

Understanding and Overcoming the Entrapment Defense in
Undercover Operations

Sgt. Danny Baker

Fort Smith Police Department Street Crimes Unit

Introduction:

Perhaps one of the most effective, yet often misunderstood investigatory tools available to law enforcement agencies around the world is that of the undercover agent. In all other aspects of modern policing, from traffic enforcement to homicide investigation, policing technique relies heavily upon the recognition and identification of an agent as an officer of the law. Though coming under question in recent years, it has long been professed that highly visible police have a deterrent effect on crime simply by their presence. Simply stated, the belief is that a criminal intent on breaking the law will likely refrain from doing so should he or she encounter, or have a high likelihood of encountering, a uniformed police officer just moments prior to the intended crime. Such presence certainly has its benefits in a civilized society. If to no other end, the calming and peace of mind that highly visible and accessible officers provide the citizenry is invaluable. The real dilemma arises when attempting to justify and fund this police presence that crime ridden neighborhoods and communities continually demand. Particularly when the crime suppression benefits of such tactics are questionable and impossible to measure. After all, how do you quantify the number of crimes that were never committed and, if you could, how do you correlate that to simple police presence?

In polar opposition to the highly visible, readily accessible, uniformed officer, we find the undercover officer. In the former, effectiveness in suppressing crime is, at best questionable; yet their undoubted merit in providing the populous with a sense of protection is invaluable. The latter, the well managed undercover officer, can be the most effective and most efficient means of targeting, detecting, and apprehending criminal activity at minimal cost. When utilized properly, undercover police operations enjoy the ability to focus attention on only those individuals *predisposed* to commit certain crimes. Their effectiveness in a particular area with

specific criminal activity is easy to measure and is quickly perceived. However, undercover operations have often garnered an air of apprehension and distrust from the public in years past. Certainly, media portrayal of rogue undercover cops going off the grid to affect their own form of justice on unsuspecting sorts has done nothing to endear them to the idea. Particularly in American culture, there has existed a “wild west” perception of honor and “fair play” in how the police should catch criminals. Many a young lad watched duels of legendary lawmen facing the black-garbed villain down on Main Street with pistols at high noon. Shooting someone in the back was unheard of, even if it was the only means of survival. For one of these heroes, becoming like the criminal to catch him was unacceptable. Even actor Clint Eastwood’s character, A Man with No Name in the spaghetti western *A Fistful of Dollars* (Leone, 1964) is portrayed as sneaky and underhanded when he dons an iron plate under his poncho to stop the bullets of his foe. Though maybe not as prevalent in today’s culture, such attitudes certainly still exist regarding how far the police may go to detect and apprehend a criminal. Consider only for a moment how many complaints you have heard or been aware of in which an officer was chided by a citizen for breaking the speed limit law to catch a speeder.

Out of this notion of fair play, our judicial system has created a term to describe when the police have gone too far in their subterfuge to catch a criminal- entrapment. Since undercover officers walk very close to that line defined by entrapment, born of the nature of undercover tactics, a clear understanding of what entrapment is and what it is not is paramount to the success of undercover operations. Success not only in their effectiveness at catching criminals, but success in winning public perception that undercover policing is a legitimate, effective, and honorable method in combating crime. Such a cloud of misperception and misunderstanding surrounds the very mention of entrapment that many, officers and citizens alike, cringe at

anything to do with it. Unfortunately, it has been my experience that many police officers, administration included, do not understand what entrapment is, nor how to keep from doing it. Because of this, we have been terribly negligent in educating the public-at-large and have severely limited our crime fighting potential.

As you consider the potential of a well managed, properly trained undercover unit in addressing crime problems specific to your jurisdiction, please do not misperceive that I am advocating such as the end-all of more accepted police tactics. Rather, it is my intent that you recognize the strengths and limitations of such investigations as you come to clearly understand and overcome the entrapment defense.

History Overview:

Undercover work has been used in a variety of ways throughout the course of history. We are all familiar with the tale of the Trojan Horse as recounted in the epic Latin poem *The Aeneid* (Virgil, 29-19BC). By this account, the Greeks were finally able, by use of a clever trick, to enter the City of Troy and end a ten-year siege that claimed countless lives. Even the term “Trojan Horse” has come to mean “any trick that causes a target to invite a foe into a securely protected place” (Wikipedia). To morph this definition into something a little more relevant to our discussion on undercover police investigations, let’s call a Trojan Horse “any ruse that causes a criminal to invite the police into a place the criminal feels secure”. Over two thousand years ago, strategists and tacticians recognized the inherent effectiveness of “undercover operations” in gaining the trust and acceptance of a targeted individual, or organization, to learn secret information, or to gain evidence against them.

The first organized undercover program (or unit) was believed to have been created and employed by Eugene Francois Vidocq in early 19th Century France. Vidocq began his career as

a nefarious thief and was imprisoned by the age of nineteen. While in prison, Vidocq was accused and tried for forging the release papers of a fellow inmate. He managed to escape prison on numerous occasions, often using disguises and assumed names to fool the guards. During one escape, he dressed as a sailor. During another, a nun. His final escape on March 6th, 1800 was with the help of a prostitute. After several years on the lam, all the while trying to assimilate into French society, Vidocq was eventually arrested again in 1809. Vidocq became a police informant while in prison, and after nearly two years of spying on fellow inmates, he was released at the recommendation of Paris Police Chief Jean Henry. To assuage suspicion among fellow inmates concerning the early release, police arranged the release to appear as an escape. Now indebted to the Paris police, Vidocq became a secret agent and employed his special skills in targeting criminals. Vidocq organized a plainclothes unit called the *Brigade de la Surete* (Security Brigade) and in 1813, the unit was officially converted to a state security police by Napoleon Bonaparte. Vidocq was appointed head of the organization and henceforth it was known as *Surete Nationale*. *“He used his contacts and his reputation in the criminal underworld to gain trust. He disguised himself as an escaped convict and immersed himself into the criminal scene to learn about planned and committed crimes. He even took part in felonies in order to suddenly turn on his partners and arrest them. When criminals eventually began to suspect him, he used disguises and assumed other identities to continue his work and throw off suspicion.”* (Wikipedia) In his own memoirs, Vidocq reflected *“I believe I may have become a perpetual spy, so far was every one from supposing that any connivance existed between the agents of the public authority and myself.”* (Vidocq, 1834)

In March 1883, the London Metropolitan Police formed the Special Irish Branch, an undercover unit designed to combat the Irish Republican Brotherhood. As the unit’s

effectiveness was recognized and its missions grew, the “Irish” nomenclature was eventually dropped and the unit became known simply as the Special Branch. They are now responsible for acquiring and developing intelligence pertaining to national security and conducting investigations into threats of subversion, terrorism and other extremist activity.

In an effort to combat the flood of foreign criminals coming into New York City at the turn of the 20th Century, NYPD Commissioner William McAdoo formed a five man “Italian squad” in January 1905 and placed one of New York’s best known detectives, Giuseppe “Joe” Petrosino in charge. *“The unit was made up of some uncommon detectives. Joe DeGilio, who was five foot six with gray hair and spectacles, frequently masqueraded as an inspector for the Board of Health. One of the most effective members was not actually Italian: Maurice Bonsoil was of French-Irish descent, but he had grown up on the East Side and spoke fluent Sicilian. In contrast, Detective Hugh Cassidy, who had an Irish name, had been born Ugo Cassidi. At the outset, the squad suffered a small embarrassment. Petrosino had established a safe house on Waverly Place, not far from Little Italy. The furtive comings and goings of so many Italians were noted by the beat cops, who reported the place, pegging it as a hideout for anarchists or Black Handers. A police raid followed. So as not to give the safe house away, the squad allowed themselves to be hauled off in a patrol wagon. When they were out of the neighborhood, Petrosino identified himself to an angry police captain.”* Petrosino was eventually gunned down on the streets of Palermo, Sicily, after his cover was blown by the police commissioner.

(Lardner,Reppetto, 2000)

Undercover investigations began gaining popularity in American policing, particularly among federal agencies and especially during Prohibition. Much like undercover drug investigations of today, agents trying to identify and nab violators of the “Volstead Act” who

were illegally manufacturing, transporting, and selling alcoholic beverages quickly found it necessary to use undercover tactics to be effective. In the landmark Supreme Court case *Sorrells v. United States* (Sorrells, 1932), Supreme Court justices unanimously recognized for the first time the entrapment defense. In this particular case, a federal Prohibition agent in North Carolina learned from informants that a factory worker named Sorrells had a reputation as a rum runner. Posing as a tourist to the area, the agent arranged for three of Sorrell's acquaintances to introduce him to Sorrells at Sorrell's home. The meeting took place and the agent introduced himself to Sorrells as a fellow World War I veteran of the U.S. Army 30th Infantry Division. Over an hour and a half of conversation ensued in which the agent reminisced with Sorrells about his prior military service. At least three times during this conversation, the agent asked Sorrells if he would be so kind as to get a fellow soldier some liquor. Sorrells refused to do so, at one point telling the agent that he didn't have anything to do with whiskey. The agent continued to wear on Sorrells and Sorrells eventually obtained the agent a half-gallon of whiskey for \$5. The agent then arrested him for violation of the National Prohibition Act. Sorrells was convicted in Federal Court of the crime but appealed the decision to the U.S. Supreme Court. In the majority opinion, issued by Chief Justice Charles Hughes, the Court reversed Sorrell's conviction on the grounds of police entrapment and held that entrapment is a valid defense. In the opinion, Hughes called the investigation a "gross abuse of authority" and further stated "It is clear that the evidence was sufficient to warrant a finding that the act for which (the) defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by

remembrances of their experiences as companions in arms in the World War.” The Court further held that when the defense of entrapment is raised, the prosecution (that’s you and I) must show the defendant had a *predisposition* to commit the crime charged. Though Justices Owen Roberts, Harlan Fiske Stone and Louis Brandeis concurred with the majority opinion, they took strong issue with the finding that the courts should focus on the defendants’ predisposition to commit a crime rather than the conduct of the investigating officers. He wrote: “Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.” And though Roberts’ strong issue with the majority opinion did not prevail, his definition of entrapment seems to be that most widely believed by citizen and police alike. In essence, the court ruled that it is not so much the deception and trickery used by the police that is important in determining whether entrapment occurred as is the predisposition of the accused to commit the crime they are charged with. Hold on to this thought!

Entrapment Defined:

Out of the Sorrells ruling came state statutes and case law regarding the defense of entrapment. As each state in the Union has its own constitutions, its own legislative body, and its own high courts, it was necessary for each state to define entrapment in such a way that was at least as restrictive on the government as Sorrells was. Because the issue of entrapment is a limitation on government intrusion, states are allowed to be more restrictive of the government than Sorrells, however, they cannot be less restrictive. As a result, the definition of entrapment and the conduct constituting it can and does vary from state to state. From this point forward, we will be focusing solely on Arkansas law as it pertains to entrapment.

Under Arkansas statutes, entrapment occurs when a law enforcement officer, or any person acting in cooperation with a law enforcement officer, induces the commission of an offense by using persuasion or other means likely to cause a normally law-abiding person to commit the offense. Conduct merely affording the person an opportunity to commit an offense does not constitute entrapment. (Arkansas,2005). As we examine this definition of entrapment and consider ways to tailor our undercover investigations around it, we must take a detailed look at its elements.

Of paramount importance to the issue of entrapment is that it can only occur at the direction of a law enforcement officer. Though it might seem simplistic, the idea that entrapment can only take place under law enforcement direction is often overlooked. A private citizen who sets up their own “sting operation” to catch say, a car thief; outside the direction of or cooperation with a law enforcement agent, does not have to concern themselves with the defense of entrapment. Any evidence they obtain could be turned over to police and eventually used against the defendant if the police had nothing to do with obtaining it. The reverse is true however, when talking of an informant or cooperating witness. In the case of Sorrells, had the agent’s informants engaged in the entrapping conversation rather than the agent, under the Arkansas definition, Sorrells would still have a valid entrapment defense. They would be acting at the direction of (or in cooperation with) the agent.

Secondly, many officers and prosecutors get to the next element of the definition and stop there: “*induces the commission of an offense by using persuasion*”. This has all too often been used to limit the scope of undercover investigations. The assumption is often made that the undercover agent cannot do anything, cannot say anything that would induce, suggest, or cause an individual to break the law. When limited in this way, the undercover investigation is no

more productive than random, uniformed patrols. Entrapment does not take place simply because the target of investigation was induced to commit a crime. Reading the full definition, we find “*induces the commission of an offense by using persuasion or other means likely to cause a normally law-abiding person to commit the offense.*” This does not, in any way, suggest that the undercover agent cannot use an inducement (enticement) for an individual to break the law. What it does say is that inducement (enticement) cannot be so great, so outrageous, that it would likely cause a normally law-abiding person to commit the offense being induced. Obviously, words like “*likely*” and “*normally law-abiding*” are subjective terms, open to interpretation. However, I must ask you this as an example: would you, or any, “normally law-abiding” citizen you know who was not looking for a prostitute, likely be induced to engage in prostitution if a scantily clad female walked up to your vehicle at a stop light and offered to perform sex with you in exchange for \$40? Hopefully, you can see where I am going with this! Granted, the undercover agent would not want to conduct herself as described here without doing a little homework to determine “predisposition” before making that initial contact but...for those of us who have done these types of investigations, how often have we watched the potential “John” drive away because he would not say those magic key words we thought were necessary to make the case? Using the same example as before, let’s up the ante a little bit. Now, instead of \$40 for sex, the lady offers herself for \$1. Has the likelihood of a normally law-abiding citizen falling for the trap increased? Have we offered such an inducement that the normally law-abiding citizen would have difficulty turning it down? I would venture to say that in this instance, the entrapment defense has become a reality. The same would be true with the roles reversed and the undercover agent posing as the “John”. Consider an undercover agent seeing a scantily clad female walking down the side of the street. The officer approaches her and offers

her \$40 for a sex act, which happens to be the going rate for a working girl in this jurisdiction. She agrees and is arrested. Entrapment, or not? Once again, same circumstances, but the agent offers the girl \$500. How about now? The entire key to this discussion is “likely to cause a normally law-abiding person to commit the offense”. If the agent’s inducement is not such that a normally law-abiding citizen would walk away from it, then it is not entrapment. Certainly, the level of what that point might be will differ from jurisdiction to jurisdiction and neighborhood to neighborhood. But the idea that the police cannot be the first to discuss the illegal act is absolutely false. Run a search engine of “entrapment” on your web browser and you will find all sorts of erroneous information, much of which we, as the police, have bought into for years. “An undercover officer working as a prostitute, for example, cannot initiate a conversation leading to the customer’s solicitation offer.” (Entrapment, n.d.) Not so...at least not without a qualifier.....

Predisposition:

Remember Sorrells? The majority opinion ruled that the prosecution (the police) must show the defendant had a predisposition to commit a crime if the entrapment defense is raised. What does this mean for the undercover agent? Namely, this: before a reasonable inducement to break the law can be offered, the agent must have some level of proof that the individual in question was already predisposed to commit the crime being investigated. In other words, there has to be some level of evidence that a person is already thinking about breaking the law before the undercover agent offers them an opportunity to do so. That level of proof must obviously fall below that of probable cause for, with probable cause, the agent would already have enough proof to make an arrest. In all reality, a very good undercover agent will have already developed probable cause, or very close to it, before offering an inducement. But the level absolutely needed is reasonable suspicion. Reasonable suspicion that a particular individual is predisposed

to commit a particular crime. Once this is established, it's Katie bar the door as to what the undercover agent can talk about as long as it is not (you guessed it) likely to cause a normally law-abiding person to commit the offense! Without proving predisposition, a defendant's entrapment defense will likely succeed. The defendant's burden of proof that the actions of the police caused him to commit the crime is only a preponderance of the evidence, a tipping of the scales in his favor. (White, 1989) With no proof offered as to his predisposition to commit the crime, the scales will certainly be tipped in his favor. Establishing predisposition is probably the most important requirement in overcoming the entrapment defense and the most overlooked by undercover agents. It is also the easiest aspect of the investigation.

Establishing Predisposition:

It would likely be impossible to provide an all inclusive list of those indicators that demonstrate a person's predisposition to commit a crime. Some indicators are specific to a particular area or jurisdiction and may not be relevant in another. The weight given to any single or combined set of indicators is ultimately dependant upon the magistrate reviewing them. There is no set in stone rule that an agent must have a set number of indicators before initiating contact, unless of course, your jurisdiction requires it. Following is a fairly comprehensive list of general indicators that every good undercover officer should learn to look for and document. Let me stress that last requirement: document. As with all types of investigations, good documentation is critical to a successful conviction. *"If it ain't on paper, it didn't happen."* It does no good for an officer to learn how to establish predisposition if he never includes what he saw in his report.

Always run a complete criminal/arrest history on the target of your investigation. If you cannot do so prior to your initial encounter, do so immediately thereafter. Nothing demonstrates a predisposition to commit a crime like a documented history of the same individual committing

the same crime on multiple occasions. Including your prior knowledge of this individual's criminal propensities before your undercover contact will prove invaluable should he or she choose to raise the entrapment defense.

Document all complaints in detail. Each and every complaint that your office receives regarding particular criminal activity in an area should be filed for future reference. Vehicle descriptions, tag numbers, intelligence entries, all of these should be recorded in the likely event that your undercover operation nets one of these individuals. It would be most difficult for a defendant to convince a jury that he was not predisposed to enlisting the services of a prostitute when you produce an intelligence report or complaint from a citizen reporting the defendant's vehicle regularly cruising around the neighborhood picking up women walking down the side of the street.

Learn the lingo. Depending on the type of crime you are investigating, the people who regularly commit them often communicate in coded or seemingly innocuous phrases. Certain body movements or facial expressions and gestures are all means of communication. Something as innocent as "*How ya doin?*" from a lone male in a public place known for men cruising for sex might be the code phrase for "*Wanna hook up and have sex in the bathroom?*" An individual tapping his foot underneath a toilet stall is a common indicator of a person looking for sexual activity in some jurisdictions. Unless you know this, you could never testify that this action showed a predisposition to commit the crime of Loitering. Pointed and directed eye contact from complete strangers, tapping of brake lights as two vehicles meet, asking a female on the side of the street if she needs a ride. All of these consist of the "lingo" of various crimes in my jurisdiction.

Know the area. Though a person's mere presence in a high crime area is not justification for a contact, their presence coupled with one or more other indicators could certainly give proof of a predisposition to commit a crime. For instance, it may be common knowledge that good folks do not go down a certain street after 10 o'clock in the evening because of the high volume of drug trafficking that takes place. An individual is seen standing on the side of this street, after 10 o'clock as various vehicles pull up to him and after only a few seconds, pull away. Should an undercover agent pull up to him, offer him \$100 for crack cocaine, and then arrest him when the cocaine is produced, knowledge of the area could certainly get you on your way to proving predisposition.

Embrace the "cop dance". Another common misconception about what the police can and cannot do in undercover investigations is what a former Fort Smith Police Department Vice/Narcotics investigator commonly referred to as "the cop dance".(Smalley,2005) It goes without fail, in virtually every undercover encounter I have been involved with (and they number in the hundreds), the target will at some point ask "Are you a cop?" A common variation of this question, usually posed by the more astute call girls is "Are you affiliated with any law enforcement agency?" In either case, the meaning is the same and represents the golden egg in your investigation. For, in one simple question, the subject of your investigation has just told you "I am intent on breaking the law and I need to know if you are a cop or not." Sounds like predisposition to me! Contrary to popular belief, the police are allowed to lie during undercover investigations and they are under no obligation to reveal their true identity.

No means no. Unless there is an overt and compelling indication that the true meaning being communicated is not what is actually being verbalized, (for instance, the subject is saying "no" but nodding his head "yes"), an undercover agent should always attempt to excuse himself

from the target when rejection of the inducement is proffered. To continue to present the inducement after the first rejection will only lead to disaster. Most generally, if the agent has done his homework as he should, rejection of the inducement will only be temporary. As the agent attempts to break contact, the target will likely stop him with a sudden change of mind. At this point, proving predisposition is a slam dunk. “Your honor, after he told me he was not interested, I excused myself and tried to walk away. That’s when he stopped me and said he changed his mind.” Need I say more?

A Final Thought:

Up to this point, I have focused on recognizing and overcoming the entrapment defense as it pertains to undercover operations. By recognizing what entrapment is and learning to conduct business accordingly, the effectiveness of an undercover unit is limited only by the officer’s imaginations. As an added bonus, I suggest the following: once you learn where that entrapment line is and learn how to keep from crossing it, a defendant claiming entrapment is an “oh joy” moment. For, if a defendant claims police entrapment, to legally do so, he or she must admit the conduct of which he or she is accused. I’ll say that again: to claim entrapment, the defendant must admit the criminal activity. (Heritage, 1996).

I would caution you to visit with your local prosecutors, with your District and Circuit Court judges and your agency administrators before creating an undercover unit or changing an existing unit’s tactics. Much of what I have discussed ultimately hinges on what your particular judicial system recognizes and will tolerate. I can assure you that each of the points I have talked about have been tested in the Arkansas Supreme Court and have proven reliable. Should you require or enjoy further validation of the ideas presented, I encourage you to read the attached Arkansas Supreme Court case, *Wagnon v. State of Arkansas* (Gladwin, 2008)(Appendix

A). This particular ruling resulted from an undercover investigation initiated by yours truly as a Detective with the Fort Smith Police Department Street Crimes Unit.

By now, you should have a better appreciation for the potential effectiveness of using undercover officers to address specific crime problems in your jurisdiction. You hopefully have a better understanding of entrapment and misconceptions surrounding it. You might even be armed with just the information you needed to convince your agency that undercover investigations are not quite the headache they seem to be. At the very least, I hope to have sparked enough interest to cause you to research the matter further on your own. Is it possible there might be some validity to the old adage “*It takes a crook to catch a crook.*”? Well, not really. It just takes a good cop!

Arkansas Code Annotated §5-2-209 (b)(1)(2) *Entrapment*. (2005)

Colombo, Arrigo. Papi, Giorgio (Producers), & Leone, Sergio (Director). (1964). *A fistful of dollars* [Motion Picture]. Italy:Unidis

Eugene Francois Vidocq. (n.d.) In *Wikipedia*. Retrieved from http://en.wikipedia.org/wiki/Eug%C3%A8ne_Fran%C3%A7ois_Vidocq

Gladwin, Robert J. Honorable, (2008) *Christopher Eugene Wagnon, appellant versus state of Arkansas, appellee*. Retrieved from

<http://courts.arkansas.gov/unpublished/2008a/20080423/ar07-1069.pdf>

Heritage v. State of Arkansas, 326 Ark. 839, 936 S.W. 2nd 499 (1996)

Lardner, James. Reppetto, Thomas. (2000). *NYPD: a city and its police*. New York, NY: Henry Holt & Co. LLC., 131

Smalley, Captain Ed, personal communication, November 9th, 2009

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

Trojan Horse. (n.d.) In *Wikipedia*. Retrieved from http://en.wikipedia.org/wiki/Trojan_Horse

Vidocq, Eugene Francois, (1834). *Memoirs of Vidocq, principal agent of the French police*. (E. Carey and A. Hart, Trans.) Philadelphia, Baltimore: Carey, Hart & Co., 190

Virgil, Publius Vergilius Maro. (29-19BCE) *Aeneid*, book II

What Is Entrapment. (n.d.) In *wiseGEEK*. Retrieved from <http://www.wisegeek.com/what-is-entrapment.htm>

White v. State of Arkansas, 298 Ark. 163, 765 S.W. 2nd 949 (1989)

Appendix A

