928.²⁴ However, not until 1932 did the Court give the doctrine careful consideration and undertake to examine its rationale, determine its validity, and prescribe the applicable procedure. In *Sorrells v. United States*,²⁵ Martin, a prohibition agent posing as a tourist, visited the defendant's home. He was accompanied by three residents of the community who knew the defendant well. The conversation disclosed that Martin and the defendant were war veterans and former members of the same army division. Martin asked the defendant to get him some liquor, stating that he wanted to take it home to a business partner. The defendant replied that he did not have any. Later, a second request was

the world, and first interposed in *Paradise*: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment we pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian ethics, it never will."

And in *People v. Mills*, 178 N.Y. 274, 289, 70 N.E. 786 (1904) the court remarked that "We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it."

21. 233 Fed. 412 (6th Cir. 1916).

22. The cases are collected in 18 A.L.R. 146 (1922), 66 A.L.R. 478 (1930), and 86 A.L.R. (1933) and Notes, 41 YALE L.J. 1249 (1932); 2 So. CALIF. L. REV. 283 (1929); 28 COL. L. REV. 1067 (1928).

The prevalence of the defense in the prohibition field in 1927 was discussed by Judge Woodrough in *United States v. Washington*, 20 F.2d 160 (D.Neb. 1927):

"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 by the cases brought before me, it would seem that at least 30,000 of them are of that kind."

23. *Grimm v. United States*, 156 U.S. 604, 610 (1895) (post-office inspector obtained obscene pictures through the mails from defendant):

"It does not appear that it was the purpose of the post-office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business."

24. *Casey v. United States*, 276 U.S. 413, 423 (1928). "But it does not follow that the court must suffer a detective-made criminal to be punished. . . . This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts." These views were adopted by the minority in *Sorrells v. United States*, 287 U.S. 435 (1932).

25. 287 U.S. 435 (1932).

made and the same reply received. After the conversation had been going on for an hour and a half a third request was made and the defendant said that he would try to get some. Twenty or thirty minutes later the defendant returned with a half gallon of whiskey which he delivered to Martin in exchange for \$5.00. The defendant was charged with possessing and selling liquor in violation of the National Prohibition Act. He pleaded not guilty. At the trial Martin testified that he was the only one present at defendant's home who said anything about obtaining whiskey and that his purpose in obtaining it was to prosecute the defendant for procuring and selling it. Defendant did not take the stand but introduced a number of witnesses who testified that he was of good character and regularly employed by a wood fiber plant near his home. The government, in rebuttal, introduced testimony to the effect that the defendant had the general reputation of a rum runner. There was no evidence, however, that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question. The trial court refused to submit the issue of entrapment to the jury, holding as a matter of law that there was no entrapment. The Court of Appeals affirmed,²⁶ one judge dissenting, and the Supreme Court granted a writ of certiorari limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment. Mr. Justice McReynolds voted for affirmance without opinion but the other justices divided. The majority of five, in an opinion by Chief Justice Hughes, held that the issue should have been submitted to the jury. A minority, composed of Justice Roberts, Brandeis and Stone, took the position that there was entrapment as a matter of law and that the indictment should be quashed and the defendant discharged. The Chief Justice, for the majority, first pointed out that there was sufficient evidence to warrant a finding that the offense was "instigated" by Martin and "that it was the creature of his purpose"; that the defendant had "no previous disposition to commit it but was an industrious, law-abiding citizen"; that Martin "lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation"; and that Martin took advantage of the sentiment aroused by reminiscences of their war experiences. After denouncing as reprehensible the conduct of Martin, Hughes turned to the question whether his conduct precluded prosecution or afforded a ground of defense.

He admitted that officers and employees of government may afford opportunities or facilities for the commission of crime and "artifice and stratagem may be employed to catch those engaged in criminal enterprises." Conduct of this type is permitted in order to "reveal the criminal design" of the "would-be violators of the law." But a different question arises when 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." On the issue

26. *Sorrells v. United States*, 57 F.2d 973 (4th Cir. 1932).

of whether the defendant was "otherwise innocent" of the offense the "pre-disposition and criminal design of the defendant are relevant" and a defendant who raises entrapment as a defense is in no position to complain "of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue."

The majority then undertook to fashion a framework of theory to support the defense of entrapment. This task was not without difficulty for a statute had been knowingly violated and all the specified elements of the crime were present. Cases dealing with offenses such as larceny or burglary where the victim's lack of consent is an essential element of the crime were properly laid aside as inapplicable.²⁷ Nor did the majority attempt to sustain the defense on any theory of estoppel or policy of judicial administration. Instead, while conceding that the general language of the statute was broad enough to encompass cases of entrapment, it felt that Congress should not be attributed an intent to bring about "absurd or glaringly unjust results" unless specific and unequivocal language left no room for a different interpretation. No such language was employed. Therefore, an offense resulting from entrapment was not within the purview of the statute. Limits to this type of statutory interpretation were recognized, however. "We are dealing with a statutory prohibition [suggesting a distinction between crimes *mala in se* and *mala prohibita*] and we are simply concerned to ascertain whether in the light of a plain public policy and of the proper administration of justice" conduct resulting from entrapment should be deemed to be within the statute. It was admitted that certain crimes may be "so heinous or revolting that the applicable law would admit of no exceptions." In determining whether there is an exception of entrapment cases the courts will examine "the scope of the law considered in the light of what may fairly be deemed to be its object."

The majority also considered the allocation of function between judge and jury. The government had argued that entrapment should be raised as a special plea in bar and could not be asserted under a plea of not guilty. Hughes observed that this position assumed that the defendant was not denying his guilt but was only setting up facts in bar regardless of guilt or innocence. But, he said, the defense is available not on the ground that the accused though guilty may go free but for the reason that he is not guilty.

27. In these cases if the owner consents personally or through an agent there is no guilt although in every other particular the accused has independently committed the crime. Hence, officials who act with the knowledge and approval of the victim in inducing an offense of this type act on his behalf and no crime is committed. The problem involved in the larceny and burglarly cases is distinct from the issue present in a case, such as a liquor violation, where all the requisite elements of the crime are present.

The "consent cases" are collected in 18 A.L.R. 149 (1922). *People v. Mills*, 178 N.Y. 274, 70 N.E. 786 (1904) is an example of a case in which the problems of consent and entrapment were confused. The proper distinction was observed in *People v. Werner*, 16 Cal.2d 216, 105 P.2d 927 (1940) and *State v. Nelson*, 232 N.C. 602, 61 S.E.2d 626 (1950).

Whether or not there was entrapment is for the jury as an element of its findings of guilty or not guilty.

The principal difference between the majority and the minority was one of method and theory. First of all, Mr. Justice Roberts regarded as unwarranted the method of statutory interpretation employed by the majority. The statute specified the elements of the offense and the behavior of the defendant fell within its terms. Furthermore, he accused the majority of announcing no guide or criteria for determining when a statute should be read as excluding entrapment cases. He insisted that the doctrine be rooted in the public policy which "protects the purity of government and its processes" and which closes the courts to the trial of government instigated crime. A court must preserve "the purity of its own temple." This view renders unnecessary any distinction based upon the nature of the offense, that is, whether it is one at common law or merely a creature of statute, whether a crime *mala in se* or a statutory offense of lesser gravity. Consequently, the question of entrapment has no connection with guilt or innocence. It may be raised at any point in the proceeding and, if proved, requires the court to quash the indictment and set the defendant at liberty. It follows that the defendant's bad reputation or previous transgressions are outside the scope of the inquiry. A balancing of equities between the government and the accused has no place, for to say that the conduct amounting to entrapment is condoned because of defendant's bad reputation or prior lapses "is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction."

To recapitulate. There is a three-fold divergency of views between the majority and minority concerning the test of entrapment, the theoretical basis for the doctrine, and the respective roles of judge and jury. The majority adopts the "genesis of the criminal design" or "origin of the criminal intent" formula for determining whether entrapment exists. If the "criminal design" originates with the police officer and is "implanted" in the mind of a person "otherwise innocent" there is entrapment. The opinion leaves in doubt the method by which the government can show a "predisposition and criminal design" on the part of the accused. It emphasizes the industrious and law abiding qualities of the defendant. Apparently it is to be done by rebuttal testimony of the defendant's bad reputation or previous convictions. If so, this would mean that if the accused has been apprehended in what appears to be an habitual course of conduct the defense is not available regardless of the conduct of the officer. The minority, on the other hand, would look only to the officer's conduct. But what conduct would the minority condemn? This is not clear from Roberts' opinion. Manifestly an officer may conceal his identity and use persuasion that is no more than necessary to an ordinary sale. A more powerful inducement than a mere offer to purchase is required. But repeated and persistent appeals to sentiment created by friendly reminiscences of mutual war experiences is a transgression.

For the majority, a liquor violation induced by entrapment is beyond the scope of the statute. Consequently, entrapment is a doctrine of substantive law. An entrapped defendant is not guilty. The minority treats entrapment as a doctrine of procedure and judicial administration. Public policy forbids a court to lend its processes for the consummation of a wrong. It rests upon the power of a court to maintain its purity.

Finally, the majority would send the question of entrapment to the jury for consideration as an element of its finding of guilty or not guilty. The minority would place the responsibility upon the court.

Since the *Sorrells* decision the defense of entrapment has been invoked in a wide variety of situations—narcotics²⁸ and liquor²⁹ violations, counterfeiting,³⁰ price control³¹ and gas rationing³² violations, selective service,³³ and postal cases involving such nonmailable matter as abortion information³⁴ and obscene material.³⁵ The lower federal courts dutifully cite the *Sorrells* case but rarely undertake to explicate its rationale and it is frequently difficult to tell whether they are following the majority or the minority opinion or portions of each. One of the few attempts to analyze the *Sorrells* case was made by Judge Learned Hand the following year in *United States v. Becker*.³⁶ He described three situations where the defense would not be sustained. (1) When the accused was already engaged in "an existing course of similar criminal conduct," or (2) had "already formed a design to commit the crime

28. *Ratigan v. United States*, 88 F.2d 919 (9th Cir.), *cert. denied* 301 U.S. 705 (1937), *rehearing denied* 302 U.S. 774 (1937); *United States v. Ginsburg*, 96 F.2d 882 (7th Cir. 1938), *cert. denied* 305 U.S. 620 (1938); *United States v. Kaiser*, 138 F.2d 219 (7th Cir. 1943), *cert. denied* 320 U.S. 801 (1944); *United States v. Lindenfeld*, 152 F.2d 829 (2d Cir.), *cert. denied* 323 U.S. 761 (1944); *Mitchell v. United States*, 143 F.2d 953 (10th Cir. 1944); *United States v. Brandenburg*, 162 F.2d 980 (3d Cir.), *cert. denied* 332 U.S. 769 (1947); *Stein v. United States*, 166 F.2d 851 (9th Cir. 1948); *Nero v. United States*, 189 F.2d 515 (6th Cir. 1951); *United States v. Perkins*, 190 F.2d 49 (7th Cir. 1951).

29. *Mayer v. United States*, 67 F.2d 223 (9th Cir. 1933); *Hayes v. United States*, 112 F.2d 676 (10th Cir. 1940); *United States v. Roett*, 172 F.2d 379 (3d Cir.), *cert. denied* 336 U.S. 960 (1949).

30. *United States v. Spadafora*, 181 F.2d 957 (7th Cir. 1950); *United States v. Chirella*, 184 F.2d 903 (2d Cir. 1950).

31. *Kott v. United States*, 163 F.2d 984 (5th Cir. 1947).

32. *Shaw v. United States*, 151 F.2d 967 (6th Cir. 1945).

33. *United States v. Cerone*, 150 F.2d 382 (7th Cir.), *cert. denied* 326 U.S. 756 (1945). Here the defendants paid certain military personnel at an induction station to make false entries upon the record of physical examinations so as to result in rejection. One of the military men was discovered but permitted to remain on duty and continue to deal with the defendants. The Court held that the evidence failed, as a matter of law, to establish entrapment.

34. *Weathers v. United States*, 126 F.2d 118 (5th Cir.), *cert. denied* 316 U.S. 681 (1942).

35. *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933).

36. 62 F.2d 1007 (2d Cir. 1933). Also see *United States v. Chirella*, 184 F.2d 903 (2d Cir. 1950).

or similar crimes" or (3) was willing to do so "as evinced by ready complaisance." And "when the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation which will be no more than an instance in a uniform series." Hand conceded that an accused who raises the defense exposes himself to an inquiry into his past conduct. In the *Becker* case the defendant's previous criminal conduct,—his predisposition,—namely, selling obscene pamphlets, had been violations of the New York statutes. He was indicted, however, for sending obscene matter in interstate commerce. But "one who distributes obscene pamphlets locally is not morally averse to sending them to another state."

Although Hand's analysis is precisely formulated it is of little value save as a categorizing device. Even so, most attempts are even more obscure. Usually the courts, purporting to follow the majority opinion in *Sorrells*, talk in terms of "genesis of intent," "reasonable cause to believe," "good faith," and "honest belief." They agree that entrapment is a jury question unless there is clearly no evidence of entrapment.³⁷

Rarely do the United States Courts of Appeals reverse on the ground of entrapment. Two post-*Sorrells* cases, in which that was done, however, are

37. A typical instruction, approved in *Ryles v. United States* 183 F.2d 944, 945 (10th Cir. 1950), is:

"[E]ntrapment as that term is used in these instructions exists only when government agents induce and originate the criminal intent of the defendant, and there is no entrapment where criminal intent is already present and the government agents merely afford the opportunity for commission of the crime. If an officer of the law had reason to believe that a law is being violated, he may proceed to ascertain whether those who are thought to be doing so are actually violating the law. The officers of the government, however, must act in good faith and in the honest belief that the defendant is engaged in the unlawful business of which the offense charged in the indictment is a part, and the purpose of entrapment must be not to induce an innocent man to commit a crime but to secure evidence upon which a guilty man can be brought to justice. * * * You should therefore consider the evidence offered by both the defendant and the government with the view of determining whether or not the officers of the government were justified in using the informer Brown to induce the defendant to commit the acts charged in the indictment * * * and whether or not Brown merely afforded defendant an opportunity to commit a crime which he was ready and willing to commit or whether or not he lured the defendant by persuasion, continued insistence and representations to commit an offense in order that the government agents might arrest him and prosecute him therefor. . . .

". . . [T]he burden is upon the government to prove by competent evidence to the satisfaction of the jury beyond a reasonable doubt that it was not entrapment. You are therefore instructed that if you find from the evidence and beyond a reasonable doubt that the defendant had a reputation for selling narcotics and that the officers of the government had reasonable ground to believe he was engaged in selling narcotics and in good faith sought to obtain evidence of such violations, you should convict the defendant as to each count of the indictment if you further find beyond a reasonable doubt that he made the sales as charged."

*Morei v. United States*³⁸ and *Wall v. United States*.³⁹ In the *Morei* case, appeals to friendship and offers of an opportunity to make large sums of money induced Morei, who had a good reputation and who had never been engaged in the narcotics traffic or any other criminal transactions, to obtain narcotics for a government stool pigeon. It is not clear whether the court was following the majority or the minority opinion of the *Sorrells* case. It referred to the minority opinion with approval but then emphasized the absence of "reasonable cause to believe that he [the defendant] was engaged in the narcotic traffic" and found that "the criminal design originated with the agents of the Government." The court held that Morei's motion to direct a verdict of not guilty should have been granted and his conviction was reversed. In the *Wall* case the government had used as a stool pigeon a drug addict and former mistress of the defendant. The latter testified that after several unsuccessful attempts had been made to meet him, the stool pigeon accidentally met him on the street and complained of pains and cramps for want of narcotics; that because of his sympathy for her he gave her an address with a note to some other persons from whom she could obtain morphine. This testimony was contradicted by the government's witnesses. The trial judge refused to charge on the question of entrapment. This was held to be reversible error. The court conceded that the government may take steps to purchase drugs from persons suspected of dealing in narcotics but if its officers took advantage of the sympathy which the defendant would naturally feel toward his former mistress and induced him to pander to her craving for morphine and if the defendant "was acting solely in the belief that by doing so he would alleviate her suffering, and he was not in any other way interested in the unlawful sale, this would amount to entrapment."⁴⁰

The state court decisions dealing with entrapment cover a wide variety of offenses.⁴¹ Seldom do they make a careful examination of the doctrine.

38. 127 F.2d 827 (6th Cir. 1942).

39. 65 F.2d 993 (5th Cir. 1933).

40. In *Weathers v. United States*, 126 F.2d 118 (5th Cir.), *cert. denied* 316 U.S. 681 (1942) the court emphasized the fact that no "unusual offers of money, or appeals to sympathy were made, or other things practiced which might seduce the law-abiding."

41. *Gambling*: *People v. Lindsey*, 91 Cal. App.2d 914, 205 P.2d 1114 (1949); *State v. Del Bianco*, 78 A.2d 519 (N.H. 1951); *State v. Stolberg*, 318 Mo. 958, 2 S.W.2d 618 (1928). *Liquor violations*: *State v. Ragan*, 157 Wash. 130, 288 P. 218 (1930); *York v. Commonwealth*, 235 S.W.2d 1007 (Ky. 1951); *State v. Jarvis*, 105 W.Va. 499, 143 S.E. 235 (1928); *State v. Love*, 229 N.C. 99, 47 S.E.2d 712 (1948); *Sutton v. State*, 59 Ga.App. 198, 200 S.E. 225 (1938); *Illegal practice of Medicine and Dentistry*: *State v. Devore*, 58 S.E.2d 641 (W.Va. 1950); *People v. Boyden*, 400 Ill. 409, 81 N.E.2d 142 (1948); *People v. Mattei*, 381 Ill. 21, 44 N.E.2d 576 (1942); *People v. O'Dell*, 99 N.E.2d 367 (Ill.App. 1951). *Prostitution*: *City of Seattle v. Gleiser*, 29 Wash.2d 869, 189 P.2d 967 (1948); *State v. McCornish*, 59 Utah 58, 201 Pac. 637 (1921). *Sodomy*: *Ditton v. State*, 222 Ind. 25, 51 N.E.2d 356 (1943). *Bribery*: *Ossen v. Comm.* 187 Va. 902, 48 S.E.2d 204 (1948); *People v. Finkelstein*, 98 Cal.App.2d 545, 220 P.2d 934 (1950). *Abortion*: *People v. Raffington*, 98 Cal.App. 2d 455, 220 P.2d 967 (1950), *cert. denied*

They merely repeat over and over again that the officers did no more than offer an opportunity to commit an offense and that the intent arose in the mind of the defendant.⁴²

The test of entrapment generally followed in the federal and state courts is the "genesis of the intent" formula. The government may prove the defendant's "predisposition and criminal design" by evidence of bad reputation or previous convictions. It may also establish this point by proof that the officer had "reasonable cause to believe" that the defendant was disposed to commit the crime charged.⁴³ To this sonorous prescription are coupled requirements of "good faith" and "honest purpose." However it is important to note that the facts showing "reasonable cause" are used as evidentiary of an already existing criminal intent upon the part of the accused, rather than as an absolute prerequisite to the police practice involved.⁴⁴ Seldom do the courts explain what amounts to reasonable cause to believe that the defendant is engaged in criminal enterprises. Routine investigations, "known circumstances,"⁴⁵ or "reliable information furnished through federal channels"⁴⁶

340 U.S. 912 (1951). *Narcotics violation*: *People v. Carlton*, 83 Cal.App.2d 475, 189 P.2d 299 (1948). *Deadly Weapons Act violation*: *People v. Makovsky*, 3 Cal.2d 366, 44 P.2d 536 (1935).

42. For example, the California Courts charge the jury on entrapment as follows:

"The law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of the person so entrapped as his acts do not constitute a crime.

"If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose, but the crime was suggested by another person acting with the purpose of entrapping and causing the arrest of the defendant, then the defendant is not criminally liable for the acts so committed."

People v. Finkelstein, 98 Cal. App. 2d 545, 220 P. 2d 934, 941 (1950). See also, *Falden v. Commonwealth*, 167 Va. 549, 189 S.E. 329 (1937); *State v. Love*, 229 N.C. 99, 47 S.E.2d 712 (1948); *State v. Jarvis*, 105 W.Va. 499, 143 S.E. 235 (1928).

Only infrequently is a defendant successful in the State Courts. The defense was sustained, however, in *Scott v. Commonwealth*, 303 Ky. 353, 197 S.W.2d 774 (1946); *York v. Commonwealth*, 235 S.W.2d 1007 (Ky. 1951); and *State v. Devore*, 58 S.E.2d 641 (W.Va. 1950).

The defense is not recognized in Tennessee. *Goins v. State*, 237 S.W.2d 8 (Tenn. 1951); *Thomas v. State*, 182 Tenn. 380, 187 S.W.2d 529 (1945).

43. *Weathers v. United States*, 126 F.2d 118 (5th Cir.), cert. denied 316 U.S. 681 (1942); *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947); *Mitchell v. United States*, 143 F.2d 953 (10th Cir. 1944).

44. Judge Clark makes this discrimination in *United States v. Abdallah*, 149 F.2d 219, 222 n.1 (2d Cir.), cert. denied 326 U.S. 724 (1945).

45. *Weathers v. United States*, 126 F.2d 118 (5th Cir.), cert. denied 316 U.S. 681 (1942).

46. *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947).

and hearsay complaints are sufficient. In *Heath v. United States*⁴⁷ a government agent testified that he had instructed a subordinate to make a case against the defendants who had been reported as evading the tax imposed upon wholesale liquor dealers. He was then asked to state why he directed an investigation. He started to answer, "For the reason that I have received numerous reports—one source was a sheriff." A hearsay objection was sustained, the testimony stricken and the jury admonished to disregard it. He was then permitted to answer the following: "Why did you select Mr. Heath as one who should be investigated?" He replied, "Because of my previous knowledge of their liquor activity." Not only was the second question and answer held to be proper but it was error to exclude the answer to the first question. The court explained that the evidence was not offered for the purpose of establishing guilt but as justification of entrapment and that it was admissible to show that the government had "reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused."

There is a strange confusion of thought in the "genesis of intent" formula.⁴⁸ When a court declares that the defendant is entitled to an acquittal if the offense was conceived and planned by the officer, what offense is the court talking about? If it is referring to the offense for which the defendant is on trial then, in practically every case, *that* particular offense was conceived and planned by the officer and would not have taken place except for the conduct of the latter. The same inquiry is pertinent when a court announces that it must appear that the defendant would not have committed the offense "except for the trickery, persuasion, or fraud of the officer." What offense is the court talking about? The defendant may have committed similar offenses in the past but he is not on trial for them. Obviously, there is insufficient evidence of his prior violations to convict him otherwise it would have been unnecessary to entrap him in the immediate transaction. Nor is he on trial for uncommitted offenses. The offense for which he is on trial is certainly one that he would not have committed if it had not been "conceived and planned" by the officer nor would the defendant have committed it "except for the trickery, persuasion or fraud of the officer." If the courts really meant what they say, a defendant could never be convicted in these police-induced cases.

Another difficulty with the "origin of the intent" formula is the assumption that the "intent" involved is a faculty that can easily be isolated and assigned in toto to either the defendant or the officer. In the usual case, both have "intended" the specific violation. But the courts do not define "design" or "intent." Certainly they are not using these terms as descriptive of a

47. 169 F.2d 1007 (10th Cir. 1948).

48. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. OF PA. L. REV. 245 (1942). In this portion of the discussion I have drawn heavily from Professor Mikell's penetrating article.

state of mind essential as an element of the particular offense, for entrapment is available as a defense when no specific intent is required and may even be asserted when no intent at all is required, *e.g.* when a statute imposes strict liability.⁴⁹ Seemingly they refer to a general, pre-existing intention of violating the law. If so, an officer who purchases liquor or narcotics does so with the prescribed intent for he surely intends to bring about a violation of the law regardless of the amount of inducement he utilizes.

A factual analysis of the entrapment cases discloses that the allocation of "intent" to the defendant or the officer actually depends upon whether the defendant was previously engaged in criminal activities of a similar character. If he was, then the "intent" is found to originate with him; if not, then it was generated by the officer. But it is not clear why this should be so even if prior violations are admissible in evidence.⁵⁰ It is a strange doctrine that makes guilt or innocence depend upon whether a defendant has committed other similar offenses. However bad a person may be, however guilty of crime, it is nevertheless a principle of our system of criminal law administration that conviction and punishment must be for some specific act or crime proved against an accused by competent evidence compelling an inference of guilt as to the specific act, and not for a general criminal depravity or wickedness. The admission of this kind of evidence invariably prejudices the jury against the accused and diverts their attention from an impartial consideration of the evidence of the particular crime charged. It is difficult to justify the injection into a trial for a specific offense hearsay complaints or officer's suspicions about other offenses. And even if proved, prior transgressions do not compel a logical inference that the defendant did in fact commit the particular offense.

The defense of entrapment is not available where the accused was provoked to commit an offense by a private person not connected in any way with the

49. *Voves v. United States*, 249 Fed. 191 (7th Cir. 1918). It is sometimes suggested that the act of the officer in instigating the crime renders the victim a mere tool with no wrongful intent. This theory would limit the defense to crimes requiring a wrongful intent. It would also follow that if the act were induced by a private individual, the necessary intent would be lacking fully as much as when officer-induced yet there can be no entrapment by a private individual. The usual view is that the defense is available though no wrongful intent is required. A few decisions also suggest that when crime is caused by government officers that the act is not "voluntarily done." This suggestion was made in the *Voves* case where the statute imposed strict liability for selling liquor to Indians. Intent was not an element of the offense nor did the statute contain the word "knowingly." A voluntary sale was all that was required. This suggests that entrapment might be regarded as a supplement to the doctrine of coercion. Coercion, however, involves threats whereas entrapment means pressures and influence falling short of coercion. In the *Voves* case the court said that "public policy estops the government," thus indicating that the doctrine is one of procedure and administration rather than substantive law.

50. Evidence of the commission of other similar criminal acts is sometimes admissible to show intent or design. But it is done to establish some element of the crime. In entrapment cases all elements of the crime have been proved directly, or are admitted. 2 WIGMORE, EVIDENCE § 300-304 (3d ed. 1940).

government. Entrapment is limited to police instigation.⁵¹ If the genesis of intent formula is to be taken seriously, why limit entrapment to instigation by government agents? In the *Sorrells* case, for example, the defendant was ignorant of Martin's true identity and it can scarcely be maintained that the fact he was an officer had any effect upon the ethical quality of the defendant's act.

Although the defense is not available if a private party does the entrapping the courts have announced no guides for determining what persons are to be deemed governmental agents. Nor have they delineated the degree of participation or cooperation required by government agents in setting the trap. The problem did not arise in the *Sorrells* case since Martin was clearly a government agent. In *United States v. Spadafora*,⁵² Bevil, a respectable business man, reported to the Secret Service that Tate, his barber and former school-mate, had offered to sell him counterfeit money. The agents of the Secret Service requested Bevil to obtain samples of the spurious money which he did. The court assumed that "because he worked with the Secret Service at their request that he should be considered in the category of a government agent." This assumption is without much significance inasmuch as the court found there was no evidence of entrapment. It is plausible that if the facts had shown entrapment the court would have held Bevil not to have been a government agent. On the other hand, the courts have treated, without discussion of their status, paid informers and those acting under promises of immunity as government agents.⁵³

51. *Polski v. United States*, 33 F.2d 686 (8th Cir.), cert. denied 280 U.S. 591 (1929).

Another limitation upon the defense of entrapment is that it is personal to the accused. It is no succor to a defendant that his partner in crime was entrapped. *United States v. Perkins*, 190 F.2d 49 (7th Cir. 1951). If the defendant is only an accessory a contrary result should be reached in a jurisdiction adhering to the common law rule that no accessory can be convicted or punished except after conviction and punishment of his principal.

The exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914) is subject to similar exceptions. Evidence stolen from a defendant by private parties is not excluded since the right of privacy protected by the Fourth Amendment proscribes only official invasion. *Burdeau v. McDowell*, 256 U.S. 465 (1921). Furthermore, the rule's protection may be claimed only by a person "aggrieved" by illegal seizure. Evidence seized in violation of the rights of privacy of a third party is admissible. *United States v. Lefkowitz*, 52 F.2d 52 (2d Cir. 1931); *Haywood v. United States*, 268 F. 795 (7th Cir.) cert. denied, 256 U.S. 689 (1920). Compare, *United States v. Block* 188 F.2d 1019 (D.C.Cir. 1951); *Jeffers v. United States*, 187 F.2d 498 (D.C.Cir. 1951), 64 HARV. L. REV. 1002 (1951). These exceptions are criticized in Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144, 154 (1948) and Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 21-5 (1950).

52. 181 F.2d 957 (7th Cir. 1950).

53. *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933); *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933); *Mayer v. United States*, 67 F.2d 223 (9th Cir. 1933); *United States v. Ginsburg*, 96 F.2d 882 (7th Cir.), cert. denied 305 U.S. 620 (1938); *Hayes v. United States*, 112 F.2d 676 (10th Cir. 1940); *Morei v. United States*, 127 F.2d 827 (6th

According to the majority in the *Sorrells* case, inquiry is not confined to the question of whether the defendant was entrapped. There is the further question of whether Congress intended the particular statute to encompass entrapment. In none of the many cases that have reached the appellate courts since 1932 has this second question been discussed. Either an implied exception to the statute has been tacitly assumed or this aspect of the decision ignored. The doctrine continues to be justified in terms of estoppel⁵⁴ or public policy.⁵⁵ Notwithstanding Roberts' criticism, the majority's treatment of the statute was not as unprecedented as he presumed. The application of common law defenses to statutory crimes is one of the commonest examples of non-literal interpretations of statutes. The defense of entrapment was recognized at the time the statute involved in the *Sorrells* case was enacted.⁵⁶ The majority's technique leaves a court free to consider the particular crime and if it is so heinous as to shock the sense of decency more than does the conduct of the officer the court may hold that public policy will not tolerate making an exception. Roberts' assertion that his position is meritorious in that it avoids the necessity of making distinctions according to the gravity of the crime is highly questionable. The same considerations of policy which would cause the majority to refrain from reading entrapment into a statute would in all probability impel a court adopting the minority view to restrict

Cir. 1942); *United States v. Lindendorf*, 142 F.2d 829 (2d Cir.), *cert. denied* 323 U.S. 761 (1944); *United States v. Abdallah*, 149 F.2d 219 (2d Cir.), *cert. denied* 326 U.S. 724 (1945); *United States v. Brandenburg*, 162 F.2d 980 (3d Cir.), *cert. denied* 332 U.S. 769 (1947); *Cratty v. United States*, 163 F.2d 844 (D.C.Cir. 1947); *Ryles v. United States*, 183 F.2d 944 (10th Cir.), *cert. denied* 340 U.S. 877 (1950), all being entrapment cases. A case that was wrongly decided on this point was *Polski v. United States*, 33 F.2d 686 (8th Cir.), *cert. denied* 280 U.S. 591 (1929). Bradfield was an applicant for a position as prohibition agent. He had been recommended for such a post by the prohibition director who had suggested to his assistant that he first try out Bradfield as an informer. While acting in this capacity, Bradfield induced the defendant to violate the liquor laws. The court held that Bradfield was not acting as an agent of the government.

54. *United States v. Kaiser*, 138 F.2d 219 (7th Cir. 1943), *cert. denied* 320 U.S. 801 (1944) "The defense of entrapment is a concession that the crime has been committed, but the law invokes an estoppel against the government because of the conduct of its officers."

55. *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933). "The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist."

The state courts usually base the doctrine upon public policy. *People v. Makovsky*, 3 Cal.2d 366, 44 P.2d 536 (1935); *Falden v. Commonwealth*, 167 Va. 549, 189 S.E. 329 (1937); *State v. Love*, 229 N.C. 99, 47 S.E.2d 712, 714 (1948) "Considerations of the purity and fairness of the courts and agencies created for the administration of justice gravely challenge the propriety of a procedure wherein the officers of the State envisage, plan and instigate the commission of a crime and proceed to punish it on the theory that a facile compliance with the officer's invitation confirms the accuracy of the suspicion of an unproved criminal practice—for which the defendant is in reality punished."

56. *Woo Wai v. United States*, 233 Fed. 412 (9th Cir. 1915).

its definition of entrapment in such a manner as to either exclude a plea in bar or a motion to quash or else to decide that the officer's conduct did not constitute entrapment. It is unlikely that entrapment would be available under either view if the crime were atrocious in character or threatened vital interests of government. It is significant that the great majority of cases have involved liquor and narcotics violations.⁵⁷

Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wire tapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations. Each is a substitute for skillful and scientific investigation. Each is condoned by the sinister sophism that the end, when dealing with known criminals or the "criminal classes," justifies the employment of illegal means. The Supreme Court has responded more or less effectively in curbing illegal search and seizures,⁵⁸ illegal detention,⁵⁹ and wire-tapping⁶⁰ by federal officers and "third degree" practices⁶¹ by state as well as federal police officers. It has occasionally been suggested that entrapment is sustainable as a doctrine on the same constitutional grounds as the search and seizure and the confession cases. It has been held, however, that the law forbidding conviction by entrapment methods has no affinity with legal questions concerning the admissibility of testimony for no "constitutional right of the accused has been violated; and the question is, not as to the admissibility of evidence, but as to the validity of an asserted defense to crime."⁶² And in *Olmstead v. United States*,⁶³ a closely divided court refused to extend the exclusionary rule to a

57. One interesting question arises under the minority view. Suppose that Congress should specifically provide in a given statute that entrapment should not be a defense. Would the minority treat this interference with its views of sound policy as a legislative invasion of the field of judicial power?

58. *Boyd v. United States*, 116 U.S. 616 (1886); *Weeks v. United States*, 232 U.S. 383 (1914). Also see Comment, *Judicial Control of Illegal Search and Seizure*, 58 *YALE L. J.* 144 (1948).

59. *McNabb v. United States*, 318 U.S. 332; *Upshaw v. United States*, 335 U.S. 410 (1948).

60. *Nardone v. United States*, 308 U.S. 338 (1939); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950); Helfeld, *Justice Department Policies on Wire Tapping*, 9 *LAW. GUILD REV.* 57 (1949).

61. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Watts v. Indiana*, 338 U.S. 49 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949). For an excellent discussion of the search and seizure and the confession cases see Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 *ILL. L. REV.* 1 (1950).

Judicial nullification of an illegal act by a refusal to allow it to aid the prosecution has been suggested in a variety of other fields. It was recently extended to illegal arrest in the pioneer case of *Collins v. Frisbie*, 189 F.2d 464 (6th Cir. 1951).

62. Judge Parker in *Sorrells v. United States*, 57 F.2d 973, 978 (4th Cir. 1932). And compare Judge Learned Hand's remarks in *United States v. Dennis*, 183 F.2d 201, 225 (2d Cir. 1950).

63. 277 U.S. 438 (1927). In this case federal officers had tapped wires in violation of a Washington statute. The Government contended that if evidence obtained by wire-

case where the methods used, while clearly unlawful, were not regarded as violating constitutional guaranties. Although the exclusionary rule is explained as a constitutional or statutory imperative it can be supported by the broad policy which prevents the judicial power from being employed as an instrument for the lawless enforcement of the criminal law. That was the orientation of the Holmes and Brandeis dissents in the *Olmstead* case and it was the view of Mr. Justice Roberts in the *Sorrells* case. This view is preferable. Entrapment should have its footings in the policy of the courts to preserve their own integrity.

tapping be excluded on constitutional grounds. "on the same principle would not all manner of evidence gathered by ruse or entrapment have to be excluded? Suppose an officer . . . pretends to join a conspiracy and thereby gains access to the inner councils of the conspirators and hears the hatching of their criminal schemes. These examples, varying into slight shades of distinction, might be multiplied indefinitely to show the extremes to which the principle contended for would lead." The majority of the court was apparently moved by this argument for Chief Justice Taft, after holding there was no violation of the search and seizure provisions of the Fourth Amendment said:

"Nor can we, without the sanction of congressional enactment subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. . . . Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received. . . .

"In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it." *Id.* at 468.

Mr. Justice Holmes, in a biting dissent, remarked:

"It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part. . . . We are free to choose between two principles of policy." *Id.* at 470.

Mr. Justice Brandeis was equally critical of the majority's position:

"[A court's] aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." *Id.* at 485.

In a rough way the courts, in applying the law of entrapment, have recognized a classification of criminal offenders that is psychiatrically valid. It is obvious that the stronger the inclination towards crime the weaker the precipitating events need be to evoke it; the less the criminal tendencies, the greater the precipitating events which are necessary to provoke them. A man is led into crime because of an instability of three factors—criminalistic tendencies, mental resistance, and the situation. A distinction may be made between the situational offender and the chronic offender. A situational offender commits a crime because an opportunity arises which lowers his threshold of resistance, or because of a compelling situation, such as a strong feeling of injustice or a need for self-defense, or in the course of a temporary mental condition. While the offense is being committed, the offender's impulse to act antisocially is overpowering. As soon as this impelling force vanishes, his ego rejects the crime. On the other hand, when the situational offender commits a second or a third crime a criminal pattern has started to develop in the personality. Such a pattern may become more and more deeply ingrained so that finally a definite criminal characteristic has evolved. If that happens, a chronic criminal is produced.⁶⁴ The chronic offender usually perpetrates criminal acts which are directed primarily against society. He identifies himself with antisocial activities. He rarely shows remorse and his chief regret is that he may have to go to jail. He harbors an ingrained hatred against authority and society. His criminal activities are approved by his ego and superego. Although some of these characters may be neurotic offenders such as the dope peddler who is himself an addict and sells drugs in order to supply his own needs, many are habitual criminals who commit crimes as a profession and have no interest in taking up a legitimate career. In emphasizing the question of whether or not the defendant was engaged in an habitual course of criminal enterprise the courts are attempting to discriminate between the situational and the chronic offender. And it is for this reason that a defendant who can prove no prior violations usually wins on the issue of entrapment.

It was suggested above that the courts should have some latitude in deciding in what type of offenses the defense of entrapment should be available. The defense is most frequently raised in connection with offenses having several characteristics in common. The behavior sought to be discouraged is likely to be of frequent and widespread occurrence. The violators are usually not situational offenders but are often engaged in crime as a business career. The initiative of enforcement cannot be left to private complaint. The commission of the offense is shrouded in secrecy. Therefore, the practical difficulties in securing evidence cannot be ignored. Furthermore, there is a well advanced trend in contemporary police power legislation and practice to establish procedures designed to locate potentially deviated individuals

64. This classification of offenders is elaborated in ABRAHAMSEN, *CRIME AND THE HUMAN MIND* 93-126 (1944).

before they have an opportunity to commit disturbing overt acts. Entrapment practices fall within this general pattern as a preventive technique.

A good case can be made for the position that the problems dealt with by sumptuary legislation should not be within the scope of the criminal law; that they are primarily problems of public health and education. Still, as long as legislation of this type is on the books, some activity other than that of passive observation should be permitted the police.⁶⁵ What activity should be permitted? The inquiry should be directed solely to the propriety of the officer's conduct. Such vagarious shibboleths as "genesis of intent," "reasonable cause to believe," and the officer's "good faith" are irrelevant. The question should be, Was the officer's (or stool pigeon's) conduct of such a nature that only a chronic violator would be tempted? If his conduct was no more than would induce a person engaged in an habitual course of conduct for gain and profit then the defense should not be available regardless of the officer's motives. "A person engaged in an habitual course of conduct for gain and profit" is an objective, external standard. The reputation of the particular defendant is not involved. On the other hand, if the officer uses inducements that would reasonably overcome the resistance of one not a chronic offender, such as pleas of desperate illness,⁶⁶ continued and persistent coaxing,⁶⁷ appeals to sympathy, pity, or friendship,⁶⁸ or offers of inordinate sums of money,⁶⁹ the court should find as a matter of law that there was entrapment. In other words, the precise issue is not whether the defendant committed the crime with which he is being charged. That is conceded. It is whether or not the conduct of the enforcement officers in inducing the violation was of such a character as to provoke a situational offender to commit the offense. Attention is focused solely upon the transaction put in issue by the charge and the plea. The defendant should be acquitted if this transaction shows entrapment. Of course, an officer should be permitted to conceal

65. For a discussion of the British view see, REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE (CMD. No. 3997) 42 (1929):

"No precise regulation can be laid down to deal with the problem, but we recommend that, as a general rule and subject to the exception referred to below, the Police should observe only without participating in the offence. . . . The exception which we would make to this general rule arises in a certain type of case in which observation, without participation, is from the nature of the case impossible. . . . We therefore recommend, as an exception to the general rule proposed above, that participation in offenses may be resorted to by Police, only on the written authority of the Chief Constable and in cases where there is good reason to believe that the offense is habitually committed in circumstances in which observation by a third party is *ex hypothesi* impossible."

The Canadian attitude is illustrated in *Rex v. Petheran*, 65 Can. Crim. Cas. 151 (1936).

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

67. *Woo Wai v. United States*, 233 Fed. 412 (9th Cir. 1915).

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

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

his identity. He should be permitted to offer money in reasonable amounts at the prevailing price. However, appeals to more than the ordinary expectation of gain and profit incident to the traffic should be condemned.

The bribery cases raise a different problem. Offers to bribe made to a public official should not be regarded as entrapment.⁷⁰ The offense is of such gravity, the evidence so difficult to obtain, and the temptation so constant and recurring that the government is justified in testing its officers. On the other hand, a government agent should not be permitted to entrap a private citizen by demanding that a bribe be given for protection. An incorruptible enforcement staff is capable of dealing with bribe givers whenever they appear. There is no need to seek him out. Furthermore, an innocent man, fearful of official retaliation might readily yield to such a request.⁷¹

CRIMINAL RESPONSIBILITY OF THE STOOL PIGEON

At first blush it seems that the police officer or stool pigeon who participates in the commission of an offense is *particeps criminis* and subject to prosecution and conviction. Cases involving their criminal responsibility rarely arise due to the ties between the detecting and prosecuting forces. On the other hand, the party victimized may be in a position to maintain a *qui tam* action against the instigating officer or stool pigeon.⁷²

How far may an officer or stool pigeon, with criminal immunity, induce or participate in the commission of crime? If the crime charged is one requiring a specific intent *e. g.*, larceny or burglary, the intent rationale will support an acquittal.⁷³ The courts apply the same formula, however, to offenses not

70. *Scriber v. United States*, 4 F.2d 97 (6th Cir. 1925).

71. Thus in *United States v. Mathues*, 22 F.2d 979 (E.D. Pa. 1927), the court properly held that an officer's suggestion that he would accept bribes constituted entrapment, the court discharging on a writ of habeas corpus in advance of trial. See also, *Capuano v. United States*, 9 F.2d 41 (1st Cir. 1925); *Gargano v. United States*, 24 F.2d 625 (5th Cir. 1928).

72. Some of the federal statutes providing for a *qui tam* action are referred to in footnote 6, *supra*.

In *Rex v. Petheran*, 65 Can. Crim. Cas. 151 (1936), the defendant was a police sergeant entrusted with enforcing the Liquor Control Act. In the hope of obtaining a conviction against a suspected gang of bootleggers he instructed a subordinate to make a purchase of liquor from one Klix. On the evidence of these police officers Klix was convicted of illegally selling liquor. Later an information was laid against the defendant for having purchased liquor contrary to the Act. He was acquitted by the magistrate but on appeal was convicted. Chief Justice Harvey held that while the defendant as a police spy could not be considered an accomplice of Klix, he was nevertheless guilty of a breach of the Act. The Chief Justice makes it clear that a police officer may sufficiently participate in a crime to render himself subject to conviction and still not be an accomplice requiring that his testimony be corroborated.

73. In *Wilson v. People*, 103 Colo. 441, 87 P.2d 5, 120 A.L.R. 1501 (1939), 24 MINN. L. REV. 112 (1939), the defendant had been employed by his father, the deputy district attorney, for several months. The evidence tended to show that he planned to burglarize a store with another who had suggested the offense; that he helped his

exacting a specific intent. In *State v. Torphy*,⁷⁴ a member of the city council undertook, at the mayor's direction, to ferret out and secure evidence against certain parties suspected of violating the gambling laws. He engaged in a poker game with the suspects. It was held that he could not be convicted of gambling for the reason that he had no criminal intent. The court clearly confused intent with motive. The defendant intended to gamble which was all that was required by the statute. His motive, which is usually immaterial, was to detect gambling.⁷⁵

companion over a transom and then called the police and assisted in the apprehension of the companion. The defendant was charged with aiding and abetting the commission of burglary and larceny. He pleaded that he acted solely as a decoy and without a criminal intent to burglarize or steal. The court held erroneous an instruction of the trial court that "one who attempts to detect the commission of crime in others must himself stop short of lending assistance or participation in the commission of the offense." The defendant, it said, could be found guilty only if he acted with a felonious intent.

Other cases reaching the same result are: *Price v. People*, 109 Ill. 109 (1884); *State v. Bigley*, 53 Idaho 636, 26 P.2d 375 (1933); *Commonwealth v. Robinson*, 1 Gray 555 (Mass. 1854).

74. 78 Mo. App. 206 (1899).

75. The fact that an officer is not subject to criminal liability may work to a victim's advantage when the latter is charged with conspiracy. *United States v. Wray*, 8 F.2d 429 (N.D. Ga. 1925):

"Had the conspiracy been charged to have been between the officer and one other person, I should be inclined to hold that if the officer was endeavoring to entrap the other, and not really intending to join in a violation of law, there could be no conviction. He himself could not be convicted for conspiracy, and the rule is that acquittal of one of two alleged conspirators acquits the other. Moreover, it does not seem right to aggravate a misdemeanor of selling liquor into a felony of conspiracy solely by the circumstances of an officer of the government, acting for the government, taking a part in it. If a purchaser and seller of liquor, both knowing the sale to be illegal, can be considered conspirators, still where the purchaser is an officer in the discharge of his duty, there is not indictable conspiracy. But here the indictment charges, also, that the two defendants conspired with one another, and there is evidence in support of this view of the case. The issue as to their conspiracy should be passed upon by the jury."

In *Kott v. United States*, 163 F.2d 984 (5th Cir. 1947), however, the defendants had been convicted of a conspiracy to sell liquor in excess of the ceiling price fixed by the Emergency Price Control Act. John, a merchant dealing in illicit liquor in Mississippi, was working in liason with agents of the Alcohol Tax Unit and contracted with the defendants for the purchase of liquor for a sum in excess of the ceiling price. The court held it proper to admit the testimony of John as to the statements made by one Hillman on the theory that John and Hillman were co-conspirators.

"[A]lthough John lent his services readily to the Federal agents in assisting in securing evidence of the violation of the Act, nevertheless the jury, with all good reason, could conclude that his cooperation with the Federal agents did not necessarily relieve him of complicity in the conspiracy. His purpose in so doing could have been to get a supply of liquor for John's Beverage Company and at the same time to curry favor with the agents in order to keep from being indicted. Admittedly

The question of criminal responsibility should be attuned to entrapment. This was recognized in *Reigan v. People*.⁷⁶ The defendants were convicted of a conspiracy to trap beaver unlawfully. They were game wardens who had been assigned to investigate this activity. The theory of the prosecution was that they induced two boys, not then so engaged, to go into the business of unlawfully trapping beaver and to sell the hides to the defendants. The facts were such that if the boys had been prosecuted entrapment would have been a good defense. The court, drawing an analogy with the entrapment cases, affirmed the conviction.⁷⁷ This case puts the problem in proper focus by making the criminal liability of the officer or stool pigeon depend upon whether his conduct constituted entrapment. Like entrapment, the question is not whether the officer had criminal intent. The granting of criminal immunity to those engaged in detecting crime is primarily one of policy. If proper detection techniques are exceeded the purity and integrity of criminal administration requires that the criminal sanction be imposed.⁷⁸

ARE SPIES AND STOOL PIGEONS ACCOMPLICES?

Whether spies and stool pigeons are criminally responsible is necessarily pertinent in deciding whether or not they are accomplices. In the former case they are charged with the crime while in the latter they are witnesses against other participants. The validity of a conviction based on the sole testimony of an accomplice did not become a moot question until the end of the 18th century.⁷⁹ The rules applicable to the testimony of an accomplice originated in the ancient doctrine of *approvement*.⁸⁰ Later this practice fell into disuse and was replaced by the doctrine of "King's evidence" which allowed an accomplice to testify against his fellow miscreants. If he made "a full and complete discovery of that and of all other felonies" and gave "his evidence without prevarication or fraud," he was not "prosecuted for that or any other

he entered into an unlawful agreement to buy liquor above the lawful price and any expectation that the Federal agents would recapture the money paid by him and return it to him would not make his act legal."

76. 120 Colo. 472, 210 P.2d 991 (1949).

77. *Reigan v. People*, 120 Colo. 472, 478, 210 P.2d 991, 994 (1949):

"Applying these principles to the case at bar, if the cooperation of the defendants amounted to no more than an effort to 'detect' a violation of law on the part of the two boys then the defendants could not be convicted of a conspiracy. If, however, the conduct of the defendants amounted to an attempted 'entrapment' of the boys the judgment must stand. . . . Under proper instructions concerning the law the jury found an 'entrapment' and it is not our province to determine to the contrary."

78. This is not to suggest that this sanction is an effective deterrent anymore than is the possibility of a civil suit for damages. A similar problem is involved in the illegal search and seizures cases. There, civil suits and other attempts to control police lawlessness short of the exclusionary rule have been inadequate. See Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144 (1948).

79. The history is traced in 7 WIGMORE, EVIDENCE § 2056 (3d ed. 1940).

80. This doctrine was discussed in the text accompanying footnote 1, *supra*.

previous offense of the same degree."⁸¹ The original controversy was over his competency. It was claimed that his confession rendered him as incompetent as if he had been convicted of the crime. The argument, however, was repudiated from the very beginning—partly on the ground of necessity and partly on the ground that guilt, though confessed, did not disqualify unless there had been a conviction.⁸²

For a long time no question of credibility was raised. The conception of the oath kept the question in the background. The oath of one competent witness was considered as good as another. When the modern conception of testimony developed, the feasibility of hearing a witness and yet discriminating as to the qualitative sufficiency of his testimony became more apparent and the way was open for an examination of this question. Out of the rule of complete immunity burgeoned the likelihood that an accomplice would falsely accuse others in order to save himself. To obviate this danger there came into acceptance in England toward the end of the 18th century a rule of general practice whereby juries were cautioned not to convict solely upon the testimony of an uncorroborated accomplice. This was a rule of practice rather than a rule of evidence. The judges merely exercised their common law function of commenting upon the weight of the evidence and they were not enunciating a rule of law binding upon the jury. The same discrimination was early accepted in this country. As a matter of common law then, the admonition was but a counsel of caution. The jury might or might not heed the advice to acquit upon an uncorroborated accomplice's testimony. It alone decided whether there was corroboration and whether it was sufficient. Failure by the trial judge to give a cautionary instruction was not of itself a ground for a new trial since the matter was solely within his discretion.

In about half of the states statutes have elevated this cautionary rule of practice to a rule of evidence.⁸³ To refuse the instruction when requested is reversible error; the nature and presence of corroborating circumstances is a question of law.⁸⁴ These statutes were enacted because of the aberrant rule—adopted in many states—prohibiting the judge to comment upon the evidence.⁸⁵ In the absence of such a statute the judge was precluded from ad-

81. *People v. Swift*, 161 Misc. 851, 293 N.Y. Supp. 378, 380 (Sup. Ct. N.Y. County 1936), *aff'd without opinion* in 251 App. Div. 808, 298 N.Y. Supp. 188 (1st Dep't 1937), *aff'd without opinion* 277 N.Y. 618, 14 N.E.2d 190 (1938). Also see *Guthrie v. Commonwealth*, 171 Va. 461, 198 S.E. 481 (1938).

82. 2 WIGMORE, EVIDENCE § 526 (3d. ed. 1940).

83. The statutes are collected in 7 *Id.*, § 2056.

84. As to what constitutes corroboration consult 7 WIGMORE, § 2059; *People v. Nitzberg*, 287 N.Y. 183, 38 N.E.2d 490 (1941) *rehearing denied* 287 N.Y. 754, 40 N.E.2d 40 (1942), 138 A.L.R. 1253 (1942); *People v. Griffin*, 98 Cal. App.2d 1, 219 P.2d 519 (1950).

85. The state of the law on the power of the trial judge to summarize, analyze and comment upon the evidence is catalogued in VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 224-34 (1949).

vising the jury to refuse to convict upon the uncorroborated testimony of an accomplice.

The black letter test of an accomplice is whether he himself could be convicted of the offense under consideration, either as principal or accessory.⁸⁶ For this reason the question whether a police officer or other person is an accomplice will often be determined upon the same facts as the defense of entrapment. If the conduct of the officer constitutes entrapment then, as has been shown, he should be criminally responsible for the offense and, *ergo*, an accomplice.⁸⁷ This mechanistic formula, however, is too inflexible. Other considerations should be taken into account. Recall the distinction between the informant, on the one hand, and the spy and stool pigeon on the other. The informant has participated in the commission of an offense before he extends any aid to the enforcement authorities. He usually agrees to assist the prosecution in exchange for a promise of immunity or leniency.⁸⁸ He is a confessed criminal and there is a real danger that he will falsely accuse others and give perjured testimony. The historical and common sense reason for the rule dealing with corroboration is to prevent this type of witness from transferring responsibility for a crime from his own shoulders to others.⁸⁹

The spy and stool pigeon are of a different hue. First of all, the police officer who, in an undercover role, acts as a spy or stool pigeon should be distinguished from the casual, temporary and non-professional employee. At least minimum standards of character, intelligence and trustworthiness are appropriately applied to him. He will usually hold his job whether or not a conviction is obtained in the pending case although it must be recog-

86. 2 WHARTON, CRIMINAL EVIDENCE § 732 (11th ed. 1935). As to who are principals and accessories, see Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581 (1941); United States v. Peoni, 100 F.2d 401 (2d Cir. 1938); United States v. Chiarella, 184 F.2d 903 (2d Cir. 1950), discussing the effect of the 1948 revision of 18 U.S.C. § 2(b).

87. Guthrie v. Commonwealth, 171 Va. 461, 198 S.E. 481 (1938); Reigan v. People, 120 Colo. 472, 210 P.2d 991 (1949).

88. In *People v. Green*, 228 P.2d 867 (Cal. App. 1951) the court set aside a conviction based upon testimony of an accomplice given under a promise of immunity conditioned upon his testimony resulting in a conviction of one jointly charged with the witness.

89. The attitude of the Supreme Court regarding the informant as a witness was expressed in *Caminetti v. United States*, 242 U.S. 470 (1917), where the defendant was charged with violating the White Slave Traffic Act. The government relied upon the testimony of girls involved in the alleged offense. The trial court did not instruct that the testimony was that of accomplices and, because of that, to be received with great caution and believed only when corroborated. The Supreme Court held that it was not error to fail to give such an instruction. It acknowledged that the better practice was to do so but denied the existence of any imperative preventing convictions on the testimony of accomplices alone. This case is frequently cited for the proposition that accomplice testimony need not be corroborated in order to support a conviction and that a defendant in the federal courts may be convicted solely on testimony of this kind. *United States v. Wilson*, 154 F.2d 802 (2d Cir. 1946); *United States v. Gallo*, 123 F.2d 229 (2d Cir. 1941); *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933).

nized that efficiency ratings and promotions may be affected. The temptation of the officer to exculpate himself by fixing responsibility upon others is not great. But even in his case a few courts have recognized the desirability of a cautionary instruction if requested although it is not error to refuse to give one.⁹⁰ Most courts, however, take the unyielding position that an officer whose conduct falls short of entrapment has no "criminal intent" and is not an accomplice. Lacking criminal intent he is only a "feigned accomplice."⁹¹ Nor do the statutes requiring corroboration apply to "feigned accomplices."⁹² It was demonstrated in the section on criminal responsibility that the intent rationale is applied to offenses where no specific intent is required. The same confusion of intent with motive exists here. When corroborating facts and circumstances are not in evidence and where danger of collusion between the officer and the criminal exists or where the officer may be tempted to mendaciously fix responsibility upon others, a defendant should be entitled to a cautionary instruction. It is true that if the officer's conduct constitutes entrapment he is an accomplice under formal doctrine. But this test is of little help. In such a situation the defendant should be acquitted on the ground of entrapment and should have no need for a cautionary instruction unless he is a co-defendant who cannot invoke entrapment. A Canadian court has

90. In *Shettel v. United States*, 113 F.2d 34 (D.C. Cir. 1940) the defendant requested an instruction that the testimony of police detectives should be received "with a large degree of caution." The court declined and instead charged the jury that in weighing the credibility of the witnesses, the jury should consider the interest which the witnesses had in the result and that where a witness has a direct personal interest in the result there is a strong temptation to color, pervert, or withhold facts; that this rule applies both to the accused and to all other witnesses. The appellate court held that although "it is proper for a court to give an instruction such as was requested, it did not err in refusing to do so."

Compare, however, *State v. Love*, 229 N.C. 99, 47 S.E.2d 712, 715 (1948), a typical liquor case in that a purchase was made by an officer in plain clothes without disclosing his identity and official character. "We are not so much concerned with labels as we are with what they cover. It is universally recognized, we think, that the testimony of witnesses employed in detective work of this character and who participate in the offense and receive remuneration therefor should be scrutinized as to its credibility. The State's whole case rested on fact,—the official capacity of agent Bradshaw, his attitude, his approach to the transaction, his motives and intent, and procurement and participation in the offense, were matters which could not be assumed."

91. *United States v. Wray*, 8 F.2d 429 (N.D. Ga. 1925); *Stevens v. State*, 133 Tex. Cr. 333, 110 S.W.2d 906 (1937); *Guthrie v. Commonwealth*, 171 Va. 461, 198 S.E. 481, 119 A.L.R. 683 (1938); 2 *WHARTON, CRIMINAL EVIDENCE* §736 (11th ed. 1935). For the similar Canadian view see, *Amsden v. Rogers*, 26 Can. Crim. Cas. 389 (1916).

92. *People v. Griffin*, 98 Cal.App.2d 1, 219 P.2d 519 (1950); *People v. Finkelstein*, 98 Cal.App.2d 545, 220 P.2d 934 (1950); *Hardy v. State*, 72 Okla. Cr. 303, 115 P.2d 767 (1941); *People v. Swift*, 161 Misc. 851, 293 N.Y. Supp. 378 (Sup. Ct. N.Y. County 1936), *aff'd without opinion*, 251 App. Div. 808, 298 N.Y. Supp. 188 (1st Dep't 1937), *aff'd without opinion*, 277 N.Y. 618, 14 N.E.2d 190 (1938) (police officer who engaged in an act of prostitution not an accomplice within meaning of statute requiring corroboration).

held that an officer may be subject to criminal liability and still not be an accomplice.⁹³ The inverse should also be accepted. The test of an accomplice should not be irrevocably wedded to the question of criminal liability. There should be room to take account of cases where an officer, though criminally immune, has the motivations of an accomplice. The policy behind the cautionary rule may still be vibrant notwithstanding his immunity.

The spy or stool pigeon who is only a temporary, casual, or special employee of the police elicits additional considerations. Far different problems of credibility are presented. These individuals are frequently of doubtful character, their continued employment depends upon the number of convictions obtained. They are under great temptation to commit perjury and fabricate evidence, a temptation they are not likely to withstand.⁹⁴ Here again, if these people merely feign complicity in the commission of a crime for the purpose of securing evidence and if their conduct falls short of entrapment, they are not real but only "feigned accomplices," lacking in "criminal intent."⁹⁵ Notwithstanding their failure to brand these characters as real accomplices, the courts have not been oblivious to the fact that their testimony is not the most satisfactory.

In *Fletcher v. United States*,⁹⁶ the defendant was convicted of selling narcotics. The *only* testimony connecting him with the alleged crime was that of a stool pigeon who was a drug addict. He was employed by a narcotics agent at six dollars a day to "turn up" cases involving narcotics violations. The defendant had *requested* an instruction to the effect that the witness' testimony should be examined by the jury with greater scrutiny and care than the testimony of an ordinary witness. The trial court refused. On appeal, this refusal was deemed to be prejudicial error.⁹⁷ A year later the same

93. *Rex v. Petheran*, 65 Can. Crim. Cas. 151 (1936), abstracted in footnote 72, *supra*.

94. For example, very little attention has been paid to the veracity of drug addicts who are frequently used as stool pigeons in narcotics cases. They frequently are "monstrous liars." MENNINGER, *THE HUMAN MIND* 148 (3d ed. 1949). Also consult, Note, 16 So. CALIF. L. REV. 333 (1943); 2 WIGMORE, *EVIDENCE* § 500 (3d ed. 1940); 3 *Id.*, § 934.

95. *Finley v. State*, 84 Okla. Cr. 309, 181 P.2d 849 (1947); *People v. Griffin*, 98 Cal. App.2d 1, 219 P.2d 519 (1950); *Lett v. United States*, 15 F.2d 690 (8th Cir. 1926); *Smith v. United States*, 17 F.2d 723 (8th Cir.), *cert. denied* 274 U.S. 762 (1927); *Reg. v. Mullins*, 3 Cox.C.C. 526 (1848); *Rex v. Bickley*, 73 J.P. 239 (1909); *Amsden v. Rogers*, 26 Can.Crim.Cas. 389 (1916); *Rex v. McCranor*, 31 Can.Crim. Cas. 130 (1918). The English and Canadian cases are collected and keenly analyzed in *Shaw, Instigated Crime*, 3 ALTA. L. Q. 3 (1938).

96. 158 F.2d 321 (D.C. Cir. 1946).

97. *Fletcher v. United States*, 158 F.2d 321, 322 (D.C. Cir. 1946):

"Granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness's own interest. Here, admittedly, the

court held that it was not reversible error to fail to give a cautionary instruction when none was requested and where there was corroborating evidence.⁹⁸

The purpose of the accomplice rule, whether statutory or only a rule of practice, is to prevent convictions based upon testimony that is likely to be perjured. For that reason the test of an accomplice should be whether the nature of the offense and the witness' connection with the defendant is such that there are good reasons for believing he will be tempted to distort the truth in order to assure the defendant's conviction. In applying this test the courts should consider whether the witness is an informant, a spy, or a stool pigeon. The testimony of the informant and the temporary spy or stool pigeon clearly should be scrutinized with care. If a defendant requests a cautionary instruction in regard to their testimony he should get it and a refusal to so charge, where there is no corroboration, should be reversible error. In fact, a conscientious court should give such an instruction on its own motion. The accomplice rule should be deemed a device for testing the trustworthiness of testimony, frequently the chief task confronting the jury.⁹⁹

POLITICAL OFFENSES

Although England and the United States take pride in not having a separate and official political police force neither country has been free from the agent provocateur. May deplored their odious activities in England in the late 18th and early 19th centuries.¹⁰⁰ During and just after World War I the Department of Justice under Attorney General Palmer with its Bureau of Investigation arrogated the role of the political police in dealing with pacifists and radicals.¹⁰¹

usefulness of the witness—and for which he received payment from the agent—depended wholly upon his ability to make out a case.”

98. *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947). Also see *United States v. Ginsburg*, 96 F.2d 882 (7th Cir.), *cert. denied*, 305 U.S. 620 (1938).

In *United States v. Chiarella*, 184 F.2d 903 (2d Cir. 1950), the trial judge had remarked that the infomer was “apparently telling the truth.” Judge Learned Hand felt that this “did not overstep the power universally accorded to a judge to express his opinion on the facts, provided he makes it plain to the jury that they need not agree with him, which in the case at bar the judge did very explicitly in his charge.” *Id.* at 908.

99. Aside from the *in terrorem* threat of a perjury charge, chief reliance in evaluating the truth of a witness's testimony is placed upon cross-examination and the use of other witnesses for impeachment purposes. New scientific techniques may result in more reliable methods of evaluation. The psychiatric examination of witnesses also has possibilities. See, Note, *Psychiatric Aid in Evaluating Credibility of Prosecuting Witness*, 26 IND. L.J. 98 (1950); Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324 (1950).

100. 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND 275 (1863).

101. NATIONAL POPULAR GOVERNMENT LEAGUE, REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE 3, 5 (1920):

“Agents of the Department of Justice have been introduced into radical organizations for the purpose of informing upon their members or inciting them

Sedition legislation inevitably breeds spies. "Espionage goes with an Espionage Act."¹⁰² If political agitation is made criminal, spies are indispensable. In no other way can the offense be detected. The spy frequently becomes an agent provocateur who instigates the activities he reports. This dirty business is the price a government must pay for the suppression of political dissent.

Like any police agency, the Federal Bureau of Investigation uses paid spies.¹⁰³ Their number is not ascertainable and their relationship with the Bureau is exceedingly obscure. Occasionally their activities are brought to light. In the New York trial of the eleven Communist Party leaders,¹⁰⁴ the government's case rested chiefly upon the testimony of witnesses who were or had been members of the Party. Four were apostates.¹⁰⁵ Seven had estab-

to activities; these agents have even been instructed from Washington to arrange meetings upon certain dates for the express object of facilitating wholesale raids and arrests. . . .

"We do not question the right of the Department of Justice to use its agents in the Bureau of Investigation to ascertain when the law is being violated. But the American people has never tolerated the use of undercover provocative agents or 'agents provocateurs' such as have been familiar in old Russia or Spain. Such agents have been introduced by the Department of Justice into the radical movements, have reached positions of influence therein, have occupied themselves with informing upon or instigating acts which might be declared criminal, and at the express direction of Washington have brought about meetings of radicals in order to make possible wholesale arrests at such meetings."

This report was signed by R. G. Brown, Zachariah Chaffee, Jr., Felix Frankfurter, Ernst Freund, Swinburne Hale, Frances Fisher Kane, Alfred S. Niles, Roscoe Pound, Jackson H. Ralston, David Wallerstein, Frank P. Walsh, and Tyrrell Williams.

In *Marzani v. United States*, 168 F.2d 133 (D.C. Cir. 1948) affirmed by an equally divided court in 335 U.S. 895 (1948), 336 U.S. 922 (1949), an informer had helped organize a local council of the National Negro Congress and had solicited memberships.

Also see *Colyer v. Skeffington*, 265 Fed. 17, 69 (D. Mass. 1920), *reversed* in 277 Fed. 129 (1st Cir. 1921) and CHAFEE, *FREE SPEECH IN THE UNITED STATES* 204-15 (1941).

102. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 215 (1941).

103. Hoover, *A Comment on the Article 'Loyalty Among Government Employees'*, 58 *YALE L.J.* 401, 404 (1949):

"That is correct. How else is it possible to secure certain types of information? The most important espionage case in American history was solved through the services of a paid informant of the FBI. By the same token, how could the FBI in certain Loyalty investigations report that the Federal employee had issued to him a membership card of the Communist Political Association No. 35985, Communist membership card No. 83987, Communist Party dues book No. 79298, Communist Registration Card No. 67202, Communist Card No. 79418, without utilizing paid informants?"

Also consult BARTH, *THE LOYALTY OF FREE MEN*, 153-76 (1950); LOWENTHAL, *THE FEDERAL BUREAU OF INVESTIGATION*, 457-65 (1950).

104. *United States v. Dennis*, (S.D. New York, No. C 128-87), *aff'd* 183 F.2d 201 (2d Cir. 1950), *aff'd* 71 S.Ct. 857 (1951).

105. William O. Nowell, Charles W. Nicodemus, Frank S. Meyer, and the ubiquitous Louis F. Budenz. Nowell had been a member of the Communist Party from 1929 until 1936

lished contact with the FBI before joining the Party.¹⁰⁶ During the time the seven were active in the Party they were continuously in communication with the FBI, reporting on Party activities and its membership.¹⁰⁷ Each held positions of some responsibility in the Party.¹⁰⁸ They all received payments from the FBI either in the form of expenses or as compensation.¹⁰⁹ Three

when he resigned. He had been removed from his Party offices in 1934 for opposing the national leadership on a policy question. About four months before the trial he had been put on the Government's payroll as a clerk in the Baltimore office of the Immigration and Naturalization Service. At the time of the trial he was serving under a second temporary appointment of 90 days. 6 Transcript of Record, p. 4680, *United States v. Dennis*, (S.D. New York, No. C 128-87) (hereinafter cited as Record). At one time he had worked for Gerald L. K. Smith but testified that he resigned when he learned the nature of the Smith organization. He had testified in several deportation cases as well as before Congressional Committees. 6 *Id.* at 4729-32, 4734-6, 4743, 4745-6.

Nicodemus was an employee of the Celanese Corporation and a member of the C.I.O. union at the plant. He had been a Party member from 1937 until 1946.

Frank S. Meyer belonged to the Communist Party of the United States from 1934 until 1945 and at one time was in charge of Educational work for the Illinois-Indiana district of the Party. 6 *Id.* at 4509, 4515. He was not cross-examined by the defendants for the reason—according to them—that they lacked sufficient time to prepare.

106. Herbert A. Philbrick, Garfield Herron, Angela Calomiris, Thomas A. Younglove, William G. Cummings, John V. Blanc, Balmes Hidalgo, Jr.

Brief biographies of these seven as well as the four informants referred to in footnote 105, *supra*, appear as Appendix A to the Brief for the United States in the Court of Appeals.

Angela Calomiris publicized her life and experience in a rather pretentious autobiography entitled *RED MASQUERADE* (1950).

107. Philbrick joined the Young Communist League in 1942 and the Communist Party in 1944; Cummings joined the Party in 1943; Calomiris in 1942; and Hidalgo in 1946. They remained active members until the time of trial. Blanc had been a member of the Party from 1934 until 1936 but had not reported to the FBI during that period. In July 1944, he offered to become active in order to furnish information to the FBI and he was in continuous communication with the FBI after that. Herron was a member from 1944 until 1947 and reported only during that time. Younglove was a member from 1945 until 1947 when his union demanded that he cease his active role in Party affairs. He did so but remained a member until the trial.

108. Philbrick had been a member of the State Education Committee of the Party for Massachusetts. 6 Record 4391. Angela Calomiris was financial secretary of the Party's West Midtown Club in New York when she took the witness stand. 7 Record 5022-3. She previously had served as finance secretary, educational director, branch organizer, and co-section organizer. 7 Record 5263. Cummings was a member of the Party's State Committee for Ohio from 1944 until 1948. 7 Record 5687. He had been press director for Toledo and also chairman of local clubs. *Ibid.* Blanc was a club delegate to the county central committee of the Party and had been club dues secretary, shop club chairman, and section press and literature director. 8 Record 6053, 6085. Hidalgo acted as financial secretary of a club in 1947 and was section press director and a member of the section executive from March to December 1948. 8 Record 6137, 6180-2.

109. Philbrick and Cummings were reimbursed for expenses which included dues, purchases of literature, and contributions. 6 Record 4319-20, 8 Record 5906-12. Blanc was compensated for his expenses and time lost from work in connection with his Party

had engaged in recruiting new members among whom were relatives and friends whose names were turned in to the FBI.¹¹⁰

The *Dennis* case raises most of the questions heretofore discussed and many more besides. The defendants made much of the fact that some of the spies recruited members and that they had occupied positions of responsibility within the party hierarchy. The thrust of these tactics was to make them out as agent provocateurs. In the unlikely event that the recruits are prosecuted on account of their party membership they would undoubtedly be successful in claiming entrapment. The government admitted as much.¹¹¹ As far as the defendants were concerned, however, there was no evidence that the witnesses beguiled them into any activities in which they would not otherwise have indulged. The defendants were members of the Party when the witnesses joined. The defendants accepted and followed a party policy made at a much higher level than that attained by the witnesses. The Court of Appeals was right in holding that no entrapment was involved.¹¹²

All three courts construed the statute under which the defendants were indicted as requiring a specific intent "to overthrow the government by

activities. 8 Record 6041. Younglove received payments from the FBI beginning with \$35 when he started reporting in 1944 and reaching \$100 per month later. At the time he stopped being active in March 1947 he received \$125 for that month. 7 Record 5600. He was also reimbursed for expenses. 7 Record 5596-8. Herron was reimbursed for expenses and for time lost from work which ranged as high as \$60 per month. 6 Record 4945-6. Calomiris was reimbursed for expenses which included a \$50 contribution to the defense fund in this case. 7 Record 5212-3, 5307-8. Hidalgo was reimbursed for expenses and was paid for his services. The latter began at \$10 per month and increased, from time to time, until it reached \$75 per month. 8 Record 6224-5.

110. Calomiris. 7 Record 5191, 5303. Cummings recruited three of his relatives. 8 Record 5879. Blanc recruited a "large number." 8 Record 5976.

111. See, Government's Brief in the Court of Appeals, p. 360 *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950). The only political offense case involving the defense of entrapment that has been found is *Partan v. United States*, 261 Fed. 515 (9th Cir. 1919), *cert. denied*, 251 U.S. 561 (1920) where the defendants were charged with violating the section of the Espionage Act of 1917 making it unlawful to distribute literature reflecting upon the military and naval forces. In disapproving the defense the court said:

"We are asked to reverse the conviction upon the ground that the representatives of the United States induced the defendants to commit the crime charged. It is true that employes of the United States did inquire at the bookstore of the Publishing Company whether the book could be bought, and said they wanted to buy it; but there is evidence tending to show that the sales were made voluntarily by the clerks at the bookstore, and by the authority of defendants and with their knowledge. We have had occasion before now to say that, if an officer of the law has reason to believe that a crime is being committed, he may proceed to ascertain whether those charged with the commission of the crime are actually committing it or are otherwise criminally implicated. The detection of a crime in its commission is far from inducing the wrongdoer to commit the crime detected. The District Court in its charge to the jury was very careful to protect the rights of the defendants by pointing out this distinction." *Id.* at 516.

112. *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950).

force and violence as speedily as circumstances permit."¹¹³ Presumably the witnesses did not entertain this intent and for that reason alone would be immune from criminal liability. That being so, under traditional doctrine they were not accomplices. But were they not accomplices within the test proposed in this discussion? Wasn't the nature of the offense and the witnesses' connection with the defendants such that there were good reasons for believing that the witnesses would distort the truth in order to assure a conviction? Why does an apostate turn against his former comrades? Psychiatric studies are wanting. Surely he does not invariably act from patriotic motives alone. Conceivably, he is moved by hate, fear, revenge, or perhaps a pathetic desire to regain status and respectability. If he has meanwhile embraced a new dogmatism his retaliation may be a form of expiation or atonement—his denunciation, a rite of ablution. The spy too may act from motives not entirely honorable. He may be stirred by revenge, fear, hate, or pecuniary considerations. He may just be a neurotic busybody.

Curiously enough, the political informant, spy, or agent provocateur is not now regarded with the same opprobrium as his brother who participates in other types of crime. Public opinion being what it is, his credibility is at a premium.¹¹⁴ His veracity count exceeds that of his more orthodox and less eccentric fellows. He may admit to all kinds of past knavery and mendacity but the greater his self-debasement the greater his claim to belief. That he now acts from patriotic motives is conclusively presumed.

In the *Dennis* case the defendants requested a cautionary instruction regarding the testimony of the informants and spies.¹¹⁵ This was refused and,

113. *Dennis v. United States*, 71 S.Ct. 857, 862, 868 (1951).

114. Mrs. Mary Stalcup Markward recently appeared before the House Committee on Un-American Activities as a witness. She was recruited for undercover work by the FBI in 1943. At that time she was a beauty parlor operator and had just finished high school. She spent seven years in the Communist Party and rose quickly in the party ranks. A newspaper reporter described her appearance before the committee as follows:

"Mrs. Markward was a calm composed witness, with a prodigious memory. Without benefit of any notes, she recalled dozens of names of party members, recited their wives' first names, and fixed exact dates for important meetings and developments of five or six years ago. . . .

"When she completed her appearance on the stand, the crowd in the room applauded loudly and long, unrebuked by Representative John S. Wood, Democrat of Georgia, committee chairman. The members all complimented her on her courage and patience in her dangerous assignment, and Representative Charles E. Potter, Republican of Michigan, a wounded and decorated veteran of World War II, told her she deserved a medal for gallantry as much as most men honored on the field of battle." *N.Y. Times*, July 12, 1951, p. 9, col. 1.

115. The requested instructions were, in part, as follows:

"58 (16B) I call your attention to the fact that seven of the witnesses produced by the prosecution, namely, Philbrick, Herron, Calomiris, Younglove, Cummings, Blanc and Hidalgo, were persons who joined the Communist Party, and acted as informers for the Federal Bureau of Investigation, and reported to the FBI on the activities of the Communist Party and members thereof. The testimony is

instead, Judge Medina gave an innocuous and watery instruction to the effect that the jury was to pass upon the credibility of all the witnesses.¹¹⁶ And on appeal, Judge Learned Hand brushed aside the point with the statement that "it is never 'an absolute necessity' to caution the jury as to the use they may make of informers' testimony."¹¹⁷

that these witnesses received money from the FBI, some receiving expenses and others receiving sums in addition thereto. With respect to each of these witnesses, I charge you that such testimony, especially if uncorroborated, is open to the suspicion of bias.

"59.(16C) I charge you that, while the credibility of the testimony of each of the witnesses [stated above], is for you to decide, where so much of the prosecution's case depends on their testimony you should scrutinize such testimony closely for the purpose of determining whether it is colored in such a way as to place guilt upon one or more of the defendants in furtherance of the interest of any of these witnesses.

"60 (16D) I charge you that in considering the credibility of each of the informers who testified in this case and in determining the weight to be given to their testimony, you should bear in mind that informers are usually drawn from those in our society who are untrustworthy.

"61 (16E) Each of the prosecution's witnesses [the seven named above] was paid either his or her expenses, or sums in addition thereto, for the purpose of procuring information with respect to the Communist Party, its activities and membership. I charge you that in considering the credibility of each of these witnesses and the weight to be given to his testimony, you should bear in mind that he may have deemed it to his interest that one or more of the defendants be convicted, since otherwise he may have been considered as having failed in the task that he undertook.

...
 "64. (16H) I charge you that in considering the credibility of the witnesses Louis Budenz, William Nowell, Charles Nicodemus and Frank S. Meyer, and the weight to be given to the testimony of each of them, you should consider the possible bias of any such witness arising out of a desire on his part, if any, to publicly disassociate himself from defendants and the Communist Party, or to benefit from such public disassociation."

See 16 Record 12570-2.

116. 16 Record 12481. Judge Medina then added:

"You will accordingly observe that, before reaching any conclusion as to whether or not you will believe the testimony of any particular witness, or as to whether you will believe part of the testimony of a particular witness and reject the rest, it is of the essence that you give consideration to all the circumstances bearing on the question of the credibility of the particular witness, as I have just indicated. For this reason you must be careful not to act in an arbitrary manner. Thus you are not at liberty arbitrarily to say that simply because a witness happens to be an F.B.I. agent, an informer, a present or former member of the Communist Party or a Communist official or functionary or a defendant or other witness falling into one category or another, or because a witness is called by the prosecution or by the defendants, he or she is therefore more than usually credible or less than usually credible. Credibility cannot be determined by any such rule of thumb." 16 Record 12482.

Judge Medina's charge is also reported in 9 F.R.D. 365, 371.

117. *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950).

As far as non-political offenses are concerned, there is no right to be free from police surveillance if the police have reasonable grounds for suspecting crime.¹¹⁸ Are political offenses entitled to different treatment? *Local 309 v. Gates*¹¹⁹ indicates that they should be. During a strike accompanied by violence, union members held private meetings in the local court house. State policemen persisted in attending and taking notes. Suit was brought by the members to enjoin the police surveillance on the ground that police attendance invaded their rights of freedom of speech and freedom of assembly. Judge Swygert granted a temporary injunction restraining police attendance. He buttressed his decision by applying the First Amendment guaranties of freedom of speech and assembly to private meetings as well as to public assemblies. He found no showing of any connection between the strike violence and the union meetings,¹²⁰ hence no public interest was threatened with clear and present danger. The presence of the police and their note taking had the same effect as active interference.¹²¹

118. Notes 16 and 17, *supra*.

119. 75 F.Supp. 620 (N.D. Ind. 1948).

120. There was no conflicting testimony on this point. In fact, one of the policemen testified that he had never heard any suggestions of violence at the union meetings and that he believed that no acts of violence had emanated from them. For this reason, Judge Swygert could have reached the same result without relying upon the First Amendment or the clear and present danger test. The test applied in the non-First Amendment cases was satisfied. See note 17, *supra*.

121. *Local 309 v. Gates*, 75 F.Supp. 620, 624, 625 (N.D. Ind. 1948):

"It is clearly established by the evidence that the presence of the state police officers has prevented the Union members from discussing freely the matters they wish to take up. It is true that the police officers have not actively prevented the plaintiffs from conducting their meetings as they desire or from speaking if they wished. But the evidence is that their presence and their taking of notes have had the same effect as if there were active interference. . . . This feeling of restraint, frustration, and interference within the minds of the Union members, engendered by the presence of the state police, appears to be a natural result flowing from the conduct of the police officers by their relations with the striking employees and the employer. The evidence discloses that this feeling is neither imaginary nor inconsequential.

"This right to speak freely and to assemble peaceably for any lawful purpose without interference by either state or federal government officials ordinarily is thought of in connection with speaking and assembling in a public forum. However, there is nothing in the Constitution or in the cases decided under the First Amendment which limit these rights to such circumstances. The freedom and liberty to express ourselves privately and to hold private assemblies for lawful purposes and in a lawful manner without governmental interference or hindrance is protected as much by the First Amendment as the right to do so publicly. Limitation in this regard would be such a serious encroachment upon our liberties and freedoms as to render the pre-eminent rights guaranteed by the First Amendment nugatory in large areas of legitimate action. . . .

"The pertinent questions of fact in this case are: Are these lawful assemblies? Has there been any public interest threatened by clear and present danger as a

Of course, the police may enter a private meeting to make an arrest based upon probable cause,¹²² but the *Gates* case limits their right to be present for the purpose of surveillance alone to an assemblage at which there is a clear and present danger of disorder.

The *Gates* case is distinguishable from the *Dennis* case on at least two grounds. (1) In the former the presence of policemen was known and they were identifiable. In fact, they were requested repeatedly by the Union representatives and members to leave the meetings and to state their reasons for being there. (2) In the *Gates* case injunctive relief was requested while in the *Dennis* case the defendants attempted to suppress the testimony of the witnesses. The *Gates* situation would have arisen had the Communist Party sought to enjoin the Attorney General from maintaining spies within the organization. Are these distinctions of any real significance? If a lawful organization has reasonable grounds for believing that police spies have infiltrated its ranks why shouldn't injunctive relief be available even though the particular spies cannot be identified? The likelihood that spies are present may have an even more demoralizing and disreputative effect upon discussion and assembly than if their identity is known. An objector will undoubtedly ask, How else than by surveillance can the police determine whether a clear and present danger exists? Of course, they cannot. But the *Gates* case makes it possible for the organization to actuate the clear and present danger issue without waiting for the government to instigate it. If none exists then police surveillance should be restrained. Another objection is that the political trappings of an organization may be only a facade for other, more dangerous activities. One answer to that is that there are several statutes on the books, other than the Smith Act,¹²³ which are adequate to protect the Government from overthrow by bombs or other violent methods.¹²⁴ As to suspected vio-

result of these meetings? Have the police restrained or interfered with these assemblies in any manner?"

It is not clear from Judge Swygert's opinion where the burden of proof lies although he did say that "The defendants' evidence fails to link the meetings with the acts of violence which have occurred and which have grown out of the strike situation." *Id.* at 625.

In the non-First Amendment cases, the plaintiff seeking injunctive relief has not only the burden of showing his own "clean hands" but of showing that the police have no reasonable grounds of suspicion. See note 17, *supra*.

Nor have the courts been clear in the "clear and present danger" cases in delineating the allocation of proof. See Mr. Justice Douglas' dissenting opinion in *Dennis v. United States*, 71 S.Ct. 857, 903 (1951).

122. A.L.I., CODE OF PROCEDURE 253-6 (1931); *Modern Horse Shoe Club v. Stewart*, 242 Mo. 421, 146 S.W. 1157 (1912); *Monte Vulture Social Club v. Wallander*, 189 Misc. 162, 68 N.Y.S.2d 657 (Sup. Ct. N.Y. County 1947).

123. 18 U.S.C. § 2385 (Supp. 1951).

124. 18 U.S.C. § 2381 (Supp. 1951) (treason); 18 U.S.C. § 2383 (Supp. 1951) (rebellion or insurrection); 18 U.S.C. § 2384 (Supp. 1951) (seditious conspiracy); 18 U.S.C. § 2387 (Supp. 1951) (activities affecting the armed forces); 18 U.S.C. § 371 (Supp. 1951) (the general conspiracy statute).

lations of these statutes the usual rule applicable to non-political offenses should be applicable.

It is arguable that the exclusionary rule of the *Weeks* case should not be limited to violations of the Fourth Amendment. In view of the "preferred position"¹²⁵ accorded the First Amendment, evidence obtained by its violation should, *a fortiori*, be excluded. On the other hand, just what would this amount to? Judge Swygert in the *Gates* case was careful to point out the absence of a clear and present danger. If this limitation is accepted then it would also act as a limitation upon an exclusionary rule. Here again, it would precipitate what would ordinarily be one of the crucial questions in the case. Inasmuch as the question of the defendant's guilt or innocence would ordinarily hinge upon this very issue it is difficult to see just what additional benefit he would receive from an exclusionary rule.

In view of the reformulation of the clear and present danger test in *Dennis v. United States*,¹²⁶ even injunctive relief will be of limited utility. Certainly any group advocating the overthrow of the government by force and violence will not be entitled to it whether there is any present danger or not. With

125. Mr. Justice Frankfurter has challenged the "preferred position" of the First Amendment, describing it as a mischievous phrase radiating "a constitutional doctrine without avowing it." *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (concurring opinion). For a pointed reply, see the dissent of Mr. Justice Rutledge in the same case. *Id.* at 104.

126. 71 S.Ct. 857 (1951). The opinion of Chief Justice Vinson, in which Justices Reed, Burton and Minton joined is obscure as to what test is being formulated. He first says that if "Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. . . ." The validity of the statute is not measured "in terms of the probability of success, or the immediacy of a successful attempt. . . . We must therefore reject the contention that success or probability of success is the criterion." *Id.* at 867. He then expressly adopts the formula of Judge Learned Hand that "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 868. Either test is a repudiation of "clear and present danger."

Mr. Justice Frankfurter takes the position that when the interests of security and freedom of expression are in conflict the matter of reconciliation is primarily a matter of legislative judgment. *Id.* at 875. This abdication of judicial responsibility leaves it up to Congress to decide when it will be subject to the limitations of the Bill of Rights. The last third of his opinion, however, is an eloquent statement of reasons that should have led to a dissent.

Mr. Justice Jackson apparently feels that the clear and present danger test is just not applicable in conspiracy cases. *Id.* at 899. This startling suggestion would make it possible to bypass the First Amendment by merely casting an indictment in conspiracy terms. Compare, however, his views on conspiracy in *Krulewitch v. United States*, 336 U.S. 440, 445 (1949). He also overlooks the fact that the clear and present danger test was first enunciated in a conspiracy case. *Schenck v. United States*, 249 U.S. 47 (1919). Other conspiracy cases in which the test was applied are *Frohwerk v. United States*, 249 U.S. 204 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); and *Pierce v. United States*, 252 U.S. 239 (1920).

sedition legislation on the statute books, the Dennis decision in the reports, and public opinion being what it now is, it is naively sanguine to expect the courts to employ such subsidiary doctrines as entrapment, the accomplice rule, and injunctive relief in circumvention. It is perhaps even out of tune with the times to suggest that the best protection against internal enemies of freedom lies in the free flow of discussion, in the absence of spies, and in the adoption of well-considered improvements of political and economic institutions. The historian May, writing of another day, eloquently expressed what I mean:¹²⁷

“Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators,—who shall say that they are free? Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in a spirit of absolutism; and suspected subjects will be ever sensible of their bondage.”

127. 2 MAY CONSTITUTIONAL HISTORY OF ENGLAND 275 (1863).