Athens Journal of Law - Volume 9, Issue 1, January 2023 – Pages 59-88

Proactive Intelligence-Led Policing Shading the Boundaries of Entrapment: An Assessment of How Common Law Jurisdictions have Responded

By Ger Coffey[1]*

Law enforcement agencies have adapted their detection and investigative strategies in accordance with proactive intelligence-led policing of suspected offenders that include surreptitious undercover methods. While such measures are necessary and proportionate to safeguard society from harm caused by offenders, some forms of proactive policing methods could be regarded as entrapment. Allegations of entrapment are typically raised in circumstances where undercover law enforcement officers have actively participated in the creation of a crime, have tested the virtue of people instead of directing their detection and investigative strategies on persons against whom there are reasonable grounds for suspicion, or have gone beyond merely creating the circumstances and effectively induced the suspect to commit an offence. Criminal justice systems have typically responded to allegations of entrapment with judicial discretion to grant a stay of the prosecution for an abuse of the courts process, relying on judicial integrity and the imperative of constitutional principles and international human rights standards being adhered to by courts of justice. Undercover methods bordering entrapment might require the exercise of judicial discretion to either exclude impugned evidence or as a mitigating factor reducing the sentence imposed on convicted offenders. This article evaluates the judicial responses to successful pleas of entrapment in foremost common law jurisdictions underpinned by constitutional principles of due process and international human rights standards in accordance with the rule of law.

Keywords: *Abuse of process; Agent provocateur; Defence; Entrapment; Exclusion of evidence; Judicial discretion; Stay of criminal proceedings*

Introduction

The essence of entrapment is causing someone to commit a criminal offence they would have been unlikely to commit of their own volition, either directly through law enforcement officers or persons acting under their direction and control (*agent provocateurs*). A stratagem (encouragement, incitement, coercion, persuasion) is employed as a temptation to lure suspects into committing an

[*]BA (UL), LLB (NUI), MA (NUI), PhD (NUI), Lecturer in Law and Course Director LLM/MA in Human Rights in Criminal Justice, Centre for Crime, Justice & Victim Studies, School of Law, University of Limerick, Limerick, Ireland.
Email: ger.coffey@ul.ie

[1]This article is a revised and expanded version of a paper presented at the ATINER 19th Annual International Conference on Law, Athens 11-14 July 2022.

https://doi.org/10.30958/ajl.9-1-3 doi=10.30958/ajl.9-1-3

offence which the suspect otherwise would probably not have committed.[2] In most common law jurisdictions entrapment is raised as a procedural defence and the accused bear the burden and onus of proof on the balance of probabilities to establish they was incited, coerced or persuaded into committing the substantive offence. The burden then shifts to the prosecution to prove beyond a reasonable doubt that the accused was predisposed to commit the offence notwithstanding the purported influence of law enforcement officers (provided the allegations are not wholly improbable). The accused's previous criminal record and reputation for the type offending behaviour targeted by the undercover methods are relevant to the determining the issue of weather law enforcement had reasonable suspicion. Merely creating the circumstances to facilitate the accused to form the intention to commit the offence would not constitute entrapment. If the accused committed an offence they would otherwise not have committed this will probably equate with state created crime if law enforcement officers have actively participated in the commission of the substantive offences by the accused.[3] Successfully pleading entrapment requires the accused to establish that the idea, or impetus, for committing the offence was instigated by a law enforcement officer, or *agent provocateur*, and the accused was not already willing or predisposed to commit the offence. The establishment of predisposition to commit such offences however militates against successful pleas of entrapment.[4]

The discernible increase in crime rates has resulted in a change in law enforcement policies from reactive to proactive detection and investigative methods with the exponential use of intelligence-led methods including undercover operations and the increasing use of police informers. Surreptitious deceptive strategies are used to investigate offences that have been committed and more recently the increasing use of such operations is to determine whether a suspect who has been provided with the opportunity, where law enforcement offices have created the circumstances, would go on to commit the substantive offence. Such dissimulation strategies typically include sting operations, use of decoys, test purchases, controlled deliveries and so-called virtue testing of fidelity to legal values.[5] Categories of serious criminal offences targeted by undercover investigations by law enforcement officers invariably comprise terrorism, human trafficking and sexual grooming of children on the internet.[6]

The superior courts in foremost common law jurisdictions have grappled with the nature and scope of undercover policing strategies to determine whether the proactive methods are lawful and permissible or alternatively whether such methods are unlawful and therefore constitute entrapment.

This article evaluates the responses to entrapment in foremost common law jurisdictions with a focus on evidential and procedural safeguards regarding successful pleas of entrapment. An assessment of human rights safeguards

[2]Ashworth (1978).
[3]Ho (2011).
[4]Field (2019).
[5]Ashworth (2000).
[6]Allen, Luttrell & Kreeger (1999).

adumbrated through ECtHR jurisprudence reveals international best practice in a European context ensuring undercover methods do not violate due process and fair trial safeguards of accused persons.

Consensual Offences

Issues regarding allegations of entrapment invariably arise with respect to consensual criminal offences, so-called offences without a victim. Society through the law-making process has deemed proscribed conduct as offences that are enforced. Unless victims and witnesses come forward to report offences, such offences are detected ad investigated by law enforcement to rigorously enforce the legislative mandate of enforcing the criminal law. Surreptitious policing methods shade the boundaries of participating in the commission of a substantive offence with the intention of obtaining proof of the commission of the substantive offence and evidence against the accused.

Ostensible victimless crimes include circumstances where there is no apparent victim (e.g. corruption, money laundering, drug offence), proscribed conduct constituting an offence despite the consent of the victim (e.g. certain categories of sexual offences), where both parties engage in proscribed conduct to their mutual benefit (e.g. selling goods or providing services to underage consumers, selling counterfeit goods), and engaging in proscribed conduct that has not yet reached the stage of impinging on potential victims directly (e.g. conspiracy). Law enforcement agencies typically adapt their proactive intelligence-led detection and investigative strategies as conventional methods are inadequate.

Definitional Elements

Entrapment is not a legal term of art and the boundaries encircling the nature and scope of the doctrine remain controversial and somewhat illusive. The term ‘entrapment’ is a derivative of the verb ‘to entrap’ and seemingly used for the first time by the Colorado Court of Appeals in *People v Braisted*.[7] The term is now widely used in common law jurisdictions to refer to unlawful undercover methods by law enforcement officers.

Entrapment occurs when law enforcement officers, or controlled informers, effectively cause a suspect to commit a substantive offence with the intention of prosecuting the suspect for that offence.[8] This entails active intervention by law enforcement officers encouraging the commission of an offence as opposed to passive investigation of suspects. There is a rebuttable presumption the substantive offence has not been committed before the involvement of undercover law enforcement officers.

Identifying characteristics of the entrapment doctrine encompasses impermissible conduct by law enforcement agents before or when the substantive

[7](1899) 13 Colo App 532.
[8]Hill, McLeod, & Tanyi (2018).

offence is committed. Judicial oversight functions in determining allegations of entrapment were neatly encapsulated in *R v Bellingham*[9] where Smyth, J. opined:

> "*The court should look at the nature of the offence, the reason for the police operation, the presence or absence of malice, and the nature and extent of the police participation in the crime. The greater the inducement held out by the police is, and the more forceful or persistent the police overtures are, the more readily may a court conclude that the police overstepped the mark. It will not, however, normally be regarded as objectionable for the police to be behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant. If having considered all these matters, the court adjudges that this amounts to 'State created' crime then the prosecution will be stayed or, less frequently, the evidence excluded…. On the other hand, where it is not such an affront the matter goes to mitigation of sentence if that is a relevant consideration.*"

This circular and somewhat formulistic description as to the parameters of proscribed conduct that encircle the boundaries of entrapment does not sufficiently clarify the issue. Judicial formulations of the doctrine and legislative intervention clarifying the nature and scope of the plea may be necessary in accordance with the rule of law. Devising a working definition of entrapment is a challenging concept mainly due to the surreptitious nature of undercover investigative strategies. Nonetheless, the courts and legislatures will be required to construct the defining parameters of entrapment from the perspective of the conduct by law enforcement officers and the conduct of suspects. Balancing constitutional and statutory obligations on law enforcement officers (as emanations of the state) in protecting society through effective detection and investigative strategies with the panoply of fundamental rights of (especially vulnerable) suspected persons will necessitate a proportionate response in terms of the objective to be achieved by surreptitious undercover operations. In this context, Lord Bingham of Cornhill CJ in *Nottingham City Council v Amin*[10] opined:

> "*On the one hand it has been recognised as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer. On the other hand, it has been recognised that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else*."

The same principles would equally apply whether the impugned undercover methods were undertaken by law enforcement officers or by informants operating under the direction and control of law enforcement (*agent provocateur*).

---

[9][2003] NICC 2, para 19.
[10][2000] 1 WLR 1071 at 1076.

Merely creating an opportunity or circumstances through passive intervention for suspects reasonably believed to be engaged in criminal behaviour to commit offences would not constitute entrapment. Unlike creating an opportunity through passive intervention, entrapment might be raised as a procedural defence where the law enforcement agent has incited or caused the commission of an offence with the intention that the suspect would be prosecuted. Creating an opportunity such as pretending to be a criminal, engaged in criminal behaviour oneself or alerting the suspect to an opportunity to commit an offence will not suffice. To successfully raise the procedural defence of entrapment, the accused must prove that law enforcement officers effectively incited or encouraged the accused to commit an offence. Thus, although incitement is an inchoate offence it can be raised in answer to a criminal prosecution by an accused alleging entrapment.

Judicial Recognition of the Entrapment Doctrine

The superior courts exercise judicial discretion modifying aspects of law and procedure interstitially by addressing lacunas, which is a modest form of judicial extension, not constituting judicial activism, to avoid injustice and to adapt the common law to contemporary social changes.[11]

An embryonic form of the modern entrapment doctrine was considered in nineteenth century England, which seems to have been the first intimation of the procedural defence in the common law.[12] This is evidenced in *R v Titley*,[13] where an abortionist that had been solicited by a plainclothes undercover officer did not have a defence notwithstanding the presence of misrepresentation and strong inducement. The court focused on the intent of the accused and the effectiveness of his methods as opposed to the surreptitious investigative method employed by the undercover officer. Such hostile attitudes evidence by members of the judiciary was largely due to the belief that there was no legal justification for upholding a plea of entrapment.[14] Scottish courts took a more liberal view of the embryonic entrapment plea in *Blaikie v Linton*,[15] where an undercover officer induced the accused to sell her some whisky, for which sale he had no permit. A plea of entrapment was raised and the court acquitted the accused without elaborating on the reasons for the decision. Although the officer had induced the offence that would not have been committed but for his solicitation, there were also procedural issues in the case that may also have influenced the decision.

In mid twentieth century England, judicial disapproval of encouraging and persuading another person to commit an offence was evident, albeit there was no indication the courts were prepared to declare a defence or plea in bar. In *Brannan v Peak*,[16] Lord Goddard CJ vehemently disapproved of police methods of

[11]Smith (1984); Friedman (1966); Friedmann (1961).
[12]Marcus (1986); Shafer & Sheridan (1970); DeFeo (1967).
[13](1880)14 Cox Crim Cas 502.
[14]Williams (1961) at 785.
[15](1880) 18 Scot Law Rep 583.
[16][1948] 1 KB 68.

committing offences to detect purported criminals. In *Sneddon v Stevenson,*[17] an undercover officer stopped his car near the suspect, who opened the car door, and the office accepted her offer of prostitution. In the opinion of the court, the officer had not been a party to the offence and did not actively participate by providing the suspect with an opportunity to commit the suspected offence.

One of the earliest cases where the plea in bar was raised in a criminal prosecution is *Grimm v United States,*[18] which involved sending obscene mails. On the facts of the case the Supreme Court found that the methods employed by the officer did not constitute an inducement to commit the offence, and the conviction was upheld. The negative recognition of the plea is evident in the judgment of Brandeis J (dissenting) in *Casey v United States.*[19]

In *Sorrels v United States,*[20] the plea was recognised in federal criminal law.[21] Surprisingly, the Court did not base the plea on the due process guarantee but rather on the constitutional basis that Congress would not have intended the enactment of offence to be applicable to suspects entrapped by unlawful police investigative strategies.[22] This decision suggests a constitutional basis for the plea as opposed to being an element of due process albeit with the development and expansion of the plea in the contemporary criminal justice process would equally be founded on due process of law. Roberts J concurring suggested the basis for the plea should be on the inherent supervisory jurisdiction of the courts to prevent an abuse of process.[23] Unfortunately the Court did not proceed to elaborate on the nature and scope of the plea suggesting the entrapment of suspects was inherently unlawful and implicitly not requiring further explanation.

Sorrells adumbrated the objective and subjective nature of the plea, where suspects have been induced or encouraged by law enforcement agents to engage in proscribed conduct. The application of the subjective test requires the court to consider whether the suspect was predisposed to engaging in the proscribed conduct when approached by the law enforcement agent, whereas the objective element considers the extent of the law enforcement agent's encouragement of inducement and whether this was within acceptable limits of detection and investigative strategies. Although the majority decision in *Sorrells* advanced the subjective test both tests appear to feature in judicial assessments of the plea across common law jurisdictions.

From its inception in the United States as a substantive defence, the entrapment doctrine has migrated to other foremost common law jurisdictions albeit based on evidential and procedural judicial discretionary remedies.[24]

[17][1967] 1 WLR 1051.
[18](1895) 156 US 604.
[19](1928) 276 US 423 at 421.
[20](1932) 287 US 435 at 448.
[21]Orfield (1967); Mikell (1942).
[22](1932) 287 US 435 at 448.
[23](1932) 287 US 435 at 457.
[24]Roth (2014); Bronitt (2004).

Procedural Defence

The range of defences provided by the criminal law may be classified into two broad categories, excuses and justifications.[25] A justification refers to something that the accused was entitled to do, for example, where the accused acted in self-defence. Most defences, however, are classified as excuses, whereby the accused was not entitled to do what he did, but the law may nevertheless excuse (either wholly or partially) the offender. These excuses are recognised as being 'concessions to human frailty' where, for example, the accused does a prohibited act in certain circumstances such as acting under duress, suffering from mental instability, which the law may recognise as being an excusing factor.

The outer limits of the criminal law give rise to pleas in bar of a criminal prosecution, or plea in mitigation of sentence, as a concession to human frailty such as provocation, duress and self-defence. People can be induced to engage in proscribed conduct, whether it be an act or omission, which constitutes a criminal offence especially when the temptation of potential benefit outweighs potential harm (hedonistic calculi). Entrapment may be raised as a procedural defence in a criminal prosecution on the grounds that the accused only committed the offence because of some inducement by a law enforcement officers or someone acting on their behalf, which had, in effect, caused the commission of the offence.

Evidence obtained by entrapment (by law enforcement officers acting as *agent provocateur* acting on law enforcement instructions) to be used against the accused in criminal proceedings may warrant judicial intervention to exclude evidence obtained in breach of the accused's fair trial and due process rights or judicial stay on the proceedings against the accused. The remedy for entrapment is a judicial stay on the criminal proceedings or exclusion of the unlawfully obtained evidence gathered through the undercover operation. It is possible for a criminal trial to proceed notwithstanding the presence of unlawfully obtained evidence, which can be excluded, if there is other compelling evidence of guilt.

Criminal justice systems inevitably differ in their response to successful pleas of entrapment, which include granting an order to stay a prosecution, exclusion of evidence that was procured by the entrapment, substantive defence to criminal liability, a mitigating factor reducing the sentence imposed on conviction for the substantive defence, and to a lesser extent a complete defence. Judicial discretion in the trial and sentencing processes will inevitably vary within and across jurisdictions as to the appropriate response.

General principles in the construction of criminal liability will militate against the availability of a complete defence given that the *actus reus* and *mens rea* elements of criminal offences will not be negatived by entrapment. It follows that entrapment cannot be a complete defence underpinned by legal principles unless the basis of an entrapment defence is on grounds of public policy against criminal justice agencies enabling an abuse of process.[26] Notwithstanding the illogical dilemmas caused by the presence of *actus reus* and *mens rea* elements of offences in cases of alleged entrapment, the United States Supreme Court has nonetheless

[25]Smith (1989).
[26]Choo (2008); Rogers (2008); Jacob (1970).

recognised a substantive defence of entrapment.[27]

United States

Entrapment was first recognised as a substantive defence, which is unique to the Unites States, in federal criminal law by the Supreme Court in *Sorrells v United States*.[28] In *Sherman v United States*,[29] the Supreme Court differentiated undercover investigative methods creating the circumstances for the suspected person to engage in proscribed conduct from active participation where law enforcement officers effectively create crime. Warren CJ opined:

> *"[….]stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations. However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials."*

In cases where the substantive defence of entrapment is raised by the accused in criminal proceedings a jury will determine the issue. In *Jacobson v United States*,[30] the Supreme Court held that in cases where the evidence suggests the suspected person was predisposed towards committing the type of offence charged, notwithstanding active incitement by undercover law enforcement, this will not per se ground a defence of entrapment. However, if the evidence suggests the suspect was not predisposed to committing the type of offence charged then the plea of entrapment may succeed as a full defence, exculpating the accused from criminal liability.

Canada

The doctrine of entrapment has been judicially developed by the Supreme Court of Canada in a succession of decisions including *R v Amato*[31] and *R v Barnes*.[32] In *R v Mack*,[33] the Supreme Court held that influence exerted by law enforcement officers may be acceptable in circumstances where there is objective evidence of reasonable suspicion the accused participated in the alleged criminal activity. The subject nature of reasonable suspicion was considered in *R v*

[27]Heydon (1973); Sagarin & Macnamara (1972).
[28](1932) 287 US 435.
[29](1957) 356 US 369 at 372.
[30](1992) 503 US 540.
[31][1982] 2 SCR 418
[32][1991] 1 SCR 449
[33][1988] 2 SCR 903.

Ahmad,[34] where the Supreme Court ruled that police cannot rely solely on a tip from an unverified source to establish reasonable suspicion.

Notwithstanding this general approach, the Court in *Shirose and Campbell v R*[35] held a remedy by way of judicial stay of a prosecution as an abuse of process where the accused successfully raises the issue of entrapment on grounds of active participation by law enforcement offices in the commission of the offence may be granted in the appropriate circumstances.

Australia

Covert detection and investigative methods have been part of law enforcement methods in Australia since the nineteenth century.[36] The High Court of Australia has formulated a rule that a judicial stay of criminal proceedings is inappropriate on the basis that entrapment is not a substantive defence to a criminal charge. Nonetheless, in *Nicholas v R*[37] the Court held that trial judges may exercise judicial discretion to exclude evidence of the commission of an offence in circumstances where the commission of the offence was produced by unlawful conduct by law enforcement.

Ridgeway v The Queen[38] is one of the leading cases regarding entrapment as a procedural defence. The accused was charged with the importation of heroin because of a controlled operation between the Australian Federal Police and Malaysian Federal Police. The accused sought a judicial stay on the grounds that the criminal prosecution were an abuse of process, which the High Court held was inappropriate based on the facts of the case. However, in cases where evidence of the involuntary elements of the offence is excluded the proceedings would fail as to proceed would be oppressive, vexatious and unfair. While the Court did not recognise a defence of entrapment, the Court did stipulate that as a matter of public policy, courts of justice should exercise judicial discretion to exclude any evidence against the accused of an offence that was brought about by unlawful conduct of law enforcement officers. It is notable thar purposes for exercising judicial discretion to exclude such evidence is to discourage such unlawful conduct by law enforcement officers and to preserve the integrity of the administration of criminal justice. The right to due process and fair trial seems to be either subsumed into this discretion or subservient to the preservation of the integrity of the criminal justice process.

The judicial explanation of the entrapment concept in *Ridgeway* suggests that it may be feasible to formulate a general rule to encompass cases of alleged entrapment where the accused petitions the court seeks to grant a stay of criminal proceedings on the ground that the offence was either induced or otherwise was the result of active participation by law enforcement officers. Preserving the

[34](2020) SCC 11.
[35](1999) 133 CCC (3d) 257.
[36]Murphy (2021).
[37](1998) 193 CLR 173.
[38](1995) 184 CLR 19.

integrity of the criminal justice process necessitates a judicial stay on criminal prosecutions in cases where the offence was effectively artificially created by the unlawful conduct of law enforcement officers. McHugh J neatly encapsulated the criteria to guide trial judges when determining the issue:

> "*(1) Whether conduct of the law enforcement authorities induced the offence.*
> *(2) Whether, in proffering the inducement, the authorities had reasonable grounds for suspecting that the accused was likely to commit the particular offence or one that was similar to that offence or were acting in the course of a bona fide investigation of offences of a kind similar to that with which the accused has been charged.*
> *(3) Whether, prior to the inducement, the accused had the intention of committing the offence or a similar offence if an opportunity arose.*
> *(4) Whether the offence was induced as the result of persistent importunity, threats, deceit, offers of rewards or other inducements that would not ordinarily be associated with the commission of the offence or a similar offence*."[39]

In the circumstances of the case, the appellant was not entitled to a stay of the proceedings. This judgment clearly negatives any assumption that entrapment is a substantive defence, but rather that successful pleas of entrapment preserve the integrity of the administration of criminal justice. Courts of justice shall not condone illegal and improper conduct by law enforcement officers and the exercise of judicial discretion may deem evidence of entrapment inadmissible. Courts will generally decline to grant a judicial stay of criminal proceedings on the basis that entrapment is not a substantive defence to a criminal charge.

Notwithstanding the absence of a substantive defence of entrapment in Australia, jurisprudence on the issue that in circumstances where an accused would normally not have committed an offence, but for the active participation of law enforcement officers, the sentence imposed on conviction may be reduced by the exercise of judicial discretion. Evidence of entrapment may be considered as a mitigating factor in sentencing, subject to judicial discretion in this regard.

New Zealand

A similar approach to developments in Australia has been formulated by the superior courts in New Zealand whereby unfairly obtained evidence can be excluded on the grounds of entrapment. In a series of decisions including *Fox v Attorney General,*[40] *R v Katipa,*[41] *Police v Lavalle*[42] and *R v Pethig,*[43] the New Zealand superior courts recognise the existence of judicial discretion to exclude obtained evidence that would include the products of entrapment. Trial judges may

[39](1995) 184 CLR 19, para 3.
[40][2002] 3 NZLR 62.
[41][1986] 2 NZLR 121.
[42][1979] 1 NZLR 45.
[43][1977] 1 NZLR 448.

exercise the courts inherent jurisdiction to exclude evidence of the commission of the offence produced by unlawful undercover practices to prevent an abuse of process of the courts by the avoidance of unfairness.

Unfairly obtained evidence not constituting entrapment may be admitted into evidence. This principle is illustrated in *R v Cameron,*[44] where a accused made a statement to an undercover police officer regarding previous offending. The High Court held that because accused had made the statement voluntarily to a person who happened to be a police officer it was not unfair to use it as evidence. Such cases are indicative of the penumbra of the entrapment doctrine and the exercise of judicial discretion in determining whether to exclude evidence that has been unfairly obtained and whether this is evidence of entrapment.

England and Wales

While evidence of entrapment does not constitute a substantive defence, jurisprudence has nonetheless incrementally developed a procedural defence encompassing the exercise of judicial discretion to grant a judicial stay on a prosecution, or the exclusion of evidence that would have an adverse effect on the fairness of criminal proceedings under section 78 of the Police and Criminal Evidence Act 1984.

In *R v Sang,*[45] the House of Lords held that it would be illogical and contra to principles of criminal liability to allow an accused to please a substantive defence of entrapment in circumstances where the accused effectively admits committing the *actus reus* with the required *mens rea* elements of the offence for the purposes of asserting that a law enforcement officer had induced the accused to commit the. Nonetheless, the exercise of judicial discretion in sentencing might consider evidence of entrapment as a mitigating factor in determining the sentence to be imposed. Their Lordships overruled previous decisions that found a judicial discretion to exclude evidence in such circumstances based on the premise that as there was no substantive defence of entrapment there could be no judicial discretion to exclude evidence of an offence allegedly induced by an *agent provocateur* as this would, in the words of Lord Salmon "amount to giving the judge the power of changing or disregarding the law." Their Lordships considered that evidence of entrapment as a mitigating factor in the sentencing process would be sufficient in such cases. Their Lordships did not proceed to consider the possibility of a substantive defence of entrapment nor indeed judicial discretion to exclude evidence obtained because of entrapment.[46] The House of Lords per lord Diplock obstinately considered the law in this reads as being as undisputable that evidence of entrapment does not operate as a substantive defence in the criminal law.[47] The potential criminal liability of law enforcement officers who counsel or procure the commission of the substantive offence is noteworthy in the judgment

[44]Unreported, High Court, Gisborne, Venning J, 10 August 2007.
[45][1980] AC 402.
[46]Allen (1982); Allen (1980).
[47][1980] AC 402 at 432.

and is illustrated by the decision of the High Court of Ireland in *Dental Board v O'Callaghan*.[48]

The analysis of entrapment by the House of Lords in *Sang* did not encompass a consideration of the authority of trial judges to grant a judicial stay of criminal proceedings for abuse of process when law enforcement officers have acted unlawfully. It had been suggested that their Lordships implicitly rejected the availability of this judicial remedy in entrapment cases. Strenuous arguments have been made against adopting this approach limiting the scope of judicial discretion in cases of unfairly obtained evidence undermining the plea of entrapment.[49]

In *R v Looseley*,[50] the House of Lords overturned the intransigent approach of Lord Diplock in *Sang*.[51] The judgment provides a comprehensive analysis of the doctrine concluding that entrapment could be raised as a procedural defence (mitigating factor) by way of judicial discretion to grant a stay on a prosecution or to exclude unlawfully gathered evidence. Their Lordships held that a plea of entrapment would not be sustained provided that the undercover law enforcement officer, or informant under the control and direction of law enforcement, merely provided an 'unexceptional opportunity' to commit the offence to a suspect whom the law enforcement officers had formed reasonable suspicion of being involved in the criminal activity. In circumstances where the investigative method constituted luring or enticing a person to commit an offence, a criminal courts of justice should not proceed with a prosecution for the offence.

It is noteworthy that the abuse of process doctrine had not been fully developed when *Sang* was decided. The House of Lords has since been resolute that this doctrine is the appropriate remedy for a successful plea of entrapment. Their Lordships reasoned this approach preserving the integrity of the courts process, which is directly contra to the much-criticised view of Lord Diplock in *Sang*.[52]

Looseley established the test for trial judges to consider in cases alleging entrapment. The court should consider whether the participation of law enforcement officers has brought the administration of justice into disrepute. It seems therefore that preservation of the integrity of the criminal justice will be considered by the court before any assessment of the fair trial rights of the accused in determining whether a judicial stay on criminal proceedings for an abuse of process, or exclusion of evidence, would be appropriate in any given case.

Lord Hoffmann analysed the legal principles under various themes (causing and providing an opportunity; suspicion and supervision; nature of the criminal offence; predisposition; whether the investigation was active or passive) which may guide trial courts judges in their assessment of whether the conduct of law enforcement officers was so gravely serious as to bring the administration of justice into disrepute. Safeguarding the integrity of the criminal justice process is

[48][1969] IR 181. See text accompanying fn 58-59.
[49]Orchard (1980).
[50][2001] 1 WLR 2060.
[51]Ashworth (2002a); Ashworth (2002b).
[52]Bronnitt (2002).

therefore a key consideration in cases of alleged entrapment. Lord Nicholls stated it would be an abuse of the process of the courts' process for law enforcement agencies, as emanations of the state, to lure suspects into committing offences followed by a prosecution for those offences. The inherent jurisdiction of the courts is to ensure the state, through law enforcement agencies, is not permitted to take this course of action by granting a stay on such purported prosecutions. In sum, their Lordships stipulated that in cases where there is insufficient grounds to grant a stagy of prosecution, judicial discretion may nonetheless be exercised to excluded impugned evidence. It is noteworthy that preventing an abuse of the courts process is regarded as the primary remedy in entrapment cases.

In *R v Syed (Haroon)*,[53] the Court of Appeal approved *Looseley* and further held that there was no material difference between the common law on the doctrine of entrapment and the jurisprudence of the European Court of Human Rights (hereinafter ECtHR). This is significant for the development of the doctrine in criminal justice process and whether the right to a fair trial under Article 6.1 of the European Convention on Human Rights (hereinafter ECHR) will be treated as materially different to the common law on entrapment. The Court found there was no arguable case of entrapment and no arguable case that there was any material difference between English common law and ECtHR jurisprudence such as to cast any doubt on *Looseley* complying with Article 6.1. However, the Court recognised that the burden of proof which the common law places on the accused may be incompatible with Article 6.1.

Superior courts in England and Wales seem to have adopted a balancing test, in the interest of justice, in assessing whether a prosecution should be stayed, or evidence excluded commensurate with the withholding of intelligence from the suspect.[54]

Scotland

The leading judicial authorities in Scotland, a hybrid jurisdiction combining elements of common law tradition and civil law tradition, indicate the remedies available correspond with those in England and are either a plea in bar of trial or a challenge to the admissibility of evidence obtained through entrapment. In *Brown v Her Majesty's Advocate*[55] the High Court of Justiciary stated that entrapment will occur when law enforcement officials cause an offense to be committed which would not have occurred had it not been for their involvement. This line of reasoning was followed in *Calum, Jones and Doyle v Her Majesty's Advocate*[56] where the same court stressed the importance of not over-elaborating or indulging in excessive philosophical analysis stating the courts assessment "is simply whether an unfair trick was played upon the accused whereby he was deceived, pressured, encouraged or induced into committing an offence which he would

[53][2019] 1 WLR 2459.
[54]Choo (1999).
[55][2002] SLT 809.
[56][2010] JC 255, para 88.

never otherwise have committed. That is essentially the only test. No doubt resolution will depend on the facts and circumstances of the individual case." This judicial formulation clearly favoured the avoidance of a theoretical approach to the detriment of a practical approach considering the practicalities and inherent complexities associated with surreptitious undercover investigations.

Ireland

Like most common law jurisdictions, the doctrine of entrapment operates to stay a criminal prosecution for abuse of process or exclusion of evidence obtained because of unlawful undercover operation.[57] The justification for judicial stay of a prosecution for an abuse of process is the obligation on the courts not to allow the integrity of the criminal justice process to be compromised, which might occur if law enforcement agencies were permitted to prosecute an accused for an offence whom they had caused to commit that offence. Accordingly, the accused could avoid prosecution even through technically s/he committed the offence charged.

In the absence of a legislative framework or regulatory guidelines, the nature and scope of the doctrine has been distilled from previous case law. A judicial stay might be ordered to prevent an abuse of the courts process or to protect the due process rights (Constitution of Ireland, Article 38.1) and fair trial rights (ECHR Article 6.1) of the accused. The courts have an inherent jurisdiction to protect the integrity of the criminal justice process and invoke preventative remedies including judicial stays of proceedings.

In *Dental Board v O'Callaghan*,[58] the Irish Dental Board had reason to believe a dental technician was practicing as a dentist without a licence to practice, that is, was providing a service unlawfully. An investigator, posed as a customer, requested the technician to repair a set of dentures, which he duly did. The technician was prosecuted for performing a service that only a licensed dentist was lawfully permitted to do. The District Court believed the law enforcement officer (inspector) was effectively an accomplice to the commission of the offence and because of some uncertainty regarding the admissibility and reliability of accomplice evidence, stated a case to the High Court. Butler J. reviewed English authorities which held that the actions of undercover law enforcement officers in gathering evidence differed from accomplices, the latter having the intention to commit the offence.[59] The Court stated that while undercover investigative techniques of this nature should be used sparingly the necessity to employ such tactics is permissible. It is unclear from the judgment whether this was an endorsement of the doctrine of entrapment, which at the time of this case was not an issue that was raised in criminal proceedings. The Court did allude to the perils of undercover law enforcement officers in circumstances where undercover operations were done in the absence of clear and adequate oversight procedures. In

[57]Coffey (2019); Orange (2011); Spencer and Veale-Martin (2005).
[58][1969] IR 181.
[59][1969] IR 181 at 185-187.

the absence of proper authorisation, undercover law enforcement officers could be exposed to potential criminal liability (accomplice or secondary participant) or disciplinary action if the undercover operation is deemed to have been conducted in breach of the accused's fundamental rights.

The explosion of illicit drugs into Ireland from the 1980's resulted in the widespread use of undercover operations to detect and investigate these offences, particularly undercover police officers posing as customers for illicit drugs. *DPP v Van Onzen and Loopmans*[60] involved the seizure of illegal drugs with a valuation over IR £19 million. The Gardaí (Ireland's National Police and Security Service) came into possession of a mobile phone and a senior officer had reason to believe a vessel offshore would make contact to bring drugs into the country. The undercover officer continued with the drug deal and the appellants were led to believe the undercover officer was their pre-arranged contact person in Ireland. The vessel was boarded by the Irish Navy and detained once it moved into Irish territorial waters. The appellants were arrested and charged for drug trafficking offences to which they raised the issue of entrapment claiming they had been lured into bringing the drugs into the state. The Court of Criminal Appeal *per* O'Flaherty J. dismissed the claim of entrapment.[61] The undercover officers had not done anything outside of the normal acts of purchasing drugs and there was no evidence of luring or entrapment, and the Court of Criminal Appeal affirmed the convictions.

In *People (DPP) v Mbeme*,[62] the Gardaí intercepted a package containing illegal drugs and undercover officers in the guise of postal workers delivered the package to the accused (controlled delivery), who was subsequently intercepted when he attempted to make his departure by car with the package. The Court pf Criminal Appeal cited the House of Lords judgment *Looseley* with approval and Hardiman J. framed the test for entrapment in terms of whether the accused would have behaved in the same manner "offered the opportunity by anybody else or at least anyone he didn't believe to be a policeman."

In *Syon v Hewitt and McTiernan*,[63] the High Court reaffirmed the practice of random test purchases is permissible and necessary in detection of sales of products and services to underage persons and public policy required that children be protected against the dangers of such activities. Murphy J. held there was no substantive defence of entrapment where an underage person is used to make test purchase. Trial judges are confined to the application of the rules of evidence in determining whether evidence obtained be means of a test purchase should be excluded. It is uncertain whether this ruling was confined to the facts of the case dealing with random test purchases or whether the ruling was applicable more generally. This is indicative of the dearth of Irish authority on the parameters of entrapment.

In the *People (DPP) v Mills*,[64] the central issue had been whether the trial

[60][1996] 2 ILRM 387.
[61][1996] 2 ILRM 387 at 400.
[62]Unreported, Court of Criminal Appeal, 22 February 2008, Hardiman J.
[63][2008] 1 IR 168.
[64][2015] IECA 305.

judge had erred in allowing evidence to be given by several law enforcement officers who had been engaged in undercover operations involving the purchase of controlled drugs. In upholding the conviction, the Court of Appeal held that the accused had been provided with no more than an 'unexceptional opportunity' to commit an offence, and he had freely taken advantage of this opportunity in circumstances where it appeared that he would have behaved in the same way if the same opportunity had been offered by anyone else. The law enforcement officers had confined themselves to investigating the suspected criminal activity in an essentially passive manner. The Court of Appeal found that while there was no formal written protocol in place, there were adequate safeguards in that the operation was conducted under the supervision of a detective sergeant. The Court also found that the law enforcement officers had provided the appellant with no more than an 'unexceptional opportunity' to commit an offence, and the accused freely, not being under duress or compulsion, took advantage of the opportunity to commit the offence charged.[65] The accused was not "was not incited, instigated, persuaded, pressured or wheedled into committing a crime."[66] It is noteworthy the Court held that, notwithstanding the criticism of the lack of procedures in respect of undercover purchasing of drugs, there was no infringement of the appellant's fundamental rights protections.[67] A further appeal was dismissed by the Supreme Court.[68] Mr Justice Mahon opined that while the practice of test purchasing drugs had been in existence in Ireland for many years, there was little Irish case law on the issue. A subsequent application to the ECtHR was unanimously deemed inadmissible however, it is noteworthy that the ECtHR reiterated the Court of Criminal Appeal's finding of no formal legislative or regulatory basis for the use of undercover operations.[69] A crucial aspect of undercover investigations was raised by the ECtHR in *Mills*, which suggests the need for a clear and appropriate protocols governing the authorisation and supervision of undercover investigations.

Non-State Actors

Allegations of entrapment are confined to official state involvement and at present does not arise through the intervention by a private individual or organisation such as media/journalist investigations.[70] This lacuna has implications for due process rights of accused persons and will require, at the very least, judicial formulation on the extent of the doctrine or legislative intervention. This is necessitated in accordance with the rule of law and principle of legality in the criminal justice process. Whether the plea should extend to inducement or encouragement by a private person, as opposed to law enforcement agents as

[65] White (2017).
[66] [2015] IECA 305, para 66.
[67] [2015] IECA 305, para 65.
[68] *DPP v Mills* [2016] IESC 45.
[69] *Mills v Ireland* App No 50468/16.
[70] Leggett (2018); Dyer (2015).

emanations of the state, remains uncertain and this ambiguity further adds to the controversial nature and scope of the plea.

In *Council for the Regulation of Health Care Professionals v. General Medical Council*,[71] an undercover journalist attended a doctor's surgery posing as a patient and had asked to be provided with a sickness certificate in circumstances where she wanted to take time off work for leisure activities. The doctor indicated that he would provide a sickness certificate for a fee notwithstanding that the person was in good health. The journalist had surreptitiously recorded the conversation however, the audio was unclear. In subsequent disciplinary proceedings the Fitness to Practise Panel of the General Medical Council decided to grant a stay on the proceedings as an abuse of process based on entrapment. The Panel relied on case law in relation to criminal proceedings. On appeal, the High Court overturned the order staying the proceedings on the basis that the Panel erred in law in not distinguishing civil proceedings from criminal proceedings, entrapment only being applicable to the latter.

A similar line of reasoning was followed by the High Court of Ireland in *McElvaney v Standards in Public Office Commission.*[72] Allegations of the impermissible exercise of entrapment by an undercover reporter was rejected. The Court held that the reporter had not promoted or instigated the commission of an offence and/or the commission of alleged contraventions of planning laws in circumstances where no such offence or contravention would otherwise have taken place.

Public Policy Considerations

At the core of proactive intelligence-led policing is a necessary and proportionate response by criminal justice agencies on public policy grounds to protect society and safeguard against the criminal activities targeted by undercover detection and investigative strategies. However, the difficulties for law enforcement agencies and the courts is in circumstances where such undercover operations occur at the penumbra of crime investigations and more likely to give rise to allegations of entrapment for improperly obtained evidence.

The court should be mindful of the type of criminal activity targeted by undercover investigations; the rationale for the undercover operation and whether there was a clear and sufficient legislative framework or regulatory guidelines for undercover operations; whether the law enforcement involvement was merely a passive investigation gathering evidence or conversely whether there was an inducement or incitement to commit an offence relating to the type of criminal activity targeted; the bona fides of targeting certain individuals or places will also be relevant in the assessment of surrounding circumstances leading to the allegation of entrapment.

The use of entrapment techniques by law enforcement officers involves a practice whereby a law enforcement agent or agent of the State (such as an informer)

[71][2007] 1 WLR 3094.
[72][2019] IEHC 633.

induces, incites or entices a suspect to commit an offence in circumstances where the person suspected would otherwise have been unlikely or unwilling. Undercover investigative techniques that involve law enforcement agents engaging in deceptive practices to detect offenders precipitate concerns about possible entrapment.[73]

Entrapment practices are unlawful as they involve the creation of crime by law enforcement agencies for the purpose of detection and prosecution in circumstances where the commission of the offence would otherwise not have been committed. There is a clear distinction between law enforcement agencies merely providing the opportunity through passive intervention for a suspect to commit an offence and active intervention causing the commission of an offence. Providing an opportunity through passive intervention is permissible whereas actively inciting the commission of an offence is unlawful.

The perceived unfairness of prosecuting and punishing offenders in cases of entrapment may be considered from two complementary perspectives, concerning the culpability of the entrapped accused and concerning the legitimacy of the state through law enforcement agencies to entrap and prosecute offenders that the state has effectively created.[74] Distinguishing between these two perspectives of entrapment offers some clarity on the moral issues in the balance and resolve perceived uncertainty in judicial determinations and legal analyses of the entrapment doctrine.[75]

The extent of proactive intelligence undercover policing detection and investigative methods should be limited to creating the circumstances in which suspect might form the intent to commit an offence where law enforcement officers have reasonable suspicion that such individuals are already engaged or intending to engage in proscribed conduct of a similar nature.[76]

The exclusionary rule of evidence balances competing interests in the criminal justice process. Only lawfully obtained evidence should be admissible to prosecute and punish offenders. Concomitantly the admissibility of evidence obtained unlawfully would constitute an abuse of the courts process and undermine the integrity of the criminal justice process. This balancing exercise requires the court to consider the extent of participation by undercover law enforcement officers, whether the officers merely created the circumstances for the offender to freely commit the offence and whether the accused was predisposed into committing an offence

Evidence obtained though unlawful or improper conduct should be excluded on grounds of public policy however, the criminal trial may still proceed based on other admissible evidence to prove the accused is guilty of the offences charged.

Public policy considerations militate against the use of unlawfully obtained evidence as the basis of conviction and punishment, consummating a miscarriage of justice. Moreover, judicial oversite of propriety by law enforcement officers and surreptitious undercover methods safeguards individual rights and freedoms from

[73]Ashworth (1998).
[74]Kauzlarich, Matthews & Miller (2001).
[75]Kim (2020).
[76]Dworkin (1985).

the purported oppressive use of the criminal law. Such public policy considerations are reflected in most common law jurisdictions by judicial discretion to exclude evidence rather than by the complexities of a substantive defence of entrapment adjudicated on by a jury as is the case in the United States. The general approach employed by the courts in most jurisdictions is to make a determination as to whether unlawfully or unconstitutionally obtained evidence could be admissible based on extraordinary excusing circumstances, the seriousness and prevalence of the offences being investigated are factors to be considered when deciding whether impugned evidence should be excluded.

Judicial discretion may be invoked to exclude impugned evidence where the ostensible probative value is clearly outweighed by the prejudicial effect of such evidence. Judicial discretion to exclude admissible evidence on the basis that such evidence was obtained by improper or unfair means seems less clear. Willingness, or otherwise, to exercise judicial discretion is very much dependant on the personality of the judge, whether influenced by due process or crime control ideologies, and this process inevitably results in a degree of uncertainty of approach and outcome of decisions.[77] It is apposite that members of the judiciary presiding over cases, and lawyers for prosecution and defence will invariably need guidance on the nature and scope of such discretionary remedies where the issue of excluding impugned evidence is raised. More specific guidance is needed in accordance with the rule of law however, each case is considered on its own merits therefore precise guidelines for every conceivable case is unwarranted.

Human Rights Standards

In criminal proceedings the onus rests with the prosecution to establish the guilt of the accused beyond reasonable doubt. It is imperative that in cases where entrapment is raised that judicial discretion, whether to grant a stay on criminal proceedings, exclude evidence, or consider entrapment evidence as a mitigating factor in the sentencing process, complies with national bills of rights. Article 6.1 ECHR enshrines the right to a fair trial, reveals international best practice in a regional context. The right to a fair trial guaranteed by Article 6.1 could be infringed in circumstances where law enforcement authorities had gone beyond a passive investigation of the suspect's criminal activities and had effectively incited or caused the commission of an offence that would not have otherwise been committed by the suspect. The ECtHR has elaborated on the general principles of the entrapment doctrine in a series of judgments including *Matanović v Croatia*,[78] *Furcht v Germany*,[79] and *Vanyan v Russia*.[80] The ECtHR has underscored the importance of authorisation and supervision of performance, and criticised states for their lack of formal guidelines with regards to undercover operations. The ECtHR identified principal factors to be considered as to whether entrapment had

[77]Frank (2017); Quinn (2002).
[78]App No 2742/12.
[79]App No 54648/09.
[80]App No 53203/99.

occurred. Factors such as whether law enforcement officers were passive or incited criminal activity, whether there was a reasonable suspicion against the suspects, and whether appropriate safeguards, procedures and judicial oversight were in place.

In *Ramanauskas v Lithuania (No 2),*[81] the ECtHR acknowledged the difficulties for law enforcement in searching for and gathering evidence for the purpose of detecting and investigating criminal offences with the increasing use of undercover agents, informers and covert practices for serious criminal offences. The phrase concerning law enforcement officers confining themselves to investigating criminal activity 'in an essentially passive manner', is part of a sentence in which the contrast drawn is with behaviour which 'exert[s] such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed.' In *Bannikova v Russia,*[82] the phrase was used in contrast with any conduct that may be interpreted as pressure being put on the applicant to commit the offence, such as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits. The use of undercover detection and investigative cannot infringe the right to a fair trial. Moreover, in *Khudobin v Russia,*[83] the ECtHR held that in cases where an accused claims that he was incited to commit an offence, the courts must carefully examine the evidence because for criminal trials to be fair within the meaning of Article 6.1 all evidence obtained because of active participation by law enforcement officers must be excluded. This is especially true where the undercover operation took place without a sufficient legal framework or adequate fundamental rights safeguards.

In jurisdictions where there is judicial discretion to exclude evidence of entrapment but there is a criminal prosecution, the accused person may nonetheless be convicted by indirect means, such as circumstantial evidence, rather than by direct reliance on the impugned evidence of entrapment.

Undercover policing methods by their very nature can be nebulous in terms of allegations of entrapment. In less contentious cases the accused is already involved in the criminal activity when the law enforcement officer infiltrates passively. In *Lüdi v Switzerland,*[84] law enforcement offices had formed reasonable suspicion the accused had been involved in procuring and selling illicit drugs. This was a typical case of predisposition by the accused when the undercover officer purchased the illicit drugs.

The test formulated in *Teixeira de Castro v Portugal*[85] is whether law enforcement officers had "exercised an influence such as to incite the commission of the offence." The ECtHR will carefully examine the extent of the influence

[81]App No 55146/14, paras 49-61.
[82]App No 18757/06.
[83]App No 59696/00, paras 133-135.
[84]App No 12433/86.
[85]App No 25829/94 para 38.

exercised on the suspect. Two undercover law enforcement officers had been introduced to accused, who did not have a criminal record and was not suspected by them of dealing illicit drugs. The officers asked the accused, who was himself a drug user but not a supplier if he could procure a quantity of heroin. Following a subsequent request by the officers, the accused purchased the drugs from a supplier and then in turn sold the drugs to the undercover officers. At the second request he bought drugs from another man and sold them to the undercover officers for a profit. A noteworthy aspect of this case is the absence of evidence the accused had previously been involved in dealing illicit drugs. The undercover officers had effectively incited the accused on several occasions to commit the offence and the accused ultimately yielded to the enticement. The ECtHR held that because the accused was not a known or suspected offender before the undercover officers approached him on several occasions with a proposition to procure illicit drugs, this surreptitious method violated the right to a fair trial guaranteed by Article 6.1 for having been entrapped into committing the offence. The inducement by the undercover officers of a suspect who was not predisposed to committing the type of offence resulted in the depravation of a fair trial as the evidence suggested the accused would not have committed the offence but for the unlawful inducement by the officers.

ECtHR jurisprudence clearly stipulate that the exercise of judicial discretion to exclude evidence would be an insufficient safeguard against the entrapment of suspects where the evidence suggests they are not predisposed to committing such offences. Courts of justice are therefore mandated to determine whether the undercover law enforcement officers had reasonable grounds for suspecting the accused had committed similar type offences before a determination is made whether the methods employed by the officers was permissible. It follows that in cases where judicial discretion to exclude evidence is an insufficient response to safeguard the right to a fair trial then judicial discretion to mitigate sentence is also inadequate. Courts of justice are constitutionally bound to perform their judicial functions in a manner that is compatible with ECHR fundamental rights, with the result that legislative intervention and incremental developments of the inherent common law right of the courts to prevent an abuse of process undermining fair trial rights of accused persons have been underpinned by judicial reasoning in entrapment cases.

ECtHR jurisprudence has developed criteria to enable the court to distinguish cases of entrapment from permissible conduct by law enforcement officers in the use of legitimate undercover investigative techniques in criminal investigations. A more structured and coherent scheme to regulate the authorisation and conduct of undercover operations and remedies for abuses of entrapment.[86] A legislative framework or formal guidelines governing the use of undercover operations is required such as in *Syon* where the High Court of Ireland found that a non-statutory protocol that had been adopted by a statutory body was sufficient in this regard.

In *Tchokhonelidze v Georgia,*[87] the ECtHR has formulated substantive and

[86]Ormerod and Roberts (2002).
[87]App No 31536/07.

procedural tests to distinguish between entrapment and legitimate undercover operations.[88] The substantive test considers whether the offence would have been committed without the influence exerted by law enforcement officers, that is, whether the investigation was essentially passive. In determining whether the undercover investigation was passive the ECtHR will be mindful of the reasons for the undercover operation, whether the law enforcement officers had reasonable suspicions the accused might be engaged in or was predisposed to criminal activities until the law enforcement officer approached him. Applying the procedural test, the ECtHR will consider procedures employed by domestic courts to deal with the accused's assertion that law enforcement officers incited the commission of the offence and therefore the officers operated as *agent provocateurs* instead of passive investigators. In particular, the capacity of the domestic courts to deal with the accused's complaint in a manner compatible with a fair hearing is key. The Court will consider whether the complaint of incitement constituting entrapment is a substantive defence, or grounds for excluding evidence obtained unlawfully, have similar consequences in terms of the remedy in cases of entrapment. The procedure must be adversarial, thorough, comprehensive and conclusive on the issue of entrapment raise by the accused.

In *Mills v Ireland*,[89] the ECtHR noted that "Ireland was the only country in a comparative survey covering 22 Contracting Parties to the Convention that lacked a formal legislative or regulatory basis for the use of undercover [operations]." The ECtHR reiterated the Court of Criminal Appeal of Ireland finding of inadequate safeguards owing to the absence of a formal system regulating undercover operations. This is a salutary pronouncement for Contracting States to have appropriate stipulations and oversight ensuring undercover surreptitious methods are in accordance with the rule of law. It is notable that a similar line of reasoning had been followed in *Veselov and Others v Russia*.[90] These decisions underscore the necessity of a legislative framework or formal regulations governing undercover operations by law enforcement agencies.

Analysis

In jurisdictions where the perceived pre-disposition of suspects is not the principal criterion by which the acceptability of conduct by law enforcement officers is to be determined, it follows that the suspect's previous criminal record would be of limited value. Criminal justice values will be determinative of whether judicial considerations of entrapment allegations should focus on the impugned methods employed by undercover officers conduct rather than the susceptibility of the accused. In this context, it is notable that the judicial formulation in *Texeira v Portugal* was whether undercover officers had "exercised an influence such as to incite the commission of the offence," whereas in *R v Loosely*, is whether in the

[88]Gray (2018).
[89]App No 50468/16, para 12.
[90]App No 23200/10, 24009/07, 556/10, para 51.

circumstances of the case the conduct of undercover law enforcement officers is improper to the extent that the administration of justice is brought into disrepute. In the exercise of judicial discretion, courts of justice must strike a necessary and proportionate balancing between the public interest in the proper investigation, prosecution and punishment of offenders and the individual interest of ensuring courts will not adopt an approach that the end will justify the means.

Unethical methods employed by law enforcement agencies undermine due process safeguards and the integrity of the criminal justice process.[91] The general approach that conduct amounting to entrapment is ethically unacceptable because intentional temptation engages the suspect in the entrapment has been questioned.[92]

There is a rebuttable presumption in the construction of criminal liability that individuals are autonomous with the capacity to make rational decisions and consequently should be held responsible for their acts or omissions constituting a criminal offence. A corollary of this general principle of liability is that there is unlikely to be a significant difference in terms of criminal liability between the suspect who pleads entrapment and the person who encouraged the commission (omission) of the offence. Attributing culpability may be compounded in circumstances where the person who encouraged the commission (omission) of the offence is not a law enforcement officer but rather was acting under their direction and control.

While the criminal justice response to allegations of entrapment invariably differs across jurisdictions there seems to be commonality in terms of the basis for the 'defence' that seems to be more concerned with the level of active participation by the law enforcement official or person acting under their direction and control effectively creating the offence (state crime) as opposed to reducing the accused persons level of culpability. Preserving the integrity of the criminal justice process through judicial discretion to exclude evidence, grant a stay on the prosecution, or giving due consideration to a successful plea of entrapment in the sentencing process thus seems to be the primary rationale for entrapment whether it be a substantive defence or exercised through judicial discretion. The rule of law in the criminal justice process stipulates that conviction and punishment should not be permitted in circumstances were the offence was effectively committed by the state. It follows that if the law enforcement officer's conduct has compromised the integrity of the criminal justice process, then a judicial stay on a prosecution would seem appropriate.[93] If a successful plea of entrapment is raised, the appropriate remedy would be a judicial stay on the prosecution as opposed to excluding the evidence or in mitigation of sentence. Entrapment effectively creates offences that might not have been committed but for the active participation by law enforcement officers therefore the issue for the courts is not simply one of evidence but the very commission of the offence.

A successful plea of entrapment necessitates an appropriate response by the criminal justice system. At the very least, the law enforcement officer would (presumably) not have complied with internal policies of the criminal justice

[91]Dworkin (1987).
[92]Hill, McLeod & Tanyi (2022).
[93]Birch (1994).

agency and may have committed a criminal offence under the principles of criminal liability, either an inchoate offences (attempt, conspiracy, incitement) or secondary participation (aid, abet, counsel or procure) the commission of an offence. In most cases of alleged entrapment, the law enforcement officer may be liable for the inchoate offence of incitement, or indeed an accomplice to the commission of the substantive criminal offence as having counselled or procured the commission of the substantive offence by the person targeted by the undercover operation.

It is conceivable that jurisdictions will, in due course, enact specific offences proscribing conduct that may constitute entrapment of suspects in circumstances where law enforcement officers incited the commission (or omission) of a criminal offence regardless of whether the completion of the offence (whether by commission or omission) would have been prevented or nullified. The responsibility of national legislatures to ensure undercover investigative strategies are fully compliant with the rule of law (principles of legality, legal certainty and access to justice) will possibly be underscored by future challenges against prosecutions by suspected offenders before national superior courts and regional human rights courts.

It is evident from a series of decisions in Canada, including *Campbell and Shirose v The Queen*,[94] *Barnes v The Queen*[95] and *Mack v The Queen*[96] that the Supreme Court had adopted the approach of the House of Lords in *Looseley*. On the other hand, the High Court of Australia in decisions such as *Nicholas v The Queen*[97] and *Ridgeway v The Queen*[98] have not followed *Looseley* instead placing emphasis judicial discretion to exclude evidence of entrapment.

Comparative jurisprudence on the concept of entrapment reveal a significant divergence of approaches revealing an important divergence that has emerge in mitigating sentence as a judicial response to successful pleas of entrapment. The issue falls between reconciling the rationale of the entrapment doctrine with the rationales of judicial discretion to apply the various remedies available by virtue of the inherent jurisdiction of the courts. The underlying distinction is that between a fair trial, which might in some cases be possible, and the fairness of trying the accused at all because of entrapment.

In Canada and Australia, the exercise of judicial discretion may exclude evidence or grant a judicial stay on the prosecution in circumstances where the accused was induced into committing an offence to commit a crim that he would not have contemplated but for the active participation by undercover law enforcement officers. Moreover, in Australia courts of justice may also exercise judicial discretion to reduce the sentence imposed based on entrapment as a mitigating factor in cases where conduct by law enforcement officers has fallen short of entrapment but nevertheless either contributed to or escalated the commission of an offence by the accused. In contrast, such judicial discretion as

[94](1999) 171 DLR (4th) 193.
[95][1991] 1 SCR 149.
[96][1988] 2 SCR 903.
[97](1998) 193 CLR 173.
[98](1995) 184 CLR 19.

pertains in Australia does not pertain in Canada regardless of whether the impugned conduct of law enforcement officers suggests doubt over the culpability of the accused.[99]

Judicial discretion to preserve the integrity of the criminal justice process is a possible legal basis for resolving allegations of entrapment. It is noteworthy that in *Amato v R*[100] the Supreme Court of Canada opined that the criminal justice process should demand obeyance of the law by law enforcement officers who enforce the law.[101] Active participation in the detection and investigation of suspects would undermine the integrity of the process especially of criminal courts of justice admitted tainted tendered by the prosecution. It is imperative that the criminal justice process continues to be underpinned by moral authority and legitimacy in accordance with the rule of law.

Codes of practice governing the authorisation and supervision of undercover operations pertain in many common law accusatorial jurisdictions while in some European civil law inquisitorial jurisdictions provision is made for the judicial authorisation of such operations.

Conclusion

Consensual crime is not easily identified as it is unlikely that participants would report the offence to law enforcement authorities. The entrapment doctrine not only requires an assessment of whether the conduct of law enforcement was impermissible, unlawful but also whether the response by the criminal justice process is appropriate. The nature and scope of the plea has developed incrementally, and the courts have not definitely delineated the contours of the plea in accordance with the rule of law and in particular the principles of legal certainty and access to justice. Apart from the United States, the approach to dealing with allegations entrapment in most common law jurisdictions essentially limited to evidential and procedural judicial discretionary remedies may not adequately safeguard the fundamental right to due process and a fair criminal trial.

Law enforcement officers necessarily employ undercover investigative practices. The role of the courts in reviewing allegations of entrapment is to balance competing interests. The public interest in the detection, investigation and prevention of crime sometimes yields to the practicalities of the means necessarily employed during undercover operations, which must be balanced with fundamental constitutional due process and ECHR fair trial rights. There must be clear, adequate and formal oversight mechanisms delimiting undercover operations to safeguard the integrity of the criminal justice process and the rule of law. It is a truism that ends do not justify the means employed in the investigation of crime and apprehension of suspects. Moreover, the complexities associated with the investigation of consensual crimes can has the potential to blur the line between

[99]Murphy & Anderson (2014).
[100](1982) 69 CCC (2d) 31.
[101]Joh (2009).

creating the opportunity (legitimate infiltration) and causing (incitement) the commission of an offence.

An identifiable Code of Practice regulating the authorisation and conduct of undercover detection and investigative methods in full compliance with the rule of law is essential to safeguarding the due process and fair trial rights of suspects. Balancing the public interest in the investigation and prosecution of offenders must be squarely balanced with the individual due process and fair trial rights of accused persons.

References

Allen, D. (1980). 'Entrapment and exclusion of evidence' in *Modern Law Review* 43:450-456.

Allen, M. (1982). 'Judicial discretion and the exclusion of evidence in entrapment situations in light of the House of Lords decision in *R v Sang*' in *Northern Ireland Legal Quarterly* 33:105-131.

Allen, R.J., Luttrell, M. & A. Kreeger (1999). 'Clarifying entrapment' in *Journal of Criminal Law and Criminology* 89:407-443.

Ashworth, A. (1978). 'Entrapment' in *Criminal Law Review* 2002:137-140.

Ashworth, A. (1998). 'Should the police be allowed to use deceptive practices?' in *Law Quarterly Review* 114:108-140.

Ashworth, A. (2000). 'Testing fidelity to legal values: official involvement and criminal justice' in *Modern Law Review* 63:633-659.

Ashworth, A. (2002a). 'Entrapment and criminal justice' in *Oxford University Commonwealth Law Journal* 2:125-132.

Ashworth, A. (2002b). 'Re-drawing the boundaries of entrapment' in *Criminal Law Review* 2002:161-179.

Birch, D.J. (1994). 'Excluding evidence from entrapment: what is a fair cop?' in *Current Legal Problems* 47:73-99.

Bronitt, S. (2002). 'Sang is dead, looseley speaking' in *Singapore Journal of Legal Studies* 2002(1):374-387.

Bronitt, S. (2004). 'The law in undercover policing: a comparative study of entrapment and covert interviewing in Australia, Canada and Europe' in *Common Law World Review* 33:35-80.

Choo, A.L.T. (2008). *Abuse of Process and Judicial Stays of Criminal Proceedings*. 2nd ed. Oxford: Oxford University Press.

Choo, A.L.T. (1999). 'The legal aspects of undercover police operations in England and Wales' in *International Journal of Police Science & Management* 2:144-155.

Coffey, G. (2019). 'Entrapment in the criminal law: reassessing the contours of the procedural defence' in *Irish Criminal Law Journal* 29:68-82.

DeFeo, M.A. (1967). 'Entrapment as defense to criminal responsibility: its
history, theory and application' in *University of San Francisco Law Review* 1:243-276

Dworkin, G. (1985). 'The serpent beguiled me and I did eat: entrapment and the creation of crime' in *Law and Philosophy* 4:17-39.

Dworkin, G. (1987). 'Ethics and entrapment' in *Journal of Social Issues* 43: 57-59.

Dyer, A. (2015). 'The problem of media entrapment' in *Criminal Law Review* 2015:311-331.

Field, A. (2019). 'Ethics and entrapment: understanding counterterrorism stings' in *Terrorism and Political Violence* 31:260-276.
Frank, J. (2017). 'The judging process and the judge's personality' in *Law and the Modern Mind* London: Routledge.
Friedmann, W. (1961). 'Legal philosophy and judicial lawmaking' in *Columbia Law Review* 61:821-845.
Friedmann, W. (1966). 'Limits of judicial lawmaking and prospective overruling' in *Modern Law Review* 29: 593-607.
Gray, C. (2018). 'Police entrapment and undercover work' in *European Human Rights Law Review* 5:529-532.
Heydon, J.D. (1973). 'The problems of entrapment' in *Cambridge Law Journal* 32:268-286.
Hill, D.J., McLeod, S.K. & A. Tanyi (2018). 'The concept of entrapment' in *Criminal Law and Philosophy* 12:539-554.
Hill, D.J., McLeod, S.K. & Tanyi, A. (2022). 'Entrapment, temptation and virtue testing' in *Philosophical Studies* 179:2429-2447.
Ho, H. (2011). 'State entrapment' in *Legal Studies* 31:71-95.
Jacob, I.H. (1970). 'The inherent jurisdiction of the court' in *Current Legal Problems* 23:23-52.
Joh, E.E. (2009). 'Breaking the law to enforce it: undercover police participation in crime' in *Stanford Law Review* 62:155-198.
Kauzlarich, D., Matthews, R.A. & W.J. Miller (2001). 'Toward a victimology of state crime' in *Critical Criminology* 10:173-194.
Leggett, Z. (2018). 'When will the conduct of non-state actors give rise to entrapment?' in *Journal of Criminal Law* 82:434-437.
Marcus, P. (1986). 'The development of entrapment law' in *Wayne Law Review* 33:5-37.
Mikell, W.E. (1942). 'The doctrine of entrapment in the federal courts' in *University of Pennsylvania Law Review and American Law Register* 90:245-265.
Murphy, B. (2021). *Regulating Undercover Law Enforcement: The Australian Experience.* Singapore: Springer.
Murphy, B. & J. Anderson (2014). 'After the serpent beguiled me: entrapment and sentencing in Australia and Canada' in *Queen's Law Journal*, 39:621-654.
Orchard, G.F. (1980). 'Unfairly obtained evidence and entrapment' in *New Zealand Law Journal* 1980:203-208.
Orange, G. (2011). 'Deception and entrapment' in *Bar Review* 16:120-123.
Orfield, L.B. (1967). 'The defense of entrapment in the federal courts' in *Duke Law Journal* 39:39-71.
Ormerod, D. & A. Roberts (2002). 'The trouble with Teixeira: developing principled approach to entrapment' in *International Journal of Evidence & Proof* 6:38-61.
Quinn, G. (2002). 'The judging process and the personality of the judge: the contribution of Jerome Frank' in *Judicial Studies Institute Journal* 2:141-162.
Rogers, J. (2008). 'The boundaries of abuse of process in criminal trials' in *Current Legal Probems* 61:289-323.
Roth, J.A. (2014). 'The anomaly of entrapment' in *Washington University Law Review* 91:979-1034.
Sagarin A. & D. Donal Macnamara (1972). 'The problem of entrapment' in *Crime Law and Justice Annual* 1:358-380.
Shafer J. & W.J. Sheridan (1970). 'The defence of entrapment' in *Osgoode Hall Law Journal* 8:277-299.
Smith, A.T.H. (1984). 'Judicial lawmaking in the criminal law' in *Law Quarterly Review* 100:46-76.

Smith, J.C. (1989). *Justification and Excuse in the Criminal Law*. London: Stevens.
Spencer, K. & Ó. Veale-Martin (2005). 'Fashioning an Irish entrapment doctrine based on international experience' in *Irish Criminal Law Journal* 15:2-8.
White, T. (2017). 'Director of Public Prosecutions v Robert Mills' in *Irish Criminal Law Journal* 27:31-32.
Williams, G. (1961). *Criminal Law: The General Part*. 2nd ed. London: Stevens.

Cases

Australia

Nicholas v R (1998) 193 CLR 173
Ridgeway v The Queen (1995) 184 CLR 19

Canada

R v Ahmad (2020) SCC 11
R v Amato [1982] 2 SCR 418
R v Barnes [1991] 1 SCR 449
R v Mack [1988] 2 SCR 903
Shirose and Campbell v R (1999) 133 CCC (3d) 257

Ireland

Dental Board v O'Callaghan [1969] IR 181
DPP v Van Onzen and Loopmans [1996] 2 ILRM 387
McElvaney v Standards in Public Office Commission [2019] IEHC 633
People (DPP) v Mills [2015] IECA 305
People (DPP) v Mbeme, Court of Criminal Appeal, 22 February 2008, Hardiman, J. (unreported)
Syon v Hewitt and McTiernan [2008] 1 IR 168

New Zealand

Fox v Attorney General [2002] 3 NZLR 62
Police v Lavalle [1979] 1 NZLR 45
R v Katipa [1986] 2 NZLR 121
R v Pethig [1977] 1 NZLR 448

United Kingdom

England and Wales

Brannan v Peak [1948] 1 KB 68
Council for the Regulation of Health Care Professionals v General Medical Council [2007] 1 WLR 3094
Nottingham City Council v Amin [2000] 1 WLR 1071
R v Looseley [2001] 1 WLR 2060
R v Sang [1980] AC 402
R v Syed (Haroon) [2019] 1 WLR 2459
R v Titley (1880) 14 Cox Crim. Cas. 502
Sneddon v Stevenson [1967] 1 WLR 1051

Northern Ireland

R v Bellingham [2003] NICC 2

Scotland

Blaikie v Linton (1880) 18 Scot Law Rep 583
Brown v Her Majesty's Advocate [2002] SLT 809
Jones and Doyle v Her Majesty's Advocate [2010] JC 255

United States

Casey v. United States (1928) 276 US 423
Grimm v. United States (1895) 156 US 604
Jacobson v. United States (1992) 503 US 540
People v. Braisted (1899) 13 Colo App 532
Sherman v. United States (1957) 356 US 369
Sorrels v. United States (1932) 287 US 435

European Court of Human Rights

Bannikova v Russia App No 18757/06 (4 November 2010).
Furcht v Germany App No 54648/09 (23 October 2014).
Khudobin v Russia App No 59696/00 (26 October 2006).
Lüdi v Switzerland App No 12433/86 (15 June 1992).
Matanović v Croatia App No 2742/12 (04 April 2017).
Mills v Ireland App No 50468/16 (10 October 2017).
Ramanauskas v Lithuania (No 2) App No 55146/14 (20 February 2018).

Tchokhonelidze v Georgia App No 31536/07 (28 June 2018).
Teixeira de Castro v Portugal App No 25829/94 (09 June 1998).
Vanyan v Russia App No 53203/99 (15 December 2005).
Veselov and Others v Russia App Nos 23200/10, 24009/07, 556/10 (02 October 2012).