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COMMENT

THE DOCTRINE OF ENTRAPMENT AND ITS APPLICATION IN TEXAS

The problem of whether a person who has committed an unlawful act may escape culpability on the grounds that he was induced or solicited to perpetrate the act by another has been the subject of much discussion and comment. The question that perpetually arises when the topic of entrapment is discussed or raised as a defense in a criminal prosecution, is one of a moral nature; *viz.* the legitimate detection of crime, or the illegitimate creation of it for the sole purpose of punishing the unsuspecting guilty. The Supreme Court of the United States decided this question in the now famous *Sorrels* case which has become the recognized authority on the subject. Since some twenty odd years have passed from the time that case was decided, it is the purpose of this article to review the decision of the *Sorrels* case, its background, and show the effect it has had on the present day status of the doctrine in the various jurisdictions, and in particular, Texas.

Historical Background

In order to facilitate a better understanding of the doctrine of entrapment a brief reference must be made to its origin and history. Prior to World War I, the defense of entrapment was restricted for the most part to those crimes where the criminality of the act was affected by the question of consent. In these cases, the want of consent was an essential element to the particular crime, such as robbery,¹ burglary,² larceny,³ or receiving stolen property,⁴ and the fact that consent was provided would in itself negate the guilt of the accused.⁵

Since these cases do not properly belong in a discussion of the doctrine of entrapment, for in reality they are decided on the issue of consent, no further consideration will be given to them.

¹ Connor v. People, 18 Colo. 373, 33 P. 159 (1893).

² Bird v. State, 49 Tex. Cr. 96, 90 S. W. 651 (1905).

³ Topolewski v. State, 130 Wis. 244, 109 N. W. 1037 (1906).

⁴ People v. Jaffe, 185 N. Y. 497, 78 N. E. 169 (1906).

⁵ For a more complete discussion of these cases, see 18 A.L.R. 143, 149; Beale, *The Borderland of Larceny*, 6 HARV. L. REV. 244, 245 (1893); and 76 U. PA. L. REV. 873 (1928).

Entrapment, in its modern connotation, may be said to have stemmed from the case of *Woo Wai v. United States*.⁶ Further development of the defense was prompted by the great amount of police legislation passed during the 1920's and 30's, such as the narcotic and liquor laws, where unlawful acts were easily hidden and detection of them rendered more difficult. Judge Woodrough said in 1927, "As shown by the last report of the Attorney General there were some 44,000 liquor prosecutions brought in the federal courts during the fiscal year, and I may estimate the proportion of them that are based on sales to agents (prohibition officers) by the cases brought before me, it would seem that at least 30,000 of them are of that kind."⁷ It was from this legislation that cases such as *United States v. Certain Quantities of Intoxicating Liquor*,⁸ *Casey v. United States*,⁹ and *Sorrels v United States*¹⁰ arose. The present day concept of the defense of entrapment has developed from these cases.

A number of cases involving the actions of detectives and the use of decoys in the apprehension of persons suspected of, or actually engaged in, violations of the law have arisen. These cases are closely allied to the topic of entrapment and have been compiled in several articles.¹¹

Rationale and Scope

The defense of entrapment in its early state of development took a wide variety of forms and tests. The *Woo Wai* case was one of the first cases to decide that a defendant was entitled to an acquittal solely on the grounds of entrapment. The court rea-

⁶ 223 F. 412 (9th Cir. 1915), where a confidential agent of the Immigration Commission suspected Woo Wai, a Chinese merchant in San Francisco, possessed certain information regarding the unlawful importation of Chinese women into San Francisco. The agent conceived a scheme whereby a private detective was hired to approach Woo Wai with the proposition of bringing Chinese unlawfully into the country across the Mexican border, in order that Woo Wai would be caught and any information he knew, extracted from him. Despite long protests on his part, he was finally induced to bring a number of Chinese into the country for which he was apprehended, tried, and convicted. The Circuit Court held the acts of the officers to be a clear case of entrapment for which no criminal liability would attach to Woo Wai.

⁷ *United States v. Washington*, 20 F. 2d 160, 161 (D. Neb. 1927).

⁸ 290 F. 824 (D. N.H. 1923).

⁹ 276 U. S. 413 (1928); see, 2 So. CAL. L. REV. 287, 291 (1928).

¹⁰ 287 U. S. 435 (1932); see, 41 YALE L. J. 1249 (1932).

¹¹ See, 29 HARV. L. REV. 100 (1915) (detectives); and 20 COLUM. L. REV. 598 (1920), (use of decoys).

soned in this case that it was against public policy for an agent of the government to lure an otherwise innocent person into the commission of a crime. This public policy was described as that of "denying the criminality of those who are thus induced to commit acts which infringe the letter of criminal statutes."¹²

Following the *Woo Wai* case, the defense of entrapment was used to a great extent in the vast amount of criminal litigation instituted under the police legislation previously referred to. A wide variety of procedural devices and rationale were employed by the courts in deciding these cases. Judge Learned Hand, commenting on this fact in *United States v. Becker*, said, "decisions are plentiful, but the judges generally content themselves with deciding the case upon the evidence before them; we have been unable to extract from them any definite doctrine, and it seems unprofitable once more merely to catalogue the citations."¹³ Some of the decisions seem to be based on an extension of the civil law doctrine of estoppel, whereby the government was estopped by the conduct of its agents from prosecuting the defendant.¹⁴ In other cases, it was held that the government would be prevented from pursuing the prosecution of an entrapped defendant and the case should be dismissed at any stage of the proceedings.¹⁵

Despite the fact that these decisions were varied and inconsistent in the procedures and theories used in reaching their conclusions, a concept emerged from these cases which has been referred to as the "doctrine of entrapment." The phenomenal growth of this so called "doctrine," which had no established procedure or theory at this time, can best be attributed to a feeling of moral indignation on the part of the judges who decided these cases. This "doctrine" was said to be based on a public policy that estopped or enjoined the government from prosecuting persons who had been the victims of its agents. The idea of a private citizen being placed on trial because he was induced to commit an unlawful act by a law enforcement official shocked the conscience of the courts. Judge Sanborn stated the feeling of the courts when

¹² 223 F. 412, 415 (9th Cir. 1915).

¹³ 62 F.2d 1007, 1008 (2nd Cir. 1933).

¹⁴ *United States v. Lynch*, 256 F. 983 (S.D. N.Y. 1918).

¹⁵ *Gambino v. United States*, 275 U.S. 310 (1927); and *United States v. Pappagoda*, 288 F. 214 (D. Conn. 1923).

he wrote, "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."¹⁶

The Supreme Court of the United States had the opportunity to clarify its position on the matter when the case of *Casey v. United States* came before it. However, the Court avoided the issue in deciding the case and only Mr. Justice Brandeis, in a dissenting opinion, mentioned the fact that the case should have been decided on this point.¹⁷ It was not until 1932 that the Court was again afforded the opportunity to determine the validity of the "doctrine," propose a theory for it, and establish a procedure for its application. The case that presented this opportunity was the celebrated *Sorrels* case.¹⁸ Unfortunately, not only did the Court fail to unite in a decision that would establish some definite procedure and rationale for the defense, but even disagreed as to the existence of the so called "doctrine."

Mr. Chief Justice Hughes, in speaking for a majority of the Court, reversed and remanded the case. He stated, "We are of the opinion that upon the evidence produced in the instant case the defense of entrapment was available and the trial court was in error in holding that as a matter of law there was no entrapment, and in refusing to submit the issue to the jury."¹⁹

The Court based its decision on the premise that Congress, in enacting the National Prohibition Act, did not intend the Act to apply to cases in which the sale was instigated by a prohibition agent for the purpose of luring an otherwise innocent person to the commission of a crime in order that he might be arrested and punished. It went on to say that the defense of entrapment can not be attributed to any power in the Court to grant immunity

¹⁶ *Butts v. United States*, 273 F. 35, 38 (8th Cir. 1921).

¹⁷ 276 U. S. 413, 425 (1928).

¹⁸ Cited *supra*, in this case a prohibition agent visited the defendant's home with three other men, one of whom was a friend of the defendant. The agent after a conversation asked the defendant if he could get some liquor to which the defendant replied he could not. After further conversation it was brought out that both the agent and the defendant had been in the same army division in World War I and shortly thereafter the defendant went out and returned with some liquor which he sold to the agent for five dollars. The defendant was indicated and tried for the illegal possession and sale of liquor in violation of the National Prohibition Act. The district court judge ruled as a "matter of law" that there was no entrapment, and a jury verdict which followed found the defendant guilty. The Circuit Court of Appeals affirmed the conviction, and the Supreme Court granted certiorari.

¹⁹ 287 U. S. 435, 452 (1932).

or defeat prosecution when a penal statute has been violated, as these powers are vested in the executive branch of the government; but rather it depends upon the scope of the statute alleged to have been violated.

In short, the majority opinion completely rejected the "doctrine of entrapment" and stated that as a defense, entrapment could only be used when the statute, under which the defendant is being tried, can be construed as not to be applicable to the particular fact situation.

A separate opinion, written by Mr. Justice Roberts, concurred as to result but not as to reason. In his opinion, the Justice stated, "The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belong only to the court. It is the province of the court alone to protect itself and the government from such prostitution of the criminal law."²⁰ The opinion then went on to say that once proof of entrapment is presented to the court, the prosecution must stop, the indictment quashed, and the case dismissed.²¹

In this opinion, one observes the "doctrine of entrapment" as it was established on the principle of estoppel. The basis for the difference in the two opinions seems to be a conflict in views on the policy-making authority as related to the administration of the penal laws. The majority opinion indicates that the legislative branch of the government has the power to create offenses and defenses and the judiciary must stay within the limits of statutory interpretation in administering these laws. The concurring opinion, on the other hand, will concede that the legislative branch can create criminal laws and grant immunity from them by statutes, but it maintains that the judiciary has the right to "over-see" this process while administering these laws; and if it finds a situation exists which the legislature did not contemplate, then it is the duty and right of the judiciary to "clean its own house."

As a result of these conflicting theories, the procedural ramifi-

²⁰ 287 U. S. 435, 457 (1932).

²¹ For a discussion of the Sorrels case, see, Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1941); 8 SO. CAL. L. REV. 246 (1935); 46 HARV. L. REV. 848 (1933); and 81 U. PA. L. REV. 1001 (1933).

cations are great and totally different. The majority opinion provides that the defense should be put in issue as a question of fact at such time the defendant is called upon to make his defense; whereas, the concurring opinion permits the accused to raise the issue as a question of law before the case goes to trial, thereby preventing the prosecution of the case. Because of this procedural difference, Justice Roberts contends that under his view, the accused is never permitted to be tried for a crime he did not commit, while the majority opinion grants immunity to a person who is in fact guilty. The Justice further contends that under his theory the accused is granted an unwarranted defense, while the majority of the Court grants immunity to a guilty person, which power is not within the province of the court.

It would seem that the majority opinion presents the better view in that it is the function of the legislature to define public policy.²² Since this proposition has been firmly established over a long period of years, it would not be within the realm of the judiciary, as Mr. Justice Roberts advocates, to set aside a public policy established by the Congress; nor would it be within the province of the court to decide that Congress has declared no public policy on the subject and then proceed to declare one of its own. This would transcend the power of the judiciary and amount to judicial legislation. Therefore, the public policy theory should be rejected and the "statutory interpretation" theory of the majority opinion accepted.

The *Sorrels* case has also provided us with an excellent definition of the defense which it describes as follows: "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."²³ From this definition we may deduce that the defense has two elements: (1) origin of the intent in the mind of the officer; and (2) the inducement of the defendant by the officer to commit the act. It is essential in order to make the defense available to the defendant that the "criminal intent" originate

²² *Chicago, Burlington & Quincy Railroad Company v. McGuire*, 219 U. S. 549, 565 (1911).

²³ 287 U. S. 435, 454 (1932).

in the mind of the officer and not in the mind of the defendant.²⁴ The courts have not established any particular degree of inducement or persuasion by the officer in order to make the defense apply, but some persuasion is necessary,²⁵ and merely furnishing an opportunity to commit the crime is not sufficient.²⁶

Some courts have placed a restriction on the application of the defense by holding that in order for it to be available, the entrapping officers must not have had a reasonable belief that the accused is about to, or was actually committing the crime.²⁷ If there is a reasonable belief by the officers, there can be no entrapment and the defense will not be allowed. This qualification to the defense merely makes the distinction between the legitimate detection of crime and the reprehensible practice of entrapment. If the officers can show that they had reason to suspect the defendant, any scheme or plot used by them to apprehend is legitimate and the defense of entrapment is placed out of reach of the defendant. This addition to the defense seems to obscure the basic question involved, that of intent, and has not been followed in recent cases.

Crimes to Which Entrapment Is a Defense

The distinction made at common law between crimes that are *malum in se* and those that are *malum prohibita* has become for the most part obsolete today. This is especially true in jurisdictions where no act is a crime unless prohibited by statute.²⁸ Nevertheless, the distinction is still important in determining the presence or absence of a required "criminal intent" or *mens rea*. This "criminal intent," or *mens rea*, is not easily defined and at best can be described as, "the particular state of mind, differing in different crimes, which, by the definition of the particular crime, must concur with the criminal act."²⁹

It would seem that since a "criminal intent" is required only in

²⁴ *Woo Wai v. United States*, cited *supra*; *United States v. Lynch*, cited *supra*.

²⁵ *United States v. Pappagoda*, cited *supra*.

²⁶ See 2 So. CAL. L. REV. 288 (1928); and *Hitchler, Entrapment as a Defense in Criminal Cases*, 42 DICK. L. REV. 195, 199 (1938).

²⁷ *United States v. Certain Quantities of Intoxicating Liquor*, cited *supra*.

²⁸ TEX. PEN. CODE (1925), art. 3.

²⁹ MILLER, CRIMINAL LAW (1934), Chapter 5, par. 14(b), p. 54.

crimes *malum in se* that the defense would apply only to these crimes. However, the defense has been held to apply to crimes both *malum in se*³⁰ and *malum prohibita*.³¹ It has also been used as a defense to crimes that require a "criminal intent"³² and to crimes that require no such intent.³³ Entrapment has also been held to be a defense to common law crimes,³⁴ statutory crimes,³⁵ felonies,³⁶ and misdemeanors.³⁷

Entrapment by Persons Other Than Officers

Generally, the use of entrapment as a defense has been confined to cases in which the entrapping person is an agent of the government. If the inducement or persuasion under which the accused acts is provided by a person who is neither an officer of the law, nor one acting in a representative capacity for them, the accused cannot avail himself of the defense of entrapment.³⁸ To constitute entrapment, the crime must have been initiated, directly or indirectly, by officers or agents of the government.³⁹ Some cases have placed private detectives in the same position as law officers and have allowed the defense.⁴⁰ It would seem from a study of these cases that the courts apply the defense only when the entrapping person is an officer of the law, or a person employed by them and acting in their behalf, or in certain cases involving the use of private detectives or investigators. The difficulty that has pre-

³⁰ State v. Broadus, 315 Mo. 1279, 289 S. W. 792 (1926); State v. McCornish, 59 Utah 58, 201 P. 637 (1921); and see 86 A.L.R. 249 for a collection of cases.

³¹ United States v. Healy, 202 F. 349 (D. Mont. 1913); Wilcox v. People, 17 Colo. Ap. 109, 67 P. 343 (1902); see 18 A.L.R. 162 for a collection of cases; and 2 So. CAL. L. REV. 286 (1929).

³² People v. Lanzit, 70 Cal. Ap. 498, 233 P. 816 (1924); Warren v. State, 35 Okla. Cr. 430, 251 P. 101 (1926).

³³ Voves v. United States, 249 F. 191 (7th Cir. 1918); United States v. Healy, cited *supra*.

³⁴ Sorrels v. United States, cited *supra*, Justice Roberts concurring.

³⁵ Sorrels v. United States, cited *supra*; People v. Lanzit, cited *supra*.

³⁶ People v. Lanzit, cited *supra* (attempt to murder); State v. McCornish, cited *supra* (pandering); Shouquette v. State, 25 Okla. Cr. 169, 219 P. 727 (1923), (bank robbery); See 18 A.L.R. 189, 66 A.L.R. 506, and 86 A.L.R. 272 for collection of cases.

³⁷ State v. Dudousat, 47 La. Ann. 977, 17 S. 685 (1895); and State v. Mantis, 32 Idaho 724, 187 P. 268 (1920).

³⁸ Polski v. United States, 33 F. 2d 686 (8th Cir. 1929).

³⁹ Polski v. United States, cited *supra*.

⁴⁰ Shouquette v. State, cited *supra*; Woo Wai v. United States, cited *supra*; State v. Feldman, 150 Mo. Ap. 120, 129 S. W. 998 (1910); see Wood, *Entrapment by Public Officers as a Defense Against Criminal Prosecution*, 38 DICK. L. REV. 191, 196 (1934); and 23 TUL. L. REV. 400 (1949).

sented itself to the courts is the problem of determining when the agent employed by the law enforcement officials or the private investigator ceases to act in behalf of the government and becomes a co-conspirator with the accused. Each case involving this problem is decided on its facts and no generalization or rule can be drawn from these cases.

Survey of the States on the Defense of Entrapment

After making a survey of the jurisdictions in the United States, it was found that only two states have enacted statutes affecting the subject. The Legislature of Florida passed a law in 1949 that abolished the defense of entrapment in cases of bribery, offering bribes, offering or accepting unauthorized compensation for the performance or non-performance of official duties, and obtaining or attempting to obtain certificates of registration other than the required fee.⁴¹ The other state, Wisconsin, in its new criminal code, which became effective July 1, 1955, drafted into the code a section that provides for entrapment to be a defense to all crimes.⁴² This appears to be the first attempt to draft a statute with a general provision for this defense.

A further study of the case law in the various jurisdictions has revealed that all save three states have had decisions bearing on the subject.⁴³ It would be purely speculative to surmise whether the defense exists or would be followed in these states. In the remaining jurisdictions, it was found that the federal jurisdiction, the jurisdiction for the District of Columbia, and all but two of the several state jurisdictions recognize entrapment as a defense in criminal prosecutions. The two states that reject the defense are New York and Tennessee. A list of the latest cases found in

⁴¹ Florida Statutes (1953), Title XLIV, Chapter 838, section 838.11.

⁴² Wisconsin Statutes (1953), Title XXXII, Chapter 339, section 399.44:

"339.44. ENTRAPMENT. The fact that the actor was induced or solicited to commit a crime for the purpose of obtaining evidence with which to prosecute him is a defense unless:

- (1) The idea of committing the crime originated with the actor or a co-conspirator and not with the person so soliciting its commission; or
- (2) The crime was of a type which is likely to occur and recur in the course of the actor's business or activity, and the person doing the inducing or soliciting did not mislead the actor into believing his conduct to be lawful and did not use undue inducement or encouragement to procure the commission of the crime."

⁴³ No cases found in: Delaware, New Mexico, and Vermont.

the various jurisdictions dealing with the subject has been compiled in the footnotes.⁴⁴

It is most difficult to distinguish and compare the rationale and procedures used in these cases, and a grouping or cataloguing of them is almost impossible. It does seem, however, that the majority

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- ⁴⁴ALABAMA, *Johnson v. State*, 36 Ala. Ap. 634, 61 S. 867 (1952)
 ARIZONA, *Hoy v. State*, 53 Ariz. 440, 90 P. 2d 623 (1939)
 ARKANSAS, *Whittington v. State*, 160 Ark. 257, 254 S. W. 532 (1923)
 CALIFORNIA, *People v. Jackson*, 42 Cal. 2d 540, 268 P. 2d 6 (1954)
 COLORADO, *Reigan v. People*, 120 Colo. 472, 210 P. 2d 991 (1949)
 CONNECTICUT, *State v. Marquandt*, 139 Conn. 1, 89 A. 2d 219 (1952); see 27 CONN. BAR J. 125.
 DELAWARE, no case found
 DISTRICT OF COLUMBIA, *Sherman v. United States*, 36 A. 2d 556 (1944)
 FLORIDA, *Lashley v. State*, 67 S. 2d 648 (1953)
 GEORGIA, *Bienert v. State*, 85 Ga. Ap. 451, 69 S. E. 2d 300 (1952)
 IDAHO, *State v. McKeehan*, 48 Idaho 112, 279 P. 616 (1929)
 ILLINOIS, *People v. Lewis*, 285 Ill. Ap. 171, 1 N. E. 2d 696 (1936)
 INDIANA, *Ditton v. State*, 221 Ind. 702, 51 N. E. 2d 356 (1943)
 IOWA, *State v. Heeron*, 208 Iowa 1151, 226 N. W. 30 (1929)
 KANSAS, *State v. Leopold*, 172 Kan. 371, 240 P. 2d 138 (1952)
 KENTUCKY, *York v. Commonwealth*, 314 Ky. 445, 235 S. W. 2d 1007 (1951)
 LOUISIANA, *State v. Rainey*, 184 La. 547, 166 S. 670 (1936)
 MAINE, *State v. Calanti*, 142 Me. 59, 46 A. 2d 412 (1946)
 MARYLAND, *Ferraro v. State*, 200 Md. 274, 89 A. 2d 628 (1952)
 MASSACHUSETTS, *Commonwealth v. Graves*, 97 Mass. 114 (1867)
 MICHIGAN, *People v. Scaduto*, 301 Mich. 700, 4 N. W. 2d 64 (1942)
 MINNESOTA, *State v. McKenzie*, 182 Minn. 513, 235 N. W. 274 (1931)
 MISSISSIPPI, *French v. State*, 149 Miss. 684, 115 S. 705 (1928)
 MISSOURI, *State v. Varnon*, 174 S. W. 2d 146 (1943)
 MONTANA, *State v. Snider*, 111 Mont. 310, 111 P. 2d 1047 (1940)
 NEBRASKA, *State v. Sneff*, 22 Neb. 481, 35 N. W. 219 (1887)
 NEVADA, *In re Davidson*, 64 Nev. 514, 186 P. 2d 354 (1947)
 NEW HAMPSHIRE, *State v. Del Bianco*, 96 N. H. 1436, 78 A. 2d 519 (1951)
 NEW JERSEY, *State v. Dougherty*, 86 N.J.L. 525, 93 A. 98 (1915)
 NEW MEXICO, no case found.
 NEW YORK, *People v. Schacher*, 47 N.Y.S. 2d 371 (1944)
 NORTH CAROLINA, *State v. Love*, 229 N. C. 99, 47 S. E. 2d 712 (1948)
 NORTH DAKOTA, *State v. Currie*, 13 N. D. 665, 102 N. W. 875 (1905)
 OHIO, *State v. Miller*, 85 Ohio Ap. 376, 88 N. E. 2d 614 (1948)
 OKLAHOMA, *Finley v. State*, 84 Okla. Cr. 309, 181 P. 2d 849 (1947)
 OREGON, *State v. Hoffman*, 85 Ore. 276, 166 P. 765 (1917)
 PENNSYLVANIA, *Commonwealth v. Kutler*, 173 Pa. Super. 153, 96 A. 2d 160 (1953)
 RHODE ISLAND, *Tripp v. Flanigan*, 10 R. I. 128 (1871)
 SOUTH CAROLINA, *State v. Rippey*, 127 S. C. 550, 122 S. E. 397 (1924)
 SOUTH DAKOTA, *City of Sioux Falls v. Famestad*, 71 S. D. 98, 21 N. W. 2d 693 (1946)
 TENNESSEE, *Goins v. State*, 192 Tenn. 32, 237 S. W. 2d 8 (1951)
 TEXAS, *Ivy v. State*, _____Tex. Cr._____, 277 S. W. 2d 712 (1955)
 UTAH, *State v. Franco*, 76 Utah 202, 289 P. 100 (1930)
 VERMONT, no case found.
 VIRGINIA, *Dorchincoz v. Commonwealth*, 191 Va. 33, 59 S. E. 2d 863 (1950)
 WASHINGTON, *City of Seattle v. Gleiser*, 29 Wash. 2d 869, 189 P. 2d 967 (1948); see 9 U. Pittsburgh L. R. 299 (1947)
 WEST VIRGINIA, *Taylor v. Devore*, 134 W. Va. 151, 58 S. E. 2d 641 (1950)
 WISCONSIN, *Piper v. State*, 202 Wis. 558, 231 N. W. 162 (1930)
 WYOMING, *State v. Kirkbride*, 34 Wyo. 98, 241 P. 709 (1925)

opinion of the *Sorrels* case is generally followed. However, one case makes reference to the "doctrine of estoppel" as the basis of the defense.⁴⁵

An interesting view is taken by the Colorado courts, whereby not only is the victim of the entrapment allowed to maintain the defense to escape criminal liability, but the entrapping officers are guilty of a conspiracy to cause a law violation.⁴⁶ Under this view, a wide distinction is made between detection and entrapment. Detection is classified as the testing of a suspected person by being offered an opportunity to transgress the law in a manner that is usual to the activity in which he is engaged, while entrapment is considered to be the instigation of crime by an officer that the commission of which was nonexistent in the mind of the victim.⁴⁷ The Colorado courts take the position that not only is the act reprehensible, but it should be punished. The question of entrapment is one of fact and is for the determination of the jury.

Review of the Texas Law on Entrapment

In Texas, the defense of entrapment has been employed over a long period of time. It has been used as a defense to crimes involving the element of consent.⁴⁸ In burglary,⁴⁹ theft,⁵⁰ and robbery,⁵¹ if the owner of the property or his agent induces the accused to commit the offense in order that he may be prosecuted, the inducement is held to be the equivalent of consent and the defense is established. However, the owner of the property may employ a person to apparently encourage a thief's design and lead him on, provided the owner or the agent does not induce the original intent to commit the crime on the part of the thief.⁵²

It is interesting to note that as early as 1879 the Texas courts recognized the defense as existing apart from the issue of consent.⁵³ In this case, it was held that when an officer originates the criminal intent and apparently joins the defendant in a criminal

⁴⁵ *Sherman v. United States*, 36 A. 556 (1944).

⁴⁶ *Reigan v. People*, 120 Colo. 472, 210 P. 2d 991 (1949).

⁴⁷ *Reigan v. People*, 210 P. 2d 991, 993 (1949).

⁴⁸ *Speiden v. State*, 3 Tex. Cr. Ap. 156 (1887).

⁴⁹ *Bird v. State*, cited *supra*.

⁵⁰ *Pigg v. State*, 43 Tex. 108 (1874).

⁵¹ *Tones v. State*, 48 Tex. Cr. 363, 88 S. W. 217 (1905).

⁵² *Crowder v. State*, 50 Tex. Cr. 92, 96 S. W. 934 (1906).

⁵³ *O'Brien v. State*, 6 Tex. Ap. 665 (1879).

act first suggested by the officer merely to entrap the defendant, the case is not within the spirit of the article of the criminal code with which he is charged and the defendant is not guilty.⁵⁴ This view is in accord with the majority opinion of the *Sörrels* case. Entrapment has been raised as a defense to other crimes in which there is no issue of consent.⁵⁵

The question of entrapment has been raised in the Texas courts on the theory that the person instigating the crime is an accomplice within the meaning of the penal code.⁵⁶ A man who incites and participates in a crime for the purpose of having the perpetrator caught and convicted, is guilty as an accomplice, even though he is a detective or another law enforcement official.⁵⁷ Under the Texas rules of criminal procedure, the testimony of an accomplice witness must be corroborated.⁵⁸ This procedural problem was raised in *Bush v. State*⁵⁹ where the court held that when a person or agent deliberately and intentionally originated or *succeeded* in bringing about a violation of the law, he becomes a *particeps criminis* of that violation and when used as a witness must be corroborated. A test that has been applied to determine whether or not corroboration is necessary is that if the prosecuting witness did not originate the crime, or was not instrumental in its initiation, he is not an accomplice and need not be corroborated; but when this is in question, it is a question of fact which the court should submit to the jury.⁶⁰ In *Davis v. State*,⁶¹ where the testimony was conflicting, it was held that the trial court should have charged the jury to the effect that if the prosecuting witness made the first tender, he would be an accomplice and his testimony would have to be corroborated. However, this case also held that even though the prosecuting witness was the inducing cause, the defendant would be guilty if he tendered the bribe. Although this case seems to be in

⁵⁴ *O'Brien v. State*, 6 Tex. Ap. 665, 668 (1879).

⁵⁵ *Minter v. State*, 70 Tex. Cr. 634, 159 S. W. 287 (1913) bribery; *Bush v. State*, 68 Tex. Cr. 299, 151 S. W. 554 (1912) violation of liquor laws; *Savage v. State*, 75 Tex. Cr. 213, 170 S. W. 730 (1914) offering bribe; *Gaines v. State*, 46 Tex. Cr. 212, 78 S. W. 1076 (1904) gaming.

⁵⁶ TEX. PEN. CODE (1925), art. 70.

⁵⁷ *Dever v. State*, 37 Tex. Cr. 396, 30 S. W. 1071 (1895); *Davis v. State*, 70 Tex. Cr. 524, 158 S. W. 288 (1913).

⁵⁸ TEX. CODE CR. PRO. (1925), art. 718.

⁵⁹ 68 Tex. Cr. 299, 151 S. W. 554 (1912).

⁶⁰ *Savage v. State*, 75 Tex. Cr. 213, 170 S. W. 730 (1914).

⁶¹ 70 Tex. Cr. 524, 158 S. W. 288 (1913).

conflict with the great weight of authority, it should be noted that in cases of bribery or attempting to bribe the courts have been hesitant in allowing the defense. The reason for this is that both of these offenses prejudicially affect the morals of the community more so than any other crime. This view is well founded because the highest standards of morality must be expected of civic officials in order to preserve the proper functioning of the government.

Recent cases have dealt with the problem of whether or not the defense has been sufficiently raised by the evidence to constitute a question of fact. The court has held that where there is no evidence of a transpiring between the prosecuting witness and the defendant to commit the crime, the trial court is correct in refusing to instruct the jury as to corroboration of an accomplice witness' testimony.⁶² The trial court is equally justified in not giving this instruction if the evidence shows that the prosecuting witness was not a part of the alleged plot or scheme.⁶³ However, if there is any doubt as to this question, it should be submitted to the jury. If the evidence reveals that the defendant may be acting as an agent of the entrapping persons, this issue should be submitted to the jury as a question of fact.⁶⁴ Where the facts clearly indicate there is no entrapment, a special charge as to entrapment should not be submitted to the jury.⁶⁵

The most recent case involving the issue of entrapment disallowed the defense on the grounds that it was not raised by the evidence. In *Ivy v. State*,⁶⁶ the Court of Criminal Appeals held

⁶² *Stevens v. State*, 133 Tex. Cr. 333, 110 S. W. 2d 906 (1937); *Woolridge v. State*, 133 Tex. Cr. 386, 111 S. W. 2d 248 (1937); and *Humphrey v. State*, 152 Tex. Cr. 203, 212 S. W. 2d 159 (1948).

⁶³ *Peery v. State*, 138 Tex. Cr. 155, 134 S. W. 2d 283 (1939).

⁶⁴ *Scott v. State*, 70 Tex. Cr. 57, 153 S. W. 871 (1913).

⁶⁵ *Cliff v. State*, 144 Tex. Cr. 340, 162 S. W. 2d 712 (1942); *Dabney v. State*, 159 Tex. Cr. 495, 265 S. W. 2d 603 (1954); and *Ridinger v. State*, 146 Tex. Cr. 286, 174 S. W. 2d 319 (1943).

⁶⁶ _____ Tex. Cr. _____, 277 S. W. 2d 712 (1955), where the defendant was convicted for the unlawful sale of narcotics on the testimony of one Richards, a narcotic agent of the state. Officer Richards testified that he employed one Bayly to act as an informer for him in ferreting out law violators and that said Bayly was under his direction and supervision. The officer further testified that he had no reason to believe that the defendant was a law breaker or that he would be at the informant's home when he called there. The defendant testified that Bayly suggested that he (defendant) put \$25 in a joint fund with which Bayly purchased the narcotics. Defendant also testified that Bayly suggested that the sale be made to the officer whom Bayly represented as a friend of his and that he (Bayly) could not make the sale because he owed the prospective purchaser a debt which said purchaser would expect the narcotics to be payment thereof.

that the trial court was not in error in refusing to submit to the jury a charge on entrapment because the testimony of the prosecuting witness was uncontradicted in so far that it showed that he was not a party to the scheme. This majority opinion then proceeded to quote from *Ridinger v. State*,⁶⁷ in which the court said, "It would be rather difficult to conceive of a state of facts whereby a party was, by entrapment, induced to make a sale of liquor, where he does so by his own acts and with full knowledge of what he is doing."⁶⁸ What the court neglected to include from that opinion was the next sentence which states, "At any rate, the law of entrapment is not involved in the remotest degree by the facts of the case before us."⁶⁹ Unfortunately, in both the *Ridinger* and *Ivy* cases the court does not seem to be aware of the *Sorrels* case. Despite this fact, the conclusion reached in the *Ridinger* case is correct in that the officer testified that he saw the defendant sell a pint of liquid to a soldier which he thought to be alcohol, shortly before he asked the defendant to sell him some. There was no evidence that the officer provided any encouragement or persuasion to induce the sale, which facts are unlike those in the *Ivy* case.

Judge Morrison, in his dissent to the *Ivy* case, pointed out that the majority opinion holds that the entrapping person must be the officer himself, which permits him to do indirectly what he is not allowed to do directly. He then observed that it was immaterial whether the officer knew all the details of his informants' plot, but the real question was whether or not the defendant was entrapped by the officer or his agent and this issue should have been submitted to the jury.

The dissenting opinion's criticism is justified. Although the majority opinion appears to decide this case on the point of evidence, the court fails to recognize the problem of substantive law that rests therein; *viz.* that the informant was in fact employed by the officer, as indicated by the officer's testimony. This places the informant in the position of being an agent of the officer and in view of existing case law on the point, the defense of entrapment could properly be put in issue.

The only real question in the case, then, is presented by the

⁶⁷ 146 Tex. Cr. 286, 174 S. W. 2d 319 (1943).

⁶⁸ *Ivy v. State*, *supra* note 66, at 714.

⁶⁹ *Ridinger v. State*, 174 S. W. 2d 319, 320 (1943).

testimony of the defendant to the effect that the informant was the one who suggested the scheme and purchased the narcotics. This testimony raised the question of intent, which is a question of fact to be determined by the jury. Judge Woodley, in his opinion denying the motion for rehearing, states, "We disclaim any intent to hold that a defense to crime may not be raised by the testimony of the defendant."⁷⁰ However, the court's decision, in its practical effect, does the very thing it disclaims to do. *Ivy v. State* illustrates the danger that the defense may be relegated to a position of unused legal theory because the courts submerge the defense in a mire of adjective law that is misapplied through misunderstandings of the basic principles of the defense.

Conclusion

The defense of entrapment has become a confused and uncertain theory in Texas. This is due to the fact that the Texas courts have adopted the procedural device that the entrapping person is an accomplice and his testimony must be corroborated. This approach to the problem is unreal because in most of the cases the entrapping person not only advises and encourages the accused before the crime is committed, but actually participates in the act. It is a pure fiction to consider such a witness as an accomplice, for under the article of the penal code that defines accomplices,⁷¹ an accomplice is one who advises, commands, or encourages another to commit a crime before the act is done, but who is not present at the time the act is committed. Under this view, no real defense is provided for the defendant but an extra burden of proof is placed upon the State. If the State can provide the necessary corroborating testimony, the defendant is convicted even though it was proved that the witness placed the intent to perpetrate the act in the mind of the defendant. The only instance in which the defendant may be acquitted is when the State cannot provide the necessary corroboration.

The doctrine of entrapment, free from such procedural fictions, is a desirable defense in the proper administration of the penal laws as it serves as a deterrent to over-zealous law enforcement

⁷⁰ *Ivy v. State*, *supra* note 66, at 716.

⁷¹ TEX. PEN. CODE, (1925), Art. 70.

officials. The "statutory interpretation" theory, as expressed in the majority opinion of the *Sorrels* and *O'Brien* cases, provides the better approach to the problem. Under this theory, the defense should consist of two elements: (1) origin of the intent in the mind of the officer; and (2) some inducement or persuasion by the officer to the accused to commit the act. This defense should be limited to fact situations where the entrapping person is an officer of the law or an agent acting in his behalf. The defense should be made available to all crimes with the exception of bribery and attempting to bribe. In this aspect, the Florida statute and the views expressed in *Davis v. State* are desirable in order to maintain high standards of morality in our public officials.

The best way to clarify the defense and overrule the conflicting case law on the subject would be for the legislature to enact an article in the penal code describing the defense and providing for its use. Such an article may be patterned after the provision in the Wisconsin Penal Code for the defense. The need for such legislation has long been realized in Texas. Judge Davidson said in 1913, "We here call the attention of the Legislature to such matters and would suggest that appropriate legislation be enacted to prevent matters of this sort occurring."⁷² It would seem that after forty-two years of this warning the time for such legislation is long overdue.

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⁷² *Scott v. State*, 153 S. W. 871, 872 (1913).