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Entrapment as a Defense in Criminal Cases

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ENTRAPMENT AS A DEFENSE IN CRIMINAL CASES

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ENTRAPMENT BY THE VICTIM

The fact that a person, who suspects or believes that another intends to commit a crime against him or his property, makes no effort to prevent its commission, or furnishes the most ample and complete opportunities and facilities for its commission,[1] or even hopes that it will be committed,[2] does not constitute a defense if the other person commits acts which otherwise would constitute the crime.

Thus one who steals or embezzles another's property is guilty although the other knew of his purpose and left the property exposed in order to entrap and prosecute him.[3] In a prosecution for burglary it is not a defense that the occupant of the house knew of the accused's intention and, instead of locking the door more securely than usual, or as securely, left it unlocked and waited to arrest the accused as he opened the door and entered.[4] In a prosecution for robbery it is not a defense that the victim, with marked money, went where he believed the robbers were in order that he might entrap them.[5] The rule is applicable to other crimes.[6]

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[1]P. v. Hanselman, 76 Cal. 469, 18 Pac. 425; Lowe v. S., 44 Fla. 449, 32 So. 956; Williams v. S., 55 Ga. 391; Abley v. S., 109 Ia. 61, 80 N.W. 225, 46 L.R.A. 862; Thompson v. S., 18 Ind. 386; S. v. Duncan, 8 Rob. (La.) 562; Adams v. S., 115 N.C. 775, 20 S.E. 722; S. v. Currie, 13 N.D. 655, 102 N.W. 875, 69 L.R.A. 405; C. v. Hollister, 157 Pa. 13, 27 Atl. 386; Robinson v. S., 37 Tex. Cr. 71, 29 S.W. 40; Topolewski v. S., 130 Wis. 244, 109 N.W. 1037, 7 L.R.A.N.S. 786. See 10 Ann. Cas. 631 note; 25 L.R.A. 341 note; 7 L.R.A.N.S. 756 note; 30 L.R.A.N.S. 946 note; 18 A.L.R. 151 note; 66 A.L.R. 478 note.

[2]Norden's Case, Foster C.L. 129; Tones v. S., 48 Tex. Cr. 363, 88 S.W. 217, 1 L.R.A.N.S. 1024.

[3]R. v. Williams, 1 Car. & K. 195; R. v. Eggington, 2 Leach C.C. 913, 2 East P.C. 666; P. v. Hanselman, 76 Cal. 469, 18 Pac. 425; P. v. Smith, 251 Ill. 185, 95 N.E. 1041; S. v. Adams, 115 N.C. 775, 20 S.E. 722; S. v. Covington, 2 Beuleg (S.C.) 569. See 10 Ann. Cas. 631 note; 18 A.L.R. 172 note.

[4]R. v. Chandler, 1 K.B. (1913) 125; Thompson v. S., 18 Ind. 386; S. v. Abley, 109 Ia. 61, 80 N.W. 225, 46 L.R.A. 862; S. v. Jansin, 22 Kan. 498; S. v. Currie, 13 N.D. 655, 102 N.W. 875, 6 L.R.A. 405; Robinson v. S., 34 Tex. Cr. 71, 29 S.W. 40. See 18 A.L.R. 157 note.

[5]Tones v. S., 48 Tex. Cr. 363, 88 S.W. 217, 1 L.R.A.N.S. 1024; S. v. Piscioneri, 66 W. Va. 76, 69 S.E. 375. See also Norden's Case, Foster C.L. 129; S. v. West, 157 Mo. 309, 57 S.W. 1071; 18 A.L.R. 189 note.

[6]S. v. Dudousat, 47 La. Ann. 977, 17 So. 685 (Bribery); P. v. Liphardt, 105 Mich. 80, 62 N.W. 1022 (Bribery); Dalton v. S., 113 Ga. 1037, 39 S.E. 1037 (Train wrecking); S. v. Salisbury Ice Co., 166 N.C. 403, 81 S.E. 956, Ann. Cas. 1916C 728 (False pretenses); S. v. West, 157 Mo. 309, 57 S.W. 1071 (Stopping train).

QUALIFICATIONS

The rule is not applicable if (1) lack of consent is an essential element of the crime and the conduct of the victim or his authorized agent amounts to consent;[7] or if (2) the victim or his authorized agent performs or renders unnecessary some act which is an essential element of the crime.[8]

CONSENT

The conduct of the victim or his authorized agent may be such as to constitute consent, and if it does, and lack of consent is an essential element of the crime, it follows that the crime is not committed.[9] Thus if a person who suspects that another intends to steal his property, instead of merely lying in wait, actually delivers the property to the other, larceny is not committed, because the conduct of the victim amounts to consent and lack of consent is an essential element of larceny.[10]

In such cases, where the conduct of the victim or his agents is such as to constitute consent, it is immaterial that the criminal intent originated in the mind of the accused,[11] or that consent was given merely for the purpose of entrapment,[12] or that the accused was unaware that the person consenting was the victim or his authorized agent.[13]

ACTS OF VICTIM

The victim or his authorized agent may perform or render unnecessary some act which is an essential element of the crime, and, if this is the case,

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[7]See infra notes.

[8]See infra notes.

[9]Adams v. S., 13 Ala. Ap. 330, 69 So. 357; Love v. P., 160 Ill. 501, 43 N.E. 710, 32 L.R.A. 139; P. v. McCord, 76 Mich. 200, 42 N.W. 1106; Speiden v. S., 3 Tex. Ap. 156; Topolewski v. S., 130 Wis. 244, 109 N.W. 1037, 7 L.R.A.N.S. 1037. See 18 A.L.R. 149 note; 66 A.L.R. 482 note. Where the victim authorizes a third person to act with the accused and be present when the crime is committed, it has been held that if the criminal intent originates with the accused and he does every act necessary to constitute the crime, he is not rendered guiltless by reason of the fact that the third person with the knowledge and approval of the victim, or even by his direct employment appears to cooperate with the accused and is present at and aids in the commission of the crime. Lowe v. S., 44 Fla. 499, 32 So. 956; Dalton v. S., 113 Ga. 1037, 29 S.E. 468; S. v. Neeley, 90 Mont. 199, 300 Pac. 561; S. v. Currie, 13 N.D. 655, 102 N.W. 875, 66 L.R.A. 405; Lowe v. S., 50 Tex. Cr. 92, 96 S.W. 937; P. v. Lanzit, 70 Cal. Ap. 498, 233 Pac. 816. But see contra, S. v. Hull, 33 Ore. 56, 54 Pac. 159; S. v. Adams, 115 N.C. 775, 20 S.E. 722.

[10]R. v. Lawrence, 4 Cox C.C. 438; Williams v. S., 55 Ga. 391; S. v. Waghalter, 177 Mo. 676, 76 S.W. 1028; S. v. Adams, 115 N.C. 775, 20 S.E. 722.

[11]S. v. Adams, supra; R. v. Johnson, 1 Car. & M. 218, 174 Eng. Rep. 479; Speiden v. S., 3 Tex. Ap. 156; Topolewski v. S., 130 Wis. 244, 109 N.W. 1037. But see, McAdams v. S., 8 Lea (Tenn.) 456.

[12]S. v. Goffney, 157 N.C. 624, 73 S.E. 162; S. v. Loeb,— Mo. —, 190 S.W. 299; S. v. Adams, supra.

[13]R. v. Johnson, 1 Car. and M. 218, 174 Eng. Rep. 479; Speiden v. S., 3 Tex. Ap. 156; Topolewski v. S., 130 Wis. 244, 109 N.W. 1037.

the accused is not guilty, because no act performed by the victim or his authorized agent can be imputed to the accused.[14] Thus burglary is not committed if the occupant of a house, or his servant by his authority, opens the door and admits a suspected burglar, because the opening of the door, which is an essential element of the crime, is done, not by the accused, but by the victim or his agent.[15]

ENTRAPMENT BY OFFICERS

The defense of "entrapment" has been invoked in many cases in which it was alleged that the commission of the crime was instigated by officers of the law.[16] These cases have given rise to difficult questions concerning (1) the validity and scope of the defense; (2) the reasons underlying the defense; and (3) the procedure which should be followed when the defense is invoked.[17]

VALIDITY OF DEFENSE

It has been said truly that the law as to entrapment "is not so entirely settled as to be easy of application."[18] The authorities agree that "entrapment" by an officer is a defense where it has (1) eliminated a physical condition which is an essential element of the crime charged;[19] or (2) been done with the authority of the victim or his agent and amounts to consent, if lack of consent is an essential element of the crime charged;[20] or (3) created a mistake of fact on the part of the defendant as to the existence of an essential

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[14]P. v. Collins, 53 Cal. 185; Dalton v. S., 113 Ga. 1037, 29 S.E. 468; S. v. Douglas, 44 Kan. 618, 26 Pac. 476; Love v. P., 160 Ill. 501, 32 L.R.A. 139; S. v. Hayes, 105 Mo. 76, 16 S.W. 514; S. v. Neeley, 90 Mont. 199, 300 Pac. 561; Koscak v. S., 160 Wis. 255, 152 N.W. 181. See 25 L.R.A. 341 note.

[15]R. v. Eggington, 2 Leach C.C. 913, 2 East P.C. 494; Allen v. S., 40 Ala. 334; R. v. Johnson, 1 Car. & M. 218, 174 Eng. Rep. 479.

[16]Sorrells v. U.S., 287 U.S. 435, 53 Sup. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 146. See 25 A.L.R. 341 note; 30 L.R.A.N.S. 946 note; 51 L.R.A.N.S. 825 note; 18 A.L.R. 146 note; 66 A.L.R. 478 note; 86 A.L.R. 146 note.

[17]Sorrells v. U.S., supra.

[18]U.S. v. Washington, 20 Fed. (2d) 852; S. v. Wong Hip Chung, 74 Mont. 523, 241 Pac. 620. See 38 Dickinson Law Review 191; 46 Harvard Law Review 848. The fact that a person was entrapped into revealing that he had committed a crime is not a defense. Luterman v. U.S., 281 Fed. 374.

[19]Sorrels v. U.S., 287 U.S. 435, 53 Sup. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 146; P. v. Lanzit, 70 Cal. Ap. 498, 233 Pac. 816; S. v. Decker, (Mo.) 14 S.W. (2d) 617; S. v. Shouquette, 25 Okla. Cr. 169, 219 Pac. 727. As, e.g., in burglary where the breaking is done by the officer. Love v. P., 160 Ill. 501, 43 N.E. 710, 32 L.R.A. 139.

[20]Sorrels v. U.S., supra; Connor v. P., 18 Colo. 273, 33 Pac. 159, 25 L.R.A. 341; P. v. Collins, 53 Cal. 185; Williams v. S., 25 Ga. 391; P. v. McCord, 76 Mich. 200, 42 N.W. 1106; Woo Wai v. U.S., 223 Fed. 412. These cases "are not true entrapment cases." 2 So. California Law Review 246. See also 28 Columbia Law Review 1067; 18 A.L.R. 146 note; 66 A.L.R. 478 note; and P. v. Mills, 178 N.Y. 274, 70 N.E. 786 in which the court confused entrapment and consent.

element of the crime charged.[21] The great weight of recent authority is to the effect that these cases "neither in reasoning or effect prescribe limits for the doctrine of entrapment,"[22] but for the determination of the precise extent of the defense, beyond these cases, the decisions announce confused and conflicting rules[23] or no particular rules at all.[24] The decision in each case, it has been said, depends on its own circumstances[25] and "must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object."[26]

Elements of Defense

"Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."[27] The defense consists of two elements, to each of which the courts have given varying degrees of emphasis:[28] (1) The origin of the criminal entent in the mind of the officer;

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[21]U.S. v. Healey, 202 Fed. 349; Voves v. U.S., 247 Fed. 191; S. v. Seidler,— (Mo.)—, 267 S.W. 424. As, e.g., where liquor is sold to an "Indian who was so disguised as to mislead the defendant" into believing he was not an Indian. Sorrels v. U.S., supra. The rule is applicable even though the crime is a statutory crime and such a mistake would not ordinarily constitute a defense. U.S. v. Healy, supra. See 28 Columbia Law Review 1068; 17 Minnesota Law Review 331.

[22]Sorrels v. U.S., supra; P. v. Makousty, 78 Cal. 194, 36 Pac. (2d) 118; Ford v. Denver, 10 Colo. 500, 51 Pac. 1015; S. v. Mantes, 32 Ida. 724, 187 Pac. 268; Love v. P., 160 Ill. 501, 143 N.E. 710; S. v. Dudoussat, 47 La. Ann. 977, 17 So. 685; Saunders v. P., 28 Mich. 218; S. v. Hayes, 105 Mo. 76, 16 S.W. 514; C. v. Brown, 54 Pa. Super. 439; Smith v. S., 61 Tex. Cr. 328, 135 S.W. 154; S. v. McCornish, 59 Utah 58, 201 Pac. 637; Falden v. C., 167 Va. 549, 189 S.E. 329; S. v. Litooy, 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292; S. v. Pisciotri, 68 W. Va. 76, 69 S.E. 375; Koscak v. S., 160 Wis. 255, 152 N.W. 181.

But see apparently contra: S. v. Abley, 109 Ia. 61, 80 N.W. 225, 46 L.R.A. 862; Borch v. S.— Ala.—, 39 So. 580; S. v. Jansen, 22 Kan. 498; Callahan v. S., 163 Md. 298, 162 Atl. 856; P. v. Liphardt, 105 Mich. 80; French v. S., 149 Miss. 684; 115 So. 705; S. v. Wong Hip Chung, 74 Mont. 323, 241 Pac. 620; C. v. Wasson, 42 Pa. Super. 38; and 81 University of Pennsylvania Law Review 1001; 17 Minnesota Law Review 662.

[23]Falden v. C., 167 Va. 549, 189 S.E. 329; 28 Columbia Law Review 1068; 42 Yale Law Journal 803; 8 So. California Law Review 246.

[24]Becker v. U.S., 62 Fed. (2d) 1007. The courts indulge in such generalities as: "The courts do not look to see who held out the bait but who took it," (P. v. Mills, 178 N.Y. 289, 70 N.E. 786, 67 L.R.A. 131) or "It is not the purpose of officers to create criminals but to prevent crime." (Scriber v. U.S., 4 Fed. (2d) 971).

[25]U.S. v. Washington, 20 Fed. (2d) 166. See 44 Harvard Law Review 109; 28 Columbia Law Review 1072.

[26]Sorrels v. U.S., 287 U.S. 435, 53 Sup. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 146.

[27]Sorrels v. U.S., supra; Falden v. C., 167 Va. 549, 189 S.E. 329.

[28]See 28 Columbia Law Review 1068. In C. v. Wasson, 42 Pa. Super. 38, it is said that the officer must have acted "to accomplish some private purpose of his own." But it is generally held that the motive or purpose of the officer is immaterial. See 38 Dickinson Law Review 191; P. v. Everts, 112 Mich. 294, 70 N.W. 430; S. v. Beeson, 106 Ore. 134, 211 Pac. 907; S. v. Rippey, 127 S.C. 550, 122 S.E. 397.

and (2) the inducement of the defendant by the officer.[29] These elements are closely related. The fact that no inducement was used by the officer is evidence that the criminal intent originated in the mind of the defendant, and the fact that such inducement was used is evidence that the criminal intent originated in the mind of the officer.[30]

Origin of Criminal Intent

The essence of the defense is that "criminal intent" originated in the mind of the officer and not in the mind of the accused.[31] The validity of the defense does not, however, depend upon whether the intention to commit the particular crime with which the defendant is charged originated in the mind of the officer or of the accused.[32] The defense is not available if, previous to the "entrapment," the defendant intended to commit a crime of the same type,[33] or a crime which is morally indistinguishable and of the same kind,[34] or if the defendant has been induced merely to furnish a specific instance of a course of habitual criminal conduct.[35]

Conduct of Officer

The defense of entrapment is not available unless the defendant was "induced" by the officer to commit the crime. Some degree of persuasion is

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[29]Butts v. U.S., 273 Fed. 35; Peterson v. U.S., 255 Fed. 433; Sam Yick v. U.S., 240 Fed. 60; S. v. Wong Hip Chung, 47 Mont. 523, 241 Pac. 620; P. v. Malone, 117 Cal. Ap. 629, 4 Pac. (2d) 287. "The doctrine is that an otherwise innocent defendant who has been persuaded by government agents to break the law cannot be convicted." 46 Harvard Law Review 848.

[30]Papolitono v. U.S., 299 Fed. 128. "The present tendency is to look to the conduct of the officers as the criterion to determine where the design originated." 20 Kentucky Law Review 246. See also 8 So. California Law Review 246; 28 Columbia Law Review 1069.

[31]Woo Wai v. U.S., 223 Fed. 412; Newman v. U.S., 299 Fed. 128; U.S. v. Lynch, 256 Fed. 983; Capriano v. U.S., 9 Fed. (2d) 24; P. v. Bradford, 84 Cal. Ap. 707, 258 Pac. 660; P. v. Smith, 251 Ill. 185, 95 N.E. 1041; S. v. Stolberg, 318 Mo. 958, 2 S.W. (2d) 618; S. v. Decker, 321 Mo. 1163, 14 S.W. (2d) 617; C. v. Bickings, 17 Pa. D.R. 206; Falden v. C., 167 Va. 549, 189 S.E. 329. But see U.S. v. Washington, 20 Fed. (2d) 160.

[32]Butts v. U.S., 273 Fed. 35; Orsatte v. U.S., 3 Fed. (2d) 778; U.S. v. Wray, 8 Fed. (2d) 429; U.S. v. Becker, 62 Fed. (2d) 1007; P. v. Ficke, 313 Ill. 367, 175 N.E. 543; Warren v. S., 35 Okla. Cr. 430, 251 Pac. 101. See 8 So. California Law Review 246.

[33]Scriber v. U.S., 4 Fed. (2d) 97; O'Brien v. U.S., 51 Fed. (2d) 674. See 17 Minnesota Law Review 662.

[34]U.S. v. Becker, 62 Fed. 1007. Even though it is an offense against another sovereign. U.S. v. Becker, supra. See 81 University of Pennsylvania Law Review 1001.

[35]Butts v. U.S., 273 Fed. 35; Simmonds v. U.S., 300 Fed. 321; P. v. Tomasovich, 56 Cal. Ap. 520, 206 Pac. 119; S. v. Stolberg, 318 Mo. 958, 2 S.W. (2d) 619; S. v. McCornish, 59 Utah 58, 201 Pac. 637.

necessary.[36] The courts have not defined the precise extent or scope of the persuasion which is necessary,[37] and it seems to differ in different crimes.[38] The fact that the officer merely furnished the defendant an opportunity to commit the crime is not sufficient.[39] It has been held that the defense is not available where the officer did nothing to overcome the defendant's shrinking reluctance,[40] or simply resorted to the normal coaxing of a liquor purchaser,[41] or displayed the common symptoms of a drug addict,[42] or subjected the defendant to no more than the ordinary temptation to which he was likely to be subjected in the discharge of his duties.[43]

On the other hand it has been held that the defense is available where there had been advances on the part of the officer extending over a period of time,[44] or where the officer had resorted to pleas of desperate illness,[45] or persistent coaxing,[46] or threats,[47] or "any conduct of enticement, beguilment, suggestion, procurement, or aiding that goes beyond the mere offering of opportunity."[48]

Reasonable Belief

The validity or invalidity of the defense of entrapment has by some courts been made to depend upon the non-existence or existence, respectively,

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[36]U.S. v. Pappagoda, 288 Fed. 214; U.S. v. Wray, 8 Fed. (2d) 429; O'Brien v. U.S., 51 Fed. (2d) 674; P. v. Heurs 58 Cal. Ap. 103, 207 Pac. 903; Schacklett vs. S., 197 Ind. 323, 150 N.E. 758; S. v. Wong Hip Chung, 74 Mont. 523, 241 Pac. 531. "The line of cleavage seems to be whether the incitement or inducement on the part of the officers has been active or passive." Falden v. C., 167 Va. 549, 189 S.E. 329. "The inquiry is simply what the officers did." U.S. v. Washington, 20 Fed. (2d) 160.

[37]See. U.S. v. Washington, supra; U.S. v. Wray, 8 Fed. (2d) 429; 2 So. California Law Review 287.

[38]"The scope of activities permitted an officer differs in different crimes, due consideration being given to the repugnancy of the offense and the difficulty of procuring evidence." 28 Columbia Law Review 1067. See also 44 Harvard Law Review 109.

[39]"Opportunity and inducement are not equivalent." S. v. Litooy, 52 Wash. 87, 100 Pac. 170; 17 Ann. Cas. 392; Robinson v. U.S., 32 Fed. (2d) 505; P. v. Caiazza, 61 Cal. Ap. 505, 215 Pac. 80; Cooke v. C., 119 Ky. 111, 250 S.W. 802; S. v. Boylan, 158 Minn. 263, 197 N.W. 281;S. v. Smith, 152 N.C. 798, 67 S.E. 508, 30 L.R.A.N.S. 956; C. v. Johnson, 312 Pa. 140, 167 Atl. 344; S. v. Jarvis, 105 W. Va. 599, 143 S.E. 235; 2 So. California Law Review 288. But see Ford v. Denver, 10 Colo. Ap. 500, 51 Pac. 1015; P. v. Makousty, 78 Cal. Ap. 194, 36 Pac. (2d) 118.

[40]Scriber v. U.S., 4 Fed. (2d) 97.

[41]U.S. v. Wray, 8 Fed. (2d) 424.

[42]U.S. v. Wray, supra. The mere fact that an officer concealed his identity is not sufficient. Zucker v. U.S., 288 Fed. 12; P. v. McIntyre, 218 Mich. 540, 188 N.W. 407.

[43]Scriber v. U.S., 4 Fed. (2d) 97. Mere association with the defendant is not sufficient. In re Wellcome, 23 Mont. 450, 59 Pac. 445.

[44]Sam Yick v. U.S., 240 Fed. 60.

[45]Driscoll v. U.S., 24 Fed. (2d) 525; U.S. v. Wray, 8 Fed. (2d) 429. But see, Goldstein v. U.S., 253 Fed. 62.

[46]Peterson v. U.S., 253 Fed. 862.

[47]Capriano v. U.S., 9 Fed. (2d) 41; U.S. v. Lynch, 256 Fed. 983.

[48]U.S. v. Washington, 20 Fed. (2d) 160.

of a reasonable belief on the part of the officer that the accused was, or was about to be, engaged in the commission of a crime.[49] This test is incorrect.[50] If the criminal intent originated in the mind of the defendant, he should not be excused because the officer had no reasonable grounds to suspect him,[51] and if the criminal intent originated in the mind of the officer and he induced the defendant to commit the crime, the defendant should be excused even though the officer had reasonable grounds to suspect him.[52] The test has been severely criticized[53] and in the later and better considered cases has been rejected.[54]

Crimes to Which Entrapment is a Defense

It has been held that entrapment is a defense to both common law[55] and statutory[56] crimes, felonies[57] and misdemaanors,[58] crimes mala in se[59] and crimes mala prohibita,[60] and crimes of which "criminal intent" is[61] or is not[62] an essential element.

Entrapment by Third Persons

The fact that the defendant was entrapped by a third person, who was neither the victim of the crime, his authorized agent, or a public officer, is

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[49]Goldman v. U.S., 220 Fed. 57; U.S. v. Eman Mfg. Co., 271 Fed. 353; Spring Drug Co. v. U.S., 12 Fed. (2d) 52, S. v. McKeehan, 49 Idaho 531, 289 Pac. 993; S. v. Driscoll, 119 Kan. 473, 239 Pac. 1105; P. v. England, 221 Mich. 607, 192 N.W. 612. See 46 Harvard Law Review 849. It is sufficient if the officer acted to verify rumors. De Long v. U.S., 4 Fed. (2d) 244.

[50]See U.S. v. Washington, 20 Fed. (2d) 160.

[51]Swallum v. U.S., 39 Fed. (2d) 390. See 44 Harvard Law Review 109.

[52]Sorrels v. U.S., 287 U.S. 437, 53 Sup. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 249; P. v. Rodriguez, 61 Cal. Ap. 698, 214 Pac. 452.

[53]See 28 Columbia Law Review 1070; 44 Harvard Law Review 110; 17 Minnesota Law Review 91; 2 So. California Law Review 96.

[54]Newman v. U.S., 299 Fed. 198; U.S. v. Washington, 20 Fed. (2d) 160. In Sorrels v. U.S., 287 U.S. 435, 53 Sup. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 249, it is held that the evidence showing reasonable suspicion does not rebut the defense but is admissible upon the question of the origin of the criminal intent. Some courts assert that the degree of persuasion permitted depends upon the degree of reasonableness of the officer's suspicion. Scriber v. U.S., 4 Fed. (2d) 97; Sills v. U.S., 6 Fed. (2d) 568. See for an evasion of the rule, Napolitano v. US., 3 Fed. (2d) 994.

[55]Sorrels v. U.S., supra, per Roberts concurring.

[56]Sorrels v. U.S., supra; P. v. Lanzit, 70 Cal. Ap. 498, 233 Pac. 816; S. v. McCornish, 59 Utah 58, 201 Pac. 637.

[57]P. v. Lanzit, supra; S. v. McCornish, supra; Warren v. S., 35 Okla. Cr. 430, 251 Pac. 101.

[58]S. v. Dudousat, 47 La. Ann. 977, 17 So. 685; S. v. Mantis, 32 Idaho 724; 187 Pac. 268; C. v. Bickings, 12 Pa. Dist. R. 206.

[59]S. v. Broadus, 315 Mo. 1279, 289 S.W. 792; S. v. McCornish, 59 Utah 58, 301 Pac. 637. But see Sorrels v. U.S., 287 U.S. 435, 53 Sup. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 249.

[60]U.S. v. Healey, 202 Fed. 349; Wilcox v. P., 17 Colo. Ap. 109, 67 Pac. 343; S. v. Feldman, 150 Mo. Ap. 120, 129 S.W. 998. See 18 A.L.R. 162; 2 So. California Law Review 286.

[61]P. v. Lanzit, 70 Cal. Ap. 498, 233 Pac. 816, Warren v. S., 35 Okla. Cr. 430, 251 Pac. 101.

[62]Voves v. U.S., 249 Fed. 191; U.S. v. Healey, 202 Fed. 349; S. v. Feldman, 150 Mo. Ap. 120, 129 S.W. 998. See S. v. Seidler, (Mo.) 267 S.W. 424.

not a defense.[63] This is true even though this person intended to betray the defendant to the government and later did so.[64] The courts do not seem to have established any definite rules as to what persons may be considered public officers for the purpose of rendering the defense available.[65]

Basis of Defense

It is agreed quite generally that the defense of entrapment is not based on the theory that the state is estopped by the conduct of its officers;[66] nor upon the theory that the officer's consent to the acts done by the defendant deprives them of an essential element of criminality,[67] but is based upon public policy.[68] As is usual in such cases, the courts fail to state clearly the precise public policy which the recognition of the defense is designed to advance.[69] It is quite probable that public sentiment,[70] a distrust of *agents provocateurs*,[71] an appreciation of the ease with which charges may be framed,[72] a desire to shield the innocent,[73] and to maintain the purity and integrity of the executive and judicial branches of the government,[74] all have contributed to the recognition of the defense.

Procedure

There is a conflict[75] of authority as to whether the defense of entrapment (1) must be introduced under the plea of not guilty and determined as a

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[63]Polski v. U.S., 23 Fed. (2d) 685; Cermak v. U.S., 4 Fed. (2d) 99; P. v. Murphy, 93 Mich. 41, 52 N.W. 1042; P. v. Beck, 125 N.Y.S. 301. But see 38 Dickinson Law Review 191.

[64]Beard v. U.S., 59 Fed. (2d) 941.

[65]In S. v. Feldman, 150, Mo. Ap. 120, 29 S.W. (2d) 988, Koscak v. S., 160 Wis. 255, 152 N.W. 181, and C. v. Brown, 54 Pa. Super. 439, entrapment by a private detective was held to be a defense. See also P. v. Conrad, 92 N.Y.S. 606 and S. v. Seidler, (Mo.) 267 S.W. 424.

[66]Borch v. S., (Ala) , 39 So. 580; De Groff v. S. 2 Okla. Cr. 519, 103 Pac. 538; Moss v. S., 4 Okla. Cr. 247, 111 Pac. 950; C. v. Wasson, 42 Pa. Super. 38. But see O'Brien v. U.S., 51 Fed. (2d) 674 and 45 Harvard Law Review 381.

[67]P. v. Mills, 178 N.Y. 274, 70 N.E. 786; C. v. Wasson, 42 Pa. Super. 38.

[68]Sorrels v. U.S., 287 U.S. 435, 53 Sup. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 249; P. v. Barkoll, 36 Cal. Ap. 25, 171 Pac. 440; Smith v. S., 61 Tex. Cr. 328, 135 S.W. 154; C. v. Wasson, 42 Pa. Super. 38; Falden v. C., 167 Va. 549, 189 S.E. 329. See 2 So. California Law Review 286.

[69]See 39 West Virginia Law Quarterly 260. "Courts formulate this policy by saying that they will not permit their process to be used in aid of a scheme for the actual creation of crime by those whose duty it is to deter its commission." Sorrels v. U.S., supra.

[70]C. v. Wasson, 42 Pa. Super. 38.

[71]Butts v. U.S., 273 Fed. 35.

[72]S. v. Mantes, 32 Ida. 724, 187 Pac. 268.

[73]Woo Wai v. U.S., 233 Fed. 412.

[74]Sorrels v. U.S., 287 U.S. 435, 53 Sup. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 249.

[75]Sorrels v. U.S., supra; See 42 Yale Law Journal 803.

question of fact by the jury,[76] or (2) is a matter for determination by the court at any time and in whatever manner the question may be raised.[77] The first rule is based on the theory that an "entrapped" defendant is not guilty of the crime. The second is based on the theory that, although the defendant is guilty, public policy requires, in order to protect the purity of the government and its processes, that the courts must be closed to the trial of a crime instigated by the agents of the government.[78]

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[76]Butts v. U.S., 273 Fed. 35; Peterson v. U.S., 255 Fed. 443; O'Brien v. U.S., 51 Fed. (2d) 674.

[77]U.S. v. Healey, 202 Fed. 349; U.S. v. Mathues, 22 Fed. (2d) 862.

[78]See 56 Harvard Law Review 848.