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Joseph D. Johnson

to rescind a contract needs to be drawn. The correct relation between these rights is that the right to revoke does not give one the right to rescind. The opinion in *Rape* fails to state this distinction and incorrectly implies that one's inability to rescind a valid contract bars revocation of the will executed pursuant to the contract. By citing cases[46] from other jurisdictions that directly state that execution of a will pursuant to a contract bars revocation of it,[47] *Rape v. Lyerly* propounds incorrect theories and promotes confusion about the justification for specific performance of a contract to devise. The correct justification rests simply upon the breach of contract to devise.

In conclusion, the North Carolina Supreme Court improperly justified the remedy that it awarded. Nonetheless, the remedy, conclusions, and holding of the court in *Rape v. Lyerly* are proper ones. The court's holding, that a revoked will can provide a sufficient memorandum of an oral agreement for Statute of Frauds purposes, had no North Carolina precedent but is supported by the weight of authority from other jurisdictions. Notwithstanding the North Carolina courts' ability to enforce an oral contract to devise realty evidenced by a will, promisees are well advised to insist upon a separate written instrument containing the promise to devise.

EVERETT B. SASLOW, JR.

Criminal Law—A Survey and Appraisal of the Law of Entrapment in North Carolina

In attempting to apprehend persons involved in the so-called victimless crimes,[1] modern law enforcement officers have found it necessary to set traps that are often quite elaborate to obtain evidence needed for conviction. In setting a trap, it is often necessary for the law officer or his agent to actually participate in the criminal act. The

46. 287 N.C. at 615, 215 S.E.2d at 748.

47. *See, e.g.*, Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730 (1946). *See also In re* Estate of Ranthum, 249 Iowa 790, 89 N.W.2d 337 (1958); Brock v. Noecker, 66 N.D. 567, 267 N.W. 656 (1936).

1. "Victimless crimes" include crimes in which there is no "victim" or in which the "victim" is a willing participant. Crimes relating to prostitution, homosexuality, narcotics, liquor sales, and gambling are common examples. *See* Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 874-75 (1963).

amount of actual participation by the officer can vary substantially depending on the nature of the crime and the surrounding circumstances, as well as the aggressiveness of the officer himself. This participation can range from a minimal role of observation to substantial overt solicitation. If the solicitation becomes so strong that the government could be manufacturing criminal acts when none would have existed otherwise, the validity of any subsequent criminal prosecution must be questioned.

Courts have created the defense of entrapment in order to prevent government law enforcement officials from creating crime when none previously existed. The defense of entrapment is recognized in the federal courts[2] and in almost all state courts[3] except Tennessee.[4] Although each jurisdiction has its own definition, entrapment is generally recognized as a defense when government officials or agents, by persuasion, trickery, or fraud, induce or incite a person to commit a crime in order to prosecute that person. In particular, courts have required that criminal intent and design originate with the government officials or agents rather than with the defendant in order for the defense to operate.[5]

The North Carolina Supreme Court has recently examined the North Carolina law of entrapment in *State v. Stanley*,[6] in which it found for the first time the presence of entrapment as a matter of law. The defendant in *Stanley* was a seventeen-year-old high school student charged with felonious possession of a controlled substance with the intent to distribute, and felonious distribution of a controlled substance.[7] At trial in superior court, Stanley, the defendant, admitted that the alleged transaction had occurred, but he relied on the defense of entrapment. Although the jury returned a verdict of guilty to the charge of felonious possession, Stanley was acquitted on the charge of distribution of a controlled substance.[8]

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

3. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 48, at 370 (1972); A. LOEWY, CRIMINAL LAW IN A NUTSHELL § 13.06 (1975) [hereinafter cited as LOEWY]; 22 C.J.S. *Criminal Law* § 45(1) (1961). Although the status of the defense is unclear in New York, entrapment has not been rejected as a defense there. People v. Williams, 38 Misc. 2d 80, 237 N.Y.S.2d 527 (County Ct. 1963).

4. Warden v. State, 214 Tenn. 398, 381 S.W.2d 247 (1964).

5. Sorrells v. United States, 287 U.S. 435 (1932); State v. Burnette, 242 N.C. 164, 87 S.E.2d 191 (1955). *See also* Annot., 62 A.L.R.3d 110 (1975).

6. 288 N.C. 19, 215 S.E.2d 589 (1975).

7. The parties stipulated that the controlled substance was found to be lysergic acid diethylamide (LSD). *Id.* at 20, 215 S.E.2d at 590.

8. *Id.* at 20-25, 215 S.E.2d at 590-93.

Upon appeal by defendant, the court of appeals found no trial error; however, the issue of entrapment was not raised before the court of appeals.[9] Defendant then petitioned for certiorari to the North Carolina Supreme Court, but again he did not raise the entrapment issue.[10] The supreme court granted certiorari[11] and, upon examination of the trial court record, chose to consider the entrapment defense by exercising its general supervisory powers over inferior state courts.[12] The high court held that the uncontradicted evidence showed that the undercover agent of the state, in establishing a "big brother" relationship with the defendant, had induced the defendant to commit the criminal act and that the intent to commit the crime originated with the agent of the state rather than with the defendant. Therefore, the court found that the evidence compelled a finding of entrapment as a matter of law.[13]

While *Stanley* is the first North Carolina Supreme Court decision to find entrapment as a matter of law, the defense has previously been recognized in North Carolina. The first case to consider entrapment was *State v. Smith*.[14] In that case an agent of the police illegally bought liquor from the defendant. Although the word "entrapment" was not used to describe the defense, the defendant contended that the conduct of the police agent in purchasing the liquor should be a bar to prosecution. The court rejected the defense, reasoning that this technique of trapping the defendant was a reasonable method of confirming suspicions of illegal conduct. The court stated that "[i]t is not the motive of the buyer, but the conduct of the seller which is to be considered."[15] The defendant had broken the law, and he could not complain "that the law of the jungle was violated."[16]

The court reached the same result in *State v. Hopkins*,[17] a similar case that arose one year after *Smith*. The conviction was upheld in *Hopkins*, and although the court noted that the methods used by the

9. State v. Stanley, 24 N.C. App. 323, 210 S.E.2d 496 (1974). The court of appeals, in affirming the trial court's ruling, held that possession of a controlled substance was properly found to be a lesser included offense of distribution of a controlled substance.

10. 288 N.C. at 25-26, 215 S.E.2d at 594.

11. 286 N.C. 547, 212 S.E.2d 169 (1975).

12. 288 N.C. at 25-27, 215 S.E.2d at 593-94 (1975).

13. *Id.* at 32-33, 215 S.E.2d at 597-98.

14. 152 N.C. 798, 67 S.E. 508 (1910).

15. *Id.* at 800, 67 S.E. at 509.

16. *Id.*

17. 154 N.C. 622, 70 S.E. 394 (1911).

officers of the law had been criticized, it was held that "the transaction is, so far as [the] defendant is concerned, a violation of law."[18]

Almost forty years after *Smith* and *Hopkins*, the North Carolina Supreme Court first explicitly recognized the defense of entrapment in *State v. Love*.[19] The court held that for entrapment to exist, the officer's conduct must amount to more than mere initiation, invitation, or exposure to temptation, but must constitute trickery, fraud, or persuasion. Although the improper conduct of the officer is an essential element of the defense, the crucial factor in establishing entrapment is the defendant's predisposition to commit the crime. The *Love* court found that, for entrapment to exist, the trickery, fraud, or persuasion must be "practiced upon one who entertained no prior criminal intent."[20]

The North Carolina rule on entrapment crystallized into its present form in *State v. Burnette*.[21] The court held in *Burnette* that entrapment exists when an officer or agent of the government, by persuasion, trickery, or fraud, induces or incites a person to commit a crime in order to prosecute. The court found it essential that the criminal intent and design originate in the mind of one other than the defendant, and also, that there be a finding that the defendant would not have committed the act but for the inducement.[22] In utilizing this definition, the court made clear that the major issue is the defendant's predisposition. It follows that under this test of predisposition, the government's conduct assumes importance only because the degree of inducement or incite-

18. *Id.* at 624, 70 S.E. at 394.

19. 229 N.C. 99, 47 S.E.2d 712 (1948). *See also* State v. Godwin, 227 N.C. 449, 42 S.E.2d 617 (1947) (problems related to entrapment discussed, but decision reached on other grounds).

20. 229 N.C. at 101, 47 S.E.2d at 714.

21. 242 N.C. 164, 87 S.E.2d 191 (1955).

22. In order for there to be entrapment, the officer or agent of the government must do more than merely offer the accused an opportunity to commit the criminal act. *See, e.g.*, State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967); State v. Kilgore, 246 N.C. 455, 98 S.E.2d 346 (1957) (per curiam); State v. Greenlee, 25 N.C. App. 640, 214 S.E.2d 246 (1975); State v. Stanback, 19 N.C. App. 375, 198 S.E.2d 759, *cert. denied*, 284 N.C. 258, 200 S.E.2d 658 (1973), *cert. denied*, 415 U.S. 990 (1974); State v. Hendrix, 19 N.C. App. 99, 197 S.E.2d 892 (1973); State v. Williams, 14 N.C. App. 431, 188 S.E.2d 717 (1972). In narcotics cases, such facts as inquiring to purchase, arranging a meeting for sale, ready acquiescence in sale, and admission of at least one prior illegal sale have probative value in establishing an inference that the intent originated with the defendant. State v. Salame, 24 N.C. App. 1, 210 S.E.2d 77 (1974), *cert. denied and appeal dismissed*, 286 N.C. 419, 211 S.E.2d 800 (1975). For other entrapment cases see State v. Walker, 251 N.C. 465, 112 S.E.2d 61, *cert. denied*, 364 U.S. 832 (1960); State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958); State v. Wallace, 246 N.C. 445, 98 S.E.2d 473 (1957); State v. Bradshaw, 12 N.C. App. 510, 183 S.E.2d 787 (1971).

ment helps establish the amount of active participation by the accused in the crime: governmental participation is simply used as a means of measuring the defendant's predisposition.

In order properly to analyze entrapment, it is essential first to establish the legal basis as well as the policy rationale for allowing the defense. Entrapment does not rest on constitutional grounds. The United States Supreme Court has considered the constitutional status of entrapment principally on due process grounds, but the Court has refused to reverse a conviction allegedly involving entrapment on constitutional grounds.[23] Although the due process argument has not been totally ruled out, it seems unlikely that a case of entrapment will ever be decided on constitutional grounds. Since entrapment is recognized as a valid defense in almost all jurisdictions in the United States,[24] it appears that even in extreme cases courts will acquit on the ground of entrapment before reaching the constitutional question.

Since the entrapment defense does not rest on constitutional grounds, courts have utilized a number of legal theories and policy statements to justify the defense. One such theoretical justification is that the government is estopped from prosecution because entrapment is unconscionable and contrary to public policy,[25] deriving from "a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist."[26] It should be noted, however, that general statements of public policy fail adequately to distinguish whether the ultimate purpose of the defense is to protect a right of the accused or to prohibit intolerable government activity.

In support of the position that the purpose of the entrapment defense is to protect a substantive right of the accused, certain courts, interpreting criminal statutes, have held that the defense is based on an inference that the legislature did not intend for the given statute to apply to a victim of entrapment.[27] Consequently, if this unwritten purpose of the statute is intended to protect a substantive right of the accused rather than being a deterrent to improper government activity,

23. United States v. Russell, 411 U.S. 423 (1973). *See also* Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

24. LOEWY, *supra* note 3, § 13.06; 22 C.J.S. *Criminal Law* § 45(1) (1961).

25. Sorrells v. United States, 287 U.S. 435, 445 (1932), *citing* Newman v. United States, 299 F. 128, 131 (4th Cir. 1924).

26. United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933) (Learned Hand, J.).

27. Sorrells v. United States, 287 U.S. 435, 445-49 (1932).

the defense should be available without regard to the identity of the entrapper. However, it has uniformly been held that entrapment is available as a defense only when the entrapper is an officer or agent of the government.[28]

Beyond considerations of the identity of the entrapper, courts that have attributed the entrapment defense to an unwritten legislative purpose have indulged in judicial inventiveness unless, of course, entrapment itself has been defined by statute. While some crimes require a form of specific intent, most victimless crimes only require general intent.[29] For example, in the prosecution of an illegal drug sale, it is enough for the state to show that the accused made the sale. No further proof of intent is usually necessary. Since this minimal degree of intent is present even when the accused is a victim of entrapment, the transaction clearly falls within the scope of the statute.[30] A search of the statutes fails to provide any objective evidence that the legislative intent requires the exclusion of the accused from the scope of the statute.

Although there is general agreement that a victim of entrapment should not be convicted, the reasons for such a position go beyond concern for the interests of a particular defendant. An examination of significant entrapment cases reveals the concern of the courts over the degree of government participation and encouragement in the offenses. Although drug-related crime as well as other offenses may be generally recognized as harmful to society, the practice of setting traps for potential violators "is . . . a repugnant practice, distasteful at its best and intolerable at its worst."[31] The North Carolina court first expressed its concern for such government tactics in *State v. Godwin* when it observed that the state's case relied on a "broken reed" since the

28. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955); State v. Yost, 9 N.C. App. 671, 177 S.E.2d 320 (1970), *cert. denied*, Yost v. Ross, 181 S.E.2d 600 (1971). *See also* Sherman v. United States, 356 U.S. 369 (1958); Smith v. State, 258 Ind. 415, 281 N.E.2d 803 (1972).

29. *See* State v. Love, 229 N.C. 99, 102, 47 S.E.2d 712, 714 (1948).

30. In considering the offenses in which entrapment might be available as a defense, it should be noted that entrapment is not limited to liquor and narcotics cases, although problems of entrapment arise most often in such cases. *See, e.g.*, State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967) (using profane language over the telephone); State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958) (conspiracy to dynamite a school building). Although North Carolina courts have not ruled on the point, the better view holds that entrapment is not available when the offense involves the infliction or threat of bodily harm. MODEL PENAL CODE § 2.13(3) (Proposed Official Draft 1962).

31. Smith v. State, 258 Ind. 415, 418, 281 N.E.2d 803, 805 (1972).

criminal act "was brought about by persistent entreaty and duplicity."[32]

North Carolina's policy supporting the entrapment defense as a deterrent to police misconduct was explained in *State v. Love*:

> Considerations of the purity and fairness of the *courts and the agencies created for the administration of justice* gravely challenge the propriety of a procedure wherein the officers of the State envisage, plan and instigate the commission of a crime and proceed to punish it on the theory that a facile compliance with the officer's invitation confirms the accuracy of the suspicion of an unproved criminal practice,—for which the defendant is in reality punished.[33]

In light of this reasoning it is clear that entrapment was created to deter government officials from manufacturing crime where none existed before. Since the main purpose of the entrapment defense in North Carolina is to regulate governmental activity in investigating crimes that often require no form of specific intent, the focus of judicial inquiry should be the conduct of the officers and their investigative methods rather than the state of mind of a particular defendant.

To implement this purpose of regulating governmental activity, courts have taken two divergent approaches; the principal difference between these approaches relates to the importance to be given the predisposition of the accused. The federal courts[34] and the majority of state courts,[35] including North Carolina,[36] have held that entrapment focuses on the intent of the accused. Under this view no amount of improper governmental activity[37] is sufficient unless it is shown that the defendant had no previous intent to commit the crime and that the criminal intent and design originated with the government officials or agents rather than with the defendant.[38]

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32. 227 N.C. 449, 452, 42 S.E.2d 617, 619 (1947).

33. 229 N.C. 99, 101, 47 S.E.2d 712, 714 (1948), *quoted in* State v. Stanley, 288 N.C. 19, 28, 215 S.E.2d 589, 595 (1975) (emphasis added).

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

35. LOEWY, *supra* note 3, § 13.06; 22 C.J.S. *Criminal Law* § 45(1) (1961). *See, e.g.*, State v. Bagemehl, 213 Kan. 210, 515 P.2d 1104 (1973).

36. 288 N.C. at 28, 215 S.E.2d at 595.

37. In considering the problem of improper governmental conduct, it should be noted that there have been attempts at requiring government officials to obtain approval in advance of setting traps in a manner analogous to fourth amendment search requirements. These attempts, in recognizing the scope of the problem, also illustrate the need for reevaluating the role of the defendant's prior intent in the entrapment defense. *See* Smith v. State, 258 Ind. 415, 418, 281 N.E.2d 803, 805 (1972) (requiring probable cause before setting a trap); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963).

38. State v. Crandall, 23 N.C. App. 625, 209 S.E.2d 834 (1974), *appeal dismissed*, 286 N.C. 417, 211 S.E.2d 797 (1975). Defendant's evidence went to the conduct of the officers and their investigative methods. Since the evidence did not relate to the defendant's intent, it was held that such evidence was neither material nor relevant.

The second approach to entrapment has been adopted by a minority of state courts,[39] the Model Penal Code,[40] and dissenting United States Supreme Court justices.[41] This approach uses a form of the "reasonable man" test, a more objective means of applying entrapment to a particular case. Rather than examining the predisposition of the particular person on trial, these authorities hold that entrapment exists when the conduct of the government agent creates a substantial risk that the crime would be committed by a person who would not otherwise have committed the criminal act.

The objective test used by the minority has the advantage of conforming more closely to the policy of entrapment as a check on governmental misconduct. The crucial factor in the minority rule is the measure of participation by agents and officers of the government. Since it establishes a more clearly ascertainable standard that does not vary from case to case depending on the predisposition of various defendants, it is more likely that this method will be perceived by government officials as a viable limit upon their ability to set illegal traps. The majority approach, with its preoccupation with the predisposition of the accused and the necessity for a jury's determination of that factor, is more likely to be viewed by government officials as more of a trial tactic than as a limit on police discretion.[42]

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39. LOEWY, *supra* note 3, § 13.06, at 253-54; *see* W. LAFAVE & A. SCOTT, *supra* note 3, § 48, at 371.

40. MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962). The relevant portions are as follows:

> (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by . . . :
>
> . . . .
>
> (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

See also the proposed statute in State v. Campbell, 110 N.H. 238, 241, 265 A.2d 11, 14 (1970).

41. United States v. Russell, 411 U.S. 423, 436-50 (1973) (Brennan, Douglas, Stewart, and Marshall, JJ., dissenting); Sherman v. United States, 356 U.S. 369, 378-85 (1958) (Frankfurter, Douglas, Harlan, and Brennan, JJ., concurring in result). Although the dissent in *Russell* reasoned that the defendant should be acquitted by reason of entrapment, it is arguable that on the facts of that case the rationale of the dissent could be applied to reach the result of the majority. It seems unlikely that an offer to supply a person with an essential ingredient of methamphetamine ("speed") would create a substantial risk that the drug would be produced by a person who would not otherwise have committed the criminal act.

42. Sherman v. United States, 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 899-902 (1963).

Beyond these basic policy considerations, it is necessary to consider all the elements of entrapment, especially as they are applied in North Carolina. In considering the definition of entrapment[43] it is important to distinguish this affirmative defense from those in which the consent of the victim negates an essential element of the offense. In such offenses, if the victim consents, there is no criminal act.[44] Entrapment, on the other hand, is a defense to a completed criminal act.[45]

Generally, entrapment is a question of fact for the jury to determine.[46] In North Carolina the accused has the burden of proof and must prove entrapment "to the satisfaction of the jury."[47] The court has reasoned that entrapment is an exception to criminal liability, and that the defendant should have the burden of bringing himself within the exception; however, not all jurisdictions place the burden of proof on the accused. The federal courts[48] as well as some state courts[49] require the prosecution to convince the trier of fact beyond a reasonable doubt that the accused was not entrapped. Since entrapment is no defense unless the trap is set by an agent of the government,[50] the North Carolina courts have required the defendant to produce substantial credible evidence that the person who set the trap was an agent if the state denies that the entrapper was in fact its agent. If a

43. For North Carolina's definition of entrapment see text accompanying note 21 *supra*. *See also* 288 N.C. at 28-29, 215 S.E.2d at 595.

44. *See, e.g.*, State v. Nelson, 232 N.C. 602, 61 S.E.2d 626 (1950); State v. Hughes, 208 N.C. 542, 181 S.E. 737 (1935); State v. Goffney, 157 N.C. 624, 73 S.E. 162 (1911).

45. *See* State v. Burnette, 242 N.C. 164, 87 S.E.2d 191 (1955). The defendant in *Burnette* was charged with assault with intent to commit rape. The accused actually raised two defenses—consent of the victim and entrapment. The judge instructed the jury on both defenses. *Id.* at 174-75, 87 S.E.2d at 197-99. Since the victim's consent and participation were crucial elements of both defenses, it has been noted that trial courts may experience considerable difficulty in separating the two defenses. Note, *Criminal Law—Entrapment in North Carolina*, 34 N.C.L. REV. 536, 544 (1956).

46. 288 N.C. at 32, 215 S.E.2d at 597, *quoting* State v. Campbell, 110 N.H. 238, 241, 265 A.2d 11, 14 (1970). It has been suggested that the issue be tried by the court in the absence of the jury. Jurisdictions that have followed the minority rule have been amenable to this latter view. *See, e.g.*, MODEL PENAL CODE § 2.13(2) (Proposed Official Draft 1962). *See also* text accompanying note 40 *supra*.

47. State v. Cook, 263 N.C. 730, 733, 140 S.E.2d 305, 308 (1965); State v. Bland, 19 N.C. App. 560, 199 S.E.2d 497 (1973). The Model Penal Code provides that the accused has the burden of proof and must prove the existence of entrapment "by a preponderance of the evidence." MODEL PENAL CODE § 2.13(2) (Proposed Official Draft 1962).

48. *E.g.*, Notaro v. United States, 363 F.2d 169 (9th Cir. 1966).

49. *See, e.g.*, Smith v. State, 258 Ind. 415, 281 N.E.2d 803 (1972).

50. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

defendant fails to supply such evidence, the issue of entrapment will not be submitted to the jury.[51]

It is necessary in North Carolina for the defendant to show that he "entertained no prior criminal intent."[52] This requirement is the part of the defense that has been criticized most often, both on policy grounds[53] and on the grounds that it is often unfair in its application. To convince the jury that he is a victim of entrapment, a criminal defendant must ordinarily admit while on the stand that he is indeed guilty of doing those criminal acts of which he is charged.[54] The fact that the defendant admits that he has committed the act puts an inference of guilt in the minds of the jury that would appear difficult to rebut with even the best evidence showing a lack of predisposition.[55]

The defendant with a prior criminal record is placed in an especially precarious position. Depending on local rules of evidence, once the defendant takes the stand to try to prove lack of predisposition, the prosecution may be able to introduce the defendant's prior criminal record along with other testimony that could provide the jury with rumors and suspicions of other conduct of the defendant. Besides the fact that it is often difficult or impossible to ascertain the truth or falsity of much of this evidence, the substantial prejudicial effects of such evidence create substantial danger that the jury will convict, not because of the acts in issue, but because of prior convictions.[56] These considerations mean that as a practical matter the government can go to greater lengths in trapping a person with a criminal record of related crimes than they can go in trapping a person with no criminal record.[57] Although convictions may come easier when the accused has a prior criminal record, the police conduct that entrapment seeks to prevent is as reprehensible when directed to a multiple offender as it is when

51. State v. Yost, 9 N.C. App. 671, 177 S.E.2d 320 (1970), *cert. denied*, Yost v. Ross, 181 S.E.2d 600 (1971).

52. 288 N.C. at 28, 215 S.E.2d at 595 (emphasis omitted); *see* text accompanying notes 36-38 *supra*.

53. *See* text accompanying notes 33-42 *supra*.

54. The North Carolina courts have held that the accused must admit to the criminal act in order to raise the entrapment issue, thus rejecting the possibility of inconsistent defenses. State v. Boles, 246 N.C. 83, 97 S.E.2d 476 (1957).

55. *See* United States v. Russell, 411 U.S. 423, 442 (1973) (Stewart, J., dissenting).

56. *See* Sherman v. United States, 356 U.S. 369, 382-83 (1958) (Frankfurter, J., concurring).

57. Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 898 (1963).

directed toward an ordinary law-abiding citizen.[58]

Although it is unlikely that *Stanley* reflects any substantial changes in the North Carolina law of entrapment, there are some significant points in the case that deserve noting. *Stanley* is the first case in which the North Carolina appellate courts have found entrapment as a matter of law. Additionally, entrapment was not an issue in the petition for certiorari; however, the supreme court raised the entrapment issue on its own volition.[59] These facts suggest the possibility that the North Carolina court is developing a more receptive attitude toward entrapment.

Though the North Carolina Supreme Court may be increasingly open to a broader view of entrapment, the extreme facts of *Stanley* make it difficult to perceive any real change in the North Carolina law. The court's reasoning focused on the total lack of evidence of any predisposition to commit the crime. The state's undercover officer established a "big brother" relationship with the defendant, and as the officer testified, the defendant had been unable to tell if certain substances he purchased were real drugs.[60] Beyond these facts, the court described the defendant as an "agent" of the law enforcement officer; therefore, the court ruled that the defendant should receive some sort of indirect benefit from the statute granting immunity to officers enforcing the drug laws.[61]

One of the most noteworthy aspects of the holding in *Stanley* relates to the value of prior convictions. The court held that "a conviction of possession of marijuana would not indicate a predisposition to commit the crime of [possession of LSD with intent to distribute]."[62] Within this context, the holding seems to go beyond an assessment of the probative weight of the marijuana conviction. The implication is that the marijuana conviction is irrelevant to the LSD conviction.[63] Therefore, the North Carolina court is apparently attempting to miti-

58. Sherman v. United States, 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring). "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society." *Id.* at 382-83.

59. 288 N.C. at 25-27, 215 S.E.2d at 593-94.

60. *Id.* at 22, 215 S.E.2d at 591.

61. *Id.* at 33, 215 S.E.2d at 598. *See* N.C. GEN. STAT. § 90-113.1(c) (1975).

62. 288 N.C. at 33, 215 S.E.2d at 598.

63. *Cf.* Sherman v. United States, 356 U.S. 369, 375-76 (1958), in which it was held that a nine year old conviction for sale of narcotics and a five year old conviction for possession of narcotics were "insufficient" to prove a present intent to sell narcotics.

gate the prejudicial effects of introducing evidence of a prior criminal record by strictly limiting such evidence to those crimes that bear the highest degree of relevance to the present charges.

With the exception of the points discussed above, *Stanley* is essentially a reaffirmation of prior North Carolina law with greater reliance on the federal definition of entrapment.[64] Except for extreme cases, the issue remains one for the jury to resolve. The court also announced in *Stanley* that it will continue to focus on the particular defendant's predisposition to participate in the criminal act. However, the North Carolina court has recognized that abuses inevitably occur when overzealous law enforcement officers set traps, particularly in search of violations of drug laws. In correcting these abuses, it is hoped that the court, recognizing the need for judicial intervention, will continue to search for the appropriate responses.

JOSEPH D. JOHNSON

Criminal Law—Diminished Responsibility, Long Ignored in North Carolina, Is Given a Hearing But Not Yet Adopted

North Carolina has never recognized the doctrine of "diminished responsibility," by which a mentally disordered defendant may be deemed incapable of the degree of mens rea required for conviction of the crime for which he is charged, even though his mental illness does not reach the level of insanity.[1] In three recent cases[2] the North Carolina Supreme Court has indicated that it remains unwilling to adopt

64. *See* 288 N.C. at 29-32, 215 S.E.2d at 595-97.

1. The doctrine herein referred to as "diminished responsibility" goes by several different names, including "diminished capacity," "partial insanity" and "partial responsibility." F. LINDMAN & D. MCINTYRE, THE MENTALLY DISABLED AND THE LAW 355 (1961); People v. Anderson, 63 Cal. 2d 351, 364, 406 P.2d 43, 52, 46 Cal. Rptr. 763, 772 (1965). In addition, the term "diminished reponsibility" is used to describe a quite different doctrine derived from civil and Scottish law whereby the defendant's punishment is reduced if he could not resist the criminal impulse. *Id.* Despite this confusion and the fact that the doctrine "contemplates full responsibility, not partial, but only for the crime actually committed," State v. Padilla, 66 N.M. 289, 292, 347 P.2d 312, 314 (1959), "diminished responsibility" is probably the most common term and is the one used by the North Carolina Supreme Court. *E.g.*, State v. Baldwin, 276 N.C. 690, 699, 174 S.E.2d 526, 532 (1970).

2. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Wetmore, 287 N.C. 344, 215 S.E.2d 51 (1975); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975).