Entrapment

"I ate the apple because the serpent beguiled me."
—Eve[1]

While most modern-day serpents have curtailed their beguilement activities, there is another form of enticement that continues to be viewed as problematic, at least by the courts: entrapment by law enforcement officers. There are two reasons for this.

First, it is distasteful for officers to entice people to break laws that the officers are sworn to enforce. As the California Supreme Court observed, it's the job of officers "to investigate, not instigate, crime."[2] That's also the sentiment of the U.S. Supreme Court which said, "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime."[3]

Second, entrapment is viewed as a poor "substitute for skillful and scientific investigation" and a tactic that is based on the misguided belief that the "employment of illegal means" can be justified when officers are dealing with "known criminals or the criminal classes."[4]

For these reasons, entrapment constitutes a complete defense to a crime. This means that if a jury finds that the defendant was entrapped, he goes free.[5] It doesn't matter that the crime was a major felony, or that the evidence against him was overwhelming, or even that his guilt was not disputed. If he was entrapped, he walks.[6]

Because these consequences are so severe, it is essential that officers understand how the courts determine whether a defendant was entrapped and, just as important, what investigative methods are—and are not—likely to constitute entrapment.

What is Entrapment?

In California, entrapment occurs if the following three circumstances existed: (1) an officer communicated with the defendant before he committed the crime with which he was charged, (2) the officer's communication included an inducement to commit the crime, and (3) the inducement was such that it would have motivated a "normally law-abiding person" to commit it.[7] Later we will discuss the kinds of inducements that may constitute entrapment. But first, the basics.

Basic principles

Because entrapment depends mainly on the probable affect of the officer's words on a basically honest person, the courts start by isolating the words at issue, after which they seek to determine whether they would have motivated a "normally law-abiding person" to commit the crime.

THE OFFICER'S WORDS: In determining whether a defendant was entrapped, California courts apply what they call an "objective" test. This essentially means that they are interested only in what the officer actually said to the defendant before he com-

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[1] See Genesis 3:13. **HISTORICAL NOTE**: This was the first reported assertion of the entrapment defense. It was not successful.
[2] *Patty* v. *Board of Medical Examiners* (1973) 9 Cal.3d 356, 364; *People* v. *McIntire* (1979) 23 Cal.3d 742, 748.
[3] *Sherman* v. *United States* (1958) 356 U.S. 369, 372. ALSO SEE *Olmstead* v. *United States* (1928) 277 U.S. 438, 484 (conc. opn. of Holmes, J.) ["I think it a less evil that some criminals should escape than that the government should play an ignoble part."].
[4] *People* v. *Barraza* (1979) 23 Cal.3d 675, 689.
[5] See CALCRIM 3408.
[6] **NOTE**: A court must give the jury an entrapment instruction if "there is substantial evidence supportive of a defense that is not inconsistent with the defendant's theory of the case." *People* v. *Barraza* (1979) 23 Cal.3d 675, 691. The court may not, however, dismiss charges on grounds of entrapment. See *People* v. *Harris* (1985) 165 Cal.App.3d 324, 332.
[7] See *People* v. *Watson* (2000) 22 Cal.4th 220, 223 ["Entrapment is established if the law enforcement conduct is likely to induce a normally law-abiding person to commit the offense."]; *People* v. *Barraza* (1979) 23 Cal.3d 675, 689-90 [the test is whether the conduct of the law enforcement agent was "likely to induce a normally law-abiding person to commit the offense"]; CALCRIM 3408 ["When deciding whether the defendant was entrapped, consider what a normally law-abiding person would have done in this situation."].

mitted the crime.[8] "What we do care about," said the California Supreme Court, "is how much and what manner of persuasion, pressure, and cajoling are brought to bear by law enforcement officials to induce persons to commit crimes."[9] Thus, entrapment cannot ordinarily occur in the absence of "something akin to excessive pressure, threats, or the exploitation of an unfair advantage."[10]

CONSIDER OFFICER'S WORDS IN CONTEXT: Although everything depends on what the officers said to the defendant before he committed the crime, the courts will consider their words in context (i.e., in light of the surrounding circumstances or earlier conversations) if it would add meaning to them. As the court explained in *People* v. *Smith*:

> [T]he conduct of the police does not occur in a vacuum, especially in a sting operation. The court's assessment of an officer's objective conduct will inevitably be colored by, for example, whether the defendant was from the start an enthusiastic proponent of the proposed crime or initially declined and was only gradually worn down.[11]

"NORMALLY LAW-ABIDING PERSON": Having determined what the officers said to the defendant, and the context in which it was said, the courts will consider whether a "normally law-abiding person" would have responded by committing the crime in question. Said the court in *People* v. *Barraza*, "[W]hile the inquiry must focus primarily on the conduct of the law enforcement agent, that conduct is not to be viewed in a vacuum; it should also be judged by the effect it would have on a normally law-abiding person situated in the circumstances of the case at hand."[12]

So, what do we know about this hypothetical person whose ethical principles must be overpowered to produce entrapment? Technically, he is a scoundrel. After all, while he disapproves of crime in the abstract, he is not averse to listening to and giving serious consideration to whatever criminal schemes are presented to him by total strangers. Moreover, it is hard to distinguish him from a run-of-the-mill crook because anybody who only "normally" obeys the law is, by definition, a person who commits crimes—albeit occasionally.

This is not, however, the type of person that the courts have in mind. To them, he is nothing more than an individual whose natural impulse is to say "no" if presented with a criminal proposal or opportunity. Said the California Supreme Court:

> [W]e presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully.[13]

But while he would *normally* resist, he could be persuaded if the inducement was sufficiently attractive. Thus, everything depends on how enticing the crime was made to appear. As the Alaska Supreme Court put it, "[T]he line between what is permitted and not must be drawn somewhat as a matter of degree."[14]

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[8] See *People* v. *Cappellia* (1989) 208 Cal.App.3d 1331, 1340 [the "focus of inquiry" is "the conduct of the law enforcement officer preceding the offense"]; *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1764-65 ["The California entrapment doctrine is known as an objective defense because it focuses exclusively on police conduct and ignores the suspect's subjective intent or any predisposition to commit the crime."]; CALCRIM 3408 ["Do not consider the defendant's particular intentions or character, or whether the defendant had a predisposition to commit the crime."].

[9] *People* v. *Barraza* (1979) 23 Cal.3d 675, 688. ALSO SEE *People* v. *McClellan* (1980) 107 Cal.App.3d 297, 302 ["Only undue pressure from law enforcement officials is proscribed."].

[10] *U.S.* v. *Shinderman* (1st Cir. 2008) 515 F.3d 5, 14.

[11] (2003) 31 Cal.4th 1207, 1218. ALSO SEE *People* v. *McClellan* (1980) 107 Cal.App.3d 297, 302 ["[T]he conduct of the law enforcement officials must be considered in light of the surrounding circumstances."]. **NOTE**: In *Barraza,* the court said that, in addition to considering the officers' conduct, courts may take into account "the gravity of the crime, and the difficulty of detecting instances of its commission." At p. 690. It is not, however, apparent why these two circumstances are relevant to the issue of whether the officers' pressured or the defendant?

[12] (1979) 23 Cal.3d 675, 690 ALSO SEE *People* v. *Smith* (2003) 31 Cal.4th 1207, 1218.

[13] *People* v. *Barraza* (1979) 23 Cal.3d 675, 690. ALSO SEE *People* v. *Grant* (1985) 165 Cal.App.3d 496, 500 ["This hypothetical is similar to the 'reasonable man' instructions which define a negligence standard in civil cases."].

[14] *Grossman* v. *State* (Alaska 1969) 457 P.2d 226, 230.

COMPARE FEDERAL ENTRAPMENT: To fully understand the significance of California's objective test, it will be helpful to consider the federal court's "subjective" test and the "deep schism" that exists between the two.[15] In the federal system, entrapment cannot occur if the defendant was predisposed to commit the crime. Thus, there is virtually nothing that officers can say or do that will result in entrapment if the defendant was already inclined to commit the crime.[16] As the court explained in *United States* v. *Padron*, "A successful entrapment defense requires two elements: (1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant."[17] So, because the people who commit crimes are ordinarily predisposed to commit them, it is difficult for defendants in federal courts to successfully raise an entrapment defense.[18]

In contrast, as noted earlier, a defendant's predisposition to commit the offense is irrelevant in California courts.[19]

Other issues

In addition to the basic principles, there are some other things about entrapment that should be noted.

GAINING THE DEFENDANT'S CONFIDENCE: One of the most common misconceptions among criminals is that entrapment automatically results whenever an undercover officer assures them that he is not an officer or if he took other reasonable steps to gain the suspect's confidence. But, as the California Supreme Court explained:

> There will be no entrapment when the official conduct is found to have gone no further than necessary to assure the suspect that he is not being "set up." The police remain free to take reasonable, though restrained, steps to gain the confidence of suspects.[20]

OFFICERS INITIATED THE CRIMINAL PLAN: Entrapment will not automatically result merely because officers initiated the contact with the defendant or because officers proposed the commission of a crime.[21] Again quoting the California Supreme Court, "[W]e are not concerned with who first conceived or who willingly, or reluctantly, acquiesced in a criminal project."[22] As a practical matter, however, entrapment seldom results when the defendant was the instigator because there would have been no reason for officers to entice him.[23]

NO VICARIOUS ENTRAPMENT: Entrapment is a defense only if the defendant was the person who was induced to commit the crime; i.e., the law does not recognize vicarious entrapment.[24]

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[15] *People* v. *Barraza* (1979) 23 Cal.3d 675, 686.

[16] See *United States* v. *Russell* (1973) 411 U.S. 423, 436; *Sherman* v. *United States* (1958) 356 U.S. 369, 372. **NOTE**: There is one exception to this rule. Known as "outrageous police conduct," it provides that a defendant who was predisposed will be entitled to an entrapment instruction if the officers' misconduct was "so shocking, outrageous and intolerable" as to constitute a violation of due process. See *U.S.* v. *Perrine* (10th Cir. 2008) 518 F.3d 1196, 1207; *U.S.* v. *Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1238.

[17] (11th Cir. 2008) 527 F.3d 1156, 1159.

[18] See *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1765 [California's entrapment standard "arguably provides defendants more protection from overreaching police conduct than the federal rule"].

[19] See *Douglass* v. *Board of Medical Quality Assurance* (1983) 141 Cal.App.3d 645, 655; *People* v. *Lee* (1990) 219 Cal.App.3d 829, 835 ["Under California law, "matters such as the character of the suspect, his predisposition to commit the offense, and his subjective intent are irrelevant."]; *People* v. *Peppars* (1983) 140 Cal.App.3d 677, 685-86 ["California has explicitly rejected the federal standard for entrapment; the stated purpose of the entrapment defense in this state is to assure lawfulness of law enforcement activity."]. **NOTE**: In *People* v. *Martinez* (1984) 157 Cal.App.3d 660 the court ruled that, because California's standard takes into account the mindset of a normally law-abiding person, it is the same or similar to the federal "subjective" test. But neither law nor logic supports this view. The "normally law-abiding person" test merely creates a standard of proof that the defendant must overcome. See *People* v. *Lee* (1990) 219 Cal.App.3d 829, 838 ["We agree with the weight of authority which has rejected this portion of *Martinez*."]; *People* v. *Slatton* (1985) 173 Cal.App.3d 487, 491-92 [rejects *Martinez* holding]; *People* v. *Arthurlee* (1985) 168 Cal.App.3d 246, 251 ["We do not follow the *Martinez* rationale"]; *People* v. *Grant* (1985) 165 Cal.App.3d 496, 500 [rejects *Martinez*].

[20] *People* v. *Barraza* (1979) 23 Cal.3d 675, 690, fn.4. ALSO SEE CALCRIM 3408 [no entrapment if the officer "merely tried to gain the defendant's confidence through reasonable and restrained steps"].

[21] See *U.S.* v. *Padron* (11th Cir. 2008) 527 F.3d 1156, 1159 ["The mere suggestion of a crime or initiation of contact is not enough."].

[22] *People* v. *Barraza* (1979) 23 Cal.3d 675, 688.

[23] See *People* v. *West* (1990) 224 Cal.App.3d 1337 [defendant approached undercover officer and asked, "You got anything?"].

[24] See *People* v. *Harris* (1985) 165 Cal.App.3d 324, 332 ["The law does not recognize a defense of vicarious entrapment."]; *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1767 [entrapment defense cannot be asserted "by defendants not themselves affected by the alleged police overreaching"].

ENTRAPMENT BY A POLICE AGENT: Entrapment may result from the actions of a police agent, as well as an officer.[25] As the court explained in *People* v. *McIntire*, "[M]anipulation of a third party by law enforcement officers to procure the commission of a criminal offense by another renders the third party a government agent for purposes of the entrapment defense."[26]

SENTENCE ENTRAPMENT: In the federal courts, "sentence entrapment" occurs if the defendant was predisposed to commit a certain crime, but was persuaded by officers to commit a crime with more prison time.[27] In such cases, the defendant cannot be given the harsher sentence. Sentence entrapment is not a recognized defense in California.[28]

Having covered the basics, we will now examine the five types of inducements that are commonly alleged to constitute entrapment: providing a criminal opportunity, making the crime appear unusually attractive, importuning, exploiting vulnerabilities, and appeals to friendship or sympathy.

Providing a criminal opportunity

Entrapment does not result if officers merely provided the defendant with an opportunity to commit a crime. In the words of the U.S. Supreme Court:

> It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offenses does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.[29]

Consequently, in the absence of pressure or importuning, officers may employ an undercover officer or police agent to pose as someone who is looking to commit a crime, such as a seller or buyer of drugs or stolen property, a prostitute, or a john.[30] For example, in *Provigo Corp*. v. *ABC Appeals Board* the court ruled that the use of underage decoys to attempt to buy alcoholic beverages in grocery stores did not constitute entrapment "so long as no pressure or overbearing conduct is employed by the decoy."[31]

Similarly, in *Douglass* v. *Board of Medical Quality Assurance*,[32] undercover agents posing as patients started visiting a physician, Douglass, because he was suspected of prescribing controlled drugs that were not medically indicated. Over time, Douglas prescribed Preludin, Seconal, Quaalude, Dexamyl, and Dexedrine to three "patients" who had merely complained of such maladies as backache, virus, and the need to "get going" in the morning. Once, he even prescribed Quaaludes to an agent because "she liked the way they made her feel." In rejecting the argument that the agents had entrapped Douglass, the court said, "Here, the agents' conduct simply provided Douglass the opportunity to engage in unprofessional conduct for the ordinary criminal motive of pecuniary gain. Douglass does not argue that agents badgered or cajoled him into providing the drugs and there is no evidence they did."

The same principle applies to "bait car" stings. For example, in *People* v. *Watson*[33] the defendant argued that a bait car operation constituted entrapment

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[25] See *Sherman* v. *United States* (1958) 356 U.S. 369, 373 ["The Government cannot disown [the informant] and insist that it is not responsible for his actions"]; *Bradley* v. *Duncan* (9th Cir. 2002) 315 F.3d 1091, 1096 [although the officers did not badger the defendant, "their decoy did"].

[26] (1979) 23 Cal.3d 742, 748.

[27] See *U.S.* v. *Knox* (7th Cir. 2009) 573 F.3d 441, 451 ["Sentencing entrapment occurs when a defendant who lacks a predisposition to engage in more serious crimes nevertheless does so as a result of unrelenting government persistence."].

[28] See *People* v. *Smith* (2003) 31 Cal.4th 1207.

[29] *Jacobson* v. *United States* (1992) 503 U.S. 540, 548. ALSO SEE *People* v. *Benford* (1959) 53 Cal.2d 1, 15 [the officers "simply gave defendant the opportunity to commit a crime, a legal, reasonable stratagem]; CALCRIM 3408 [entrapment does not result "[i]f an officer simply gave the defendant an opportunity to commit the crime"].

[30] See *U.S.* v. *Poehlman* (9th Cir. 2000) 217 F.3d 692, 701 ["Where government agents merely make themselves available to participate in a criminal transaction, such as standing ready to buy or sell illegal drugs, they do not induce commission of the crime."]; *Reyes* v. *Municipal Court* (1981) 117 Cal.App.3d 771, 778 [court rejects argument that a john was entrapped "because he was deceived by [the undercover agent's] looks and acts into thinking she was a prostitute"]; *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1764 ["The police merely posed as drug buyers and sellers in a notorious drug trafficking area."]; *People* v. *Shapiro* (1974) 37 Cal.App.3d 1038, 1043 [controlled delivery of drugs was not entrapment].

[31] (1994) 7 Cal.4th 561, 568.

[32] (1983) 141 Cal.App.3d 645.

[33] (2000) 22 Cal.4th 220.

because the officers made a big production of stopping the car and "arresting" the driver while a group of spectators watched, then leaving the car unattended with the keys in the ignition. But the court ruled this was not entrapment because "normally law-abiding persons do not take a car not belonging to them merely because it is unlocked with the keys in the ignition and it appears they will not get caught."

While a lack of pressure is a relevant circumstance in determining whether a sting constituted entrapment, so is the fact that undercover officers or agents had provided the defendant with an opportunity to withdraw. For example, in *People* v. *Reed*[34] the court ruled that a sting involving lewd conduct with a minor did not constitute entrapment because, among other things, "the officers gave defendant every opportunity to withdraw from the plan," and "reminded him of the risks involved in such an enterprise."

One other thing pertaining to stings: In *United States* v. *Russell* the Supreme Court ruled that an undercover officer did not entrap a manufacturer of methamphetamine merely because he provided him with a precursor. As the Court pointed out, an undercover officer who is trying to infiltrate a criminal enterprise "will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them."[35]

Making the crime appear attractive

An officer's act of making the crime appear rewarding or otherwise attractive will not result in entrapment because, as the First Circuit observed, undercover operations are often "designed to tempt the criminally inclined, and a well-constructed sting is often sculpted to test the limits of the target's criminal inclinations."[36] For example, in *People* v. *Holloway*[37] the defendant argued that an undercover Santa Monica police officer entrapped him in the course of a reverse sting when, after the defendant initiated contact, the officer sold him drugs at less than resale value. In rejecting the argument, the court pointed out that the officer sold the drugs "only after trying to negotiate a higher price, which [the defendant] insisted he could not meet."

Similarly, in *People* v. *Peppars*[38] an undercover Sonoma County sheriff's deputy contacted Peppars, apparently for the purpose of selling a stolen wedding ring. In the course of the conversation, Peppers asked the officer if he "knew of a warehouse to rip off." The officer dodged the question but, about a week later, he told Peppers that he could obtain the keys to a certain warehouse from a former employee who had made a set of duplicates. He added that the warehouse was "full of stereo equipment, TVs and video recorders," and that the burglary will "just be a matter of walkin' in, loadin' up and walkin' out. No break in, no alarms or nothing'." Peppars took the bait, committed the burglary, and was arrested two days later. In what appears to be a close case, the court ruled that the defendant was not entrapped mainly because "it was appellant who had suggested the idea in the first place. . . . There was no reluctance on appellant's part to commit the crime; he was willing from the beginning."

Entrapment will, however, result if officers provided an extraordinary incentive; e.g., they represented that commission of the act was not illegal, or that it would go undetected, or that it would result in an exorbitant payoff.[39] As the Ninth Circuit put it:

> [T]he government induces a crime when it creates a special incentive for the defendant to commit the crime. This incentive can consist of anything that materially alters the balance of risk and rewards bearing on defendant's decision whether to commit the offense, so as to increase the likelihood that he will engage in the particular criminal conduct.[40]

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[34] (1996) 53 Cal.App.4th 389.
[35] (1973) 411 U.S. 423.
[36] *U.S.* v. *Connell* (1st Cir. 1992) 960 F.2d 191, 196.
[37] (1996) 47 Cal.App.4th 1757.
[38] (1983) 140 Cal.App.3d 677. ALSO SEE *People* v. *Watson* (2000) 22 Cal.4th 220, 224 [officers "merely conveyed the idea detection was unlikely"].
[39] See *People* v. *Barraza* (1979) 23 Cal.3d 675, 690 ["[Entrapping] conduct would include a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement."].
[40] *U.S.* v. *Poehlman* (9th Cir. 2000) 217 F.3d 692, 698.

Importuning

Importuning will ordinarily result in entrapment because it is a form of pressure that results from persistent appeals, badgering, or harassment.[41] In the words of the California Supreme Court. "[I]t is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."[42]

For example, in *Jacobson* v. *United States*[43] government agents happened to find the defendant's name on a list of people who had purchased a magazine containing nude photographs of young boys. Suspecting that he might also be ordering child pornography through the mails, a postal inspector sent him a letter from a fictitious business asking if he would be interested in purchasing photos of "lusty and youthful lads" and "pre-teen sex." While Jacobson responded to a questionnaire, he did not order anything. According to the Court, "There followed over the next 2½ years repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the new [child pornography] law by ordering sexually explicit photographs of children through the mail." Eventually, Jacobson ordered a catalogue containing child pornography but the Supreme Court ruled that the agents' importuning amounted to impermissible inducement. "By the time petitioner finally placed his order," said the Court, "he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations."

Similarly, in *People* v. *McIntire*[44] an LAPD narcotics officer who was working undercover at a high school learned that the sister of a student named Todd was selling marijuana. There was testimony that, during a seven week period, the officer repeatedly asked Todd for marijuana, that he "always wanted dope," and that the officer "urged him to keep asking his sister to supply marijuana after she had indicated she didn't have any." Eventually, Todd's sister, McIntire, sold marijuana to the officer and was arrested. At her trial, the judge refused her request for an entrapment instruction, and she was convicted. But the California Supreme Court ruled that an entrapment instruction was warranted because there had been testimony that the defendant "acquiesced after constant urging by her younger brother because of sympathy aroused by family problems; and that the importuning from her brother was the direct result of strong and persistent pressure brought to bear by an undercover police agent."

While importuning will likely result in entrapment, officers may initiate contact with a suspect and make a request that would result in the commission of a crime or would probably do so. For example, in *People* v. *Smith*[45] the court ruled that the defendant was not entrapped when a police agent approached him with a plan for a home-invasion robbery. As the court observed, the defendant "expressed nothing but enthusiasm at the prospect of robbing a home where she was told 200 kilograms of cocaine would be found." Similarly, in *People* v. *McClellan* the defendant claimed that he had been entrapped when an undercover officer knocked on the door of his apartment and asked if he knew where he could get a "Sherm" (i.e., a cigarette dipped in PCP). In rejecting the defense, the trial judge told the defendant, "[N]ow here is a situation where the officer simply walks in. You don't know him from the man in the moon. He walks in and says he wants to buy a Sherm, and you just go and get him one."[46]

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[41] See *People* v. *Barraza* (1979) 23 Cal.3d 675, 690 [the law prohibits "overbearing conduct such as badgering, cajoling, importuning"]; *Provigo Corp.* v. *ABC Appeals Board* (1994) 7 Cal.4th 561, 569 ["[T]he rule is clear that ruses, stings, and decoys, are permissible stratagems in the enforcement of criminal law, and they become invalid only when badgering or importuning takes place to an extent and degree that is likely to induce an otherwise law-abiding person to commit a crime."].

[42] *People* v. *Barraza* (1979) 23 Cal.3d 675, 690.

[43] (1992) 503 U.S.540. ALSO SEE *Bradley* v. *Duncan* (9th Cir. 2002) 315 F.3d 1091 [agent was an addict going through withdrawal who begged the defendant to sell him drugs].

[44] (1979) 23 Cal.3d 742.

[45] (2003) 31 Cal.4th 1207, 1218.

[46] (1980) 107 Cal.App.3d 297.

Nor will entrapment result if officers ask a suspect to do something that, while not illegal per se, will likely result in the commission of a crime. For example, in *People* v. *Graves*[47] the defendant was operating a scam in which he would take orders from people on the street for "discount" airline tickets, which he would then purchase with stolen credit cards. In the course of the investigation, a Secret Service agent learned that one of the tickets was used by Reggie Cooks who told the agent that he bought the tickets from a man later identified as Graves. Under the agent's direction, Cooks phoned Graves and placed an order for two tickets to Hawaii.

A few days later, while still operating under the agent's direction, Cooks phoned Graves and told him that he and his girlfriend were "stuck in Hawaii," that they were not allowed to board their return flight because the airline claimed that the tickets were purchased with a stolen credit card. Cooks then told Graves, "Look, we can't get out of Hawaii, You have got to do something." Graves said he would "take care of it" and, a few hours later, he provided Cooks with two tickets on a return flight that Graves had purchased with a stolen American Express Card. Graves was subsequently convicted of, among other things, grand theft.

On appeal, the court rejected his argument that Cooks had entrapped him, citing two reasons. First, Cooks' request did not constitute "overbearing police conduct." Second, even though it was likely that Graves would charge the tickets on another stolen credit card, a "normally law-abiding person would not be induced by this telephone call to purchase more airline tickets with a stolen credit card in order to help the caller."

Similarly, in *Alcoholic Beverage Control* v. *ABC Appeals Board* the Court of Appeal ruled that an undercover ABC agent did not entrap a stripper at a club in San Diego merely because, in the course of a "couch dance," he asked if there would be "more skin involved," after which she showed him so much skin that her employer lost his liquor license. The agent's conduct, said the court, "was not of such a nature that it was likely to induce a normally law-abiding person to commit the offense."[48]

Exploiting vulnerabilities

The courts are especially apt to find entrapment if officers pressed a defendant who was physically or mentally vulnerable to their enticement. For example, in *People* v. *Barraza*[49] the California Supreme Court ruled that the defendant was entitled to a jury instruction on entrapment because there was evidence that he was a recovering heroin addict who sold heroin to an informant only because, (1) the informant telephoned him repeatedly at work; (2) the defendant agreed to meet with the informant because he was afraid that he would lose his job if the agent kept calling; and (3) during the meeting, which lasted more than an hour, the agent pressed him until he caved. Said the court, such conduct was consistent with the defense that the defendant "was a past offender trying desperately to reform himself but was prevented from doing so by an overzealous law enforcement agent who importuned him relentlessly until his resistance was worn down and overcome."

Similarly, in *U.S.* v. *Poehlman*[50] an undercover agent who was investigating child pornography began corresponding with Poehlman, apparently after finding his name on the membership list of an "alternative lifestyle" chat group. While Poehlman told her he was looking for companionship, the agent, "Sharon," suggested that she would be interested only if he agreed to become the "special teacher" to her two young daughters, eventually making it clear that this meant having sexual relations with them. As the court noted, she "repeatedly held her own relationship with Poehlman hostage to his fulfilling the role of special man teacher." Eventually, following lengthy correspondence along these lines, Poehlman arranged to meet with Sharon and her children at a motel. When he arrived, he was arrested, and was

[47] (2001) 93 Cal.App.4th 1171.
[48] (2002) 100 Cal.App.4th 1094.
[49] (1979) 23 Cal.3d 675. ALSO SEE *Patty* v. *Board of Medical Examiners* (1973) 9 Cal.3d 356, 369 ["the employment of young women to obtain illegal prescribed drugs from elderly male doctors is not a new tactic to agents of the Board"].
[50] (9th Cir. 2000) 217 F.3d 692.

subsequently charged with crossing state lines for the purpose of engaging in sex with a minor.

But the Ninth Circuit ruled that the agent's conduct constituted entrapment. Among other things, the court noted that Poehlman "continued to long for an adult relationship with Sharon," he "offered marriage," talked about "quitting his job and moving to California," and "even offered his military health insurance benefits." Meanwhile, Sharon was making it clear that none of these things would happen unless Poehlman agreed to her terms; e.g., "If this is ok to you [sic], please tell me so. If not, I wish you well and I'll continue my search." Said the court, "Through its aggressive intervention, the government materially affected the normal balance between risk and rewards from the commission of the crime, and thereby induced Poehlman to commit the offense."

Appeals to sympathy or friendship

Entrapment will also result if the officers motivated the defendant to commit the crime by means of a strong emotional appeal such as close friendship or sympathy.[51] For example, in *Bradley* v. *Duncan*[52] an undercover narcotics officer contacted an addict on the street and told him that he was looking to buy some cocaine. The addict, Flores, was going through withdrawal and was in bad shape. According to the officer, he was "pale and shaking," his head "kept moving back and forth," and he said he desperately needed cocaine.

Although Flores said he didn't have any cocaine to sell, he agreed to take the officer to a seller up the street. The seller, Bradley, testified that when Flores arrived he "smelled like vomit; he was 'tweaking and twitching'; and he was 'shaking like a junky.'" According to Bradley, Flores told him "I need a fix, I'm hurting," adding, "Please, please, big man, would you help me out?" Bradley testified that he told Flores that he did not sell drugs, but that he knew some people nearby who did. So he rode his bicycle "up the street where the drug dealers congregated" and returned with cocaine, which he delivered to Flores.

In ruling that Bradley was entitled to an entrapment instruction, the Ninth Circuit noted, among other things, "Flores appeal, 'Please, please, big man, would you help me out?'—despite Bradley's statements that he neither had drugs nor sold them—could certainly be found by a jury to constitute badgering or cajoling."

Similarly, in *Sherman* v. *United States*[53] the defendant and an informant were addicts who happened to meet at the office of the doctor who was treating them. The informant told the defendant that he was "not responding to treatment" and asked if he "knew a good source of narcotics." The defendant said no and, for some time thereafter, he "tried to avoid the issue." But the informant persisted, making "a number of repetitions of the request" and claiming he needed the drugs because he was "suffering." Eventually, the defendant sold drugs to the informant and, as a result the defendant was convicted. But the United States Supreme Court overturned the conviction, ruling that entrapment results when "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted."

In the absence of a close frienndship, however, entrapment is not apt to result merely because the defendant and the undercover officer were acquainted. For example, in *People* v. *Lee*[54] the defendant argued that she was entrapped because her decision to sell drugs to a police agent was motivated by feelings of friendship. But the court pointed out that, while the defendant and agent were friends, they were hardly close friends. Said the court, people have "best friends, dear friends, close' friends, [and] fair-weather friends." But here, said the court, "there was substantial evidence that Lee sold drugs to earn money, not out of friendship." POV

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[51] See *People* v. *Barraza* (1979) 23 Cal.3d 675, 690 [appeal to "friendship or sympathy" would result in entrapment]; *People* v. *Thoi* (1989) 213 Cal.App.3d 689, 694 ["It would be repugnant for government agents to spawn Medi-Cal fraud by playing upon the sympathies of Vietnamese doctors for persons suffering in their mother country."]; *U.S.* v. *Poehlman* (9th Cir. 2000) 217 F.3d 692, 698 ["[T]he government induces a crime when it creates a special incentive for the defendant to commit the crime."].

[52] (9th Cir. 2002) 315 F.3d 1091.

[53] (1958) 356 U.S. 369.

[54] (1990) 219 Cal.App.3d 829. ALSO SEE *U.S.* v. *Vincent* (10th Cir. 2010) __ F.3d __ [2010 WL 2902748] [not entrapment when CI merely asked defendant to sell him drugs so that he could resell them and make some money to prevent being evicted];