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ENTRAPMENT: INSTIGATION NOT INVESTIGATION

Contradictory considerations beset law enforcement officers in uncovering crime. The police have the duty of apprehending lawbreakers, and are subject to substantial pressure for convictions to demonstrate their vigilance.¹ They must take account, however, of basic human rights and liberties and of the fact that human nature is frail and requires no encouragement in wrongdoing.² Also involved are the chief aims of the criminal law — preventing socially harmful conduct and establishing basic standards of citizenship.³ The courts in reconciling these interests have sought to curtail overzealous law enforcement by creating the defense of entrapment for persons who, without prior criminal intent, are induced to commit a crime by the police or someone acting under their direction.⁴ The defense is meant to protect innocent persons from being drawn, through use of governmental power, into lapses they might otherwise resist, but not to prevent the apprehension of persons already embarked on a course of criminal conduct.⁵ The idea for this defense is that law officers should not create criminals merely to punish them;⁶ rather, that their first duty is to prevent crime.⁷ Law enforcement agencies should not be the ruin of citizens, but rather their safeguard and protection.⁸ Thus, the defense of entrapment absolves a defendant of criminal liability when he has been persuaded to commit a crime, which he would otherwise not have committed, by law officers or those acting under their direction.

The defense was suggested as early as 1878⁹ and mentioned

1. Note, 11 HASTINGS L.J. 88 (1959).

2. *Love v. People*, 160 Ill. 501, 508, 43 N.E. 710, 713 (1896): "Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished."; *Saunders v. People*, 38 Mich. 218 (1878); See Williams, *Entrapment — A Legal Limitation on Police Techniques*, 48 J. CRIM. L., C.&P.S. 343 (1957).

3. See Model Penal Code § 2.10 (Tent. Draft No. 9, 1959).

4. See *Sorrells v. United States*, 287 U.S. 435 (1932); *State v. Turner*, 241 La. 94, 127 So.2d 512 (1961); Comment, 64 W. VA. L. REV. 223 (1963); and note 45 *infra*.

5. *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933).

6. *State v. Turner*, 241 La. 94, 99, 127 So.2d 512, 514 (1961).

7. *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921).

8. *United States v. Echols*, 253 Fed. 862 (S.D. Tex. 1918).

9. See *United States v. Whittier*, 28 Fed. Cas. 591 (E.D. Mo. 1878) (decoy letters held to be proper. In quoting from Comment, 10 VAND. L. REV. 608 (1957), *Commissioners v. Backus*, 29 How. Pr. 33 (N.Y. 1964), the court said that the earliest plea of entrapment was overruled by the Great Lawgiver after hearing the plea of Eve in Paradise: "The serpent beguiled me and I did eat." GENESIS 3:13. For a historical survey of the defense see Note, 26 TENN. L. REV. 554 (1959).

by the United States Supreme Court in 1895.¹⁰ The first application in a federal court was *Woo Wai v. United States* in 1915,¹¹ but the Supreme Court did not apply the defense until 1932 in *Sorrells v. United States*.¹² Today, the doctrine is generally recognized,¹³ and the entrapped person will not be held criminally responsible,¹⁴ but the courts have never fully agreed on the basis for this defense despite wide use of the doctrine.

JUSTIFICATION FOR THE DOCTRINE

Conflicts in the decisions and inconsistencies in reasoning have created uncertainty about entrapment. Estoppel,¹⁵ public policy,¹⁶ want of voluntary criminality,¹⁷ statutory interpretation,¹⁸ and due process¹⁹ have been considered, at various times, as the basis of the doctrine. Deciding the correct basis is important to clarity of analysis²⁰ and to a determination whether the defense is of a permanent character.²¹ If the doctrine is a judicial creation or is founded on legislative policy, it can be abrogated much more easily than if it is a constitutional requirement.

In *Sorrells v. United States* the Supreme Court rejected the estoppel basis²² but was divided on whether the proper basis was

10. See *Grimm v. United States*, 156 U.S. 604 (1895).

11. 223 Fed. 412 (6th Cir. 1916).

12. 287 U.S. 435 (1932).

13. All but two jurisdictions agree that the defense is available to one who commits a crime where the intent originated with a state official. See Annot., 33 A.L.R.2d 884 (1952). The defense is not recognized in Tennessee, see *Goins v. State*, 192 Tenn. 32, 237 S.W.2d 8 (1958), not in New York, *People v. Schacher*, 181 Misc. 769, 46 N.Y.S.2d 471 (1944). See also Comment, 10 VAND. L. REV. 608 (1957).

14. See *Sorrells v. United States*, 287 U.S. 435 (1932); *State v. Rainey*, 184 La. 547, 166 So. 670 (1936).

15. See *United States v. Healy*, 202 Fed. 349 (D. Mont. 1913); *United States v. Lynch*, 256 Fed. 983 (S.D.N.Y. 1918).

16. See *United States v. Washington*, 20 F.2d 160 (D. Neb. 1927); *Billingsley v. United States*, 274 Fed. 86 (6th Cir. 1921); *United States v. Echols*, 253 Fed. 862 (S.D. Tex. 1918); *Woo Wai v. United States*, 223 Fed. 412 (9th Cir. 1915); *Peters v. Brown*, 55 So. 2d 334 (Ala. 1951).

17. See *Voves v. United States*, 249 Fed. 191 (7th Cir. 1918). This theory was not used again because the court realized that a person committing a criminal act did intend to act, and to maintain that he did not was pure fiction.

18. See *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

19. See *Cox v. Louisiana*, 379 U.S. 559, 571 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959); *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957).

20. See *Sherman v. United States*, 356 U.S. 369, 380 (1958).

21. See Comment, 49 J. CRIM. L., C. & P.S. 447 (1959).

22. 287 U.S. 435 (1932). The Supreme Court felt that to apply the estoppel basis would be to encroach on the pardon powers of the executive and substitute

statutory interpretation or public policy. The majority favored legislative intent, reasoning that the legislature intended that a criminal statute should apply only to offenders acting on their own volition.²³ This analysis was followed in *Sherman v. United States*,²⁴ although the Court was again divided on the basis for the defense. The weakness of this approach is that Congress might enact a statute abolishing entrapment as a defense, and thus bring an abrupt end to the doctrine.

The concurring Justices in *Sorrells*²⁵ and *Sherman*²⁶ felt that public policy demanded that courts refuse to allow the law enforcement officer to create criminals out of otherwise law-abiding citizens. Public policy does not provide a consistent or predictable basis for dealing with entrapment, since courts often differ as to what public policy demands, and in various situations there may be only a hazy distinction between proper investigation, which the public encourages, and violations of accepted police practices.²⁷ The public policy basis has received support in some state decisions,²⁸ including several in Louisiana.²⁹

Due process was rejected as a basis for the defense in *United States ex rel. Hall v. Illinois*,³⁰ where the court reasoned that entrapment did not constitute an unlawful seizure, more properly termed an unlawful arrest, within the fourth amendment. Consequently, the court found no analogy between entrapment and exclusionary rules concerning prohibited search and seizure. Other decisions, however, have based the defense of entrapment on the due process clause of the fifth and fourteenth amendments.³¹ Courts have often spoken of entrapment as intolerable

the courts as administrative controllers of the law enforcement activities of the executive branch. See Note, 65 W. VA. L. REV. 223 (1963).

23. 287 U.S. 435, 448 (1932): "[I]t was not the intent of Congress . . . that its . . . enforcement should be abused by the instigation of government officials of an act on the part of persons otherwise innocent in order to lure them into its [criminal act] commission." See also Comment, 49 J. CRIM. L., C. & P.S. 447, 448 (1959).

24. 356 U.S. 369 (1958).

25. Justices Roberts, Brandeis, and Stone.

26. Justices Frankfurter, Harlan, Douglas, and Brennan.

27. See Comment, 49 J. CRIM. L., C. & P.S. 447, 488 (1959).

28. See Comment, 10 VAND. L. REV. 608 (1957).

29. See *State v. Turner*, 241 La. 94, 127 So.2d 512 (1961); *State v. Rainey*, 184 La. 547, 166 So. 670 (1936); *State v. Abraham*, 158 La. 1021, 105 So. 50 (1925).

30. 329 F.2d 354 (7th Cir. 1964).

31. See *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921). See also Comment, 49 J. CRIM. L., C. & P.S. 447 (1959); note 19 *supra*.

and unconscionable, implying that it is against the fundamental concept of fairness which lies at the heart of due process.³² The United States Supreme Court reversed a conviction in the case of *Cox v. Louisiana*,³³ in part on the basis of entrapment, stating that "to sustain appellant's later conviction . . . would be to sanction an *indefensible sort of entrapment* . . . [T]he Due Process Clause does not permit convictions obtained under such circumstances."³⁴ (Emphasis added.) It is not to be doubted that, in theory, the due process clause is a proper foundation for entrapment; however, it would be preferable if there were a more definite statement from the Court. A persuasive argument for basing entrapment on the due process clause is the analogy to coerced confessions because both induce a person to supply evidence of his own guilt.³⁵ The due process approach would raise important procedural considerations. If due process were the basis for the defense, entrapment might be a question of law for the court, rather than a question of fact for the jury.³⁶ The American Law Institute's Model Penal Code provides in section 2.13³⁷ that the issue is one for the court's determination. Further, if the defense is based on due process this would compel a uniform application of the doctrine by the states.

32. See *Hoag v. New Jersey*, 356 U.S. 464, 467 (1958); *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

33. The writer of Note, 40 TUL. L. REV. 185 (1966) takes the position that the case was decided on the wrong basis, and that due process should not have been a consideration. This Comment takes an opposite position; however, it would have been preferable had the Court made its decision more definite.

34. *Id.* at 571. See also *Raley v. Ohio*, 360 U.S. 423 (1959).

35. See *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957). See also HALL & KAMISAR, MODERN CRIMINAL PROCEDURE (1965); Note, 1964 U. ILL. L.F. 821, 824.

36. Under the present decisions the question of whether entrapment has been established is a jury question. *Sorrells v. United States*, 287 U.S. 435 (1932).

37. MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962) states: "(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 either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (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. (2) Except as provided in subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves that his conduct occurred in response to an entrapment. (The issue of entrapment shall be tried by the court in the absence of the jury.) (3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment."

Theory apart, the defense itself is still nebulous,³⁸ and it is not simple to determine whether in a particular case the officer is to be commended for protecting society or to be censured for entrapping an individual.³⁹ The line can best be determined by examining such standards as have been established.

WHAT CONSTITUTES ENTRAPMENT

Activities that constitute entrapment differ with the circumstances of each case.⁴⁰ The jurisprudence has indicated that since the purpose of the defense is to prevent governmental creation of criminals, a line must be drawn between the trap for the unwary innocent and the trap for the unwary predisposed criminal.⁴¹ In order to draw the line, the United States Supreme Court, in *Sorrells v. United States*,⁴² established two related guideposts: (1) whether the alleged entrapper⁴³ has placed the intent to commit the crime in the mind of the offender or has merely offered him an opportunity, and (2) whether from his prior actions the offender was predisposed to commit the crime. In some cases courts emphasize the former test; and in others

38. *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933).

39. See Note, 11 HASTINGS L.J. 88 (1959). One court has gone so far as to punish the officer involved. See *Rex v. Commissioner of Metropolitan Police*, reported in HERBERT, UNCOMMON LAW 81 (1952), where the court said: "It is urged . . . that these officers have broken the law for the law's good, but this is as much as to say that the police may break a man's head if he complains of a headache . . . [I]t cannot be too clearly understood that the police are not entitled to break the law." It does not seem likely as a practical matter, however, that the district attorney will prosecute a policeman for the crime which he has enticed another to commit, and this is the apparent reason for the absence of cases on this point.

40. See Comment, 26 TENN. L. REV. 554 (1959).

41. See *Sherman v. United States*, 356 U.S. 369 (1958).

42. 287 U.S. 435 (1932). See also Comment, 16 WASH. & LEE L. REV. 72 (1959).

43. The question of who may entrap has rarely been a vital issue before the court because in the usual case the person involved is an officer or a person acting under an officer's control. See *Louisiana v. Jordan*, 379 U.S. 945 (1964) (deputy called woman to make an engagement in order to arrest her for prostitution); *Sherman v. United States*, 356 U.S. 369 (1958) (decoy employed by federal agents to obtain heroin from known addict); *Sorrells v. United States*, 287 U.S. 435 (1932) (federal agent appealed to a friend to sell him liquor); *United States v. Masciale*, 236 F.2d 601 (1956) (government agents hired a man to introduce them to accused); *State v. Abraham*, 158 La. 1021, 105 So. 50 (1925) (deputies furnished money to convicts and sent them to purchase liquor). See also Comment, 10 VAND. L. REV. 608 n.15 (1957); 55 A.L.R.2d 1322 (1957). If the person is not acting under the color of official authority the defense is not applicable. See *Knotts v. United States*, 163 F.2d 984 (5th Cir. 1947); *Polski v. United States*, 33 F.2d 686 (8th Cir. 1929). See also MILLER, CRIMINAL LAW § 60 (1934). In the latter situation, however, one of the elements of the crime might not be present. See *Brock v. State*, 39 So. 580 (Ala. 1905); 18 A.L.R. 146, 148 (1922).

both questions are considered in determining whether the defense is applicable.⁴⁴ These guides are to be applied from the standpoint of the offender, and not, as the concurring Justices in *Sorrells* advocated, from the standpoint of the police to determine whether their actions fell below the proper use of governmental power.⁴⁵

There is a distinction between inducing a person to commit an unlawful act for the purpose of prosecuting him, and setting a trap to catch a person in the execution of a crime of his own conception.⁴⁶ In the final analysis the question is whether the intent to commit the crime was furnished by the officer, or whether the officer simply accommodated the accused.⁴⁷ In *Louisiana v. Turner*,⁴⁸ a correctional officer at the penitentiary learned of a plan to smuggle contraband to the inmates and pretended to cooperate. The Supreme Court of Louisiana refused to sustain a defense of entrapment and recognized the well-settled rule that a defendant cannot rely on the fact that an opportunity was intentionally given him to commit a crime which had originated in his own mind.⁴⁹ The Supreme Courts of the United States and of Louisiana have also held that it is legitimate to adopt devices and traps to detect crimes, provided it is not a temptation to ensnare an otherwise law-abiding citizen without prior criminal intent⁵⁰ into committing an offense. If the police learn that an offense is to be committed at a certain place, they may wait until the act has been committed before making an arrest.⁵¹ The use of decoys does not necessarily indi-

44. See Note, 73 HARV. L. REV. 1333 (1960). Although *Sorrells* was a federal decision, state courts have adopted these tests and apply them in most cases. See *State v. Abraham*, 158 La. 1021, 105 So. 50 (1925).

45. Justices Roberts, Brandeis, and Stone. This is also the position that Justice Frankfurter advocated in his concurring opinion in *Sherman v. United States*, 356 U.S. 369 (1958). See also Note, 73 HARV. L. REV. 1333 (1960).

46. See *State v. Turner*, 214 La. 94, 127 So. 2d 512 (1961); *State v. Abraham*, 158 La. 1021, 105 So. 50 (1925).

47. See Williams, *Entrapment: A Legal Limitation on Police Techniques*, 48 J. CRIM. L., C. & P.S. 343, 345 (1957).

48. 214 La. 94, 127 So. 2d 512 (1961).

49. See, e.g., *Kivette v. United States*, 230 F.2d 749 (5th Cir. 1956); *Knotts v. United States*, 163 F.2d 984 (5th Cir. 1947); *United States v. Washington*, 20 F.2d 160 (D. Neb. 1927).

50. Justice Roberts, concurring in *Sorrells v. United States*, 287 U.S. 435, 453 (1932), said: "Society is at war with criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention may use traps, decoys, and deception to obtain evidence of the commission of crime." See *State v. Rainey*, 184 La. 547, 166 So. 670 (1936); *State v. Doudoussat*, 47 La. Ann. 977, 17 So. 685 (1895).

51. See *Dalton v. State*, 113 Ga. 1037, 39 S.E. 468 (1901); *State v. Currie*, 13 N.D. 655, 102 N.W. 875 (1905).

cate that the officers induced an accused to do what he would not have done in the absence of such action.⁵² There is conflict of authority on the propriety of hiring informers to give an accused an opportunity to commit a crime. In *Williamson v. United States*⁵³ the Fifth Circuit Court of Appeals indicated that without some justification a conviction cannot be sustained when an informer is paid on a contingent basis to produce evidence against an individual; but the court did not indicate what justification was sufficient. However, it is well settled that informers may be hired for a set amount.⁵⁴ The courts seem to feel that an informer will not manufacture evidence when a definite sum is paid.

Generally officers may use deception to obtain evidence to support a conviction;⁵⁵ however, decisions indicate that if the deception is grossly unfair the defense of entrapment will be recognized.⁵⁶ The most frequent application of the defense is in cases like *Sherman v. United States*,⁵⁷ characterized by repeated requests by the entrapping officer. Courts seem to feel that a person's resistance can be greatly reduced by persistent urging to commit an offense. Appeals to sympathy, as for loss of one's job if drugs could not be procured⁵⁸ or for narcotics to ease the suffering of an employer's son,⁵⁹ appeals to friendship, by discussing war experiences,⁶⁰ and appeals to compassion⁶¹ have also supported the defense.

52. See *United States v. Pappagoda*, 288 Fed. 214 (D. Conn. 1923). *But see United States v. Healy*, 202 Fed. 349 (D. Mont. 1913).

53. 311 F.2d 441 (5th Cir. 1962); *accord*, *Hill v. United States*, 328 F.2d 988 (5th Cir. 1964).

54. See *Reyff v. United States*, 2 F.2d 39 (9th Cir. 1924); *State v. Calanti*, 142 Me. 50, 46 A.2d 412 (1946). See also *Annot.*, 55 A.L.R.2d 1322 (1957).

55. In *United States v. Amo*, 261 Fed. 106 (D. Wis. 1919), Indians were hired to purchase liquor in contravention of a federal statute and the court said that deception of this sort is not unreasonable. See *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933), where postal inspectors prepared supposititious customer orders in order to obtain evidence of mailing obscene matter.

56. In contrast to the cases in note 55 *supra*, a federal court in *United States v. Healy*, 202 Fed. 349 (D. Mont. 1913), held that sending two Indians, who looked like Caucasians, to purchase liquor was an unreasonable deception. In the final analysis, the question is one of degree only. See note 80 *infra*.

57. 365 U.S. 369 (1958); see *Cermak v. United States*, 4 F.2d 99 (6th Cir. 1925). An example of this attitude is the court's statement in *Woo Wai v. United States*, 223 Fed. 412, 414 (9th Cir. 1915): "The scheme . . . [was] assiduously and persistently urged upon him." Therefore, the number of requests seems to be a significant factor in the courts' consideration.

58. See *Cline v. United States*, 20 F.2d 494 (8th Cir. 1927).

59. See *People v. Toler*, 26 Ill. 2d 100, 185 N.E.2d 874 (1962). See *Annot.*, 33 A.L.R.2d 884 (1952).

60. See *Sorrells v. United States*, 287 U.S. 435 (1932); *United States v. Washington*, 20 F.2d 160 (D. Neb. 1927).

61. See *United States v. Washington*, 20 F.2d 160 (D. Neb. 1927).

The second consideration used in entrapment cases is whether, from prior actions, it appears the accused was predisposed to commit the offense.⁶² The predisposition of the accused is of paramount importance in determining whether there was an inducement to commit the crime or whether the officer merely furnished an opportunity to the accused.⁶³ The courts have uniformly held that the degree of inducement can be greater when it appears that the accused has previously engaged in criminal activity.⁶⁴ Thus, once the defense of entrapment has been raised, it is proper to inquire into the reputation of the accused to determine his predisposition to commit the offense so as to adjudge the reasonableness of the officer's conduct.⁶⁵ Evidence of the officer's knowledge of the reputation of the accused and his prior conduct is considered relevant.⁶⁶ This evidence is not considered by the court as an attack upon character, but is specifically admitted on the question of entrapment, and its relevance is confined to whether the officer's conduct was an inducement or merely an opportunity for one already predisposed.⁶⁷ The admission of this evidence has been held improper where (1) it is extremely prejudicial and the defendant with a prior criminal record is faced with a substantial sentence,⁶⁸ and (2) the issue should be the standard of the officer's conduct and not the disposition of the accused.⁶⁹

62. *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

63. See *State v. Turner & Sheeler*, 241 La. 94, 127 So.2d 512 (1961).

64. See *Trice v. United States*, 211 F.2d 513 (9th Cir. 1954); *Henry v. United States*, 215 F.2d 639 (9th Cir. 1954). Illustrative of this is Judge Hand's statement in *United States v. Becker*, 62 F.2d 1007, 1008 (2d Cir. 1932), that the agent's conduct is excused when there has been an "existing course of similar conduct . . . [or the accused] already formed design to commit the crime or similar crimes."

65. See *Washington v. United States*, 275 F.2d 687 (1960).

66. See *Sorrells v. United States*, 287 U.S. 435, 451 (1932); *Billingsley v. United States*, 274 Fed. 86 (6th Cir. 1921); *State v. Turner & Wheeler*, 241 La. 94, 127 So.2d 512 (1961); 22 C.J.S., *Criminal Law* § 45(2); Comment, 49 J. CRIM. L., C. & P.S. 447, 450 (1959).

67. See *State v. Turner & Wheeler*, 241 La. 94, 127 So.2d 512 (1961); MCCORMICK, EVIDENCE § 158 (1954). This view is criticized in Comment, 49 CRIM. L., C. & P.S. 447, 450 (1959).

68. In *United States v. Washington*, 20 F.2d 160, 162 (D. Neb. 1927), the court recognized this possibility and said: "A hated and suspected man must stand before the court like any other . . . [N]either suspicion nor honest belief that the defendant committed other offenses at other times has any place in the inquiry." The writer of Comment, 49 J. CRIM. L., C. & P.S. 447 (1959) recognizes that this type of evidence might also be beneficial to the defendant if his past is void of prior criminal activity. The court in *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921) recognized this and sustained a defense of entrapment because of the lack of prior criminal conduct.

69. 287 U.S. 435, 459 (1932). See note 44 *supra*.

Basically, entrapment is a relationship between the offender's disposition and the officer's inducement sufficient to allow the jury or the court to find that the act is that of the officer.

THE DEFENSE OF ENTRAPMENT APPLIED TO PARTICULAR OFFENSES

There seems to be a marked difference in the application of entrapment to regulatory statutes, such as narcotics and liquor laws, and to the traditional common-law crimes, such as robbery and murder. Regulatory statutes are designed to condemn behavior of the individual directed, not against other individuals, but against public order. The violation of a regulatory statute is frequently part of a pattern of anti-social behavior, and it is often necessary for law enforcement officers to rely on their own diligence to bring the offender to justice. In traditional common-law crimes, extrinsic evidence is often readily available as to the commission of the offense. Also, the seriousness of the crime militates against allowing an offender to escape punishment because of police tactics; consequently, the defense is limited to regulatory defenses and is not available in the traditional common-law crimes.⁷⁰

The bulk of the cases in which entrapment has been urged involve liquor violations and narcotics offenses.⁷¹ In order to prevent entrapment, officers who buy illegal liquor must have a reasonable suspicion that the accused is engaged in, or is about to engage in, illegal sales, and the initiative must have originated with the accused.⁷² This reasonable suspicion does not require probable cause;⁷³ and accordingly, the previous record of the accused and his probable predisposition, are only factors tending to support or negate the defense. In *Louisiana v. Abraham*,⁷⁴ deputies released convicts to purchase "pear extract"

70. See Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 874 (1963); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 YALE L.J. 1091, 1093 (1951).

71. In a 1927 case, *Washington v. United States*, 20 F.2d 160 (D. Neb. 1927), the court estimated that 30,000 of 44,000 liquor prosecutions involved sales to government agents. However, it must be remembered that these statistics were compiled during prohibition. Today narcotic violations furnish the most frequent application of the defense. See *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Marciale*, 236 F.2d 601 (2d Cir. 1956).

72. See *United States v. Certain Quantities of Intoxicating Liquor*, 290 Fed. 824 (D. N.H. 1923).

73. See Comments, 26 LA. L. REV. 802 (1966).

74. 158 La. 1021, 105 So. 50 (1925).

which they believed contained a prohibited amount of alcohol. The Louisiana Supreme Court recognized the well-settled rule that it is not a defense that the purchase was made by a detective or a person acting under his direction, if there are reasonable grounds to believe the accused was already engaged in illegally selling liquor.⁷⁵ The pivotal question is whether the accused is ready and waiting for an opportunity to make a sale.⁷⁶ A question of possible deception of an innocent seller is presented when an agent procures a minor to purchase liquor. In these cases the courts stress the appearance of the minor and whether the accused was willing to sell to a minor.⁷⁷

The general rules of entrapment apply to prosecutions for the unlawful sale⁷⁸ or possession of narcotics⁷⁹ and because of the nature and seriousness of the offense, police are forced to use unconventional means of apprehension. As a result, entrapment is often sustained in narcotics cases. The use of deception, such as having an officer pose as an addict,⁸⁰ or traps, such as giving the offender an opportunity to sell,⁸¹ does not

75. See *Badon v. United States*, 269 F.2d 75 (5th Cir. 1959) (seaman hired by agents to sell obviously contraband liquor to tavern owner); *United States v. Washington*, 20 F.2d 160 (D. Neb. 1927) (agent purchased illegal liquor); *United States v. Amo*, 261 Fed. 106 (D. Wis. 1919) (full-blooded Indians employed to purchase liquor). *But see Sorrells v. United States*, 287 U.S. 435 (1932) (prohibition agent induced accused to purchase liquor by appealing to friendship); *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962) (government agents hired informer on contingent basis to persuade accused to sell liquor in an illegal manner); *Henderson v. United States*, 237 F.2d 169 (5th Cir. 1956) (state officers induced accused to operate an illegal still in order to prosecute in federal court).

76. See 22 C.J.S., *Criminal Law* § 45(2).

77. The reason for the uncertainty seems to stem from the possible applications of federal cases by analogy. In *United States v. Healy*, 202 Fed. 349 (D. Mont. 1913), an Indian, who looked Caucasian, was hired to purchase liquor by government agents. The defense of entrapment was sustained on the grounds that such deception was an abuse of government power. In *United States v. Amo*, 261 Fed. 106 (D. Wis. 1919), two full-blooded Indians were hired to purchase liquor and the defense was rejected on the grounds that from the circumstances the accused must have known he was selling liquor to an Indian. The Supreme Court of Louisiana rejected the defense in *State v. Emerson*, 233 La. 885, 98 So. 2d 225 (1957), when minors hired by state agents purchased beer. In *Emerson* the minors obviously gave the appearance of being under the required age and were served upon request. A similar Montana case, *State v. Parr*, 129 Mont. 175, 283 P.2d 1086 (1955), refused to sustain the defense because the minor who was sent to purchase the liquor clearly appeared to be over twenty-one. An additional factor brought out in the *Parr* case is that it was against public policy to have wards of the state purchase liquor. This point has never arisen in Louisiana; however, it seems there could be a strong argument formed on this point.

78. See *Accardi v. United States*, 257 F.2d 168 (5th Cir. 1958).

79. See *State v. Rainey*, 184 La. 547, 166 So. 670 (1936).

80. See *Masciale v. United States*, 356 U.S. 386 (1958).

81. See *People v. Toler*, 26 Ill. 2d 100, 185 N.E.2d 874 (1962).

constitute entrapment where there is reasonable suspicion that the law is being violated by the defendant.⁸² If an officer uses no more persuasion than is necessary to effect an ordinary sale and the accused is willing to make the sale, there is no entrapment.⁸³ If, however, the officer makes repeated requests or appeals to the accused, and the latter is an otherwise law-abiding citizen, the courts will not allow the law-enforcement officer to create a criminal.⁸⁴

The defense of entrapment is also available in prostitution cases; however, *Louisiana v. Jordan*⁸⁵ applied the well-established rule that if the officer merely asks a known prostitute for a "date" the defense is not available. The tests formulated in *Sorrells v. United States*⁸⁶ as to origin of the intent and the prior record of the accused, have been adopted in the *Model Penal Code*,⁸⁷ and have been applied in cases involving gambling,⁸⁸ transportation of aliens,⁸⁹ medical licensing,⁹⁰ and mailing obscene matter.⁹¹ It seems that the defense would also apply to numerous other regulatory offenses.

CONCLUSION

Law enforcement officers should be allowed ample latitude in methods of investigation, but the protection of the individual citizen should remain the primary consideration. The defense of entrapment, which excuses one who is lured, enticed, or

82. See 22 C.J.S., *Criminal Law* § 45(4).

83. See *United States v. Pappagoda*, 288 Fed. 214 (D. Conn. 1923) (officers hired a beggar to purchase narcotics and he did without urging defendant to sell).

84. See *Sherman v. United States*, 356 U.S. 369 (1958) (agent induced accused, a drug addict, to purchase heroin); *United States v. Marciale*, 236 F.2d 601 (2d Cir. 1956) (agent persisted for seven months); *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921) (agent told accused that if he purchased he would be given immunity).

85. 379 U.S. 945 (1964). See also *Bolick v. State*, 165 Tex. Crim. App. 534, 309 S.W. 74 (1958) (officer expressed interest in a particular girl, whereupon accused procured her); *State v. Poague*, 245 Minn. 438, 72 N.W.2d 620 (1955) (officer procured girl through "escort" bureau).

86. See text accompanying note 44 *supra*.

87. See note 37 *supra*.

88. See *State v. Marquardt*, 139 Conn. 1, 89 A.2d 219 (1952) (officer gave bellboy money to bet on horse); *Commonwealth v. Conway*, 173 A.2d 777 (Pa. 1961) (cab driver let agent place bets with him). See Annot., 31 A.L.R.2d 1206 (1953).

89. *Soo Woo Wai v. United States*, 223 Fed. 412 (9th Cir. 1915).

90. See *Aitchison v. United States*, 98 A.2d 791 (D.C. Munie. Ct. 1953); *Peters v. Brown*, 55 So. 2d 334 (Fla. 1951).

91. See *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933).

tricked into committing a crime he would not otherwise have committed, safeguards the weak. The courts have recognized that the primary function of the law enforcement officer is to prevent crimes, not to instigate them, though it may sometimes be difficult to distinguish between investigation and instigation. A definite foundation for the defense is needed, and if it were placed under the due process clauses of the fifth and the fourteenth amendments, it could be uniformly applied in both federal and state courts. A more satisfactory test for entrapment is desirable, but the formulation of such a test is difficult and the *Model Penal Code*⁹² does no more than codify the tests given in the *Sorrells* decision. Possibly it is best to recognize that entrapment is a defense based on a combination of circumstances, such as the origin of the intent and the evidence of predisposition of the accused.

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92. See note 37 *supra*.