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François Lareau
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ENTRAPMENT AND THE GENERAL PART

Scott Bomhof

Two dominant approaches to entrapment appear throughout the literature on the topic. The first, commonly known as the subjective approach, fits within a framework of culpability and defences such as the General Part. The second, known as the objective approach, does not rationally mesh within the General Part. By examining the rationale behind these two approaches, their application in the Canadian and American legal systems, and various alternative methods of controlling entrapment, a general framework for a preferred approach for codification will be developed.

The task of defining the term entrapment is difficult since it is approached from many divergent views in different jurisdictions. The focus in this paper will be in making a distinction between acceptable and unacceptable police procedures in the prevention of crime. It is along this spectrum of police conduct that law enforcement becomes entrapment, but the exact point of divergence is hard, if not impossible, to pinpoint. The Law Commission of Great Britain loosely defines entrapment as, "the participation of informers or the involvement of individual police officers themselves in the commission of an offence for the purpose of apprehending the actual criminals involved"[123] .While this definition is very generalized, it helps to display the important aspect of police conduct in the manufacturing of a criminal act.

The Subjective Approach

The development of the defence of entrapment was spearheaded by the Supreme Court of the United States, and it is from the body of decisions arising within that Court that the subjective approach is most prominent. The focus here is upon the guilt of the accused, and as such would fit within the confines of the General Part. Two distinct groupings of cases have arisen which deal with the notion of entrapment. The early cases of Sorrells v. United States[124] and Sherman v. United States[125] both dealt with the apprehension of individuals involved in consensual crimes, where the police investigatory methods were brought into question. In both cases the court produced only concurring opinions, and seemed to focus on the predisposition of the accused as well as the appropriateness of the police conduct. The defence was held to arise from statutory interpretation rather than any overriding goal of protecting the administration

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[123] Great Britain Law Commission, Criminal Law: Report on Defences of General Application (Report 83) (London: Her Majesty's Stationery Office, 1987)
[124] (1932), 287 U.S. 435.
[125] (1958), 356 U.S. 369.

of justice[126]. The dominant focus on culpability was to lay the groundwork for the adoption of a purely subjective test in later cases. In the second grouping, which is made up of more recent American cases, the division within the Court as to the proper approach to entrapment became highly visible. In the decisions given in Russell v. United States[127], Hampton v. United States[128], and Mathews v. United States[129], a more conservative bench began to shore up the scope of the defence, and limit the test to a purely subjective analysis of the predisposition of the accused. The basic elements of the defence of entrapment recognized by the United States Supreme Court, were articulated by the majority in Mathews:

> government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct ... [the] question of entrapment is generally one for the jury[130].

The focus is clearly on the intention of the accused, with the defence operating as a negation of mens rea due to the inducement offered by government actors.

The problems presented by a purely subjective test were examined thoroughly by the minority opinions voiced within these cases. In Sorrells, Justice Frankfurter pointed out that placing the focus on predisposition, which is often linked to past criminal activity, allows police to create new crimes as long as they are dealing with old criminals[131]. The accused is then required to put his/her past character into issue at trial. The subjective approach has also been criticized because it operates to negate mens rea only when inducements are from government actors and is not available when non-government actors offer inducements[132]. These flaws make the subjective formulation of the defence rationally unacceptable.

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126 *Supra*, note 124 at 439.
127 (1973), 411 U.S. page 423.
128 (1976), 425 U.S. page 484
129 (1988), 485 U.S. page 58
130 *Ibid.* at 63.
131 *Supra*, note 125 at 383.
132 L.G. Webster, "Building A Better Mousetrap: Reconstructing Federal Entrapment Theory From Sorrells to Mathews" (1990) 32 Arizona L.R. 605 at 627. See also Mack v. The Queen, (1988) 44 C.C.C. (3d) 513 at 546 (S.C.C.).

The Objective Approach

As dissatisfaction blossomed with the use of a subjective test, a number of scholars called for the introduction of an objective element to entrapment[133]. In the United States, both the American Law Institute and the United States National Commission on Reform of the Federal Law (the Brown Commission) proposed the adoption of rules which focused on police conduct rather than the predisposition of the accused[134].

The basic elements of the objective test can be generalized into four points. The focus of the inquiry is upon the involvement of the government in the commission of the crime. This involvement is to be weighed against a test of external reasonableness. The inquiry is concerned only with the current criminal charges, and not with past conduct[135].

Canadian Interpretation of Entrapment

The recognition of entrapment as a valid defence did not occur spontaneously in the Canadian Courts. Rather, it was arrived at by a piecemeal interpretation of scholarly opinion and recommendations for reform. The need for the defence was implied in early cases such as Kirzner v. The Queen[136], where the importance of using police infiltration in the commission of consensual crimes was noted by the Supreme Court of Canada.

[133] See Webster, *ibid.* at 607; M.F.J. Whelan, "Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement" (1985) 133 U. Pa. L.R 1193; P.H. Robinson, "Criminal Law Defenses: A Systematic Analysis" (1982) 82 Col. L.R. 199 at 236; D. Lanham, "Entrapment, Qualified Defences and Codification" (1984) 4 Oxford J. of Legal Studies 437.

[134] The Brown Commission defined entrapment as "when a law enforcement agent induces the commission of an offence, using persuasion or other means likely to cause a normally law-abiding person to commit the offence". See The United States National Commission on Reform of Federal Criminal Law, Study Draft of a New Federal Criminal Code (Washington: U.S. Government Printing Office, 1970). See also *supra*, note 23, s. 2.19.

[135] Webster, *supra*, note 132 at 618. See also Stober, Entrapment in Canadian Criminal Law (Toronto: Carswell, 1985) at 65.

[136] [1977] 38 C.C.C. (2d) 131 at 136 (S.C.C.).

The first case in which the defence of entrapment was recognized by the Supreme Court of Canada, albeit in a minority decision, was Amato v. The Queen[137]. In his powerful dissent, Mr. Justice Estey laid out the framework for a finding of entrapment: the offence must have been instigated by the police, the accused must have been ensnared by police conduct, and if these elements are met, there is a stay of proceeding, not an acquittal[138]. The defence was first recognized by a majority of the Supreme Court of Canada only five years later. In Mack v. The Queen[139], the objective approach taken by Estey, J. in Amato was welded to a second subjective test, creating a hybrid approach that is now law in Canada[140]. Rather than asking if the accused had the predisposition to commit the offence, the first Mack test asks if the police had a reasonable suspicion that the accused was already engaged in criminal conduct, or if they were engaged in a *bona fide* investigation[141]. It is in the second arm of the test that a subjective element is used in order to temper the objective review of police conduct. This stage requires that the police, while acting under a reasonable suspicion or within a *bona fide* investigation, do not go beyond providing an opportunity for the offence to be committed and actually induce the commission of the offence. In determining if the police have crossed over this delicate line, the Supreme Court decided to employ the reasonable person test. It is necessary to consider "whether the conduct of the police would have induced the average person in the position of the accused"[142]. This dividing line between acceptable and unacceptable conduct is said to be at the point at which the administration of justice would be brought into disrepute.

The most recent Canadian case to deal with the issue of entrapment was the Supreme Court of Canada decision in Barnes v. The Queen[143] where the focus was on the first branch of the test outlined in Mack. The Court denied the use of the defence of entrapment in this case because the police were involved in a bona fide investigation into drug activity covering six city blocks of a pedestrian mall[144]. It is interesting to note that the undercover officer who requested drugs from the accused had no reasonable suspicion that the accused was a drug dealer. The wide scope given to the police in undertaking a bona fide investigation seems to severely limit the scope of the test as it was originally formulated.

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137 [1983] 69 C.C.C. (2d) at 31.
138 *Ibid.* at 61 and 75.
139 *Supra*, note 132.
140 *Ibid.* at 513.
141 *Ibid.* at 522.
142 *Ibid.* at 555.
143 [1991] 63 C.C.C. (3d) 1.
144 *Ibid.* at 6.

The shift in the majority opinion towards a more narrow reading of the entrapment defence is further highlighted by the dissenting opinion of McLachlin, J., who focused on the circumstances surrounding the actual charges. Given the minor nature of the offence, the vastness of the area in which the police were engaged in their investigation, and the many innocent people who were likely to have their rights infringed by such an investigation, McLachlin J., concluded that the police conduct crossed over the line of acceptable methods[145]. The wide consideration given in this dissent seems to be more cognizant of the rationale behind entrapment outlined in Mack.

Where does entrapment fit into the grand scheme of Canadian criminal law? The defence was not developed in the present General Part of the *Criminal Code* which includes the option for the continuance of common law defences[146]. Instead, the Supreme Court chose to deal with the defence as independent from the common law defences since it is rooted in the inherent power of the judiciary to prevent an abuse of the legal process[147].

One can also clearly differentiate between the entrapment defence and those defences which either act as an excuse or as a justification for the accused's actions. A justification can be defined as the choice between two evils, where the choice of a lesser evil, though forbidden by law, can be overlooked because of the greater evil it avoided. An excuse is the existence of conditions that suggest that an actor is not responsible for his actions[148]. While entrapment can be likened to either of these categories of defence, it possesses many qualities which make it distinct from both as well.

The most promising categorization for the placement of entrapment is among public policy defences. It is among defences such as double jeopardy and statutes of limitations that the rationale for entrapment best fits. The focus here is not on the culpability of the accused, but on countervailing values to crime control[149]. Such a categorization complies with the argument that the General Part of the *Criminal Code* is not the proper home for a defence of entrapment, since that would require that the defence focus on the elements of the crime itself.

[145] *Ibid.* at 29.
[146] R.S.C. , 1985, c.46, s.8(3).
[147] See Mack, *supra*, note 132 at 525.
[148] Robinson, *supra*, note 133 at 213, 221.
[149] *Ibid.* at 230.

Alternative Approaches

Some academics argue against recognizing the defence of entrapment at all as it allows a factually guilty accused to escape conviction. In the subjective model, this is exasperated by the actual acquittal of the accused. In the objective test however, the finding of entrapment does not lead to an actual acquittal, but rather to a stay of proceedings. While this is in effect the cessation of charges, it does not actually lead to a finding that the offence was never committed. A possible development along this line would be to consider the creation of a finding of 'guilty but entrapped', wherein guilt would be recognized, but no conviction entered.

There are other alternatives in lieu of recognizing a defence of entrapment. The rejection of the defence of entrapment in the United Kingdom has resulted in the alternative approach of employing proof of entrapment as a mitigating factor for the judge to consider in the process of sentencing. While such an option is attractive as a middle ground for dealing with entrapment, it fails to obtain any protection for the integrity of the justice system. The entrapped accused is still convicted and the police conduct goes unchecked.

This method of dealing with entrapment is also highly problematic in the Canadian context, where many offences are still bound by minimum sentences. In order for this approach to be applied, it would be necessary for mandatory minimum sentences to be repealed. While this has been suggested in many recommendations for reform, it has not yet been accomplished[150]. When coupled with a procedural defence of entrapment, however, the use of mitigation of sentence could be useful where the evidence was not enough to prove entrapment to the degree required to lead to a stay of proceedings, but was enough to cause the judge to feel the sentence should be mitigated.

The era of the Charter has opened the door to inventive approaches to dealing with police activity, especially in the area of excluding evidence obtained in a manner which violates Charter rights. This avenue should be explored further in the area of excluding evidence obtained by entrapment, but at the present time it appears to be of little use in protecting the good repute of the administration of justice. Although evidence can be excluded under s.24 of the Charter, it is first necessary that a Charter right or freedom be breached by the police conduct. Since there is no such thing as a right not to be induced into crime, the application of s.24 is limited. There is also the problem that entrapment does not create evidence, but only discovers real evidence. Therefore there is very little that a Court can exclude, making this approach of little use to either the entrapped individual, or to the protection of the good repute of the justice system[151]. The exclusion of evidence obtained by entrapment, therefore, is neither an adequate nor workable alternative to a codified defence of entrapment.

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[150] Canadian Criminology and Corrections Association, Toward a New Criminal Law: A Brief to the Law Reform Commission of Canada (Ottawa: The Association, 1973) at 27.

[151] M. L. Friedland, "Controlling Entrapment" (1982) 32 U.T. L.J. 1 at 22.

Another way to deal with entrapment is indirectly, through the use of controls on police activity. By means of police guidelines, civil liability, and criminal charges being laid upon the entrapper, these approaches try to achieve what can best be done directly through a codified defence of entrapment. The use of criminal liability has been suggested as the best means of controlling police conduct by the Law Commission of Great Britain[152]. However, there is no empirical evidence that such control methods are effective, much less if they are ever enforced[153]. Given the substantial limitations to this method of controlling entrapment, the benefits of relying instead on a codified defence, where the result of abuse of process is readily apparent to the police, and the Court is able to control the purity of its own system, outweigh any possible benefits of relying on indirect controls.

Draft Legislation

With the rationale of protecting the integrity of the justice at the core of a codified defence of entrapment, the following is one draft of what possible legislation could look like :

1. A stay of proceedings may [will] be entered where it is established by the accused, by a preponderance of evidence, that the police, or an agent of the police :

(1) Provided the accused with an opportunity to commit the offence charged without :

(a)having reasonable grounds to suspect that the accused was already engaged in criminal activity, or

(b)being engaged in a *bona fide* police investigation, or

(2) while acting upon a reasonable suspicion, went beyond merely providing an opportunity, and actually induced the commission of the offence charged, in such a manner that the administration of justice is brought into disrepute.

2. The Judge shall consider all relevant circumstances [including the predisposition of the accused] in considering if the police conduct was such as to bring the administration of justice into disrepute.

[3. Where the defence of entrapment is raised by the accused, but the evidence does not meet the requirements of s.1, the Judge may nonetheless consider evidence of entrapment in mitigating the sentence of the accused upon a finding of guilt.].

Commentary on Draft Legislation

The draft legislation is clearly formulated on the objective approach heralded in this paper. The words contained in parenthesis are possible alternative interpretations which tend to shift the focus of the inquiry. The main text, however, is an attempt to codify the present understanding of the defence as it is known in Canada. The procedural elements would follow those previously outlined for an objective approach, including the requirement that a judge deal with the consideration of entrapment. This would allow the reasonable conduct standard to be a question of law, and allow the judge to decide if the conduct in question was sufficient to bring the administration of justice into disrepute. The burden of proof would be on the accused, based on a preponderance of proof, and the defence could only be raised after the elements of the crime have been proven beyond a reasonable doubt.

An important consideration in codifying a defence of entrapment is to deal with the types of offences for which the defence will be available. In both the Model Penal Code and the Ouimet Committee Report, there are recommendations that the defence not be available when "causing or threatening of bodily injury" is a part of the offence charged[154] However, given the wide scope left open to the judge in the draft legislation, there should be no need to formulate any such limits on the applicability of the defence. In considering the relevant circumstances, the judge can deal with the issues of whether bodily harm was threatened or caused, and include it in his/her analysis of the defence.

The burden of proof placed on the accused, adopted from the Model Penal Code, is "by a preponderance of evidence". This should not be an unfair burden, and therefore would not violate the Charter, since the Crown has already had the burden of proving all of the elements of the offence before the defence would be available.

Conclusion

Entrapment can be approached from many different angles, but only one analysis is consistent with the Canadian concern with preventing the abuse of the judicial process. In the present era of the Charter, with its focus on the maintenance of the good repute of the administration of justice and individual rights, the objective approach to entrapment better embodies the fundamental values of our system. This formulation, however, does not fit within the categorization of 'defence' as the term is applied in the General Part of the *Criminal Code*. Rather, it rests comfortably within the procedural framework which is the infrastructure of our criminal law.

[152] *Supra*, note 123 at 68. These guidelines attempt to control police activity by broadly defining the limits of permissible conduct, and requiring reasonable methods in the use of undercover operatives.
[153] See *supra*, note 150 at 28, and M. L. Friedland, "Controlling the Administrators of Criminal Justice" (1989) 31 Crim.L. Q. 280 at 281.
[154] See *supra*, note 23. See also *supra*, note 150 at 80.