

## **Entrapment**

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## **Abstract**

We discuss how the law and scholars have approached three questions. First, what acts count as acts of entrapment? Secondly, is entrapment a permissible method of law-enforcement and, if so, in what circumstances? Thirdly, what must criminal courts do, in response to the finding that an offence was brought about by an act of entrapment, in order to deliver justice? While noting the contrary tendency, we suggest that the first question should be addressed in a manner that is neutral about the answers to the other two. On the second question, we summarize various arguments about the permissibility of entrapment, while remaining largely

neutral about their merits. With regard to the third question, we summarize the approaches to entrapment in various jurisdictions, and we note some patterns, across the jurisdictions here surveyed, concerning shifts from one sort of entrapment remedy to another.

**Keywords**

admissibility of evidence, abuse of process, entrapment, entrapment defence, entrapment remedies, undercover policing

## I. Introduction

The word ‘entrapment’ has three common usages in legal discourse. First, it is used in connection with *acts of entrapment*: it applies, at least, to a class of acts in which a party, whom we call the ‘agent’, intentionally brings it about that another party, whom we call the ‘target’, performs a distinct act that is of a criminal type. Secondly, it is used to refer to a *method of proactive law enforcement*: the use of acts of entrapment to secure convictions. Thirdly, it is used, predominantly in the USA, to refer to *the entrapment defence*: under this usage, it is argued that the offence with which the defendant is charged resulted from an act of entrapment. In most jurisdictions, and in the literature, the focus has been, as it is here, on acts of entrapment, called ‘legal’, ‘state’ or ‘police’ entrapment, in which the agent is, or is a deputy of, a law-enforcement agent. We mention entrapment by other agents, called ‘civil’ or ‘private’ entrapment, only in passing.

An approach to entrapment may be codified in legislation (e.g., as in South Africa and under Australian federal law) or, more typically, embodied only in case law (e.g., Canada, England and Wales, Germany, Scotland, Singapore, and the US federal jurisdiction). While entrapment is a substantive defence in US federal courts, the criminal courts in other jurisdictions that recognize entrapment respond to it differently. Entrapment can be grounds for mitigation at sentencing (sometimes, e.g., in Singapore, as the only recognized remedy), for the discretionary exclusion of evidence (e.g., Australia, New Zealand, South Africa, England and Wales, Scotland), or for a permanent stay in proceedings (e.g., Canada, England and Wales, Scotland).

Each of the three usages of ‘entrapment’ may be associated with a corresponding philosophical question. First, there is a definitional question: which acts count as acts of entrapment? Secondly, is entrapment a permissible method of law-enforcement and, if so, in what circumstances? Thirdly, what must criminal courts do to deliver justice, in response to

the finding that an offence was brought about by an act of entrapment? The second and third questions are normative: they cannot be settled just by considering how the courts happen to have responded to claims of entrapment by defendants. Although our three questions are often confused with each other, their distinctness was implied early on, in the US Supreme Court's opinion in *Sorrells v United States* 287 US 435, 441 (1932):

the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it [...] and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation [...]. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation; but the question whether it precludes prosecution or affords a ground of defense, and, if so, upon what theory, has given rise to conflicting opinions.

Hughes CJ here begins by characterizing the agent's act of entrapment. He then asserts that, while the agent's act was an abuse of authority, this does not prejudge the question of the target's criminal liability. These assertions presuppose the distinctness of the questions of permissibility and of what the appropriate response should be when a defendant has been entrapped.

We now consider how the law and scholars have answered our three questions.

## **II. What is Entrapment?**

What conditions must an act meet in order for it to be an act of entrapment? While it is possible that there is no good answer to that question, this would perhaps have unfortunate

consequences for the law, and it is not a conclusion hastily to be embraced. At present, the question is more often addressed in passing than in detail. Case law and the literature exhibit a multitude of conflicting views on it. Moreover, there has been a propensity, especially in the USA, inadequately to distinguish it from the question whether the defendant can reasonably be held culpable. The tendency to define entrapment in ways that already incorporate considerations of permissibility, impermissibility, culpability, or the lack thereof arguably fosters confusion. As *Sorrells* allows, the question of what entrapment *is* admits of treatment as distinct from questions about permissibility and culpability; answering it before attempting to answer any normative questions seems to be apt methodology.

While US legal thought on entrapment was forged in the state courts in the late nineteenth century, federal cases predominate from *Sorrells* onwards. Associate Justice Roberts defined entrapment as:

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.

*Sorrells v United States* 287 US 435, 454 (1932), Roberts J, concurring

This definition includes some elements that commonly feature in later definitions. These include the following conditions (stated in our terms): (i) the entrapping agent is a law-enforcement agent; (ii) the agent intends that the target perform an act (of the agent's devising) that is a criminal offence; (iii) the agent procures that act via 'trickery, persuasion or fraud'; (iv) the target would not have performed the act if the agent had not procured it.

While *Sorrells* did involve such deception, condition (iii) allows for, but does not require, that the agent deceive the target. Subsequently, however, the US Supreme Court and

scholars have often included a deception condition. Likewise, the definition allows for, but does not require, that the agent tempt, or try to tempt, the target. Considerations of temptation feature in the Court's subsequent cases, but these fall short of amounting to the introduction of a temptation condition; scholars, however, have often included one.

In relation to condition (iii), we may distinguish between entrapment (which necessarily involves procurement) and the mere presentation of an opportunity: this distinction, or one close to it, is subsequently made by the Court, e.g., in *Jacobson v United States*, 503 US 540, 549–50 (1992), and in many other jurisdictions (see Section IV).

Condition (iv) is a counterfactual condition. Since procuring an action is a way of bringing it about, (iii) seems to render (iv) at least partly redundant. Dispensing with (iv) may also be desirable, given that it rests upon a contentious, counterfactual, philosophy of causation.

A controversy about predisposition has exercised the US Supreme Court since *Sorrells*. It relates to the dispute, played out in the Court, between 'subjectivist' and 'objectivist' approaches to entrapment. Subjectivism focuses upon the target's predisposition. According to the Court in *Sorrells*:

the defense of entrapment is not simply that the particular act was committed at the instance of government officials. [...] The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to *the controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials*. If that is the fact, common justice requires that the accused be permitted to prove it. The government in such a case is in no position to object to evidence of the activities of its representatives in relation to

the accused, and, if the defendant seeks acquittal by reason of entrapment, he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.

*Sorrells v United States* 287 US 435, 451 (1932), our italics

Objectivism focuses upon the agent's conduct, as in this early statement of it:

[...] courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy.

*Sorrells v United States* 287 US 435, 459 (1932), Roberts J, concurring

The debate, particularly prominent at the US Supreme Court, about the relevance of predisposition is better conceived of not as concerning whether the absence of predisposition is necessary to entrapment's having occurred, but rather as about the conditions for the applicability of the entrapment defence (or alternatives to it applicable in the jurisdiction). B. Grant Stitt and Gene G. James write:

Neither the subjective nor the objective test is a test of whether entrapment *in fact* took place. [...] The subjective and objective tests are criteria for determining whether people are to be held accountable for the crimes that they were entrapped into committing.

'Entrapment and the Entrapment Defense: Dilemmas for a Democratic Society',

(1984) 3 Law and Philosophy 111, 114

Accordingly, and as the divergent approaches of the criminal courts in different jurisdictions to entrapment scenarios might suggest, there is a core concept of entrapment that is neutral between subjectivists and objectivists about the appropriate response of the courts to entrapment scenarios. Conditions (i)–(iv) above can be seen as seeking to explicate such a concept. Plausibly, conceptual clarity favours defining entrapment in a manner consistent with both subjectivist and objectivist approaches to its implications for the criminal process (if this can be done).

### **III. Entrapment and Law Enforcement**

Although some judges and commentators reserve the term ‘entrapment’ for what they regard as illegitimate acts, we assume a neutral usage that keeps open the question about entrapment’s permissibility. At its most stringent, objectivism maintains that entrapment is impermissible, no matter the target. Objectivist judges at the US Supreme Court have opposed entrapment on such grounds as the following.

- Entrapment is inconsistent with the duty of law-enforcement agents to prevent, rather than to create, crime: *Sherman v United States*, 356 US 369, 384 (1958) (Frankfurter J, concurring); *United States v Russell*, 411 US 423, 445, 449 (1973) (Stewart J, dissenting). (Subjectivists sometimes support a weaker version of this objection, that restricts it to when the target is not predisposed: *Sorrells v United States*, 287 US 435, 441 (1932).)
- Furthermore, it fails genuinely to detect crime: *Sherman* 384 (Frankfurter J, concurring).
- It is inimical to ‘the purity’ or ‘integrity’ of ‘government and its processes’: *Sorrells* 455, cf. 457 (Roberts J, concurring); *Russell* 445 (Stewart J, dissenting).

- It might undermine public confidence in the criminal-justice system and, thereby, the rule of law: *Sherman* 380 (Frankfurter J, concurring).

In academic work, these objections have been mirrored in the objections that entrapment (at least without, and often despite, reasonable suspicion): creates crime and thereby results in ‘incoherence’ or ‘inconsistency’ in the system of criminal justice (Dworkin, Ashworth); fails to accomplish genuine detection (Dworkin); breaches the ‘integrity’ of the system (Ashworth, Leverick and Stark); and is inimical to democratic values (Stitt and James). Among numerous further objections from scholars are that entrapment appears inconsistent with the presumption of innocence (Körner), that it is oppressive to the defendant (Leverick and Stark), that it is an abuse of process (Leverick and Stark), that it objectionably subverts the target’s autonomy (Hughes), that it is readily open to abuses such as the victimization of personal or political enemies, the silencing of opponents and blackmail (Marx, Stitt and James), and that, by reason of the ‘dirty hands’ involved in entrapment, the state lacks the standing to condemn the target (Ho, Leverick and Stark). An objection that features, at least in the background, in the thinking of many of entrapment’s strong opponents, is that entrapment involves treating the target as a mere means towards their own conviction (Leverick and Stark).

Judges at the US Supreme Court that have seen entrapment as permissible in some circumstances have argued that resort to it facilitates the detection of some crimes otherwise impossible or difficult to detect, and that due process does not always debar it: e.g., *Hampton v United States* 425 US 484, 495, Footnote 7 (1976) (Powell J, concurring). Pragmatic considerations about detection, however, neither settle normative questions of justice and ethics nor establish that detecting crime is a dominant end that other ends or values (including those to which objectivists commonly appeal) must subserve.

Entrapment's most stringent critics have stated relatively clearly both their view that entrapment is impermissible, no matter the status or predisposition of the target, and their reasons for holding that view. By contrast, the reasons behind the contrary view that entrapment is permissible when the target is predisposed, or reasonably suspected of being a habitual criminal, await comparable articulation and defence. The view that entrapping the predisposed can be a just practice, while entrapping a person that lacks predisposition is generally unjust, seems more often to have been treated as obvious than rationally defended. Subjectivists that adopt it are faced with the problem of why the stated injustice of entrapping someone lacking predisposition is not also held to apply to like cases of private entrapment.

#### **IV. Entrapment and Criminal Justice**

The question whether entrapment 'precludes prosecution or affords a ground of defense, and, if so, upon what theory' (*Sorrells* 441) remains pertinent, as does the broader question of how the courts should respond to entrapment scenarios. The disparate ways in which different jurisdictions treat entrapment, the dispute between subjectivists and objectivists (which remains unresolved from a philosophical point-of-view), recent controversies in Germany, and the absence of well-articulated entrapment doctrines in many jurisdictions (e.g., India and the Republic of Ireland) show these to be live questions.

##### **1. Australia**

The courts have repeatedly rejected the idea of a substantive entrapment defence. Before *Ridgeway v The Queen* [1995] HCA 66, (1995) 184 CLR 19 many of the state courts in Australia inclined as a response to entrapment towards a permanent stay of proceedings on the basis of an abuse of process, and those in other states towards discretionary exclusion of evidence. In *Ridgeway*, the High Court of Australia rejected the arguments for a permanent

stay, pointing out instead that the Australian courts already had the discretion to exclude evidence that had been obtained, in an illegal or otherwise improper manner, via procurement of an offence (or an element of it), and that if the exclusion of this evidence would remove all reasonable prospect of a conviction, then the court could stay proceedings on that ground.

The High Court reached this position for reasons of public policy concerning the integrity of the courts, observance of the law by law-enforcement agents, and the propriety of the conduct of those agents, not principally for considerations about citizens' rights, or in connection with any specific unfairness to the accused. In response to *Ridgeway*, the federal government and the states of New South Wales, Queensland and South Australia, legislated to allow law-enforcement agents or their deputies to engage in illegal activity as part of controlled activities or operations, deeming evidence obtained thereby as not necessarily inadmissible: the court's discretion to exclude evidence is to be exercised only when the court considers the agent's conduct to be so grave as to require a remedy that outweighs the public interest in conviction.

## **2. Canada**

In *Kirzner v The Queen* 1977 CanLII 38 (SCC), [1978] 2 SCR 487, entrapment was characterized as involving 'the use of *agents provocateurs* who go beyond mere solicitation or encouragement and initiate a criminal design for the purpose of entrapping a person in order to prosecute him' (494). In *Amato v The Queen* 1982 CanLII 31 (SCC), [1982] 2 SCR 418, the Court settled on the view that a stay of proceedings was the appropriate response to entrapment and it deemed mitigation at sentencing unsatisfactory. *R v Mack* 1988 CanLII 24 (SCC), [1988] 2 SCR 903, 965 clarifies that, while reasonable suspicion is required if the agent's presentation of an opportunity to perform a criminal act is to be justifiable, neither reasonable suspicion nor the target's predisposition can justify the agent in going beyond the

mere presentation of an opportunity. In fact, the Court holds that entrapment occurs whenever:

(a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry;

(b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence.

*R v Mack*, 964 [134]–[135]

*R v Barnes* 1991 CanLII 84 (SCC), [1991] 1 SCR 449, 460–461 [22]–[23], citing *Mack* 956, holds that *bona fide* inquiry may include the presentation of an opportunity to an individual about whom, specifically, there is no reasonable suspicion, provided that the individual is present in an area where there is known to be regular relevant criminal activity, such as drug dealing.

### **3. England and Wales**

In *R v Sang* [1979] UKHL 3, [1980] AC 402, Lord Diplock, in giving the leading judgment, asserted that:

It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. [...] However much the judge may dislike the way in which a particular piece of

evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason. [...] Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur. *Sang* 436–437

The law was changed by the Police and Criminal Evidence Act 1984, s 78, under which evidence may be excluded at trial if it is deemed by the court to have been obtained unfairly.

In *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060, Lord Nicholls expressed strong antipathy to entrapment and stated that, in view of both legislative and judicial developments,

English law has now developed remedies in respect of entrapment: the court may stay the relevant criminal proceedings, and the court may exclude evidence pursuant to section 78. [...] [A]s a matter of principle a stay of the proceedings, or of the relevant charges, is the more appropriate form of remedy. A prosecution founded on entrapment would be an abuse of the court's process. *Looseley* 2067G [16]

Also,

the existence or absence of predisposition in the individual is not the criterion by which the acceptability of police conduct is to be decided. Predisposition does not

make acceptable what would otherwise be unacceptable conduct on the part of the police or other law enforcement agencies. *Looseley* 2069B–C [22]

Thus, Lord Hoffmann added at 2079F [68], ‘predisposition is irrelevant to whether a stay should be granted’.

#### **4. European Court of Human Rights (ECtHR)**

The ECtHR sees entrapment as breaching Article 6.1 of the European Convention of Human Rights (ECHR), which protects the right to a fair trial and includes the presumption of innocence. The right to a fair trial is construed as pertinent not just to the trial itself, but to the criminal process, including the investigation.

In *Lüdi v Switzerland* [1992] ECHR 50, (1993) 15 EHRR 173, App No. 12433/86 (15 June 1992), the European Court of Human Rights (ECtHR) upheld the use of an ‘undercover agent [to investigate] criminal activity in a predominantly passive manner without using his own influence to arouse willingness to commit the act and induce criminal conduct’ (*Lüdi* 178, para 21). In *Teixeira De Castro v Portugal* [1998] ECHR 52, (1999) 28 EHRR 101, App No. 25829/94 (9 June 1998), the Court found against Portugal because the police ‘instigated the offence and there is nothing to suggest that without their intervention it would have been committed’ (*Teixeira* 116, para 39).

*Furcht v Germany* [2014] ECHR 1138, (2015) 61 EHRR 25 (App. No. 54648/09, 23 October 2014), which consolidated the approach displayed in *Teixeira*, represents the current approach of the ECtHR to entrapment. In *Furcht*, the ECtHR did not regard mitigation at sentencing as providing sufficient redress and, while advocating no specific response from the range of alternatives in its place, it held that ‘for the trial to be fair [...] all evidence

obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply' (717–8, para 64).

The Court viewed the following factors as indicative of incitement: the agent's conduct went beyond the 'passive' investigation of criminal activity (714, para 48); there was no reasonable suspicion that the target was already in the habit of like criminal activity when first approached (714, para 50); the target initially refused to act as the agent suggested, but the agent tried again and succeeded (715, para 52). If a defendant can reasonably submit that they were incited by a relevant agent, then the onus is on the prosecution to show that entrapment did not happen, though '[i]n practice, the authorities may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation' (715, para 53). In *R v Syed* [2018] EWCA Crim 2809, [2019] 1 WLR 2459, the Court of Appeal of England and Wales stated that the concession in *Furcht* to what may be the case 'in practice' 'appears to suggest that if the state fails to discharge the burden of proof, the failure may not be fatal' (2484G, para 112).

## **5. Federal Republic of Germany**

German law distinguishes between admissible and inadmissible 'Tatprovokation' by law-enforcement agents or their deputies (e.g., BGH, Judgment of 18 November 1999, 1 StR 221/99 (BGHSt 45, 321), see para 12, and BGH, Judgment of 19 January 2016, 4 StR 252/15).

From 1984 until 2014, when the ECtHR ruled it insufficient in *Furcht v Germany* [2014] ECHR 1138, (2015) 61 EHRR 25 (App No. 54648/09, 23 October 2014), mitigation at sentencing was normally deemed the appropriate response both to unacceptable and to acceptable entrapment, and the former would, other things being equal, have greater mitigatory force. The ECtHR's ruling has intensified the long-running controversy in

Germany about the appropriate response to entrapment. The Second Criminal Panel of the BGH (BGH, Urteil v. 10.6.2015, 2 StR 97/14) followed the ECtHR in deeming the exclusion of evidence an unsatisfactory response to unacceptable entrapment (see paras 41–43). While the Second Panel instead favoured a permanent stay of proceedings, divergent responses to the ECtHR ruling in Germany have led to calls for a legislative solution.

## **6. Hong Kong**

Before *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060, the courts took the view that entrapment could diminish responsibility. They favoured mitigation at sentencing when it was deemed to have done so (*Hong Kong Special Administrative Region v Daswani* [1997] HKLY 369). Since *Looseley*, this has co-existed with the view that, when it involves police conduct that seriously affronts ‘the public conscience’, entrapment can justify a permanent stay on the basis of abuse of process (*Hong Kong Special Administrative Region v Wong Kwok Hung* [2007] 1 HKC 462 (Court of Appeal) (at 467–8)).

## **7. India**

The most notable entrapment cases have involved media entrapment. While there has been relatively little discussion of entrapment by law-enforcement agents, it has been deemed impermissible in some majority judgments, and strong judicial disapproval of it dates back at least to the 1950s. In *Ramjanam Singh v State Of Bihar* AIR 1956 SC 643, 1956 CriLJ 1254 the Supreme Court of India stated:

Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of

the law. However regrettable the necessity of employing agents provocateurs [*sic*] may be [...], it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done. (Bose J, at para 37)

The courts have traditionally held that relevant evidence, however attained, is admissible provided that the manner of its attainment is consistent with statutes. The Supreme Court of India said in *Umesh Kumar v State of Andhra Pradesh* [2013] INSC 833, (2013) 10 SCC 591 (Supreme Court of India, 6 September 2013) [37]:

It is a settled legal proposition that even if a document is procured by improper or illegal means, there is no bar to its admissibility if it is relevant and its genuineness is proved. If the evidence is admissible, it does not matter how it has been obtained. However, as a matter of caution, the court in exercise of its discretion may disallow certain evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused.

Other entrapment remedies have not found favour and the courts have not settled upon an approach.

## **8. Malaysia**

In *Wan Mohd Azman bin Hassan @ Wan Ali v PP* [2010] MLJU 271, [2010] 4 MLJ 141, Abdull Hamid Embong FCJ (for the court) took the following positions:

- (i) There is no entrapment defence (whether substantive or otherwise) in Malaysia.

- (ii) The use of *agents provocateurs* is sanctioned by the Dangerous Drugs Act 1952 s 40A. Evidence obtained thereby is admissible.
- (iii) An *agent provocateur* is not an accomplice, for (quoting *Emperor v Chaturbhuj Sahu* (1911) ILR 38 CAL 96, 105 (Doss J) and citing *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] 1 MLJ 71 and *Goh Lai Wak v Public Prosecutor* [1994] 1 SLR 748) while an accomplice ‘extends no aid to the prosecution’ until *after* the commission of the offence an *agent provocateur* is an agent for the prosecution from the outset.
- (iv) That evidence was obtained in an unfair or improper manner is insufficient, under s 40A of the Dangerous Drugs Act 1952, for it to be inadmissible.
- (v) Malaysian law allows for neither a permanent stay nor for discretionary exclusion of evidence.
- (vi) These observations notwithstanding, whether a defendant was entrapped is a question of fact. For the fact to be established, however, the defendant would need to have been ‘an “unwary innocent”’.

## 9. New Zealand

The courts distinguish between merely presenting an opportunity to commit an offence and encouraging or stimulating someone that did not already intend to commit it to do so. In the latter scenario, the court has the discretion to exclude evidence on grounds of public policy relating to abuse of process. This approach has been well-established in case law since *R v O’Shanessy* (1973) 2 CRNZ 1, and is partly embodied in the Evidence Act 2006. The courts also have a general power to stay proceedings to prevent an abuse of process: *Moevao v Department of Labour* [1980] 1 NZLR 464 CA.

## **10. Northern Ireland**

The principles enunciated in *Looseley* hold in Northern Ireland also: *R v Bellingham* [2003] NICC 2 and *R v Kearns* [2010] NICC 32.

## **11. Republic of Ireland**

In *DPP v Bowe and Casey* [2017] IECA 250 [55], the court described entrapment as ‘a recognised basis of defence in Irish law’. Nevertheless, Ireland has not established a well-developed approach to entrapment. In practice, however, the courts observe the view of the ECtHR that entrapment compromises the right of the accused to a fair trial (under Article 6 of the European Convention on Human Rights). Relatedly, in their dealings with *Director of Public Prosecution v Mills* [2015] IECA 305, [2015] 1 IR 659 and *Mills v Ireland* [2017] ECHR 984, (2018) 66 EHRR SE3, the Court of Appeal and the ECtHR have criticized the absence of an adequate legislative or regulatory framework governing undercover policing in Ireland.

## **12. Republic of South Africa**

South Africa’s approach is embodied in the Criminal Procedure Act 1977, s 252A, amended by the Criminal Procedure Second Amendment Act 1996. Law-enforcement agents or their deputies may present a target with an opportunity to offend and, provided that their influence upon an offence does not go beyond having offered it as an opportunity, the evidence thereby gained is admissible (s 252A(1)). Otherwise, the discretion to exclude evidence applies (s 252(A)(3)(a)). The Act provides a long list of criteria for determining whether the agents went beyond merely offering an opportunity (s 252A(2)), and it affords a high degree of judicial discretion. The Act also instructs the court to weigh the public interest against the interests of the accused (s 252A(3)(b)). When the accused reasonably contends that the agents

did more than merely offer an opportunity, the burden of proof is placed on the prosecution to demonstrate the admissibility of the evidence (s 252A(6)).

### **13. Scotland**

In the 2000s, Scotland moved from a position that had favoured the discretionary exclusion of evidence as a remedy for entrapment to one that favoured a permanent stay. There has been debate about whether the rationale for stay lies in abuse of process (*Brown v HM Advocate* [2002] ScotHC 65, 2002 SLT 809) or in the ‘oppression’ of the defendant (*Jones v HM Advocate* [2009] ScotHC HCJAC 86, 2010 JC 255).

### **14. Singapore**

The Court of Appeal has repeatedly (*How Poh Sun v PP* [1991] SGCA 22, [1991] 3 MLJ 216, 219 and subsequent cases) rejected the idea of an entrapment defence, holding (following *Sang*) that it is the business of the criminal courts to deal only with the evidence presented, rather than with the propriety with which it was gathered. According to the Court, ‘If entrapment can be considered at all, it is relevant only insofar as mitigation of the sentence is concerned’ (*PP v Rozman bin Jusoh* [1995] SGCA 64, [1995] 3 SLR 317, 329). Moreover, ‘the invocation of the court process *for the bona fide prosecution of criminals* [...] is not an abuse of process, even though the evidence against the accused may have been obtained by state entrapment’, so ‘*Looseley* has no application in Singapore’ (*Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207, [2008] 2 SLR 239, [138]–[139]).

### **15. USA**

The US federal courts are notable for their long-standing recognition of, and sustained debates about, a substantive entrapment defence: this is reflected in the large amount of

scholarship on entrapment that focuses on the US federal jurisdiction. Under the subjectivism that has prevailed at the US Supreme Court, the entrapment defence rests on two core elements: (i) that the target's act was instigated by (or on behalf of) a law-enforcement agent; (ii) that the target was not predisposed. Although subjectivism has prevailed since *Sorrells*, some strong statements of objectivism have been offered from *Sorrells* through to *Hampton v United States*, 425 US 484 (1976).

*Mathews v United States*, 485 US 58 (1988) engages in the debate over whether the entrapment defence requires that the defendant should admit all elements of the offence, in particular criminal intent, with the majority concluding that it does not, and (like *Jacobson*) discusses how the notion of predisposition should be understood, particularly in relation to the point at which the agent first contacts the target.

Paul Marcus, *The Entrapment Defense* (5<sup>th</sup> edn, LexisNexis 2016) is a comprehensive study of US entrapment law. It includes coverage of cases at lower federal and state levels, as well as statutes at state level. Chapter 5 shows that in a significant minority of states, objectivist approaches to entrapment modelled on the approach in the Model Penal Code, or in one of the proposed revisions to the Federal Criminal Code, is adopted (sometimes by statute) and that some states adopt a hybrid approach.

## **V. Conclusion**

Although the debate between subjectivist and objectivist judges in the US Supreme Court has dominated in many discussions of how entrapment should be defined, it is actually the appropriate response to entrapment that it puts at the forefront, and participants on both sides tend to confuse this normative question with the definitional question.

There is a consensus among legal authorities, recognized also by many scholars, that there is a distinction, of significant legal bearing, between merely presenting a target with an

opportunity to offend and encouraging the target to do so. This consensus might help foster optimism about the prospects for a definition of entrapment that is neutral concerning the appropriate administration of justice.

The legal bearing of the aforementioned distinction amounts, in some jurisdictions, to the seeing of the mere provision of an opportunity as a permissible aspect of proactive law enforcement, with measures that go beyond the mere presentation of an opportunity, and that seek to persuade, solicit or incite, being seen as harder to justify, or even as impermissible.

Most jurisdictions outside the USA that have contemplated having a substantive entrapment defence have emphatically rejected it as philosophically unsound, thereby managing to avoid many of the controversies that have arisen at the US Supreme Court. They have also avoided an acute form of the ‘problem’ of private entrapment that faces US subjectivists. Entrapment by an agent of the state cannot nullify guilt unless entrapment by a private individual can also do so. The view that entrapment by a private individual can nullify guilt is both uncommon and unconvincing. If there is something that is generally wrong with prosecuting an entrapped defendant, it would not seem to be that the defendant is, because they were entrapped by an agent of the state, actually innocent.

Despite the disparate approaches to entrapment across the jurisdictions here surveyed, all but Malaysia recognize that entrapment at least sometimes requires redress, and only Singapore clings to mitigation at sentencing as sole remedy. Nations belonging to the Council of Europe must reckon with the ECtHR’s ruling that entrapment violates human rights. This point of view, alongside the Court’s rejection of the adequacy of mitigation at sentencing as a remedy, might come to have wider global influence.

When considering how the courts in a jurisdiction have switched from favouring one sort of principal entrapment remedy to another, some interesting patterns emerge. The move is always away from mitigation at sentencing as sole remedy, never towards it. The same

goes, in general, for discretionary exclusion of evidence. Among jurisdictions that have favoured a permanent stay, by contrast, only Australian federal law has relinquished it in favour of another remedy. If we suppose that systems of criminal justice tend towards moral progress over time, or that the attainment of justice is something towards which convergence of opinion might tend, then these patterns give succour to the view (supported by such scholars as Ashworth and Ho) that, among the remedies surveyed here, permanent stay is the most appropriate.

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