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ENTRAPMENT

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I.— INTRODUCTION

The purpose of this paper is to explore some recent developments in the area of law enforcement which sanctions police use of investigative techniques amounting to entrapment.

The definition of entrapment which is universally accepted is that of Mr. Justice Roberts in *Sorrells* v. *United States*, being :

> The conception and planning of an offence by a law enforcement officer and his procurement of its commission by one who would not necessarily have perpetrated it except for the trickery, persuasion or fraud of the officer.[1]

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[1] 287 U.S. 435 at 454.

In terms of analysis a logical sequence is required. Hence, social, legal, and moral perspectives must be considered in order to comprehend the full impact of entrapment in crime detection.

Attention must be drawn to the police in general in order to magnify the dilemma between the rule of law and the maintenance of order, particularly with regard to investigation of specific categories of crimes in particular social settings.

A legal study of entrapment will draw basically from its sole source, the judiciary. In this sphere, the author proceeds by analogies, among judicial trends in the United States, England and Canada.

Finally, entrapment, whether or not it is accepted as a defence to a crime, continues to have an effect on the decisions of the courts and may, as a result of its perversity in crime detection, influence future legislation.

A. POLICE AND THE RULE OF LAW

As a public agency, the police are of great significance to the community. Usually the police officer is the initial point of contact between an individual and the law. Police conduct and accomplishments are therefore highly consequential as they may destroy or create respect for the law.

The increasing complexity of our society, with its urbanization, industrialization, technological improvement, and mobility has brought a greater need of law and efficient police protection. The police moreover, are in a strategic position to detect crime and delinquency. They are on the "front line" and their vigour and efficiency largely determine society's reaction to the violation of the law.[2]

Police behaviour and detection methods are patterned in function with their goals as public protectors. Overzealous law enforcement officers however, may bring their goal of maintenance of order into conflict with the rule of law and individual liberties. Hence arises the question of undesirable police practices and unsavoury methods of crime detection such as entrapment.[3]

Police and spokesmen for law enforcement emphasize the importance of social order. Thus it is to the public good that the police should be strong and effective in preserving law and order and preventing crime.

In the policeman's hierarchy of values, arrest and subsequent conviction are more important "the bigger the pinch". It may be feared that questionable practices that can be justified in the name of expediency would

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[2] Robert G. CALDWELL, *Criminology*, N.Y., Ronald Press, 1956, p. 255.
[3] Jerome H. SKOLNICK, *Justice without Trial*, N.Y., John Wiley & Sons Inc., 1966, p. 1.

tend to subsist unless expressly forbidden. Norms located within police organisations are more powerful than court decisions or statutes in shaping police behaviour with regard to such practices. However, ultimately it is the process of interaction among such norms, laws, and court decisions that actually accounts for how police behave.[4]

Various opinions have been expressed, usually outside police circles, demanding that the police adhere strictly to the rules governing the legal system, that they ultimately be accountable to the legal order, irrespective of their "practical" needs as law enforcers.

The police therefore, in democratic societies, are required to maintain order and to do so under the rule of law. As functionaries charged with maintaining order, they are part of the bureaucracy. The ideology of democratic bureaucracy emphasizes initiative rather than disciplined adherance to rules and regulations. By contrast, the rule of law emphasizes the rights of individual citizens and constraints upon the initiative of legal officials. The tension between the operational consequences of ideas of order, efficiency and initiative on the one hand, and legality on the other constitutes the principle problem of police as a democratic legal organization.[5] As Professor Skolnick succinctly phrases it,

> Law is not merely and instrument of order therefore, but frequently its adversary.[6]

Nevertheless, the setting of the policeman's role and the low visibility of much of his conduct offer great opportunities to behave inconsistently with the rule of law. Against what crimes and in which social milieu do police utilize dubious technniques such as entrapment and what is the status of entrapment with regard to the rule of law.

B. CRIMES WITHOUT VICTIMS

1. *Definition*

Society has deemed certain actions criminal even if there is no complainant. It is of course in the field of these victimless crimes that agressive, intrusive, and repeated police contact are most apparent.

Crimes without a direct or better an apparent victim may be defined as those

> Offences that do not result in anyone's feeling that he has been injured so as to impel him to bring the offence to the attention of the authorities.[7]

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[4] *Ibid.*, at 219.
[5] *Ibid.*, at 6.
[6] *Ibid.*, at 7.
[7] Herbert C. PACKER, *The Limits of the Criminal Sanction*, Stanford, California, Stanford University Press, 1968.

or more precisely, as those crimes, in which

> The offending behaviour involves a willing and private exchange of strongly demanded yet officially proscribed goods and services ; the element of consent precludes the existence of a victim .... in the usual sense of the word.[8]

Crimes without victims include abortion and the vice crimes which consist of prostitution, gambling, and the illegal production, sale and / or use of liquor and of narcotics. Each of these "problems" has certain medical, as well as legal and psychological aspects. The harm seen in the proscribed transaction seems primarily to be harm to the particular individuals themselves apart from any alleged harm to morals in general.

One feature which seems to characterize all crimes without victims is the unenforceability of the law surrounding them. Those who commit these crimes are usually sufficiently knowledgeable to avoid being detected by ordinary methods such as routine surveillance. Such unenforcement stems directly from the combination of the lack of a complainant, the low visibility of these offences, and the consequent difficulty in obtaining evidence. These problems regarding enforcement tend to engender arbitrary police discretion, undesirable investigatory and detection measures, and consequently offer possibilities for blackmail and police corruption.

The problem of enforcement is coupled with ambivalence on the part of many members of the community, including some trial judges as to the seriousness of consensual crimes and whether or not they are properly the concern of criminal law. As a result, sentences following convictions may be minimal. Thus the difficulties the police encounter in prosecution and conviction are very great and the rewards from conviction are small. Since strong pressure continues from certain segments of society especially when these crimes are viewed in public and when there is involvement of organized crime, police maintain their investigatory measures in order to detect offenders.[9]

2. *Police Detection Measures*

Wide variations exist in police practices reflecting numerous crimes, different police standards and objectives, and different rules of criminal law and procedure. In some areas police fulfill their duty without sacrificing integrity or decency. In others, police investigatory measures such as physical intrusion, electronic surveillance, and the use of decoys are employed although they are contrary to values of privacy and human dignity.

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[8] Edwin M. SCHUR, *Crimes Without Victims*, Englewood Hills N.J., Prentice-Hall Inc., 1968, p. 1.

[9] L.P. TIFFANY, P.M. MCINTYRE Jr., P.J. ROTENBERG, *Detection of Crime*, Boston, F.J. Remington Editor, Little, Brown & Co. 1967.

As a result of the lack of a complainant and the aggravation of enforcement in consensual crimes, the police in order to rigorously enforce these laws, fashion their detection methods to the characteristics of each particular crime. Thus police or their agents often put themselves in a position to be offended or simulate participation in a crime as a means to obtain proof of its committal and subsequently its conviction. To do so, law enforcement agencies depend heavily upon decoys, better known as agents provocateurs (undercover agents who induce commission of a crime) and upon informers, their sources of information. This accounts for traps, frames and entrapment.

Informers are a major source of evidence and are most prevalent in narcotics cases. They "set up" dealers by arranging for them to sell drugs to an undercover agent or in the presence of an agent in addition to identifying sellers and furnishing information about the movement of drugs. Some informers are volunteers or salaried "special employees", however, most are addicts arrested for possession or sales, who although they may face grave underworld reprisal, co-operate with the police in order to avoid punishment for their crimes or simply as a result of their need for funds in order to continue their drug habit. The specific arrangement entered into between police and the arrested addict varies according to local practice.[10]

In some jurisdictions the police defer prosecution with the understanding that charges will not be laid if the informer is successful. In others, a charge is filed however, with the agreement that if the informer proves his worth, either the charge will be dismissed or sentence reduced.

Where informers are paid only where they produce results and their survival depends upon the money acquired from their activities, they have every reason to entice the commission of an offence by an addict whose habits may have resulted in the first place, from his initiation by the informer. Such informers have every motive to testify falsely.

Law enforcement agencies may be authorized to pay the "operating expenses" of informers whose information leads to the seizure of drugs in illicit traffic, for example. In this manner, law enforcement agencies at least indirectly support the addition and the crime therefore, of some addicts in order to uncover others.[11]

The undesirability of such practices is that police often fail to acquire leads on professional hard-core narcotics dealers for example, because the in-

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[10] David Bernheim, *Defence of Narcotics Cases*, N.Y. Matthew Bender & Co. Inc., 1975, at par. 2.02.

[11] Edwin M. SCHUR, *Crimes without victims*, Prentice-Hall Inc., Englewood Hills N.J., 1965, at p. 135. In this book, the author refers specifically to the effect of the relationship between the U.S. Bureau of Narcotics and informers. Also see *U.S.* v. *Silva*, 180 F. Supp. 557 at 559 (Distr. Ct.).

formers, fearing violent retaliation, refuse to inform on such persons. What happens is that the informer, if he lacks moral fibre and where he is under pressure to produce, will trick a person (often an addict) who is not dealing into making a sale or appearing to do so in order to produce an arrest. Consequently, police officers may initiate narcotic transactions with individuals who were not previously trafficking in drugs.[12] This is a classic case of entrapment and the question arises over whether it is a legal defence to the crime alleged.

One must distinguish between entrapment and traps on the one hand and methods such as a frame. Entrapment occurs when the crime was initiated by a person acting as an agent of the state who by his actions suggests his willingness to be a "victim" and actually communicates this feigned willingness to the person to be accused, who had no predisposition to commit the crime and required considerable persuasion to engage in the criminal enterprise (or who, at least was influenced considerably in his commission of the crime).[13] A trap occurs where a person acting as an agent of the state proposes a transaction to a willing defendant whereas a frame occurs when the defendant dœs an act which he in no way believes to be criminal (delivers a parcel containing narcotics while being unaware of such contents). Thus a suspect may be tested by being offered an opportunity to violate the law and this may constitute legitimate detection of crime. But if there is an enticement to violate the law by perverse tactics, and when the induced would not otherwise have done so, the question of entrapment arises. Frame-ups are clearly illegal.

There is no reason to conclude that there is legislative or judicial approval of encouragement, entrapment and decoys as detection devices. The police have simply assumed, perhaps correctly that due to the lack of controlling rules they have the liberty of administrative action. The only prescribed limitation upon police encouragement pratices are those which may be found in "the defence of entrapment" and those implied in the definition of every crime. Such limitation leaves a wide latitude for unconscionable police practices.

There is no statutory basis for entrapment in Canada. The criminal code is silent and entrapment does not appear to be a defence at common law hence article 7(3) of the Criminal Code is inapplicable.[14] The possibility of exerting control over detection measures such as entrapment, can only lie with

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[12] *Sherman* v. *United States, infra* footnote 26; *United States* v. *Silva, supra* footnote 11; *Sorrells* v. *U.S., supra* footnote 1.

[13] *Ibid.*

[14] Barnett M. SNEIDMAN, *A Judicial Test for Entrapment*, 16 *Cr. L. Q.* 81 at 94 and see Mr. Justice Laskin's comments in *R.* v. *Ormerod, infra* footnote 78 at pp. 10-11 (C.C.C.).

In England and Canada judicial decisions have completely avoided the issue even when entrapment was specifically pleaded by the accused in cases where it was potentially worthy of consideration on the facts.

the judiciary. The following analysis will provide an analogy of judicial trends in the United States, England and Canada.

II.— SOURCES OF ENTRAPMENT

A. UNITED STATES

The defence of entrapment is now recognized in every U.S. jurisdiction. It intends to afford a remedy to the victims of the unconscionable police practice of inducing an innocent person to commit a crime in order to make an arrest.

The principle is that an individual must not be held criminally liable for taking part in an activity in which he had no intention of participating and in which he would not have participated without the encouragement of a government or police agent. This theory does not cover the case of an accused who allegedly committed an offence on his own initiative, merely being unaware of the officer's identity and whether or not the officer provided the opportunity to commit the crime. This distinction is the determining factor in American cases as to whether the defence is acceptable. The defence in the U.S. is as authoritative and effective as any other and leads to a complete acquittal.

The defence of entrapment is one of man's earliest recorded pleas. The Bible tells us that Eve, when accused of eating the forbidden fruit, protested, "the serpent beguiled me and I did eat".[15]

Entrapment was rejected by the New York Supreme Court in a Civil War case, *Board of commissioners* v. *Backus*.[16] Referring to Eve's defence that the serpent had beguiled her, the court declared :

> That defence was overruled by the great Lawgiver and whatever estimate we may form, or whatever judgement pass upon the character or conduct of this tempter, this plea has never since availed the shield crime or give indemnity to the culprit, and it is safe to say that under any court of civilized not to say Christian ethics, it never will.[17]

The first case in which a U.S. federal court clearly accepted the defence of entrapment was in *Woo Waie* v. *United States*.[18] Here, immigration officials

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See cases such as: *Brannan* v. *Peek, infra* footnote 58; *Sneddon* v. *Stevenson, infra* footnote 59; *R.* v. *Murphy, infra* footnote 67; *R.* v. *Ormerod*, infra footnote 78; *R.* v. *Irwin, infra* footnote 85; *R.* v. *Woods, infra* footnote 91; *R.* v. *Park Hotel (Sudbury) Ltd., infra* footnote 98; *R.* v. *Kotyszyn, infra* footnote 93 and *Lemieux* v. *Queen, infra* footnote 83 (although entrapment was not specifically pleaded in all of the latter cases, its existence as a defence was on the whole avoided).

The defence of entrapment has been approved and recognized by the Supreme Court of the United States. However, the exact basis on which it rests has never been made clear and there is no detailed explanation of its theory.

[15] Genesis 3:13.

[16] 29 How. Pr. 33 (N.Y. Sup. Ct. 1864).

[17] *Ibid.* at 42.

[18] 223 Fed. 412 (1915) Circuit Court.

felt the accused has considerable information regarding illegal smuggling of Chinese people into the U.S. from Mexico, even if he did not actually participate. To obtain information, they set out to entrap him into committing an offence and then using the threat of prosecution to blackmail him. The accused refused to comply with a number of schemes proposed until repeated entreaties and pleas won him over. When he later refrained from giving any further information, a charge of conspiracy to violate the immigration laws was laid against him. In reversing the conviction the circuit court stated it would apply a test of who conceived the original criminal design. Here, the primary intention to commit the crime was not in the defendent and he was induced to go along only by sustained pressure. The court went on to say,

> .... it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case .... a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes.[19]

This decision was the first in a U.S. federal jurisdiction where although the defendant committed the crime with which he was charged, he was still entitled to be acquitted on grounds of entrapment.

In 1932 entrapment became clearly recognized as a valid defence by the decision of the Supreme Court of the U.S. in *Sorrells* v. *U.S.*[20] Here, a federal prohibition agent, passing as a tourist and accompanied by three acquaintances of the defendant, visited Sorrells at his home. The agent's purpose was to gather evidence against the defendant. The conversation turned to World War I experiences as the defendant, the agent, and one of the acquaintances had been in the same army division. During the period of an hour or so, the agent made repeated requests for some liquor to take back home with him for a friend. No one else in the groupe mentioned liquor. Sorrells at first refused but finally obtained a half gallon, which he sold to the agent for five dollars. Testimony concerning the defendant's reputation was conflicting — some said it was good; some said he was a "rum runner". There was no evidence that the defendant had in the past possessed or sold liquor.

On these facts, the Supreme court held that the jury could have found entrapment, and because this issue was not submitted to the jury the case was reversed and remanded. The Court said :

> It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious law abiding citizen and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which

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[19] *Ibid.* at 415.
[20] *Supra* footnote 1.

> he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.[21]

The majority considered entrapment as a matter of statutory interpretation in that Congress had not intended that its statutes were to be enforced when innocent persons succumb to police instigation.

> Fundamentally, the question is whether the defence takes the case out of the purview of the Statute because it cannot be supposed that Congress intented that the letter of its enactment be used to support such a gross perversion of its purpose.[22]

Although criminal activity is of such a nature that stealth and strategy are necessary means for the police to prevent crime and apprehend criminals, the manufacturing of crime was viewed upon as another matter.

> .... a different question is presented 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 offence and induce its commission in order that they may prosecute.[23]

Thus, in order to successfully assert the defence of entrapment as per the majority in Sorrells, the crime must be planned by the police and aimed at an otherwise innocent defendant.

> The controlling question is whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offence which is the product of the creative activity of its own officials.[24]

The minority, in this case, considered entrapment to be a question of law which could be explained as a violation of public policy.

Contrary to a subjective analysis of intention of the defendant and Statute interpretation as seen by the majority, the minority judges applied an objective test. They would permit entrapment as a defence, when the police conduct revealed in the particular case falls below standards generally accepted by the public *i.e.* certain objective standards. For the purposes of this test, it is wholly irrelevant to ask if the "intention" to commit the crime originated with the government officers or the defendant or if the criminal conduct was the product of "the creative activity" of law enforcement officials.

> The majority .... see it as a doctrine of substantive law ; the accused being not guilty because he lacks the essential element of the offence (*mens rea*); the minority see it as a doctrine of procedure and judicial administration in the form of a public policy, forbidding the court to lend its processes for the consummation of a wrong.[25]

The American Supreme Court next encountered entrapment in 1958 in *Sherman* v. *United States*.[26]

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[21] *Ibid.* at 441.
[22] *Ibid.* at 446.
[23] *Ibid.* at 442.
[24] *Ibid.*
[25] J. WATT, *Entrapment*, (1971) 13 *Cr. L. Q.* 313 at 316.
[26] 356 U.S. 369.

In August 1959, a government informer first met the defendant at a doctor's office where apparently both were being treated for narcotics addiction. After numerous accidental meetings, either at the doctor's office or at the pharmacy, their conversations progressed to a discussion of mutual experiences and problems. Finally, the informer asked the defendant if he knew of a good source of narcotics.

Initially, the defendant attempted to avoid the subject, however after several repeated requests the defendant acquiesced. Frequently thereafter, he obtained a quantity of narcotics which he shared with the informer. Each time the defendant told the informer that the total cost of the narcotics was $25. and that the informer owed him $15. The informer thus bore the cost of his share of the narcotics plus expenses incidental to obtaining the drug. After several such sales, the informer notified the Bureau of Narcotics that he detected a seller, and on three occasions, government agents observed the defendant give narcotics to the informer in return for money supplied by the government.

At the trial the factual issue was whether the informer has convinced an otherwise unwilling person to commit a criminal act or whether the defendant was predisposed to commit the infraction and exhibited only the ordinary reluctancy of one familiar with the narcotics trade. The issue of entrapment went to the jury and a conviction resulted. The Court of Appeals for the Second Circuit affirmed.[27] The Supreme Court reversed.

Chief Justice Warren, speaking for the Court, stated that the function of law enforcement dœs not include the manufacturing of crime as Congress could not have intended that is statutes be enforced by tempting innocent persons into violations.

> However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offence dœs not' constitute entrapment. Entrapment occurs only when the criminal conduct was of 'product of the creative activity' of law enforcement officials .... To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.[28]

In order to determine whether or not entrapment existed, the Court, referring to *Sorrells* indicated that the accused may examine the conduct of the government agent and that the accused himself will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition",[29] as bearing on his claim of innocence.

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[27] 240 F. 2d 949 (2d Cir. 1957).
[28] *Supra* footnote 26 at 372.
[29] *Supra* footnote 1 at 451.

The Government then sought to overcome the defence of entrapment by claiming that the defendant demonstrated a "ready complaisance" to accede to the informer's requests. It offered a record of two prior convictions, one in 1942 and one in 1946, for the illegal sale of narcotics and the illegal possession of narcotics respectively. However, a nine year-old sales conviction and a five year-old possession conviction were insufficient in the view of the Court, to prove that the defendant has a readiness to sell narcotics at the time the informer approached him, particularly when he was attempting to overcome his narcotics addiction.

The Court accepted the defence of entrapment in this case and acquitted the defendant as it was clear that the defendant was induced by the informer (himself under criminal charges for illegally selling narcotics but not sentenced yet at that time) who knew that the defendant was undergoing treatment for narcotics addiction thereby tending to negate the necessary predisposition to commit the crime.

Although he declined to settle an issue not presented by the parties, Chief Justice Warren seems to have rejected the minority view espoused by Mr. Justice Roberts in the *Sorrells*[30] case that the government should not be permitted to reply to the defence of entrapment by showing that the defendant's criminal conduct was due to his own readiness and not to the persuasion of government agents. The Court also refused to decide whether the factual issue of entrapment should be decided by the judge and not the jury but stated that the Federal Courts of Appeal since *Sorrells*[31] have unanimously concluded that unless it can be decided, on the evidence, as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.

Mr. Justice Frankfurter concurred in the result in a separate opinion which was supported by Mr. Justices Douglas, Harlan, and Brennan. He pointed out that the basis of the defence of entrapment is as much in doubt today as it was when the defence was first recognized over forty years ago, despite the fact that entrapment has been the decisive issue in many prosecutions. Although the lower courts continously expressed outrage at the conduct of law enforcers which orginally brought recognition of the defence he believed that the doctrine of entrapment lacked the solid foundation which the decisions of these lower courts and criticism of learned writers have shown is needed.

The minority in *Sherman*,[32] rejected the subjective analysis espoused by the majority in *Sherman*[33] and in *Sorrells*.[34]

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[30] *Supra* footnote 1.
[31] *Ibid.*
[32] *Supra* footnote 26.
[33] *Ibid.*
[34] *Supra* footnote 1.

> It is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers, or informers because 'Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violation'.
> .... In these cases raising claims of entrapment, the only legislative intention that can with any show of reason be extracted from the statute is to make criminal precisely the conduct in which the defendant has engaged. That conduct includes all the elements necessary to constitute criminality.[35]

And later on Mr. Justice Frankfurter, continues,

> .... it is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or goverment officers, or if the criminal conduct was the product of the 'creative activity' of law-enforcement officials.[36]

Mr. Justice Frankfurter then outlined the rationale of the objective analysis proposed by the minority in *Sorrells*[37] and with which he agrees.

> The courts refuse to convict an entrapped defendant not because his conduct falls outside the prescription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the governement to bring about conviction cannot be countenanced .... The crucial question, not easy to answer to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards to which common feelings respond for the proper use of governmental power .... This does not mean that the poliice may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes, should the occasion arise .... This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood objectively considered, that it would entrap only those ready and willing to commit the crime.[38]

The minority opinion also urged that for the wise administration of criminal justice, the court should pass on the issue of entrapment as a matter of law, and not the jury. It was pointed out that a jury verdict is unable to give significant guidance for future conduct and that,

> It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law.[39]

The defence of entrapment is raised as any defence by a plea of not guilty, however, it may also be invoked before the trial begins by a motion to quash the indictement. However, as the defence of entrapment presupposes the commission of a criminal offence into which the defendant was enticed, it may be inconsistent with a claim of total innocence. It is therefore possible that where the defendant denies having committed the act charged, the defence of entrapment may be held to have been waived. Courts in the State of California have held that while the defence is available to a defendant who

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[35] *Supra* footnote 26 at 379.
[36] *Ibid.* at 380.
[37] *Supra* footnote 1.
[38] *Supra* footnote 26 at 380, 381, 382.
[39] *Ibid.* at 385.

is otherwise guilty, it is not necessary for the defendant to admit his guilt in order to establish the defence.[40] This would seem to be the better rule.

Also unsettled is whether this defence may be properly submitted to a jury or whether it should be decided as a question of law by the court. The accepted position to date is that where the facts are clear the judge must rule on them as a matter of law and the case will only proceed before the jury for a determination of facts in dispute. In other cases, where the evidence is disputable the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.

In another Supreme Court decision, *Masciale* v. *United States*, 356 U.S. 386 (1958), the issue of entrapment was again invoked, however in this case, it was not accepted. This case also invoked sales of narcotics to a government agent, leading to three counts of illegal sales of narcotics and conspiracy. The defence of entrapment was submitted to the jury and a conviction resulted. Chief Justice Warren pointed out, for the majority, that there was no indication in the defendant's testimony of any pressure or persuasion by the narcotics agent or the informer, enticing the defendant to enter the narcotics trade, during their conversations. After several conversations between the defendant and the government agent, the defendant subsequently introduced the agent to a man who sold heroin to the agent the next day. The persuasion of the informer combined with the attraction of fast money were the basis of the defendant's explanation of his willingness to deal with the agent. The majority of the Court held that while there was enough evidence, if credible, to establish the defence, there was no entrapment as a matter of law. Thus the affair was submitted to the jury, which weighed the probatory value of the evidence and found the defendant guilty. The minority judges concurred with the conviction, however they disagreed on the ground that the court should have ruled on the issue of entrapment rather than submitting it for determination by the jury.

The defence of entrapment was also refused in *Baymouth* v. *State*, 294 P. 2d 856 (Okl. Cr. 1956). A complainant reported to the police after having received several obscene telephone calls. She was advised by an officer, that on the next call she should agree to meet the man and notify the police which she did, resulting in the arrest of Baymouth when he appeared for the agreed meeting. Baymouth was convicted of enticing a woman to commit an act of lewdness and sought to have the conviction reversed on the claim of entrapment, but since th criminal idea had originated in his mind the trap set to discover his identity was held not to be a defence.

The defence of entrapment was accepted in *Scott* v. *Commonwealth*, 303 KY. 353 (1946), which arose under a state statute making the mere possession of intoxicating liquor punishable as a crime. The chief of police, having seized liquor found in the possession of Scott, was informed that it could not be used as evidennce because the search and seizure had been made without a warrant, whereupon the chief had the liquor returned to Scott, obtained a search warrant for it and promptly seized it again. Scott appealed from a conviction of unlawfully possessing intoxicating liquor claiming entrapment as a defence. It may be suggested that Scott had the intention of possessing this liquor before the chief even knew of its existence, which is no doubt true so far as the original possession was concerned but there was no available evidence by which a conviction of that offence could be obtained. Although smuggled goods are inadmissible evidence when they have been obtained from a person by constitutionally prohibited search and seizure, they must not be returned to him if the possession itself is prohibited because his reacquisition of possession will constitute a now offence; and the idea of this second unlawful possession originated in the mind of the chief who acted so, in order to secure a conviction and this constituted entrapment in the technical sense.

Similarly, in *Browning* v. *State*, 31 Ala. App. 137 (1943), a conviction of reckless driving was reversed because the only evidence of reckless driving by the defendant was after officers had attempted to arrest him unlawfully and had fired upon his car, and this was held to have been the cause of his conduct.

All the above cases clearly demonstrate that the Supreme Court and the majority of the lower courts in the United States adhere in principle to the doctrine enunciated in *Sorrells, supra* footnote 1, despite the imprecision of such doctrine.

[40] F. Lee BAILEY and Henry B. ROTHBLATT, *Handling Narcotic and Drug Cases*, N.Y., Lawyers Cooperative Publishing Co. Rochester, 1972, p. 211.

As it stands entrapment is a relatively limited defence in the U.S. It is rooted not in any authority of the judiciary to dismiss prosecutions for what it feels to have been "overzealous law enforcement" but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offence, but who was induced to commit them by the government. However, it is only when government deception actually implants the criminal design in the mind of the defendant that the defence of entrapment is accepted. Thus the distinction is between detection and investigation: traps and decoys may be utilized to secure the conviction of a person with a predisposition to commit the crime, however, the zeal for enforcement must not induce officers to implant criminal ideas in innocent minds.

This position demonstrates the prominence of the subjective test over other means to determine the applicability of entrapment as a defence. In fact, there are three theories or "tests" and they are all based on the fundamental concepts of due process and evince the reluctance of the judiciary to countenance overzealous law enforcement.

The first test or subjective test is also known as the "origin of intent test" or "genesis of intent test" or even better "the creative activity test". It is subjective in that the state of mind of the defendant must be analysed at the time approached by the police agent in order to determine if he was induced to commit the offence by the prodding of the agent.

In *Sorrells* it was considered that:

> The controlling question is whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offence which is the produce of the creative activity of its own officials.[41]

What is prohibited, is the creation of the criminal disposition by police agents, however, if the defendant already had the intention to commit the offence and was only wainting for an opportunity to implement his design, the furnishing of such opportunity by the police dœs not give rise to the defence of entrapment. The distinction was made in Sherman as follows:

> To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.[42]

This test was first formulated in *O'Brien* v. *State*[43] where it was held that there was no crime if the officer first suggests his willingness to a person to accept a bribe to release a prisoner in his charge and thereby originates or creates the criminal intent. When instructing the jury on this test the judge must indicate that the issue for the jury is whether the accused was

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[41] *Supra* footnote 1 at 451.
[42] *Supra* footnote 26 at 372.
[43] 6 Tex Cr. App. 665 at 668 (1879).

predisposed to commit crimes of the general nature with which he is charged. If the accused was likely to commit the offence charged then police entrapment is irrelevant.

Subsequently, this theory was accepted in various lower court cases such an *Scott*,[44] *Browning*,[45] *Baymouth*,[46] and *Woo Waie*.[47] The formal acceptance of this theory resulted from the decisions of the majority of the Supreme Court in *Sorrells*,[48] *Sherman*,[49] and *Masciale*.[50]

A second test for determining the applicability of entrapment as a defence has been proposed in the minority opinions of Mr. Justice Roberts in *Sorrells*[51] and Mr. Justice Frankfurter in *Sherman*.[52] This test utilized an objective standard, that of the conduct of the police rather than examining the criminal disposition of the accused. If such conduct goes beyond standards generally acceptable as being reasonable in the circumstances and acts in a manner which cannot be condoned according to basic principles of justice, the defence is established and the predisposition of the accused would then be immaterial.

An issue in which entrapment is invoked will give rise to a qualitative decision of the facts if the determination is based on this objective test. There is therefore no evidentiary problem as conflicting versions with regard to the facts are possible as this is in conformity with the normal rules of trial practice.

A third test is that of "reasonable cause" where one must determine the purpose for which the police first decided to concentrate upon the accused and then ask if they acted upon reasonable suspicion. Only if the defence can show that the police acted without reasonable cause will the defence of entrapment be established. Rebuttal evidence based on reasonable suspicion and criminal reputation would be acceptable. This test is objective, however it is unrealistic in basis and purpose as it examines police behaviour in relation to a judicial standard applicable to each particular case. Furthermore there is no authority to support this third test.

Since the subjective test is the accepted determinant of the application of the defence of entrapment, proof must be introduced in order to explain the intent and predisposition of the accused. The defence has the burden of es-

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[44] *Supra* footnote 39.
[45] *Ibid.*
[46] *Supra* footnote 39.
[47] *Supra* footnote 18.
[48] *Supra* footnote 1.
[49] *Supra* footnote 26.
[50] Supra footnote 39.
[51] *Supra* footnote 1.
[52] *Supra* footnote 26.

tablishing initiation by the government (cross-examination of the informer and police agent is important) but once it has done so, the burden shifts to the government to show the defendant's predisposition to commit the crime. The Courts have permitted the prosecution to introduce rebuttal evidence such as the defendant's past history, criminal record, and police suspicions relevant to his predisposition to commit the specific crime charged in order to counter the entrapment defence.

Mr. Justices Frankfurter and Roberts, who gave minority opinions in *Sherman*[53] and *Sorrells*[54] respectively argued that the prosecution could not introduce rebuttal evidence to prove the readiness of the defendant because such was unnecessary and irrelevant if their objective test is employed. They indicated the danger if such evidence is admitted, particularly where the issue of entrapment is submitted to the jury. The defendant either has to forego the defence or else employ it with the risk that he will be severely prejudiced if the evidence introduced is unfavourable.

The defence of entrapment, although well established in the U.S. dœs not have a properly formulated basis and there is no comprehensive explanation of its theory. The fundamental rationale is that it is against public policy for a government agent to induce a person to commit a crime he would not otherwise commit as the law forbids criminal activity only when the commission is accompanied by the requisite criminal intent on the part of the accused. Public policy can be maintained only by denying the criminality of those who are so induced to commit offences which infringe criminal statutes. Thus, the state should not be able to prosecute a person who commits a crime which was instigated and encouraged by the state (estoppel).

The purity of government and its processes (i.e. the courts, government officers, etc.) are thereby protected by public policy. The police function to investigate and prevent crime whereas judges are to be impartial adjudicators regarding an accusation of crime against an individual. If the police violate their role as a result of unsavoury detection techniques, the judges, in the absence of the defence of entrapment would be violating their role by supporting the extended police activity. As the courts should not tolerate the use of their processes to consommate a wrong, the defence of entrapment acts to protect the judicial process from abuse while at the same time ensuring the liberty of an innocent person and consequently effecting a limitation of police powers.

Whatever the theoretical basis for entrapment however, it is likely that its foundation is more a consequence of an emotional response to outrage at the conduct of law enforcers.

[53] *Supra* footnote 26.
[54] *Supra* footnote 1.

Aside from the defence of entrapment *per se*, the defence may argue that one of the two essential elements of the crime was missing *i.e. mens rea* or *actus reus*. A question may also arise concerning further limitations of police power as there are doubts as to whether police are entitled to violate the law (*i.e.* commit the *actus reus*) in order to detect the commission of a crime by others. The existence of a privilege for police is not entirely clear. These latter two points will be examined further in this paper with regard to Canadian decisions.

In a number of jurisdictions, the defence of entrapment may be inapplicable in absolute liability crimes such as violations of liquor laws. To constitute entrapment, the criminal intent must originate in the mind of the entrapper. Since no intent is required to violate absolute liability crimes, an essential element of entrapment is absent.[55]

B. ENGLAND

Until the late nineteenth century, no common law court had recognized the defence of entrapment at all. Instigation of any type was considered totally irrelevant to the issue of guilt or innocence.

Entrapment, today, was never really developed as a defence in its own right in England. Where there has been flagrant abuse of instigating techniques the English courts have taken the approach of conspicuously avoiding the entire issue and providing a remedy, where required, by some other means.

The majority of English cases related to entrapment situations deal with violations of carriage regulations,[56] breaking and entering[57] betting,[58] loitering and soliciting[59] and theft[60] among others.

The majority of English cases turn on the accomplice and corroboration issues[61] or they consider whether or not the elements of the offence are present.[62]

In *R.* v. *Bickley*,[63] the courts were only concerned with the evidentiary value of the agent provocateur's testimony. In this case, the agent bought poison from Bickley in order to obtain evidence to accuse him of "supplying

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[55] *Kearne* v. *Aragon*, 65 N.M. 119 *obiter dictum*.
[56] *Browning* v. *J.W.H. Watson Ltd*, (1953) All. E.R. 775 (Q.B.).
[57] *R.* v. *Chandler*, (1912) 8 Cr. App. 82 (C.C.A.).
[58] *Brannan* v. *Peek*, (1947) 2 All. E.R. 572 (K.B.).
[59] *Sneddon* v. *Stevenson*, (1967) 1 W.L.R. 1051 (C.C.A.).
[60] *R.* v. *Turvey*, (1946) All. E.R. 60 (C.C.A.).
[61] *R.* v. *Bickley*, (1909) 73 J.P. 239 (C.C.A.); *R.* v. *Mullins*, (1848) 12 J.P. 776, 3 Cox C.C. 526 Q.B.; *R.* v. *Chandler*, *supra* footnote 60; *Sneddon* v. *Stevenson*, *supra* footnote 62.
[62] *R.* v. *Turvey*, *supra* footnote 63; *R.* v. *Miller and Page*, (1965) 49 Cr. App. R. 241 C.C.A.; *R.* v. *Eggington*, (1801) 168 E.R. 555 (Q.B.).
[63] *Supra* footnote 64.

poison with intent that it should be used to procure a miscarriage". The court ruled that the police spy is not an accomplice so the rule that a jury should not act on the uncorroborated evidence of an accomplice dœs not apply to such a person.

The judiciary has on occasion regarded unfavourably the use of entrapment techniques. In *Brannan* v. *Peek*,[64] a police agent entered a pub and placed several bets with the accused using repeated pleas to overcome his hesitancy. The accused was acquitted on appeal, on other grounds, as the pub was not a "public place" and thus did not fall within the purview of the provisions of the statute with which he was accused. However, Lord Goddard C.J. added in an obiter dictum :

> .... unless an Act of Parliament provides that for the purpose of detecting offences police officers or others may be sent into premises to commit offences therein — and I do not think any Act dœs so provide — it is wholly wrong to allow a practice of that sort to take place.
>
> .... If the police authorities have reason to believe that offences are being committed in public houses, it is right that they should cause watch to be kept by detective officers, but it is not right that they should instruct, allow or permit a detective officer or constable in plain clothes to commit an offence so that they can say that another person in that house committed an offence. If, as the police authority assumed, a bookmaker commits an offence by taking a bet in a public house, it is just as much an offence for a police constable to make a bet with him in a public house and it is quite wrong that the police should be instructed to commit this offence. I hope the day is far distant when it will become common practice .... for police officers who are sent into premises for the purpose of detecting crime, to be told to commit an offence themselves for the purpose of getting evidence against another person .... In this case it seems to me more reprehensible because .... the appellant was reluctant to bet with the police constable.[65]

Thus Lord Goddard strongly voices his disapproval of entrapment in the pure sense and in addition he hints at the possible liability of the police officer as an accomplice.

Mr. Justice Humphreys concurred, saying:

> I think the most serious aspect of this case is that not only did the police constable commit an offence but .... he encouraged and persuaded another person to commit an offence.[66]

A similar problem arose in *R.* v. *Murphy*[67] but under different circumstances. A police officer, pretended to be a member of a subversive organization in order to obtain evidence from a man suspected of disclosing informatin to foreign countries. Lord MacDermott C.J. said that evidence produced by police participating in an offence need not, because of its

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[64] *Supra* footnote 58.
[65] *Ibid.*, p. 72.
[66] *Ibid.*, p. 73.
[67] 1965 N.I. 138.

nature, be ruled inadmissible. The justification of such police measures, he believed, lay in the particular circumstances. In the instant case Lord Parker said:

> In so far as it can be said that he (the police officer) did act so as to enable others to commit offences by making himself available if an offence was to be committed, it does seem to me that provided a police officer is acting under the orders of his superior and the superior officer genuinely thinks that the circumstances in the locality necessitate action of this sort, then in my judgement there is nothing wrong in that practice being employed.[68]

The question also arose in this case concerning the police officer's evidence because if he was to be considered as an accomplice this would have raised the issue of corroboration. In his concurring judgement Waller J. held that the rule concerning corroboration did not apply in these circumstances because the police officer, while pretending to be an accomplice was not a true participant.

In *Sneddon* v. *Stevenson*[69], the appellant, a known prostitute, was loitering in the street when a police officer in an unidentified car stopped near her at the edge of the sidewalk. She approached him and asked, "Do you want business?" After some bargaining she entered the car and they drove off a short distance. As she became suspicious he identified himself and notified her that he was arresting her for soliciting. She was subsequently convicted and instituted an appeal to the Queen's Bench Division on the ground that the police officer, by his actions has incited her or at least encouraged her to commit the offence.

Lord Parker C.J. held that although the courts have, in the past, disapproved of police obtention of evidence by feigned participation in an offense, this was not necessarily improper. This case and the *Murphy*[70] case do not derogate greatly from the dominant American position. The accused in both cases had the predisposition to commit the crime. The participation of the police agent even by providing an opportunity to commit the offence would not allow entrapment as a defence in the U.S.. What would be necessary is enticement through persuasion directed towards one who would not otherwise commit the crime. This was not present in these two latter cases.

There is one recent English case where the sentence of a convicted person was reduced because of the instigational influence of the police. In *R.* v. *Birtles*[71] consecutive sentences of three years and two years on charges of burglary and carrying an imitation firearm with intent to commit burglary

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[68] *Ibid.* p. 157.
[69] *Supra* footnote 59.
[70] *Supra* footnote 67.
[71] (1969) — 2 All.E.R. 1131 (C.A.)

were reduced to three years. Presuming that the accused was encouraged, the court felt justified in doing so.

The Lord Chief Justice concluded by stating:

> .... unless the use of informers is kept within strict limits, grave injustice may result.... It is one thing for the police to make use of information concerning an offence that is already laid on. In such a case the police are clearly entitled, indeed it is their duty, to mitigate the consequences of the proposed offence,.... to protect the proposed victim and to that end it may be perfectly proper for them to encourage the informer to take part in the offence or indeed for a police officer himself to do so.
>
> But it is quite another thing, and something of which this court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character which he would not otherwise commit, still more so if the police themselves take part in carrying it out.[72]

The English courts similarly reduced sentence in a later case *R.* v. *McAnn*[73] as the crime might not have been committed had the police officer not intervened.

In England then, at the most, there exists strong judicial disapproval, although not consistent, of police entrapment techniques, in the same manner as it is viewed in the U.S. *i.e.* police inducement of innocent person to commit a crime. However, in England, aside from a possible reduction of sentence, there is no indication whatsœver that the accused may be afforded a defence thereby.

C. CANADA

It is universally conceded that the use of stratagem by the police is often a required and appropriate investigatory practice, particularly when such activities provide the opportunity for the commission of an offence *i.e.* the catalyst for the transaction. However, uncertainty arises when such practices cease to be mere investigatory methods but become methods of instigating crime by an unwary innocent person. In Canada there is no clear authority nor rational foundation for a defence based on entrapment. There is a common feeling among judges however, that a person should not be subjected to such unconscionable instigation and consequently, the courts have groped for a legal principle or for some device in order to minimize the possibility of injustice to an accused and to voice public disapproval of such police tactics.

Mr. Justice Roberts in *Sorrells* v. *U.S.* properly distinguishes between entrapment and other police tactics.

> 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, wiretaps,

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[72] *Ibid.* at 1136.
[73] (1971) 56 Cr.App. R. 359 (C.A.).

> 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 defence here asserted involves more than obtaining evidence by artifice or deception. *Entrapment* is the conception and planning of an offence by a police 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.[74]

The Canadian position with regard to entrapment however, has not advanced to that reached in the U.S.

The American position is in keeping with their exclusionary rule of evidence, whereby evidence obtained illegally from a defendant in violation of his constitutional rights, must be suppressed by order of the court.[75] In Canada, the general rule is that evidence otherwise admissible is not inadmissible by the fact that it was illegally obtained. Correspondingly, the Supreme Court has held in *R* v. *Wray*[76] that the appropriate test to determine the admissibility of evidence is its relevance and not the manner in which it is obtained. One may invoke the *Canadian Bill of Rights*, S. 1a) and b)[77] perhaps in that every person has a right to due process of law and equality of law. Is there due process of law when a law enforcement official induces a person into commiting an offence? Jurisprudence does not give any indication.

Canadian Courts have encountered entrapment situations such as narcotics,[78] liquor,[79] licensing,[80] abortion,[81] conspiracy[82] and breaking and entering.[83]

In order to provide for a systematic approach, the Canadian decisions will be divided into categories: those cases which although faced with an entrapment situation avoid the problem entirely; those cases which consider to a certain extent the admissibility of evidence; those cases which involve the liability of the police agent, and those cases which provide a possible basis for a defence.[84]

I. *Cases which avoid the entrapment issue*

In *R* v. *Irwin*,[85] a policeman and policewoman dressed in civilian clothes, entered a drugstore. The man claimed that the woman with him, his

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[74] *Supra* footnote 1 at 453.

[75] Also known as the rule excluding "fruits from the forbidden tree" or "tainted evidence". *Miranda* v. *Arizona* 384 U.S. 436 (1966).

[76] (1970) 4 C.C.C. 1; 1971 S.C.R. 272.

[77] *Canadian Bill of Rights*, (1960) 8-9 Eliz. II, c. 44.

[78] *R* v. *Ormerod*, 6 C.R.N.S. 37, 2 O.R. 230 (C.A.), (1969) 4 C.C.C. 3.

[79] *Amsden* v. *Rogers*, (1916) 26 C.C.C. 389, 30 D.L.R. 534 (Sask. S.C.).

[80] *R* v. *Timar*, 5 C.R.N.S. 195, (1969) 3 C.C.C. 185, (1969) 2 O.R. 90 (Co. Ct.); *R* v. *Coughlan ex parte Evans*, (1970) 3 C.C.C. 61, 8 C.R.N.S. 201 (Alta S.C.).

[81] *R* v. *Kotyszyn*, (1949) 95 C.C.C. 261, 8 C R. 246 (Que.C.A.).

[82] *R* v. *O'Brien*, (1954) S.C.R. 666, 110 C.C.C. 1, 19 C.R. 371.

[83] *Lemieux* v. *Queen*, (1968) 1 C.C.C. 187, 2 C.R.N.S. 1, (1967) S.C.R. 492.

[84] This subdivision is similar to that used by J. WATT, *Entrapment*, see footnote 23.

[85] (1968) 2 C.C.C. 50 (Alta C.A.)

girlfriend, was pregnant and he indicated their desire for a drug which would induce a miscarriage. The drug was provided and the accused was subsequently convicted and this was upheld on appeal. The appeal court considered an earlier decision *R* v. *Hyland*[86] of the Australian Supreme Court where it was decided that no conviction could be had where the prisoner supplied a noxious thing to a policeman, believing it to procure an abortion, although no one intended to use the drug. Three of the six judges dissented in this latter case, preferring to follow *R* v. *Hillman*[87] of the English Court of Criminal Appeal in which the question was whether or not the accused, in supplying the noxious drug, intended it to be used to procure a miscarriage and the intention of the person to whom the drug had been supplied was held to have been irrelevant. In *R* v. *Titley*[88] the court concluded with the same reasoning.

The court in *R* v. *Irwin*,[89] completely ignored the possible entrapment situation and based its judgement on proof of the accused's intention:

> If the person who supplied the drug believes that the person to whom he is supplying it intends to use it to procure a miscarriage, that is sufficient for a conviction under the section. It does not matter that the person to whom the drug was supplied did not in fact intend to use it.[90]

In this case, as entrapment was not mentioned at all, one has no idea as to the predisposition of the accused. It is possible that the accused was predisposed to commit the crime as there was little hesitation on the part of the accused. Hence the police tactics would only have constituted a trap by providing an opportunity for the accused to do what he would have done anyway.

R v. *Woods*[91] presented a pure entrapment situation. Two off-duty, plainclothes policemen, not in their jurisdiction and without the knowledge of their superiors, pretended to be Toronto gangsters. They exhorted the accused to steal for them outboard motors as they had a ready market for such commodities. As he was threatened with physical violence if he did not steal the motors, the accused broke into a marina and stole them. At Wood's trial for breaking, entering and theft, the Magistrate readily believed the evidence of the Crown witnesses over that of the defence. The Court of Appeal quashed the conviction on the ground that the trial judge erred in assessing the credibility of the arresting officer's testimony on the basis of his previous knowledge:

> The Court is convinced that it is impossible to know what conclusion the Magistrate might have come to had it not been for his personal knowledge of the

[86] (1898) 24 Vict. L.R. 101.
[87] (1863) 9 Cox C.C. 386.
[88] (1880) 14 Cox C.C. 502.
[89] *Supra* footnote 85.
[90] *Ibid.* at 54.
[91] 7 C.R.N.S. 1, (1969) 3 C.C.C. 222, (1969) 2 O.R. 132 (C.A.).

> witness. This was an extraneous circumstance and yet the contest of credibility between the witness was undoubtedly resolved by it. It was a circumstance which ought not to have been considered.[92]

Thus it was not the accused's testimony which provided for a valid defence nor the allegation of an entrapment situation. The acquittal lay in the error committed by the trial judge in assessing the credibility of witnesses.[93]

In *Re Park Hotel (Sudbury) Ltd.*[94], two police officers were sold liquor after hours contrary to the Liquor Licence Act. The court stated:

> It is also clear that the officers here were not "agents provocateurs" or accomplices. An ordinary person making an illegal purchase and thus committing an offence under the provincial law might find his credibility questioned as an accomplice, or in any event, as a person without scruples in committing a breach of a provincial statute; but if this person had associated himself with the prosecution *before making the purchase* he is clearly not an accomplice. A fortiori, special investigators employed specifically in the enforcement of the provincial liquor laws, have as part of their duty the detection and prosecution of infringements under the Act; they are not persons employed by the police to detect crime of so-called police spies.... I therefore, find that the Magistrate was properly within his rights in coming to the conclusion that the officers were not "agent provocateurs" and that their evidence was worthy of belief.[95]

The men, in question, were police-officers, however, they were employed by the provincial government to detect liquor infractions. The distinction of whether or not the officer was employed by the police and the officer's role were factors in determining whether the officer was an "agent provocateur". The question of who the employer was, is actually irrelevant hence the judge utilized a totally superficial distinction in order to disregard the 'agent provocateur' aspect of the case.

The latter decisions give rise to another interesting aspect to entrapment situations *i.e.*, the evidentiary aspect.

2. *The accomplice and corroboration cases*

It is a well established rule that a judge must caution the jury with regard to the danger of condemning an accused on the uncorroborated testimony of an accomplice. However, there has been much controversy regarding the testimony of a police agent *i.e.* whether or not he should be considered an accomplice for these purposes.

In *Amsden* v. *Rogers*,[96] a special constable charged with the enforcement of the liquor laws induced a brakeman on a C.P.R. — train, to supply him with some liquor representing that he was too sick to go to the buffet car

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[92] *Ibid.* at 3.
[93] Refer to *E.S. White v. King* infra footnote 104.
[94] (1966) 4 C.C.C. 158 (Ont. Distr. Ct.)
[95] *Ibid.* at 165 (emphasis by author).
[96] *Supra* footnote 79.

himself. The brokeman obliged and was promptly charged with illegally selling intoxicants. The police magistrate had dismissed the case on the ground that Amsden was an accomplice and that the evidence therefore required corroboration of which there was none. On appeal to the Supreme Court of Saskatchewan, Lamont J. dismissed the appeal because the prosecution did not sufficiently prove the commission of the offence. However, he pointed out that the magistrate erred in holding that the police officers' evidence required corroboration before he could convict the accused. Referring to the English cases of *R* v. *Mulling*[97] and *R* v. *Bickley*[98] he held that:

> A police spy or agent provocateur is not an accomplice, and the practice that a jury should not act on the uncorroborated evidence of an accomplice does not apply to the case of such a person.[99]

The learned judge added that officers of the law may be entitled to resort to pretence and even make false statements to the accused in order to obtain evidence of a crime. Such subterfuge does not cast discredit on such evidence, however, the judge indicates that if the officer makes false statements to the accused, not to detect crime, but rather to induce its commission in order to prefer a charge for the offence committed at his solicitation, then the evidence must be scrutinized with great care and may bear on the credibility of the officer's testimony.

> ....where the zeal of an officer of the law leads him to make false statements to secure the commission of an offence in order that he may be able to prosecute the offender, his evidence must be weighed in the light of the possibility that the same motives might have a tendency to induce him to colour his testimony in order to secure a conviction.[100]

Similarly, in *R* v. *McCranor*[101] an agent provocateur was held not to be an accomplice whose evidence required corroboration, but rather,

> if he only lent himself to the scheme for the purpose of convicting the guilty he was a good witness and his testimony did not require confirmation as that of an accomplice would do: he was not an accomplice for he did not enter the conspiracy with the mind of a co-conspirator, but with the intention of betraying it to the police, with whom he was in communication. At the same time from the facts of his joining the confederacy for the purposes of betrayal and that he had used considerable deceit by his own ac-

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[97] *Supra* footnote 61.

[98] *Ibid.*

[99] *Supra* footnote 79 at 390. Same was held in *R* v. *Berdino* (1924) 3 D.L.R. 794 (R.C.C.A.); *Rex* v. *Acker* (1934) 62 C.C.C. 269 (N.S. county court) and *Evans* v. *Pesce & A.G. Alberta* (1969) C.R.N.S. 201 (Alta.S.C.).

[100] *Ibid.* at 391. Refer to *R* v. *Pratt* (1972) 19 C.R.N.S. 273 (N.W.T. Mag. Ct.) where it was stated that the evidence of a police spy must be scrutinized with all due caution if it is accepted at all. Had the officer disclosed he was a constable and had the accused believed he was a police agent it may be argued that the accused acted (here as regards the sale of narcotics) without *mens rea* and benefits from the same immunity from prosecution as the officer who induced him to do what was changed as an offence. Also refer to *R* v. *National Bell Liquors Ltd.* (1921) 56 D.L.R. 523 at 555, 35 C.C.C. 44 at 76, 16 A.L.R. 149 (Alta C.A.) reversed on other grounds 65 D.L.R. 1, 37 C.C.C. 129, (1922) 2 A.C. 128 (Privy Council)

[101] (1918) 31 C.C.C. 130, 47 D.L.R. 237 (Ont. H.C.).

> count in carrying out that intent, the jury would do well to receive his evidence with caution, seeing that it was probable on the face of it, and borne out as far as it could be by the other circumstances of the case?[102]

In *R* v. *White*,[103] the Ontario Court of Appeal asserted that no rule of law or practice exists which requires that the evidence of police spies, agents, etc. be discredited as a result of their role or due to false statements made by them in the course of their duty used to induce the commission of an offence. The only distinction made between detection and inducement of a crime was that in the latter case the evidence should be scrutinized more carefully.

As stated by Laidlaw J.A.

> Indeed it would be difficult if not impossible for officers of the law to prevent or successfuly combat crime of certain kinds (including offences charged against the accused) except by employment of measures involving masquerade, deceit, and false representation.... a police officer or detective is not in the same class as an accomplice and the rule of pratice as to corroboration of evidence given by an accomplice is not applicable to such persons.
>
> Nevertheless, it is proper to scrutinize carefully the testimony against a prisoner given by policemen, constables and others in the investigation of crime.[104]

These cases must be distinguished from *R* v. *Bandel*[105] where an Ontario county court judge held that the court should not convict on the uncorroborated evidence of liquor "spotters" as the evidence was most unsatisfactory and contradictory and as a result of the status enjoyed by the "shady" spotters.

3. *Liability of the Police Agent*

In most entrapment cases, where a judge discusses questions of guilt they make no reference to the possible liability of the police instigator. Prior to the judgement of Laskin, J.A., as he then was, in *R* v. *Ormerod*[106] it seems to have been assumed in Canada, that notwithstanding SS.21 and following of the Criminal Code, police could not be made liable as accomplices hence no need really arose to discuss the problem of corroboration.

There are no common law rules or procedural rules concerning police agents. Thus, S.7(3)[107] of the Criminal Code does not provide a defence of immunity to the accused agent. This is due to the fact that, traditionally police

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[102] RIDDELL, J. quoting ERLE, J. in *R* v. *Dowling*, (1848) 3 Cox C.C. 509 at 516 (C. Cr. Ct. Eng.).

[103] (1945) 84 C.C.C. 126, (1945) 3 D.L.R. 553, (1945) O.R. 378 (C.A.)

[104] *Ibid.* at p. 139 (C.C.C.). In a different case *E.S. White* v. *King* (1947) S.C.R. 268 it was held that a judge must, even if he believes a witnesses testimony, consider all the evidence and the credibility and weight to be given to the statements made by the respective witnesses. Thus, testimony of a police officer must be assessed with all the evidence.

[105] (1927) 47 C.C.C. 266 (Ont. Co. Ct.).

[106] *Supra* footnote 78.

[107] Joel SHAFER & Wm. SHERIDAN *Defence of Entrapment*, (1970) 8 *Osgoode Hall* L.J. p. 278 at 297 and see comments of Laskin J.A. in *R v. Ormerod, supra* footnote 78 at p. 17 (C.C.C.).

agents or any government official for that matter have been considered liable to the same legal penalties as ordinary citizens.[108]

The fact that officers are not brought to trial lies in the fact that police have a large discretion in the decision whether to arrest or not, including arrests of fellow constables.

One argument often advanced in favour of acquitting an agent from what would otherwise be a crime is that of lack of intent or *mens rea* in the exercise of public duty.[109]

This defence would not apply in an absolute liability case where *mens rea* was not a requisite for conviction.[110]

Furthemore Laskin J.A., in *Ormerod*,[111] replied to an accused's defence based on the latter's sense of public duty and lack of *mens rea* as follows:

> .... a general want of intent to break the law is not a defence where a person carries out forbidden acts intending to do them or knowing what he is in fact doing. That he does them for a laudable purpose or from a high motive .... is besides the point.[112]

Mr. Justice Laskin agrees that prosecution may not be commenced at all in such cases or if prosecution is lodged, a reduction of sentence may result, however, he refuses to see how a police agent may be rescued from guilt if prosecution is undertaken. Exoneration from criminal liability as a result of such "public duty" would, he adds,

> involve a drastic departure from constitutional precepts that do not recognize official immunity unless statute so prescribes. How far such immunity exists in the exercice of discretionary power not to prosecute is unknown to me; but even if it be considerable, the fact that it does not reside in a settled rule is a safeguard. Legal immunity from prosecution for breaches of the law by the very persons charged with a public duty of enforcement would subvert that public duty.[113]

If the police agent is the "causa causans" of the crime rather than merely providing an opportunity for the commission of a crime he is potentially liable. However, since the police have discretion to initiate arrest and prosecute, it is only where the agent in question has exceeded the limits provided for by internal police discipline that he would be subject to such measures. Thus Mr. Justice Laskin's opinion merely indicates when police are liable, however no remedy is thereby provided against the instigator as the power to prosecute is a discretionary one and which originates with the police.

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[108] *Brannan* v. *Peek*, *supra* footnote 58; *Roncarelli* v. *Duplessis* 1959 S.C.R. 122.
[109] *State* v. *Trophy*, 78 Mo. App. 206 (1899) (Kansas Court of Appeal).
[110] *R* v. *Petheran* (1936) 1 W.W.R. 287 (Alta. C.A.).
[111] *Supra* footnote 78.
[112] *Ibid.* at 17 (C.C.C.)
[113] *Ibid.*

Various statutory exemptions may exclude criminal liability of law enforcement officers in certain cases. The Criminal Code justifies conduct of policemen and others, in several respects where they are proceeding to enforce the law, for example, by arresting offenders. Various police acts[114] contain provisions allowing police officers, under instructions, to violate a certain statute (eg. Liquor Act, Narcotic Control Act) for the purpose of obtaining evidence.

In the absence of such provisions and in the presence of a prosecution, a police agent may be convicted.

Furthermore, administrative controls may investigate any police activity by means of an inquiry[115] or other police disciplinary measures[116].

And there is nothing to prevent a victim of such overzealous police conduct from having recourse to the civil law on torts and delicts, as in the case of false arrest or imprisonment. One may arque that entrapment constitutes a form of false arrest as no arrest would have been possible without the police instigation. However, if the accused is found quilty the recourse would be illusory as in fact no damages would have been caused.

4. *Possible Bases for a Defence*

a) *Entrapment and Abuse of Process*

In *R* v. *Timar*[117], the accused agreed for a fee to obtain master heating licences from the Metropolitan Licensing Commission by bribing someone within this commission. Lynn, a member of the Metropolitan and Suburban Plumbing and Heating Association warned the police of such activity. Lynn was consequently set up as an "agent provocateur". The court observed that each agent provocateur situation should be considered on its own particular set of facts and that public policy would probably excuse such conduct:

> Our laws have long recognized the necessity to employ "agent provocateurs" for the protection of society. This is primarily due to the existence of types of offences the detection of which would without such "police traps" .... be virtually impossible and these special methods need to be employed if these crimes are to be controlled .... In this case, the accused was a *ready and willing party* to the transaction and was not lured into conduct that was in any way contrary to his own wishes. He was not lured into acting but merely given the opportunity to perform and he was quite prepared to do so. Not only does such conduct not offend public policy but public policy has been held to excuse some.[118]

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[114] *Alberta Police Act*, 1955 R.S.A., c. 236, S.14 (1)
[115] *Quebec Police Act*, 1968 c. 17, s. 19 (as amended).
[116] *R.C.M.P. Act*, 1970 R.S.C., c. R-9, S. 25P.
[117] Supra footnote 80.
[118] *Ibid* at 197 (C.R.N.S.).

This case demonstrates the Court's acceptance of a police trap. The predisposition of the accused eliminates the possibility of entrapment here but the possibility of the defence is not excluded if the accused were not a willing party. Furthermore, since Lynn did not participate in the illegal activity until after his connection with the police, it was held that neither he nor the police could be considered as accomplices, although their evidence was to be scrutinized carefully.

In *R* v. *Ormerod*[119] the accused was charged with trafficking in a controlled drug. The accused and a friend were preoccupied with drug use among their peers and consequently contacted Rozmus, an R.C.M.P. officer to whom they were to pass on information about drug sellers and users. After six weeks the relationship was terminated, Rozmus saying he had received no useful information and Ormerod indicating his father had requested that he stop informing. The three transactions that were the subject of the trafficking charge were made with a real "agent provocateur", a R.C.M.P. officer known as "Dennis from the race track".

Ormerod argued that he had not intent or *mens rea* in committing the offence, that he was fulfilling a public duty, and that even if he was engaged in trafficking, he should be acquitted because of entrapment. The trial judge recognized entrapment as a problem but refused to accept it as a defence.

Laskin, J.A., held that all the elements of the offence were proven and indicated that this case differed from *Shermans* v. *U.S.*[120], as the accused, in the present case was only presented with an opportunity to commit the crime. He states:

> I do not think it (entrapment) arises merely because an undercover policeman provides the opportunity or gives the occasion for an accused to traffic in narcotics. Moreover, I cannot say that there was any such calculated inveigling and persistent importuning of the accused by Dennis from the race track as to go beyond ordinary solicitation of a suspected drug seller. This much at least, the police are entitled to do in seeking to discover peddlers of prohibited narcotics.[121]

His opinion is not sufficiently precise to support either the "creative activity test" or the "police conduct test". One may ask if Mr. Justice Laskin would have applied the defence of entrapment, if, in his opinion, such calculated inveigling and persistent importuning of the accused took place. He certainly would not have provided for a test to determine the existence of entrapment without expecting a future application. Hence one may deduce the existence of the defence of entrapment from this statement.

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[119] *Supra* footnote 78.
[120] *Supra* footnote 26.
[121] *Supra* footnote 78 at 11 (C.C.C.).

From the facts, however, two of the transactions appeared to have been very definitely initiated at the instigation of R.C.M.P. officer King, thus again one is in the presence of judicial avoidance or reluctance to accept entrapment as a defence.

Mr. Justice Laskin perhaps explains such avoidance, in this case as follows, in an *obiter*:

> To uphold the defence, which goes not to the issue of whether the crime has been committed but to the issue of whether the methods employed by the police should be tolerated, it would be necessary for the Courts to exercise a dispensing jurisdiction in respect of the administration of the criminal law. There is no statutory warrant for such a jurisdiction but that does not mean the court is powerless to prevent abuses, be they in the lodging of the prosecution itself or in the establishment of the foundation for the prosecution.[122]

Some of Mr. Justice Laskin's comments in *Ormerod*[123] indicate that a court may prevent abuses in the lodging of the prosecution or in the establishment of the foundation for the prosecution. However, he simply raised the question of whether or not there exists an overriding judidial discretion to stay a prosecution because of police complicity in the events which led to it. No argument on such a proposition was advanced to the Court in this case.

Such an inherent power of the court to prevent abuses is known as "the abuse of process" theory. Laskin, J.A. in *Ormerod*[124] distinguished *R* v. *Osborn*[125] however he referred to it as an authority for the proposition that where a prosecution is shown to be unfair to an accused and an abuse of the process of the court, the court may in its discretion order the proceeding stayed. That case was subsequently reversed by the Supreme Court of Canada in 1970.[126]

The facts in that case were not those of an entrapment situation, however, the decision is significant just the same for it may provide a possible basis for the defence of entrapment, in the future.

The accused was charged with knowingly having in his possession cheques which were adapted and intended to be used to commit forgery, contrary to former art. 312(b) of the Criminal Code. Less than one year later he was acquitted on a directed verdict on the grounds that because the cheques were complete they not have been adapted and intended to be used to commit forgery. Nine months later the accused was again indicted this time on a charge of conspiring with a person unknown to utter forged cheques. The trial judge disallowed the special plea of *autrefois acquit* and *res judicata* and

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[122] *Ibid.* 10-11 (C.C.C.).
[123] *Ibid.*
[124] *Ibid.*
[125] (1969) 5 C.R.N.S. 183, (1969) 1 O.R. 152, 1 D.L.R. (3d) 664 (Ont. C.A.) 1969 4 C.C.C. 185
[126] (1971) 12 C.R.N.S. 1, 1971 S.C.R. 184.

made no ruling on the accused's submission that the court had a discretion to stay the indictment as oppressive and an abuse of the process of the court. The accused was convicted and he appealed. The Ontario Court of Appeal allowed the appeal and acquitted the accused. It was decided that the courts have always had an inherent jurisdiction in civil and criminal trials to prevent the abuse of their process through oppressive and vexatious proceedings hence the trial judge erred as the successive laying of a multiplicity of charges based on the same set of facts would constitute such an abuse. It was also held that the power of the Attorney General to stay an indictment (*nolle prosequi*) could not, by mere implication divest the courts of an ancient and important jurisdiction.

Before its reversal by the Supreme Court of Canada, this case was cited as authority *R* v. *Shipley*,[127] one of the rare cases in Canada, where entrapment provided a valid defence.

Entrapment was recognized in this case as an abuse of the process of the courts. An undercover R.C.M.P. officer befriended Shipley the accused, both of whom were residing at the Ottawa YMCA. The officer had never seen the accused use drugs or even have any in his possession. He knew that the accused was not a trafficker, however, he (the officer) attempted several times to obtain drugs through the accused. After several unsuccessful attempts to obtain drugs in this manner, the officer threatened to end their friendship unless Shipley acquired the drugs. In order to ensure the completion of the transaction, the officer refused to repay Shipley $10. which he had borrowed from him, until he received the drugs. Shipley co-operated and was arrested for traficking. Counsel for the defence presented a motion to have the proceedings stayed, basing itself on the Ontario Appeal Court decision of *R* v. *Osborn*[128] where abuse of process of the court was recognized as an inherent jurisdiction of the court which could only be exercised in certain circumstances. As Jessup, J.A. concluded in that case:

> Iam not prepared to hold that in the absence of special circumstances the laying of a second indictment upon the same facts is simpliciter and in all cases productive of such injustice as to invoke the court's inherent jurisdiction. Everything depends on all the facts of the case. The discretion is to be exercised in favour of an accused only where a real injustice will otherwise result.[129]

The defence examined the American position on entrapment and argued that the facts in *Shipley*[130], as a result of the entrapment led to the "real injustice" described by Jessup, J.A. in *Osborn*[131].

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[127] (1970) 3 C.C.C. 398; (1970) 2 O.R. 411 (Ont. Co. Ct.)
[128] Supra footnote 125.
[129] *Ibid.* at 188.
[130] *Supra* footnote 127.
[131] *Supra* footnote 129.

Mr. Justice McAndrew felt justified to stay proceedings in an entrapment situation because the accused would not have indulged in the offence without the inducements held out by the officer and he concludes:

> In my view, in all the circumstances leading up to the date of the alleged offence, it would be unfair to this accused and oppressive and an abuse of the process of this court to permit this prosecution to continue.[132]

This recognition of entrapment was short-lived however as the Supreme Court of Canada rejected the theory of abuse of process in *R* v. *Osborn*[133] thereby reversing the previous decision of the Ontario Court of Appeal.[134] Hall J., with whom Ritchie and Spence J.J. concur, finds it unnecessary to decide whether or not the court has such a discretion, since he finds on the facts that there was no oppression. Pigeon J., with whom Martland and Judson J.J. concur, confines the matter to a question of law.

> It is basic in our jurisprudence that the duty of the Courts is to apply the law as it exists, not to enforce it or not in their discretion. As a general rule, legal remedies are available in an absolute way ex. debito justitiæ. Some are discretionary, but this does not destroy the general rule. I can see no legal basis for holding that criminal remedies are subject to the rule that they are to be refused whenever in its discretion, a Court considers the prosecution oppressive.[135]

The honourable judge then goes on explaining that in the particular facts of the *Obsorn* case, it is not oppressive to have an accused undergo several trials on the same charge as it would not be desirable that a criminal should escape trial for a misdeed because an error was committed in his trial that requires his conviction to be quashed. Judge Fauteux, who was left with the power to form a majority gave no motive for his allowance of the appeal, hence reducing the effect of the decision as an effective precedent. On a strict application of the *stare decisis* rules, *Osborn* merely held that courts cannot stay a prosecution on a correct charge following an acquittal on a incorrect charge arising out of the some facts. Thus unless the rule rejecting the abuse of process theory, can be confined to the particular fact situation in *Osborn*, its future use seems extremely dubious as a means to successfully invoke entrapment as a defence.

As a result of the deadlock of the Supreme Court justices on the main issue in *R* v. *Osborn*[136], subsequent decisions in the lower courts across Canada have supported the abuse of process theory by holding that a court may put an end to a prosecution where the Crown has exercised its legal powers in a manner deemed to be unjust or oppressive. In *R* v. *Kowerchuk*,[137] the accused

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[132] *Supra* footnote 127 at 402.
[133] *Supra* footnote 126.
[134] *Supra* footnote 125.
[135] *Supra* dootnote 126 at 190.
[136] *Supra* footnote 126.
[137] (1971) 3 N.C.C. (2d) 291 (Proo. Ct. Atta).

was charged with trafficking in restricted drugs under the *Food and Drug Act*[138] and after a plea of not guilty was entered and the case set down for trial, counsel for the Crown informed the Court that he was withdrawing the particular charges and laying a new information for the same infraction on the ground that the Crown was unable to produce an analyst to give oral evidence. An application was made to stay proceedings on the ground that the Court's process had been abused. The application was granted as the Crown could not avail itself of the procedure of withdrawing and relaying a new information merely for the purpose of preserving its course of action since it was the author of its own dilemma (failure to produce an analyst). The abuse lay in the fact that the two charges were substantially the same. Provincial Court Judge Coughlan (Alberta) agreed with Jessup J.A. in the Ontario Court of Appeal decision in *R* v. *Osborn*[139] and disregarded the uncertain stance of the Supreme Court in the same case;[140]

> A Court must always be on guard to ensure fairness to an accused and be ever vigilant in seeing that an accused is given fair treatment.... Since the jurisdiction is so readily invoked in civil matters where ordinarily only money or property is involved, one would have thought that there would be no question that such jurisdiction would be invoked in criminal matters where the liberty and freedom of the individual are concerned both of which are so much more precious than money or property.[141]

In *Regina v. Burns, Fairchild and Donnelly*[142] County Court Judge Darling stated:

> I am satisfied that there is no binding authority in Canada preventing me from exercising such a discretion where exceptional circumstances exist, going as high as I must to the Supreme Court of Canada decision in *R* v. *Osborn*, where the question seems to have been left open on the totality of the rationale in the judgement.[143]

The learned judge added that there is considerable authority at least in the province of British Columbia, to say that a court including a Court of in inferior jurisdiction has such a power.[144]

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[138] 1970 R.S.C. c. F-27.

[139] *Supra* footnote 125.

[140] *Supra* footnote 126.

[141] *Supra* footnote 137 at 295.

[142] (1976) 25 C.C.C. 2d 391 (B.C. County Ct.).

[143] *Ibid.* at 400.

[144] Refer to the following decisions. *Re Barnett and Queen* (1974) 17 C.C.C. (2d) 108 (B.C.S.C.) (1974) 5 W.W.R. 673; Affirmed 24 C.C.C. (2d) 399N (B.C.C.A.); *R v. K (Koski)* (1971) 5 C.C.C. (2d) 46, (1972) 1 W.W.R. 398 (B.C.S.C.); *Re Regina and Croquet* (1972) 8 C.C.C. (2d) 241 (B.C.S.C.), 21 C.R.N.S. 232, 1972 5 W.W.R. 285 and on appeal (1973) 12 C.C.N. (2d) 331,23 C.R.N.S. 374, 5 W.W.R. 654 (B.C.C.A.); *Re Regina and Rourke* (1974) 16 C.C.C. (2d) 133 (B.C.S.C.), (1976) 25 C.C.C. (2d) 555 on appeal reversed in result (B.C.C.A.); *R.* v. *Thorpe* (1973) 11 C.C.C. (2d) 502 (Ont. county Ct.); *R.* v. *McClevis: Ex parte Wright and Wright*, (1970) 3 O.R. 791, 11 C.R.N.S. 354, 1 C.C.C. (2d) 173 (Ont. H.C.).

In this latter case Galligan J. held that the inherent jurisdiction to prevent an abuse of process rests not only in Courts of superior or plenary jurisdiction but it resides in all Courts of competent jurisdiction.

Jessup J.A. in *R.* v. *Osborn* (Ont. C.A.) See footnote 125, referred to the following three

Mr. Justice McIntyre of the British Columbia Court of Appeal in *Re Regina and Rourke*[145] added that:

> The matter remains open in the Supreme Court of Canada. Canadian Judges have not been slow to seize upon the principle enunciated in Osborn by Jessup J.A. and have intervened to stay proceedings where they have considered the process has been abused by the conduct of the Crown. In so doing they have gone far beyond cases involving a multiplicity of proceedings .... Trial Courts have intervened to stay proceedings to prevent abuse where the crime alleged had been induced by the police, *R* v. *Shipley*.[146]

The learned judge concurred with Jessup J.A. in *R.* v. *Osborn*[147] in that the powers of a judge in a criminal case are similar to those in civil cases and that the judge (of inferior or superior courts) has an inherent power to protect the process of the Court from oppressive conduct on the part of the prosecution by staying proceedings.

> It must be remembered that the traditions of the common law have always dictated free access to the Courts by private litigants, those changed with crime and the Crown. In the exercise of discretionary power of the nature here under discussion, the Courts must not be allowed to become in addition to Judges of the cases presented to them, Judges of what cases shall be permitted to come to them. The discretion to stay is one which should be exercised in only the most unusual cases and the case will be a rare one indeed where its use can be justified.[148]

English cases where abuse of process was recognized in civil cases.

In *Haggard* v. *Pelicier Frères* (1892) A.C. 61, the Privy Council on appeal from the Supreme Court of Mauritius held that an inferior Court has jurisdiction to stop vexatious proceedings. At P. 67-68 Lord Watson stated, "Their Lorships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing without proof, actions which it holds to be vexatious".

In Metropolitan Bank v. *Pooley* 10 A.C. 210 (1885) where the Lord Chancellor (House of Lords) speaking with reference to the dismissal of an action on that ground said at p. 214, "The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from its own procedure".

The same principle was again laid down by the House of Lords in *Lawrance* v. *Norreys* 15 A.C. 210 (1890). In that case the Appeal Court had refused to allow proof and dismissed the action. Lord Herschell observed at p. 219, "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of process of the Court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases".

R. v. *Leroux* 62 O.L.R. 336, 50 C.C.C. 52, (1928) 3 D.L.R. 688 (Ont. C.A.). Stands as authority in recognizing that collecting a civil claim by the criminal process is an abuse of process and will not be tolerated.

[145] *Ibid.*

[146] *Ibid* at 563 (C.C.C.).

[147] *Supra* footnote 125.

[148] *Supra* footnote 142 at 565 (C.C.C.).

The learned judge also referred to *Connelly* v. *Director of Public Prosecution* (1964) A.C. 1254, 1964 2 All E.R. 401 (House of Lords) where Lord Devlin upheld the court's power to stop vexatious process in criminal and civil law, however, he admits that different justices will have different views as to what is unfair hence the difficulty in exercising the power. He adds at p. 442 (All E.R.), "Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them?"

Justice McIntyre also refers to *Re / Regina and Croquet, supra* footnote 144 where Berger J. states at p. 252 (C.C.C.) "Now it is not for the Judge to determine what he considers to be fair or unfair. The doctrine of abuse of process must be one founded on legal principles and not according to the Judge's own idiosyncratic conceptions of fairness... The principle that emerges

Abuse of process is thus linked to the question of judicial discretion. Traditionally, judicial and prosecutorial functions were distinct. The executive (*i.e.* the Attorney-General) initiated and conducted prosecutions in criminal matters. The courts treated cases brought before them according to the existing law and without exercising any discretionary power in the executive function.[149]

In the executive branch discretionary power exists at the lowest echelons *i.e.* the police officer. The decision to arrets or to intervene in any other way results from the consideration by the particular officer of the advantages and disadvantages to the suspect, the police officer himself and the community of the various courses of action.[150] The decision to prosecute rests with the Attorney-General and his agents[151] at least with regard to preferring indictments.

It is essential to have police and prosecutors, however it is equally essential to control their discretionary powers, otherwise discretion would be lawless and with no limits. The most flagrant abuses of discretion in law enforcement occur against victimless crimes. True, police will incur hostility in accomplishing their duty of enforcing the law and preserving order. Furthermore, certain political decisions such as whether to enforce a particular prohibition, whom to charge and what to charge are necessarily discretionary[152]. However, the particular methods employed by police to accomplish their functions must be scrutinized carefully.

The courts have frowned upon intervening where the law has conferred a discretionary power on the Attorney-General of his agents. The prevailing attitude of the courts has been one of non-intervention with the controversial exception of abuse of process.

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from the cases is that oppression must be shown."

Other cases to support the abuse of process theory are as follows:

R. v. *Ittoshat* (1970) 5 C.C.C. 159, 12 D.L.R. (3d) 266, 10 C.R.N.S. 385 (Que. Sess. of Peace)

Re Sheehan and Queen (1973) 14 C.C.C. (2d) 23 (Ont. H.C.)

R. v. *McAnish and Cook* (1973) 15 C.C.C. (2d) 494 (B.C. Prov. Ct.)

R. v. *Del Puppo* (1973) 16 C.C.C. (2d) 462, (1974) 3 W.W.R. 621 (B.C. Prov. Ct.)

Nebraska v. *Morris* (1971) 1 W.W.R. 53, 2 C.C.C. (2d) 282, 16 D.L.R. (3d) 102 (Man. C.A.)

[149] *R* v. *Stark* 47 C.C.C. 356, 60 O.L.R. 376, (1927) 3 D.L.R. 433 (Ont. C.A.), *A.G. Ont.* v. *Toronto Junction Recreation Club* (1904) 8 O.L.R. 440 (Weekly Ct. Ont.); *Orpen* v. *A.G. Ont.* (1925) 2 D.L.R. 366 (Ont. S.C.). *Rex* v. *Taylor* 38 C.C.C. 324, 67 D.L.R. 372 at 382 (Ont. S.C.)

[150] In acting in this way, the police officer is often influenced more by his personal and idiosyncratic values than from community values that emerge from the legislative process. See *Control of the Process* Law Reform Commission of Canada, Working Paper 15, 1975.

[151] In most cases the process is purely mechanical and the Crown intervenes only rarely. See *Our Criminal Law* Report of the Law Reform Commission of Canada 1976.

[152] "If politics is the realm of the executive, adjudication is the realm of the judiciary". Aside from this consideration the law does not coherently provide for a theoretical or practical division of responsability between the Crown and the courts. See *Control of the Process, supra* footnote 151 at 35.

This latter doctrine created a significant break in the pattern of judicial restraint with the assertion by certain courts of an inherent prosecution where in the opinion of the court, the procedures adopted by the Crown has been oppressive. Although the doctrine relates most frequently to lengthy delays attributable to the Crown and the relaying of changes following the withdrawl or staying of changes by the Crown, it has been applied to entrapment situations as in *R* v. *Shipley*.[153]

It is possible, I believe, to consider police and Crown conduct from another angle. When the accused's codified right to make full answer and defence in virtue of art. 577(3) Cr.C.; has been infringed upon, must the court interfere to protect the interests of the accused or is his right subject to the more clearly defined rights of the Crown.

Similarly, the due process clause and other procedural rights guaranteed in the Canadian Bill of rights,[154] articles 1(a) and 2e, may provide a means for the exercise of judicial control over power of the police and prosecution. The courts must be the guardians of the rights of the individual in seeking that the minimum standards of fairness are observed in the prosecution of an accused.[155]

Why would it not be possible to extend this theory to unfair and unethical police practices such as entrapment[156]. This would involve of course a broad interpretation of the due process clause as has been done in the U.S. by its substantive interpretation.

Additional decisions have considered the question of entrapment apart from the abuse of process doctrine, the Criminal Code and the Canadian Bill of rights. In *R* v. *MacDonald*[157] the Supreme Court decision in *R* v. *Osborn*[158] was disregarded and the charge was dismissed due to entrapment. The accused was charged with trafficking in narcotics he had sold to an undercover agent. The Court admitted into evidence as part of the "res gestæ" certain conversations between the accused and the agent which showed that the agent, a known drug addict, implored the accused to sell the narcotic on the basis that he was ill, and broke into tears when the accused refused, hence constituting entrapment.

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[153] *Supra* footnote 127

[154] *Supra* footnote 77

[155] Refer to *Taylor* v. *Gottfried* 47 W.W.R. 282, 43 C.R. 207 (1964) 2 C.C.C. 382 (Man. C.A.). *R* v. *Muttner* (1972) 2 W.W.R. 687 (Man. Mag. Ct.). *R* v. *Bonnycastle ex. p. Welch* (1970) 4 C.C.C. 382 (Sask Q.B.). *R* v. *Harbison and Gertz* (1973) 9 C.C.C. (2d) 259, (1972) 6 W.W.R. 501, 20 C.R.N.S. 336 (B.C.Prov. Ct.). *R* v. *Littlejohn* (1972) 21 C.R.N.S. 349 (1972) 3 W.W.R. 475 (Man. Mag.Ct.)

[156] *Infra* p. 59-70 for distinction between *R* v. *Shipley supra* footnote 127 and *R* v. *Wray supra* footnote 76.

[157] (1971) 15 C.R. 122 (B.C. Prov.Ct.)

[158] *Supra* footnote 126.

Provincial Judge Selbie (B.C.) held that it is a question of fact in each case whether or not the entrapment is objectionable. Ordinary solicitation of a suspected drug seller is unobjectionable whereas "calculated inveigling and persistent importunity" may be, as Laskin J.A. held in *R* v. *Ormerod*.[159] Judge Selbie indicates that the defendant would not have sold "but for the histrionics and persistent opportuning of the third party informer".[160] This he says goes far beyond the "ordinary solicitation of a suspect drug seller" as indicated by Laskin J.A.[161] Judge Selbie, thus accepted the defence of entrapment in this case because the accused showed a reluctance to sell and only did so under pressure by a known drug addict who was at the same time working for the police. The position taken by the learned judge is similar to the American position whereby the accused may use the defence of entrapment with success if he was not predisposed to commit the offence.[162]

In *R* v. *Chernecki*,[163] the position of entrapment in Canada was made even more confusing. An undercover police officer disguised as a "hippie", approached the accused whom he had known for several years but who was unaware he was a police officer. The officer indicated that he wished to purchase drugs whereupon the accused stated that he could get heroin from a certain café. The officer accepted the proposition and paid the accused $15. for the cost of the drug and $4. for the accused. They arrived at the café, the accused entered while the officer remained in the car. They then drove back to the hotel, the accused claiming he had the narcotic in his possession, although refusing to show it. As the two were proceeding up the stairs the officer arrested the accused for "trafficking" in narcotics contrary to Art. 4(1) of the *Narcotic Control Act*.[164] Although no narcotics were found on his person, it was held that the accused trafficked in virtue of art. 2(i) of the Act as he "offered to sell, transport and deliver a substance held out by him to be a narcotic". The accused was convicted and his appeal was dismissed unanimously.

The accused raised two grounds of appeal. The first was that the trial judge failed to consider the law with respect to entrapment as the police of-

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[159] *Supra* footnote 78 at 11 (C.C.C.)

[160] *Supra* footnote 157 at 124.

[161] *Supra* footnote 78 at 11 (C.C.C.)

[162] This position was taken in *R* v. *Pratt* supra footnote 100 however, in that case the judge considered that the accused was predisposed to commit the crime and did so when the police provided the opportunity.

In a more recent case *R* v. *Sirois* (1972) 17 C.R.N.S. 398 (Atta. S.C.), Judge Greschuk rejected entrapment as a defence basing his decision on the reasoning of the United States Supreme Court in *Sorrells* v. *U.S. supra* footnote 1. He stated that there was not present clear evidence that there was implanted in the mind of the accused, by another person, the disposition to commit the offence in question or to induce its commission in order to provide ground for a prosecution. The motives of the judge clearly admit the existence of the defence and his judgement would have been different had the accused not been predisposed to commit the crime.

[163] (1971) 4 C.C.C. (2d) 556, (B.C.C.A.).

[164] 1970 R.S.C. c. N-1.

ficer entrapped the appellant into his illegal action, and secondly, that because of such conduct on the part of the officer the Court should hold the prosecution of the appellant as an abuse of process and exercise its inherent jurisdiction to quash the conviction.

Bull J.A. states that on the evidence there was no calculated inveigling or persistent importuning or inducing in order to invoke entrapment, or an abuse of process of the Court. He then goes on to add in an *obiter dictum*, that entrapment does not constitute a defence to a charge. Furthermore, he does not accept such activities as constituting an abuse of process as a result of the Supreme Court decision in *R* v. *Osborn*.[165]

Such an argumentation is inconsistent. If, as Mr. Justice Bull believes, entrapment is not a defence to a charge, why did he consider whether there was any persistent importuning of the accused which may "raise the spectre of entrapment or any oppression or abuse of court process".[166]

However, Mr. Justice Bull remarked once again as obiter, that the fact of entrapment may be very relevant to the matter of *sentence*.

Because of the inconsistencies in this case, it would not be of much use as support in establishing entrapment as a defence.

b) *Agency*

In a distinctly Canadian solution to the problem of entrapment a few of the lower courts have acquitted the accused by invoking the civil law rules of agency in that the accused acts as a mandatary or agent for the police officer or undercover agent.

In *R* v. *Madigan*,[167] an undercover police officer developed an acquaintance with the accused and pleaded, unsuccessfully, that he obtain drugs for him. The accused then asked the officer if he was still interested in the drugs to which the officer replied affirmatively. The accused approached a woman in the restaurant in which they were seated, talked with her briefly and then returned to the table indicating to the policeman that she had some drugs. When the officer told the accused that he wished to buy, the woman approached their table. The officer passed her a two dollar bill and she left to obtain change. Upon her return she sat beside the accused and handed him the change. He in turn passed it on to the officer. The woman then passed the drugs to the officer under the table. Although the accused attempted to obtain additional drugs from two other sources, he was unsuccessful.

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[165] *Supra* footnote 126.
[166] *Supra* footnote 163 at 559.
[167] (1969) 6 C.R. 180, (1970) 1 C.C.C. 354, (1970) 1 O.R. (C.A.)

The accused was subsequently charged with unlawfully trafficking in a controlled drug contrary to S.32 (1) of the *Food and Drug Act*[168] which provided:

> 32(1) No person shall traffic in a controlled drug or any substance represented or held out by him to be a controlled drug.
>
> 31(c) "traffic" means to manufacture, sell, export from or import into Canada, transport of deliver, otherwise than under the authority of this part or the regulations.

The trial judge dismissed the conviction as he was not satisfied beyond all doubt that the accused did traffic because his activities did not come within the definition of "trafficking" as per the statute.

The Crown's Appeal was subsequently dismissed. Jessup J.A. (McGillvray concurring) concluded that the facts of the case were equally consistent with the accused acting as an agent for the *purchaser alone*. As it is not an offence under the statute to purchase, no criminal liability would attach to the accused if he had been the purchaser therefore the same reasonable doubt therefore arose over whether or not the acts of the accussed were for the purpose of "aiding" the vendor as per S.21 (1b) of the Criminal Code rather than aiding the purchaser who is not criminally liable. It must be noted that said S.21 (1b) states "for the purpose of aiding" and not "with the effect of aiding".[169]

The facts of this case resemble *Sorrells* v. *U.S.*[170] The police were justified in detecting traffickers however, there was no evidence to suggest that the accused was predisposed to commit the crime, that he had done so frequently in the past. Agency has been recognized in subsequent cases involving illegal liquor sales where the accused is a taxi-driver or other intermediary who has taken money from a policeman and returned with liquor for the undercover policeman.[171]

Agency is maintained when the accused acts sheerly on behalf of the purchasing undercover officer and makes no profit from the transaction. If a profit were to be made in this manner, there would then be two transactions and the accused may be convicted of sale.

In *R* v. *Mah Qua Non*[172] the agency principle was refused because the accused represented the vendor. The whole question of agency was decided by the Supreme Court of Canada in *R* v. *Poitras*[173] in 1974.

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[168] 1970 R.S.C. c. F-27.

[169] *R* v. *Barr* (1976) 3 C.C.C. (2d) 116 (Ont. C.A.) *Evans* v. *Pesce and Attorney General for Alberta*, supra footnote 99.

[170] Supra footnote 1.

[171] *R* v. *Hawthorne* (1971) 3 C.C.C. (2d) 505 (B.C. Co. Ct.); *R* v. *Warren* (1972) 7 C.C.C. (2d) 536 (Sask. Distr. Ct.)

[172] (1934) 1 W.W.R. 78 (B.C.C.A.)

[173] (1975) S.C.R. 649.

Arsenault, an undercover agent indicated his desire for hashish to a Mr. Little. Little then introduced Arsenault to the accused who said he would get some.

Arsenault paid the accused and Little said he would go with the accused and return with the drug. Later, Little met Arsenault and delivered the drug.

The accused was charged with trafficking contrary to S.4(1) of the *Narcotic Control Act*.[174] The court of first instance acquitted the accused as the evidence was equally consistent with the fact that the accused was acting for Arsenault alone as it was consistent with the fact that he was delivering or selling or trading in drugs or offering to do so.

The Court of Appeals[175] set aside the verdict of acquittal and registered a conviction asserting that:

> To import into this single transaction the principles of agency either for the purchaser or agency for the buyer as to balance the consistencies thereof, as did the learned trial judge, is simply to confuse an otherwise straight forward operation of purchase and sale.[176]

The Supreme Court of Canada dismissed the subsequent appeal, Dickson J. rendering judgement for the majority (Martland, Judson, and Ritchie, J.J.). He stated,

> One cannot apply the civil law of "agency" in this context. Agency does not serve to make non-criminal an act which would otherwise be attended by criminal consequences. Even if the appellant could be said to be the agent of Constable Arsenault for the purpose of civil responsability his acts may, nonetheless, amount to trafficking in narcotics or aiding in such trafficking. If, as the trial judge would seem to have found, the evidence was consistent with the accused delivering or selling or trading in drugs or offering to do so, the fact that he may have been acting as an agent for Arsenault would not exculpate him.[177]

The Supreme Court suggested an alternative view in that the appellant aided and abetted an unidentified vendor in selling and delivering the narcotic to Arsenault.

Mr. Justice Laskin in a dissenting opinion said that one who buys a narcotic does not by that act engage in trafficking, and similarly, one who assists in a purchase is not guilty of trafficking through the effect of S.21 cr.c. The evidence, he believed, supported no other purpose than that of aiding in a purchase (Little & the unknown purchaser were the sellers).

Even if this dissenting opinion and past judgements favouring the agency defence were to be maintained, the defence would still be problematic. Argu-

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[174] *Supra* footnote 164.
[175] (1972) 6 C.C.C. (2d) 559 (Manit. C.A.)
[176] *Ibid* at 563.
[177] *Ibid* at 653

ments to be used in agency circumstances are highly technical and involve a strict statutory interpretation. It could only be involved with regard to "sales" transactions in the obtaining of illegal liquor or narcotics.

As a result of these difficulties and the latest Supreme Court decision, the possibility of agency as an alternative in entrapment situations is practically nil.

c) *The substantive elements of the offence*

In certain circumstances an effective defence may argue that the substantive elements of the offence in the statute are absent.

In *Patterson* v. *Queen*[178] the Supreme Court of Canada reversed a decision of the Ontario Court of Appeal which had affirmed the accused's conviction for keeping a common bawdy-house. No mention was made of a possible entrapment situation. A morality squad officer telephoned the accused and made an instigative proposition which she readily accepted. It was further agreed that she would procure another woman who would arrange suitable quarters where both could sexually entertain the officer and three friends (also morality officers). The women were subsequently arrested at a residential home.

The Supreme Court reversed the decision because the home in question was not a common bawdy-house within the meaning statute, S.168 of the Criminal Code[179] *i.e.* "frequent or habitual uses of the premises for prostitution".

Spence J. reasoned as follows:

> .... there was no evidence in the present case of any reputation in the community and there was no evidence of the use of the premises for prostitution on any other occasion than the one which was the subject of the prosecution.[180]

Consequently, the *actus reus* was not proved and a conviction cannot be maintained.

As the court declined to comment upon the police methods or upon entrapment, it is not evident whether the accused was entrapped or whether the officer merely provided an opportunity for her to commit an offence to which she was already predisposed. However, one may surmise that the officer did no more than the ordinary solicitation of a suspected prostitute as his proposition was accepted with little, if any hesitation on the part of the accused.

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[178] (1968) 2 C.C.C. 247, 1968 R.C.S. 157.

[179] In the present Criminal Code a common bawdy house is defined in art. 179. The infraction is created by art. 193

[180] *Supra* footnote 178 at 242.

The most obvious cases of a defence based upon the substantive legislative provision are those in which the police investigatory devices have been set up in such a manner as to leave out an essential element of guilt.

In *Lemieux* v. *Queen*[181] the accused was charged with breaking and entering under former S.292(1) of the Criminal Code. The accused and another man were solicited by a police informer to undertake to break enter a dwelling house where the police awaited them. The police, in order to set up the trap had obtained the key from the owner of the house who agreed to participate in the scheme. The accused had no thought of breaking and entering this house until approached by the informer. The accused was subsequently convicted of breaking and entering and his appeal was dismissed by the Appeal Court of Ontario. The Supreme Court of Canada acquitted him because the *actus reus* was not committed.

It was open to the jury to find that the owner of the house in question had placed the police officers in possession of it giving them authority to deal with it as they pleased. He had not merely consented to the informer breaking into his house with the assistance of others but had urged him to do so. The Supreme Court considered that to break into a house in such circumstances is not an offence because notwithstanding the guilty intention of the accused, the *actus reus* which was in fact committed was no crime at all.[182]

Thus the defence is successful in this case because it negates an essential element of the crime and as a result the accused did not, in law, commit the offence. The Supreme Court added that if the accused had committed the offence in law, entrapment would not save him. Mr. Justice Judson states:

> Had Lemieux in fact committed the offence with which he was charged, the circumstance that he had done the forbidden act, at the solicitation of an "agent provocateur" would have been irrelevant to his guilt or innocence. The reason that this conviction cannot stand is that the jury were not properly instructed on a question vital to the issue whether any offence had been committed.[183]

In other words, the Supreme Court would have upheld the conviction if the police had planned and implemented their scheme without the knowledge and co-operation of the intended victim. Since the facts of this case indicate a classic case of entrapment, it would appear that the court, by this *obiter* has

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[181] *Supra* footnote 83.

[182] In such a case there is no "taking" and a conviction for theft would not be possible. However, convictions for attempt or conspiracy would be possible unless in the latter case all the alleged co-conspirators other than the accused were police agents.

[183] *Supra* footnote 83 at 189. Such an *obiter* comment regarding solicitation has not been upheld in later cases. As Laskin J.A. stated in *R* v. *Ormerod supra* footnote 78 at p. 12 (C.C.C.) "The reach of the term 'solicitation' in the quoted sentence is of course central to the scope of the proposition."

Mr. Justice Laskin did not evidently believe the matter settled by *Lemieux* otherwise he would have totally rejected the defence. He admits the possibility of the defence in the context of abuse of process and even suggests indirectly adherance to the American position by his remarks on "calculated inveigling and persistent importuning" at p. 11 (C.C.C.) regarding predisposition.

ruled out the possibility of entrapment as a viable defence to crimes originating from the "creative activity" of police agents.

Furthermore, is the court exercising an inherent discretionary power? In other words, rather than acquit Lemieux, why was he not charged with the included offence of attempt?

In *R* v. *Kotyszyn*[184] entrapment practices were overlooked however, the accused was acquitted on an indictment for conspiracy to commit an abortion due to a lack of *mens rea* on the part of one of the co-conspirators.

The patient, a policewoman who was not pregnant paid the accused who was then apprehended by the police as she prepared to perform the abortion. The Quebec Court of Appeal indicated that the principal elements of the offence were a common criminal design, two or more persons, and some criminal or unlawful purpose. Since the policewoman did not have the necessary design or *mens rea* there were not two or more persons involved in the conspiracy. There was therefore no conspiracy.

The principle that no common design exists where one "conspirator" is a police officer was upheld by the Supreme Court of Canada in *R* v. *O'Brien*.[185] Since conspiracy involves a coexistent intent to effect an unlawful purpose, if one party lacks such intention he is not a party and an acquittal must follow as one-man conspiracies are not recognized by our law. As the position of the law is unclear with regard to attempts to commit inchoate offences (*i.e.* conspiracy) the court may have been reluctant to convict on such an included offence. The possibility to convict on attempt did exist in the *Lemieux*[186] case, however the court disregarded the question.

Defences based on the technicalities of the offence charged, (lack of *actus reus* or *mens rea*) rather than upon the extent of impropriety in police conduct indicate that efficient police work will be treated in the same way as an overt departure from the common and accepted standard of fairness.

In Canada, as a result of the general avoidance of the entrapment issue, no substantial support may be found in favour of the defence. In obvious cases the court is more willing to acquit on other grounds or may reflect its disapproval of police conduct by lighter sentences[187]. Entrapment as a defence *per se*, however, is not recognized in Canada.

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[184] *Supra* footnote 81.
[185] *Supra* footnote 82.
[186] *Supra* footnote 83.
[187] *R* v. *Steinberg*, (1967) 1 O.R. 733 (Ont. C.A.).

III.— CONCLUSION

No conduct should be treated as criminal unless it poses a serious threat to other persons in society and unless such act cannot be dealt with through other social or legal means.[188]

Some criminal laws, as those which require no victim, are considerably less enforceable than others. This unenforceability is an indicator of inconsistencies in a society's moral values and pinpoints significant areas ripe for change. If the laws do not have the support of the mores of the people, they are consequently ineffective as a means of control and are mere attempts to legislate morality. After all, the character of society reflects the character of its members and enforcement cannot go beyond the point that citizens will permit irregardless of the abundance of laws.

Objections arise with regard to the criminalization of behaviour where no victim is involved as a result of the combination in certain cases, of the lack of a social threat, acceptance of such conduct by many members of society, the involvement of organized crime, police corruption, and objectionable police practices such as entrapment which hardly conduce to respect for the law and which, may possibly create "criminals" out of otherwise innocent persons.

One cannot complain about the excesses of such police entrapment practices that are inevitable in enforcing crimes without victims if, at the same time, the public supports the existence of laws regarding such crimes. This is not universally the case and as a result of the lack of legislation on the matter, the judiciary has not in Canada, nor England, taken a definite stance.

The American position on entrapment is favourable and conforms to American rules of evidence although the theory behind entrapment as a defence is unclear. In Canada, aside from the various possible bases for a defence not based on entrapment, even in an entrapment situation, the only legal underpinning for the defence of entrapment has been suggested to lie in the doctrine of abuse of process. A stay of proceedings by the courts would indicate a pronouncement by the courts that their integrity would be demeaned if they were to encounter such undesirable police practices.

The Supreme Court decision in *R* v. *Osborn*[189] has not foreclosed the right of a court to stay proceedings on the ground of entrapment as a result of the lack of a majority pronouncement on this particular issue. Thus one can only speculate as to how this particular issue would be judged if encountered

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[188] Canadian Criminology and Corrections Association brief to Law Reform Commission of Canada, re *Toward a New Criminal Law For Canada*, Sept. 1973.

[189] *Supra* footnote 126.

again by the Supreme Court. If the abuse of process doctrine is rejected, the defence of entrapment would lose its sole support. On the other hand, however, recognition of the abuse of process doctrine would not necessarily indicate recognition of the defence of entrapment.

However, any speculation of this sort must be assessed by analogy to the Supreme Court decision in *R* v. *Wray*[190] whereby evidence was judged admissible if relevant irregardless of the manner in which it was obtained, thereby curtailing the discretion of the court.

Thus, where the prevention of an abuse is based on evidentiary grounds the recourse would most likely fail. However, one may ask to what extent may police go in order to obtain evidence, *i.e.* can they induce the commission of the crime itself.

The *Wray* case lays down a rule regarding the admission of evidence. The trial judge has no discretion to exclude admissible evidence because in his opinion its admission would be calculated to bring the administration of justice into disrepute or because its admission would be unjust or unfair to the accused.[191] The test of admissibility of evidence is whether the evidence is relevant to the matters in issue.

Unauthorized police measures are not accepted *per se*, however, evidence produced as their result is admitted.

This case must be distinguished from *R* v. *Shipley*[192] which held that unjust police practices may justify a stay of proceedings where they are unfair to the accused and oppressive and an abuse of the process of the court to permit the prosecution to continue. The police tactics consist an abuse and hence cause the staying of the case.

The distinction is recognizable as in *Shipley* there is no question of admissibility of evidence; the entire case is simply dismissed. In *Wray*, the issue was the admissibility of evidence; the case proceeds, only, police measures, whether proper or not do not give the judge a discretion to exclude admissible evidence.

This latter rule does not appear to be broad enough to encompass the discretion to stay as enunciated in *Shipley* hence the abuse of process doctrine remains.

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[190] *Supra* footnote 76.

[191] However discretion exists if the admission of evidence operates unfairly to the extent that it is gravely prejudicial to the accused and whose probative force with regard to the accused before the court is trifling.

[192] *Supra* footnote 127.

With this in mind, it is submitted that potential exists for future development of a defence of entrapment in Canada whether that be in virtue of the abuse of process doctrine, the due process clause of the Canadien Bill of Rights, or the American position which has been applied in *R* v. *Macdonald.*[193]

However a limit to police activity must be established by law or the courts whether or not that be aimed at the instigation of crime directed at persons not predisposed to do so.

The absence of a stated public policy against police-instigated crime was deplored by the Ouimet Commitee[194] which called upon Canada to announce:

> 1. That a person is not guilty of an offence if his conduct is instigated by a law enforcement officer, for the prupose of obtaining evidence for the prosecution of such person, if such person did not have a pre-existing intention to commit the offence.
> 2. Conduct amounting to an offence shall be deemed not to have been instigated where the defendant had a pre-existing intention to commit the offence when the opportunity arose and the conduct which is alleged to have induced the defendant to commit the offence did not go beyond affording him an opportunity to commit it.
> 3. The defence that the offence has been instigated by a law enforcement officer or his agent should not apply to the commission of those offences which involve the infliction of bodily harm or which endanger life.[195]

The Committee therefore proposed the enactment of a statutory defence of entrapment modeled after "the creative activity test". The Committee did not choose to define "pre-existing intention" presumably regarding this duty as a judicial one. Furthermore, it did not mention what evidence could be used to prove this intention nor did it propose judicial controls on police conduct.

Although the Committee published its report in 1969 Parliament has not as of yet implemented its proposals on entrapment. Until such legislative action takes place, the status of the defence of entrapment will remain ambiguous and extremely doubtful as a successful defence, unless resolved by the Supreme Court.[196]

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[193] *Supra* footnote 157 and see footnote 162.

[194] Report of the Canadian Committee on Corrections Towards Unity: *Criminal Justice and Corrections*, Queen's Printer, 1969.

[195] *Ibid.* at 78, 79.

[196] After this article was submitted for publication, two cases were reported and are worth noting.

In *Regina* v. *Bonnar*, (1976) 34 C.R.N.S. 182, (1976) 30 C.C.C. (2d) S.S. (N.S. S.Ct.), the Nova Scotia Court of Appeal rejected the defence of entrapment as the police agent in question did not induce but merely offered the opportunity for the commission of the offence. It was found that the accused carried out the requisite *actus reus* with the requisite *mens rea* for the offence.

Although entrapment was rejected in this case, it appears that it would be maintained if the accused did not have the predisposition to commit the offence.

In *Regina* v. *Betesh*, (1976) 30 C.C.C. (2d) 233 (Ont. Co. Ct.), a case where the Crown agreed not to prosecute and subsequently prosecuted, the County Court of Ontario held that this constitutes an abuse of process which a court has an inherent jurisdiction to prevent by ordering prosecution to be stayed.