
Elaine Robinson McHale
THE AGENCY DEFENSE IN NARCOTICS SALES PROSECUTIONS: A JUDICIAL LOOPHOLE IN THE NEW YORK DRUG LAWS

INTRODUCTION

Recently criticized as an "arcane mixture of agency and penal concepts," the "procuring agent theory" has long been recognized as a defense in narcotics sale prosecutions. This judicially created doctrine is based upon the premise that one who purchases contraband at the request of another is acting merely as an agent and should not be held liable for unlawful sale when he delivers the contraband to his principal.\(^2\)

Developed in the early 1900's,\(^3\) the agency defense was widely applied in federal and state courts until the mid-1960's.\(^4\) At that time, many jurisdictions adopted broadly worded statutes that were designed to curb a growing illicit narcotics industry\(^5\) which had engendered a wide variety of social ills.\(^6\) In the face of clear legislative policy and, in many instances, explicit statutory language,\(^7\) most courts concluded that this common law doctrine was no longer viable.\(^8\)

Recently, however, the New York Court of Appeals reaffirmed the vitality of the procuring agent theory in four major opinions\(^9\) which attempt to draw loosely woven guidelines for the defense's future application. The court's reaffirmation of this common law

---


\(^2\) In United States v. Barcella, 432 F.2d 570 (1st Cir. 1970), the first circuit, examining the agency defense for the first time, stated:

In essence the theory is that if the defendant, in procuring the drugs and delivering them to the recipient, acted solely as the agent of the recipient, and in no other capacity, then the delivery was the transfer by an agent to his principal of what already belonged to the principal and hence did not involve a sale, barter, exchange or gift . . . .

Id. at 571.

\(^3\) See notes 12-17 and accompanying text infra.

\(^4\) See notes 12-24 and accompanying text infra.

\(^5\) See notes 21 & 25 and accompanying text infra.


\(^7\) See notes 23 & 26 and accompanying text infra.

\(^8\) See notes 24, 29-35 and accompanying text infra.

AGENCY DEFENSE

The doctrine has particular significance in light of New York's strict drug laws, which have been characterized as the harshest and most inflexible in the nation. This Note will trace the development of the agency defense in the federal and state courts, with particular emphasis on the reasons for its eventual decline. The doctrine's background in New York and the court of appeals' recent revitalization of the agency defense will be discussed in detail. Finally, the characteristics of the doctrine, as outlined by the court, will be explored in an effort to predict its practical utility.

DEVELOPMENT OF THE AGENCY DEFENSE

A Judicial Response to Local Prohibition Laws

The notion that a defendant is not liable for criminal acts performed by him as an agent for another was rejected early in the development of criminal law. The courts generally have adhered to the principle that

[t]he law does not recognize the doctrine of agency as a defense to a criminal charge. It deals with the person who commits the overt act, and while others may be guilty as accessories, the party committing the prohibited act is not permitted to interpose the defense that he acted only as an agent or employee.

Notwithstanding this generally accepted rule, some turn-of-the-century courts permitted the use of an agency defense in state prosecutions for the sale of intoxicating liquors. These early prosecutions arose in the context of a patchwork of local statutes which prohibited the manufacture, sale or transportation of intoxicating liquors within the borders of a particular county or state. Theoretically, 

---

11 See, e.g., People v. Richmond, 29 Cal. 415 (1866); Commonwealth v. Feeney, 95 Mass. (13 Allen) 580 (1866).
12 State v. Chauvin, 231 Mo. 31, 32, 132 S.W. 243, 244 (1910). The Chauvin defendant was charged with operating a poker table in an illegal gambling casino. The court expressly rejected this defendant's contention that he should not be held culpable since he was merely acting as an agent for his employer. Id. at 34, 132 S.W. at 245.
13 See, e.g., Du Bois v. State, 87 Ala. 101, 16 So. 381 (1899); People v. Converse, 157 Mich. 29, 121 N.W. 475 (1909); Tate v. State, 91 Miss. 382, 44 So. 836 (1907); State v. Lynch, 81 Ohio St. 336, 90 N.E. 335 (1919); Reed v. State, 3 Okla. Crim. 16, 103 P. 1070 (1909); Way v. State, 36 Tex. Crim. 40, 35 S.W. 377 (1896).
14 Statutes prohibiting the sale or manufacture of intoxicating liquors were particularly prevalent in the southern and western states. See, e.g., Morgan v. State, 81 Ala. 72, 1 So. 472 (1887); Dale v. State, 90 Ark. 579, 120 S.W. 389 (1909); Wakemen v. Chambers, 69 Iowa
cally, an individual could be held liable under these statutes for making an unlawful "sale" if he purchased liquor in a "wet" jurisdiction and subsequently transferred it to another party in a "dry" territory. Many courts rejected this argument, however, in cases where the defendant purchased and delivered the liquor at the request of another and was not personally interested in the transaction. In such cases, the courts generally concluded that the defendant was merely an agent acting at the direction of a principal and therefore could not be considered a seller within the meaning of the applicable criminal statute.

The Federal Narcotics Cases

Almost 50 years after the agency defense was recognized in state liquor prosecutions, the federal courts began to apply a similar theory in cases involving the unlawful sale of narcotics. Presented

169, 28 N.W. 498 (1886); State v. Cullins, 53 Kan. 100, 36 P. 56 (1894); State v. Wingfield, 115 Mo. 428, 22 S.W. 363 (1893); Redd v. State, 77 S.W. 214 (Tex. Crim. App. 1903). The typical state statute "regulate[d] the sale, giving away, or otherwise disposing of spiritous, vinous, or malt liquors, or intoxicating bitters, or patent medicines having alcohol as a base . . . ." Morgan v. State, 81 Ala. 72, 73, 1 So. 472, 473 (1887) (citing ALA. CODE § 4806 (1876).

These local statutes ultimately were superseded by the enactment of the National Prohibition Act, Pub. L. No. 66, ch. 85, tit. II, § 3, 41 Stat. 305, 308 (1919), which made it illegal to "manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquors."


12 See, e.g., Du Bois v. State, 87 Ala. 101, 6 So. 381 (1889); Morgan v. State, 81 Ala. 72, 1 So. 472 (1887); State v. Cairns, 64 Kan. 782, 68 P. 621 (1902); State v. Wingfield, 115 Mo. 428, 22 S.W. 363 (1893); Redd v. State, 77 S.W. 214 (Tex. Crim. App. 1903); cf. Dale v. State, 90 Ark. 579, 120 S.W. 389 (1909) (defendant with no personal interest in contraband may not invoke agency defense if he guaranteed purchaser's payment to seller).

13 Although the state statutes generally prohibited the sale of liquor, see note 14 and accompanying text supra, no penalties were prescribed for the purchase or possession of the contraband. Applying these statutes, many state courts reasoned that, since a principal could not be held criminally liable for purchasing alcohol for personal use, an agent who acts solely in the principal's behalf should not be held responsible. See, e.g., Campbell v. State, 79 Ala. 271 (1885); Wakemen v. Chambers, 69 Iowa 169, 28 N.W. 498 (1886). Similarly, the state courts generally rejected the contention that a defendant was an agent or abettor of the seller if he merely aided a friend in making a liquor purchase. See Campbell v. State, 79 Ala. 271 (1885); State v. Cullins, 53 Kan. 100, 36 P. 56 (1894).

14 See, e.g., Garcia v. United States, 373 F.2d 806 (10th Cir. 1967); United States v. Moses, 220 F.2d 165 (3d Cir. 1955); United States v. Sawyer, 210 F.2d 169 (3d Cir. 1954).

Cases arising before 1970 were prosecuted under the Jones-Miller Act, Pub. L. No. 221, 35 Stat. 614 (1909), and the Harrison Act, Pub. L. No. 223, 38 Stat. 785 (1914). These statutes were revenue producing measures which did not effectively discourage drug trafficking. See 9 UNIFORM LAWS ANN., commentary at 524 (master ed. West 1973). Under the Jones-Miller Act, Pub. L. No. 221, 35 Stat. 614 (1909), the sale, possession, purchase or importation of opium was punishable by a fine of not more than $5,000 and imprisonment for not more than 2 years. The Harrison Act, Pub. L. No. 223, 38 Stat. 785 (1914), merely imposed a tax upon
with a prosecution against an intermediary for unlawful drug sale, one court concluded that a defendant who procures narcotics on behalf of another acts as an agent for the buyer and cannot be convicted as a seller.\textsuperscript{19} This reasoning was widely accepted in the federal courts\textsuperscript{20} until the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Controlled Substances Act).\textsuperscript{21} The Act contains a broad prohibition on the distribution of controlled substances.\textsuperscript{22} "Distribution," as defined in the statute, encompasses an "actual, constructive or attempted transfer of a controlled substance, \textit{whether or not there exists an agency relationship}."\textsuperscript{23} Interpreting the revised statutory language, the federal courts generally have concluded that the agency theory is no longer available as a defense in narcotics prosecutions.\textsuperscript{24}
The Rise and Fall of the Agency Defense in the State Courts

At the state level, a majority of jurisdictions adopted the Uniform Narcotic Drug Act (Narcotic Act), which defined a sale as a "barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee." Interpreting this provision, some state courts found that the statute was intended to reach only those who acted as sellers or as agents of the seller. Under this approach, one who acted solely on behalf of a buyer could not be charged with illegal sale merely because he delivered drugs to his principal. In contrast, the courts in some jurisdictions interpreted identically worded statutes as representative of a broad legislative policy in favor of punishing all trafficking in illicit drugs. These courts generally concluded that the judicially created agency defense was precluded by the Narcotic Act.


Id. at 529.


Interpreting the language of the Uniform Narcotic Drug Act (Uniform Narcotic Act) in State v. Allen, 292 A.2d 167 (Me. 1972), the court held that the term "sale" encompassed any transfer of prescribed drugs. In this court's view, recognition of the agency defense would frustrate the purpose of the act "by seriously hindering the enforcement process." Id. at 171. Significantly, the Allen court distinguished the early liquor sales cases, see note 14 and accompanying text supra, from prosecutions for narcotics sale under the Uniform Narcotic Act. The court noted that, unlike the modern drug laws, the turn-of-the-century state prohibition statutes did not punish possession of contraband. See note 14 supra. Thus, it was reasonable for the liquor prosecution courts to assume that the legislature did not intend to punish "agents" for conduct that would be wholly lawful if pursued by the principal. Such a
Another substantial number of jurisdictions joined in the latter position when their legislatures repealed the Narcotic Act and replaced it with the Uniform Controlled Substances Act (Uniform Substances Act), a model statute which parallels the language of the federal narcotics law. Following the position adopted at the federal level, most courts within these jurisdictions ruled that the broader wording of the new uniform act demonstrated a legislative intent to eliminate the agency defense. Thus, by the mid-1970's, the procuring agent theory appeared to be headed toward extinction.

conclusion, in the Allen court's view, was unwarranted under a statutory scheme that prohibited both sale and possession. 292 A.2d at 170-71.


In contrast, the Iowa Supreme Court recently has reaffirmed the vitality of the agency defense under a version of the Uniform Substances Act which is identical to the federal provisions. State v. Lott, 255 N.W.2d 105 (Iowa 1977); see IOWA CODE ANN. § 205-101(1),(8) (West Supp. 1978-1979); note 23 and accompanying text supra. Relying on United States v. Moses, 220 F.2d 166 (3d Cir. 1955), see note 19 and accompanying text supra, the Lott court concluded that "one who aids only the transferee is [not] guilty of delivery." 255 N.W.2d at 107. Similarly, in Hill v. State, 348 So. 2d 848 (Ala. Crim. App.), cert. denied, 348 So. 2d 857 (1977), an Alabama state court permitted the use of the agency defense under the Uniform Substances Act where the accusatory instrument charged the defendant with an illegal "sale" rather than unlawful "distribution." Id. at 855; see ALA. CODE § 20-2-7 (1975). The Hill court reasoned that the enactment of the Uniform Substances Act in Alabama was not intended to alter the previously accepted definition of "sale." 348 So. 2d at 855. Thus, the court concluded that there was no reasonable basis to impose liability in this case for "selling" if the defendant did not act on behalf of the seller. Id.

32 See 9 UNIFORM LAWS ANN. 192 (master ed. West 1973). The model statute has been adopted by more than 40 states. See id. at 145.

33 Like its federal counterpart, the Uniform Substances Act, id. at 192, prohibits distribution of illicit drugs "whether or not there exists an agency relationship." Id. at 194; see notes 18-19 and accompanying text supra. The model act was drafted by the Department of Justice acting pursuant to its authority under the Controlled Substances Act. See 21 U.S.C. § 873 (1976).

34 See cases cited in note 31 supra.

THE AGENCY DEFENSE IN NEW YORK

In New York, the agency defense was first adopted in People v. Buster, a 1955 appellate division decision. Finding no evidence that the defendant was associated with the seller in a common venture or that the defendant had received any benefit from the sale, the court held that the defendant was merely an agent of the buyer and thus was not guilty of a "sale" when he transferred the narcotics to his principal. The decision was followed by People v. Branch, in which the appellate division stressed the fact that the defendant had obtained no personal benefit for his role as an intermediary in the transaction. Like the Buster court, the Branch court found the agency defense applicable.

Although the procuring agent theory received widespread recognition in the lower New York courts after the Buster decision, it was never expressly approved by the state's highest court. The issue was first presented to the New York Court of Appeals in People v. Lindsey. The Lindsey court merely affirmed without opinion the appellate division's finding that the agency defense is available to a defendant who neither profited from the transaction nor participated in a common scheme with the seller. After Lindsey, the court of appeals had numerous opportunities to evaluate the viability of

---

37 Id. at 1141, 145 N.Y.S.2d at 438. The Buster court relied primarily on its earlier decision in People v. Pasquarello, 282 App. Div. 405, 407, 123 N.Y.S.2d 98, 100 (4th Dep't 1953) (per curiam), aff'd, 306 N.Y. 759, 118 N.E.2d 361 (1954), wherein it was held that one who merely purchases narcotics may not be prosecuted as an accomplice of the seller. The Pasquarello court noted that the existing statutory scheme, see note 44 infra, reserved its harshest penalties for the professional drug seller rather than his victim, the habitual user. The court reasoned that the clear legislative intent to differentiate between the seller and the user-buyer should not be circumvented by holding the buyer criminally liable as an accomplice of the seller. 282 App. Div. at 408, 123 N.Y.S.2d at 100-01.

43 Id. at 714, 213 N.Y.S.2d at 535.
44 Id.
49 12 N.Y.2d at 959, 189 N.E.2d at 492, 238 N.Y.S.2d at 957; see note 45 and accompanying text infra.
the agency defense under the existing state narcotics laws. On each occasion, however, the court merely affirmed the decision of the appellate division without opinion. Only in People v. Carr did the court of appeals give any indication of its views on the procuring agent theory. The Carr court reversed the appellate division decision on the dissenting memorandum of the court below, which would have permitted the defendant to raise the agency defense. It was not until 1978, however, that the state’s highest court squarely addressed the issue in four major opinions which outlined the scope of the agency defense under New York law.

44 Prior to 1967, drug offenders were prosecuted under §§ 1751 and 1752 of the penal law. Chs. 529-30, [1951] N.Y. Laws 1293-94 (repealed 1967). The sale of any illegal drug, ch. 529, [1951] N.Y. Laws 1293 (repealed 1967), or the possession with intent to “unlawfully administer” a drug, ch. 530, [1951] N.Y. Laws 1294 (repealed 1967), was punishable by a term of imprisonment of “not more than ten years.” Chs. 529-30, [1951] N.Y. Laws 1293-94 (repealed 1967). The penal law was subsequently amended to account for newer drugs as they became popular. See, e.g., Ch. 323, [1965] N.Y. Laws 1041 (repealed 1967) (depressants and stimulants); ch. 332, [1965] N.Y. Laws 1073 (repealed 1967) (hallucinogens). In 1967, however, the legislature restructured the penal statute by establishing a general category of “dangerous drugs” and prescribing penalties based on the quantity sold or possessed. See N.Y. Penal Law art. 220, commentary at 4-5 (McKinney 1967). The degrees of criminal possession ranged from a Class A misdemeanor, ch. 1030, [1965] N.Y. Laws 2343, 2441 (repealed 1967), to a Class C felony, id. at 2442. The lowest degree of criminal sale was a Class D felony, id. (repealed 1973), and the highest degree was a Class B felony, id.. These dangerous Drug Offenses were repealed, however, when the Controlled Substances Offenses Act was adopted. Ch. 276, [1973] N.Y. Laws 1040; see note 53 infra.


46 People v. Carr, 49 App. Div. 656 (3d Dep’t 1975), rev’d mem., 41 N.Y.2d 847, 362 N.E.2d 259, 393 N.Y.S.2d 708 (1977) (mem.). The appellate division majority in Carr affirmed the defendant’s conviction for criminal sale of a controlled substance after finding that he was actively involved in a “drug-selling enterprise of relatively extensive proportions.” 49 App. Div. at 656. Relying on the defendant’s testimony that he purchased drugs for college students from a supplier with whom he was in close contact, the majority concluded that the defendant was acting on behalf of the seller rather than as an agent for a buyer. Id.

47 People v. Carr, 49 App. Div. 656 (3d Dep’t 1975), rev’g mem., 41 N.Y.2d 847, 362 N.E.2d 259, 393 N.Y.S.2d 708 (1977), rev’g mem., 49 App. Div. 2d 656 (3d Dep’t 1975). The dissent at the appellate division argued that the jury should have been permitted to consider whether the defendant was acting as an agent of the purchasers. Id. at 657 (Greenblott, J., dissenting). Justice Greenblott was particularly influenced by an informant’s testimony that the defendant purchased drugs at his request and by the fact that the defendant received no personal profit from the transactions in question. Id. (Greenblott, J., dissenting).

Statutory Developments

In 1972, New York State joined the growing number of jurisdictions which have adopted the Uniform Substances Act. Embodied in article 33 of the Public Health Law, the statute generally prohibits the sale of certain specified drugs by unlicensed individuals. While violations of the Uniform Substances Act are punishable only as misdemeanors, the statute's provisions have additional significance in that they supply many of the governing definitions for felony offenses contained in the narcotics sections of the New York Penal Law. Under article 220 of the present penal law, an individual may be convicted of criminal sale "when he knowingly and unlawfully sells a controlled substance." Both the penal law and the Uniform Substances Act define "sell" broadly to include "to sell, exchange, give or dispose of to another, or to offer or agree to do the same." The term unlawfully, however, is defined by reference to the Controlled Substances Act, which provides that it is "unlawful for any person to manufacture, sell, prescribe, distribute, . . . possess, . . . or transport a controlled substance except as expressly allowed by this [statute]." Like most other jurisdictions, New York has adopted the language of the Uniform Substances Act which defines "distribution" as "actual, constructive or attempted transfer . . . whether or not there is an agency relationship." Thus, a literal interpretation of the interlocking statutes could lead to the conclusion that the procuring agent theory is no longer viable under the present statutory scheme. Nevertheless, in contrast to the majority of jurisdictions, most of New York's lower courts have assumed that the agency defense remains available in narcotics sale prosecutions despite the enactment of the Uniform Act.

52 Article 33 of the New York Public Health Law is designed to regulate the distribution of controlled substances to research subjects and persons named in prescriptions by persons involved in the manufacturing or dispensing of controlled substances. The statute establishes licensing and registration procedures as well as reporting requirements for the practitioner who issues prescriptions. Although some provisions are made for misdemeanor penalties, violations of article 33 generally result in license revocation or suspension. See Id. §§ 3390-3396 (McKinney 1977); note 53 infra.
54 E.g., N.Y. PENAL LAW § 220.31 (McKinney Supp. 1978-1979) (emphasis added).
55 Id. § 220.00(1) (McKinney Supp. 1978-1979); N.Y. PUB. HEALTH LAW § 3302(32) (McKinney 1977).
57 N.Y. PUB. HEALTH LAW § 3304 (McKinney 1977).
58 Id. § 3302(8), (12).
59 See, e.g., People v. Valentine, 55 App. Div. 2d 585, 390 N.Y.S.2d 3 (1st Dep't 1976);
The Court of Appeals Approves the Agency Defense

In 1978, the New York Court of Appeals directly addressed the issue for the first time and, in the face of overwhelming opinion to the contrary, definitively approved the use of the agency defense in four opinions handed down on the same day: People v. Roche, People v. Lam Lek Chong, People v. Argibay and People v. Sierra. Noting that the statutory scheme for drug offenses was intended to impose the harshest penalties upon the drug "pusher" rather than his victim, the habitual user, the court reaffirmed the oft-cited principle that "[o]ne who acts solely as the agent of the...
buyer cannot be convicted of the crime of selling narcotics." In addition, the court used the occasion to provide loosely drawn guidelines for future applications of the procuring agent theory. The four opinions which articulate these general principles will be examined individually in order to illustrate the application of the agency defense under New York law.

In *People v. Roche,* the defendant was indicted for criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first degree. The charges stemmed from a drug transaction with an undercover police officer who met the defendant at a bar and asked him to aid in the purchase of narcotics. Although the defendant agreed to facilitate the purchase, the transaction was not effected immediately. Upon the officer's repeated requests, the defendant finally agreed to lead him to a drug supplier. Acting as an intermediary, Roche took a preestablished sum of money from the officer, handed it to a drug dealer who was waiting inside a discotheque, and returned with a package containing heroin. On appeal of Roche’s conviction for the sale of a controlled substance, the court of appeals held that the question of agency should have been submitted to the jury since there was a reasonable basis for believing that the defendant had acted merely as an agent of the buyer.

---

68 45 N.Y.2d at 81, 379 N.E.2d at 210, 407 N.Y.S.2d at 684; see note 124 infra.
69 45 N.Y.2d at 81, 379 N.E.2d at 210, 407 N.Y.S.2d at 684. After the initial meeting in the bar, the undercover officer made several unsuccessful attempts to enlist Roche's aid in making an unlawful purchase. Finally, he located Roche and informed him of his interest in buying an "eighth," or approximately 4 ounces of cocaine or heroin. At that point, Roche merely estimated the cost of such a purchase. It was not until almost 2 months later that the officer recontacted the defendant and convinced him to complete the deal. Id.
70 Id.
71 Id. at 81-82, 379 N.E.2d at 210, 407 N.Y.S.2d at 684. At trial, the police officer testified that he had witnessed an exchange between the defendant and the third-party supplier.
72 Id. at 82, 379 N.E.2d at 210, 407 N.Y.S.2d at 685. The trial court in *Roche* denied the defendant's request for an instruction on the procuring agent theory and the defendant subsequently was convicted for sale and possession. The sale conviction was reversed by the appellate division. 58 App. Div. 2d 783, 785, 396 N.Y.S.2d 377, 388 (1st Dep’t 1977) (mem.). Both the defendant and the prosecution appealed the appellate division's ruling. 45 N.Y.2d at 82, 379 N.E.2d at 211, 407 N.Y.S.2d at 685.
73 45 N.Y.2d at 86-87, 379 N.E.2d at 213-14, 407 N.Y.S.2d at 687-88. In a strongly-worded dissent, Judge Gabrielli argued that the majority's approval of the agency defense represented a misinterpretation of the legislative intent underlying New York's narcotics laws. Id. at 90, 379 N.E.2d at 215-16, 407 N.Y.S.2d at 690. Noting that the legislature distinguished between a seller and a possessor, Judge Gabrielli concluded that the statute was designed only to
In support of this conclusion, the court of appeals observed that, while the New York statutes provide penalties for the sale or possession of drugs, they do not impose criminal sanctions for the mere purchase of narcotics. In light of this statutory scheme, the Roche court reasoned, an agent should not be held to a greater degree of culpability than is the buyer from whom he derives culpable status. In addition, the court pointed out that not all narcotics buyers are motivated by criminal disposition; many are either victims of "pushers" or "good Samaritans" attempting to help such victims. Thus, the court concluded that the traditional agency defense properly could be considered a "common-law attempt . . . to recognize the existence of medical and sociological aspects which complicate the factual setting within which the nature of a particular defendant's participation is to be determined." Acknowledging the limitations inherent in utilizing a commercial-law concept in criminal prosecutions, the Roche court nevertheless concluded that the application of the principles of agency would afford the trier of fact the necessary flexibility in considering the often complex factual circumstances which surround drug transactions.

After having articulated its approval of the agency defense, the Roche court went on to enumerate some of the factors to be considered in determining when the doctrine should be applied. One important consideration is whether the defendant had a "direct interest" in the narcotics sale. If the defendant owned the drugs or in any way acted on behalf of the seller, he may not be permitted to mitigate the punishment of the ultimate user while meting out severe penalties for those "who contribute in some way to the distribution of illicit drugs." Id., 379 N.E.2d at 216, 407 N.Y.S.2d at 690. Thus, the dissent concluded that one who transfers drugs in the capacity of an agent is in reality a distributor whom the legislature intended to be punished harshly. Id. at 82-83, 379 N.E.2d at 211, 407 N.Y.S.2d at 685. If the defendant owned the drugs or in any way acted on behalf of the seller, he may not be permitted...
to invoke the agency defense. 81 "Salesman-like behavior," such as "touting the quality" or arguing about price, 82 as well as the individual's familiarity with the seller 83 or narcotics in general, 84 is some evidence that his role in the transaction was more substantial than that of a mere agent. 85 The court stated, however, that a bare finding that the defendant obtained or expected to obtain some personal benefit should not in itself be sufficient to eliminate the agency defense as a matter of law. 86 Moreover, in the court's view, the

---


82 45 N.Y.2d at 85, 379 N.E.2d at 212, 407 N.Y.S.2d at 686 (citing United States v. Smith, 452 F.2d 404 (8th Cir. 1971) (per curiam)); United States v. Johnson, 371 F.2d 800, 806-07 (3d Cir. 1970)).

The Smith court rejected the procuring agent defense where the defendant boasted to a government agent that, given a few days notice, he could obtain any amount of amphetamines. 452 F.2d at 406. Similarly, in Johnson, a defendant who emphasized the quality of the drugs in an attempt to get a higher price was precluded from invoking the agency defense. 371 F.2d at 806-07.

83 45 N.Y.2d at 85, 379 N.E.2d at 212, 407 N.Y.S.2d at 687 (citing United States v. Winfield, 341 F.2d 70, 71 (2d Cir. 1965); People v. Harris, 24 N.Y.2d 810, 246 N.E.2d 444, 300 N.Y.S.2d 589 (1969) (mem.)). In Winfield, the defendant assured the buyer that he had been doing business with the supplier for a substantial time in order to allay the buyer's fears concerning the transaction. 341 F.2d at 71. The Winfield court concluded that this evidence of prior dealing with the seller supported a finding that the defendant was not acting on behalf of the purchaser. Id. at 71-72.


85 45 N.Y.2d at 85, 379 N.E.2d at 212, 407 N.Y.S.2d at 686-87.

86 Id., 379 N.E.2d at 213, 407 N.Y.S.2d at 687 (citing People v. Valentine, 55 App. Div. 2d 585, 390 N.Y.S.2d 3 (1st Dep't 1976) (mem.); People v. Bostick, 51 App. Div. 2d 749, 379 N.Y.S.2d 169 (2d Dep't 1976) (mem.); People v. Johnston, 47 App. Div. 2d 897, 366 N.Y.S.2d 198 (2d Dep't 1975); Peoples v. Fortes, 24 App. Div. 2d 428, 260 N.Y.S.2d 716 (1st Dep't 1965)). Initially, the New York courts rejected attempts to invoke the agency defense when there was any evidence that the defendant received or expected to receive some compensation for his role in the transaction. See, e.g., People v. Bray, 15 N.Y.2d 637, 204 N.E.2d 196, 255 N.Y.S.2d 862, aff'd mem. 21 App. Div. 2d 696, 251 N.Y.S.2d 930 (2d Dep't 1964) (mem.). The Bray court concluded that the defendant had not acted as an agent of the buyer since she demanded either money or "half a bag" as payment for arranging the purchase. 15 N.Y.2d at 638, 204 N.E.2d at 198, 255 N.Y.S.2d at 864. As the agency defense evolved in the appellate division, however, the importance of the benefit received by the defendant diminished. In People v. Fortes, 24 App. Div. 2d 428, 429, 260 N.Y.S.2d 716, 717 (1st Dep't 1965), the court found the agency defense applicable although a "$5 gratuity" was paid to the defendant by the purchaser. Since Fortes, the lower courts consistently have held that the defense is not precluded as a matter of law merely because the defendant gained some personal or financial benefits. See, e.g., People v. Valentine, 55 App. Div. 2d 585, 390 N.Y.S.2d 3 (1st Dep't 1976) (mem.) ($200 payment was only one factor in determining whether defendant was agent of buyer); People v. Bostick, 51 App. Div. 2d 749, 379 N.Y.S.2d 169 (2d Dep't 1976) (mem.) (defendant who received $100 entitled to use agency defense). This position was not
defendant’s apparent familiarity with illicit drugs should not alone result in a finding that the defense is not available. In fact, the *Roche* court noted that an individual who is conversant with the local narcotics market would be the most likely target for a would-be drug purchaser.

Applying these criteria to the facts in *Roche*, the court emphasized that the defendant had acted only upon the undercover officer’s persistent prodding. Also significant was that Roche was initially unable to quote a specific price and that a third party had been observed delivering the drugs to the defendant. Moreover, there was no evidence to show that Roche in any way benefited personally as a result of the transaction. Thus, the court concluded, the defendant in *Roche* should have been permitted to raise the procuring agent theory as a defense.

In contrast to the emphasis in *Roche* upon the flexibility of the procuring agent theory, the court of appeals in *People v. Lam Lek Chong* stressed that there are some circumstances in which an agency charge will be precluded as a matter of law. The defendant in *Lam Lek Chong* was convicted for criminal sale of 1 1/2 pounds of heroin to two police officers posing as narcotics dealers. Al-
though the defendant testified that he had acted merely as the buyer's agent, the other evidence indicated that he had assumed an initiating role in the elaborately planned transaction. At trial, the jury was instructed that if the defendant "received any 'benefit, however slight, from having participated in the transaction, he would not be an agent." On appeal, the court of appeals affirmed the defendant's conviction. The court concluded that, although the trial court erred in its instruction, a reversal was not warranted, since the record did not demonstrate that the defendant was entitled to an agency charge. In reaching this result, the court distinguished cases where the defendant transfers a small amount of drugs "solely to accommodate a friend" from cases such as Lam Lek Chong, which involved a large-scale, purely commercial transaction. Noting that such transactions represent precisely the type of narcotics "trafficking" that the legislature sought to curb, the court reasoned that the Lam Lek Chong case was one in which the penal statutes should be applied "literally." Thus, the court of appeals concluded that, as a matter of law, the defendant was not an "agent" as that term has been interpreted by the New York courts.

As it did in the Lam Lek Chong opinion, the court of appeals used the facts in People v. Argibay to clarify and narrow the procuring agent theory outlined in Roche. The Argibay defendant

---

this transaction was completed, the defendant told the officers that he could help them smuggle more heroin from Hong Kong. The Hong Kong transaction collapsed after elaborate preparations, but the relationship between the defendant and the undercover officers continued and a new deal ultimately was arranged. The officers finally arrested the defendant when he took them to the supplier's apartment for delivery of the second 1½ pounds of heroin. Id. at 69-71, 379 N.E.2d at 203-04, 407 N.Y.S.2d at 676-78.

The defendant contended that he was not financially interested in the drug transaction but hoped that the officers would aid him in a legitimate business endeavor if he cooperated in procuring the heroin. Id. at 72, 379 N.E.2d at 205, 407 N.Y.S.2d at 678.

Id. at 69-71, 379 N.E.2d at 203-04, 407 N.Y.S.2d at 678.

Id. at 68, 379 N.E.2d at 202, 407 N.Y.S.2d at 676; see note 88 supra.

45 N.Y.2d at 75, 379 N.E.2d at 207, 407 N.Y.S.2d at 681-82.

Id. at 75-76, 379 N.E.2d at 207, 407 N.Y.S.2d at 681.

45 N.Y.2d at 76, 379 N.E.2d at 207, 407 N.Y.S.2d at 681. Significantly, the Lam Lek Chong court assumed that "[t]he transaction in fact was completely commercial since the buyers themselves obviously did not intend to consume one and a half pounds of heroin." Id. Moreover, the court observed, the defendant was aware that the buyers were drug dealers. Id.

Although the penal law generally differentiates between possessors and sellers, see note 148 infra, the court pointed out that the same penalties are imposed on possessors and sellers of large quantities of drugs. 45 N.Y.2d at 73, 379 N.E.2d at 205, 407 N.Y.S.2d at 679.

45 N.Y.2d at 76, 379 N.E.2d at 208, 407 N.Y.S.2d at 682.

Id., 379 N.E.2d at 207, 407 N.Y.S.2d at 681.

was convicted of selling cocaine to two undercover officers. The testimony at trial indicated that the officers initially were contacted by a third party who offered to arrange the transaction. The officers agreed and were subsequently taken to the defendant Argibay's apartment, where they waited until the "supplier" arrived with the cocaine. After the "supplier" departed, the drugs and money were exchanged and the third party was compensated by both the buyers and the defendant.

The trial court's denial of the defendant's request for an agency charge was affirmed by the appellate division and the defendant appealed. Reviewing the facts, the court of appeals found that the defendant was actually a "middleman" or broker aiming to satisfy both the seller and buyer and ultimately acting for his own benefit. In contrast to the third party, whose loyalty rested solely with the buyers, Argibay was apparently an independent merchant concerned primarily with furthering the interests of his business. Significantly, the court drew a limited analogy to commercial agency theories and concluded that "[t]o be an agent of his buyer, a narcotics merchant must be a mere extension of the buyer . . . [without] any independent desire or inclination to promote the transaction." Absent these circumstances, in the court's view, a defendant is not entitled to use the procuring agent theory as a defense to a charge of criminal narcotics sale.

\[\text{105 Id. at 50, 379 N.E.2d at 192, 407 N.Y.S.2d at 666.}\]
\[\text{106 Id. at 51, 379 N.E.2d at 193, 407 N.Y.S.2d at 666.}\]
\[\text{107 Id., 379 N.E.2d at 193, 407 N.Y.S.2d at 666-67. The police officers did not actually see the "supplier" since they were asked to wait in the kitchen until he left. Id., 379 N.E.2d at 193, 407 N.Y.S.2d at 667; see note 91 supra.}\]
\[\text{108 45 N.Y.2d at 51-52, 379 N.E.2d at 193, 407 N.Y.S.2d at 666-67. The undercover officers' subsequent attempts to purchase additional quantities of drugs directly from Argibay were unsuccessful. At one point, they were told by the defendant that he preferred to transact business through the third party. On another occasion, Argibay indicated that he "was not making enough money to warrant his continued involvement in the narcotics trade." Id. at 51-52, 379 N.E.2d at 193, 407 N.Y.S.2d at 667.}\]
\[\text{109 Id. at 52, 379 N.E.2d at 194, 407 N.Y.S.2d at 667.}\]
\[\text{110 Id. at 53, 379 N.E.2d at 194, 407 N.Y.S.2d at 668. The Argibay court stated:}\]
\[\text{All agents are, concededly, middlemen of sorts. But the converse is not true. A middleman who acts as a broker between a seller and buyer, aiming to satisfy both, but largely for his own benefit, cannot properly be termed an agent of either. Such a middleman is a trader in narcotics, a merchant. He may not be concerned with the particular needs of an individual drug purchaser except to the extent that satisfying those needs affects his illicit business. To call him an agent strains beyond recognition the agency concept.}\]
\[\text{111 Id.}\]
\[\text{112 Id. at 53-54, 379 N.E.2d at 195, 407 N.Y.S.2d at 668.}\]
\[\text{113 Id. at 54-55, 379 N.E.2d at 195, 407 N.Y.S.2d at 668-69.}\]
In *People v. Sierra*, the court of appeals reaffirmed the well-established principle that the agency doctrine is not a defense to a charge of possession of narcotics. The evidence in *Sierra* showed that, at the request of an undercover police officer, the defendant procured approximately one-eighth of an ounce of cocaine, which she subsequently delivered to him at a bar. Upon delivery, the defendant received $175 to reimburse her for the cost of the drugs and $20 for her role in the transaction. She was immediately arrested and charged with criminal sale of a controlled substance in the second degree and criminal possession of a controlled substance in the fifth degree.

Although the trial court permitted the defendant to use the procuring agency theory as a defense to the “sale” charge, it refused to give the jury an agency instruction on the possession count. On appeal of the defendant’s conviction for possession, the court of appeals approved the trial court’s ruling.

Reviewing the history of the agency defense, the *Sierra* court noted that it was based on the premise that the defendant “is merely transferring to

---

115 Id. at 58, 379 N.E.2d at 197, 407 N.Y.S.2d at 670. The agency defense repeatedly has been found inapplicable in cases involving possession charges. See, e.g., *People v. Sheldon K.*, 26 N.Y.2d 949, 258 N.E.2d 921, 310 N.Y.S.2d 507 (1970) (mem.); *People v. Garcia*, 50 App. Div. 2d 730, 375 N.Y.S.2d 1022 (1st Dep't 1975) (mem.); *People v. O'Keefe*, 87 Misc. 2d 739, 386 N.Y.S.2d 934 (Sup. Ct. Westchester County 1976). In *Sheldon K.*, the court of appeals implicitly rejected the defendant’s contention that he could not be convicted of the crime of simple possession absent a showing that he held the contraband for his own purposes rather than as an agent for the undercover officer who induced him to deliver it. 26 N.Y.2d at 950, 258 N.E.2d at 921, 310 N.Y.S.2d at 508.
118 45 N.Y.2d at 59, 379 N.E.2d at 198, 407 N.Y.S.2d at 671.
119 Id. at 63, 379 N.E.2d at 200, 407 N.Y.S.2d at 674. The *Sierra* court also rejected the defendant’s contention that N.Y. PUB. HEALTH LAW § 3305(1)(c) (McKinney 1977) insulated her from criminal liability for possession of narcotics. Section 3305 provides that the Controlled Substances Act does not apply to “temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession for the purpose of aiding public officers in performing their official duties.” *Id.* Relying on the language of this provision, the defendant argued that her possession was lawful because she was acting as agent for a “person lawfully entitled to possession” or “aiding [a] public officer in performing [his] official duty.” 45 N.Y.2d at 62, 379 N.E.2d at 199-200, 407 N.Y.S.2d at 673. In response to this argument, the *Sierra* court stated:

The flaw in defendant’s argument is the obvious fact that she had no knowledge or information that Guerzon was a police officer and therefore could not consent to act as an agent or employee of such an officer . . . . Since she did not know of his status nor the nature of his activity, neither could her possession have been accomplished "for the purpose of aiding" a public officer in the performance of his official duties.

*Id.* (citations omitted).
the recipient that which the recipient already owns or that to which he is entitled.\textsuperscript{120} Since the concept of ownership is not directly relevant to a charge of criminal possession, the agency defense was found to be inapplicable.\textsuperscript{121}

\begin{flushright}
\textbf{Some Practical Implications of the Agency Defense Cases}
\end{flushright}

\textit{The Buyer's Agent: A Profile}

Although the court of appeals was reluctant to draw overly rigid boundaries for the newly articulated procuring agent defense, it is possible to discern some of the doctrine's specific characteristics. The typical procuring agent will be an individual who is somewhat familiar with the narcotics underworld,\textsuperscript{122} but who does not traffic regularly in illicit drugs.\textsuperscript{123} Ordinarily he will not be the initiator of the transaction;\textsuperscript{124} rather, his participation generally will have been

\textsuperscript{120} 45 N.Y.2d at 61, 379 N.E.2d at 198-99, 407 N.Y.S.2d at 672.

\textsuperscript{121} Id. at 60, 379 N.E.2d at 198, 407 N.Y.S.2d at 672. "[S]ince guilt may be established regardless of whether [the contraband] belongs to someone else," the Sierra court reasoned that a possessor may be convicted even if he were merely holding the drugs in his capacity as agent for the true buyer. Id. at 61, 379 N.E.2d at 199, 407 N.Y.S.2d at 672. This conclusion is supported by the existence of N.Y. PUB. HEALTH LAW § 3305(c) (McKinney 1977), which provides an exemption from criminal liability for certain individuals who possess narcotics as agents for law enforcement officers. As noted by the Sierra court, this statute would be an unnecessary protection if the procuring agent theory were available as a defense to a charge of narcotics possession. 45 N.Y.2d at 62, 379 N.E.2d at 200, 407 N.Y.S.2d at 673.

The Sierra court suggested in dictum, however, that the theory may be available when the possession charge involves an additional element such as intent to sell. Id. at 59, 379 N.E.2d at 197, 407 N.Y.S.2d at 671; see, e.g., People v. Perez, 60 App. Div. 2d 656, 400 N.Y.S.2d 559 (2d Dep't 1977); People v. Garcia, 50 App. Div. 2d 730, 375 N.Y.S.2d 1022 (1st Dep't 1975) (mem.); People v. Johnston, 47 App. Div. 2d 897, 366 N.Y.S.2d 198 (2d Dep't 1975). In Perez, the defendant was charged with criminal sale in the third degree, criminal possession in the seventh degree and criminal possession with intent to sell. 60 App. Div. 2d at 656, 400 N.Y.S.2d at 560. At trial, the defendant invoked the agency defense and the jury found him not guilty of the criminal sale, but guilty on both possession counts. Id. On appeal, the appellate division reversed the conviction for criminal possession with intent to sell, reasoning that the only way the jury could have found the defendant not guilty of a sale was by finding that the defendant acted as the buyer's agent. Under these circumstances, the Perez court concluded, it was improper for the jury to infer that the defendant possessed the narcotics with criminal intent to sell. Id.

\textsuperscript{122} In Roche, the court pointed out that the defendant "was no stranger to drugs, to their prices and to persons involved in their traffic." 45 N.Y.2d at 87, 379 N.E.2d at 214, 407 N.Y.S.2d at 688. Nevertheless, this familiarity was not conclusive evidence that Roche was not an agent. Id. \textit{See also} People v. Munoz, 54 App. Div. 2d 844, 388 N.Y.S.2d 307 (1st Dep't 1976) (mem.).


solicited by the actual buyer. He may receive some gratuity for his role in the transaction, but he will not have been motivated primarily by the hope of personal gain. In the usual case, the procuring agent will be acting on behalf of a party who has requested the drugs for personal use. Thus, while the size of the transaction is not determinative, a transfer of large quantities of narcotics will be a strong indication that the "middleman" was acting as a broker for a professional drug "dealer" rather than merely accommodating the buyer. Similarly, the visibility of a third-party seller may be helpful in demonstrating that the intermediary was not a principal in the transaction.


See note 86 and accompanying text supra.

See, e.g., People v. Roche, 45 N.Y.2d 78, 379 N.E.2d 208, 407 N.Y.S.2d 682 (1978); People v. Fortes, 24 App. Div. 2d 428, 260 N.Y.S.2d 716 (1st Dep't 1965), appeal dismissed mem., 17 N.Y.2d 583, 215 N.E.2d 519, 268 N.Y.S.2d 341 (1966); People v. Branch, 13 App. Div. 2d 714, 213 N.Y.S.2d 555 (4th Dep't 1961). In theory, the availability of the agency defense should not turn on whether the buyer intended to use the drugs himself or resell them. As a practical matter, however, the courts may have to resort to this factor to determine whether the defendant was a "broker" rather than a mere agent in a particular drug transaction.


The presence of an identifiable or visible third-party seller may be helpful in persuading the court that a particular defendant was acting as an agent of the buyer rather than as a seller. In People v. Jenkins, 62 App. Div. 2d 1042, 405 N.Y.S.2d 1012 (2d Dep't 1978) (mem.), for example, the defendant engaged in two separate drug transactions. In the transaction that involved a visible third party, the court found the defendant to be an agent of the buyer. In the other transaction, however, the money was paid directly to the defendant with no apparent third party present, and the conviction was upheld. Id. at 1043, 405 N.Y.S.2d at 1012. In People v. Fuller, 34 App. Div. 2d 852, 310 N.Y.S.2d 535 (3d Dep't 1970), the court found the agency defense inapplicable to facts strikingly similar to those in Roche. In Fuller, the defendant was approached by an investigator claiming to be interested in purchasing drugs. After stating that he was not a dealer, the defendant agreed to lead the buyer to someone who had a supply of narcotics. The investigator, however, was not present when the defendant obtained the drugs. Id. In this case, the court's decision to disallow the agency defense and affirm the defendant's conviction appears to have been influenced by the absence of a visible third-party seller. Similarly, in People v. Robert W., 47 App. Div. 2d 793,
If most or all of these characteristics are present, the defendant in a narcotics prosecution probably will be entitled to have the jury consider whether he acted merely as a procuring agent for the buyer. On the other hand, if few or none of these criteria are met, the court may find that the agency doctrine is not applicable as a matter of law.

The Procuring Agent Theory as a Defense to Criminal Facilitation Charges

Under section 115 of the New York Penal Law, a defendant may be convicted of criminal facilitation when "believing it probable that he is rendering aid to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof." Applying a literal reading of this statute, it might be possible to conclude that a party who purchases narcotics on behalf of another is criminally liable for facilitating a felonious sale. Nevertheless, utilizing reasoning sim-
ilar to that used in drug sale prosecutions, it would appear that one who is truly an agent of the purchaser may not be convicted for facilitating the sale. Such a party is no more than a "facilitator" of the purchase, and, since the purchase is not a criminal act, it seems clear that one who makes the purchase cannot possibly be convicted of facilitating a sale under the penal statute. This argument would appear to have been reinforced by the Roche court's conclusion that the "[agency] defense represents a calculated . . . judgment not to impose [severe] penalties upon a person who merely facilitates the acquisition of drugs by a purchaser."  

The Procuring Agent Theory: An Alternative to the Entrapment Defense in Narcotics Sale Prosecutions

The procuring agent defense often is raised in conjunction with the affirmative defense of entrapment. Under the entrapment de-

and does so with scienter, he is guilty of [facilitation]. If, in order to convict a middleman, it is necessary to prove beyond a reasonable doubt his association with the seller, it seems to us that the efficacy of the facilitation clause of section 174 is nullified. 374 F.2d at 995 (emphasis in original). In Prince, however, the third circuit found that the procuring agent theory is a defense to a charge of facilitation of a criminal sale. 264 F.2d at 853.

134 See, e.g., People v. Volante, 75 Misc. 2d 400, 347 N.Y.S.2d 836 (Sup. Ct. N.Y. County 1973). In Volante, the court found that the defendant had facilitated the transaction by giving the seller his car so he could obtain drugs for the purchaser. Id. at 403, 347 N.Y.S.2d at 839. It would appear, however, that the Volante court would have rejected the facilitation charge if the defendant was truly an agent of the buyer. Id.

135 45 N.Y.2d at 84, 379 N.E.2d at 212, 407 N.Y.S.2d at 886. The reasoning used by the Sierra court would seem to suggest that, where large quantities of narcotics are involved, the agency theory would not be available as a defense to a charge of facilitating possession. See note 123 supra; People v. Kiser, 63 App. Div. 2d 707, 404 N.Y.S.2d 1005 (2d Dep't 1978), wherein the court stated that if a defendant knowingly aids a would-be possessor by "provid[ing] him with the means to commit the crime of criminal possession," a conviction for criminal facilitation would be proper. Id. at 708, 404 N.Y.S.2d at 1006.

136 Since many drug sale prosecutions involve transactions initiated by an undercover law enforcement officer, see note 126 supra, the affirmative defense of entrapment often is raised as an alternative to the agency defense. See, e.g., United States v. Sawyer, 210 F.2d 169, 170 (3d Cir. 1954); People v. Johnston, 47 App. Div. 2d 897, 366 N.Y.S.2d 198 (2d Dep't 1975). Theoretically, agency and entrapment are inconsistent defenses, although both involve similar evidence. The affirmative defense of entrapment is predicated upon the defendant's admission that he was a seller, but that he was induced to engage in the unlawful transaction by a law enforcement officer's improper conduct. See, e.g., People v. Johnston, 47 App. Div. 2d 897, 366 N.Y.S.2d 198 (2d Dep't 1975); People v. Fuller, 34 App. Div. 2d 852, 310 N.Y.S.2d 535 (3d Dep't 1970); N.Y. PENAL LAW § 40.05 (McKinney 1975); Park, The Entrapment Controversy, 60 MINN. L. REV. 163 (1976); Note, The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense, 74 YALE L.J. 942 (1965). In contrast, the defendant who invokes the procuring agent theory denies having been a seller in the first instance, claiming instead that he acted solely on behalf of the purchaser. See, e.g., People v. Pulliam, 28 App. Div. 2d 786, 281 N.Y.S.2d 137 (3d Dep't 1967). Nevertheless, the New
fense, an individual who has committed a crime may nevertheless be exonerated if "the proscribed conduct . . . was induced or encouraged" by another.\textsuperscript{137} Although the theories arise out of similar factual circumstances, the agency defense appears to have broader application. While entrapment is available only when the party soliciting the transaction is a public official,\textsuperscript{138} the agency defense may be used regardless of the identity of the ultimate buyer.\textsuperscript{139} A more significant consideration, however, is the distribution of the burden of proof under each doctrine. Since entrapment is treated as an affirmative defense under New York law,\textsuperscript{140} the defendant is required to establish by a fair preponderance of the evidence that he was persuaded by another to commit the unlawful act.\textsuperscript{141} In contrast, the procuring agent theory enunciated in Roche is apparently a true defense, since proof of an agency relationship negates the "sale" element of the crime.\textsuperscript{142} Thus, once the agency defense is raised, the prosecution presumably will be required to prove beyond a reasonable doubt that the accused was not acting as an agent for a principal-buyer.\textsuperscript{143}


\textsuperscript{137} N.Y. PENAL LAW § 40.05 (McKinney 1975).
\textsuperscript{138} Id. The entrapment provisions of the penal law represent a legislative policy "to discourage the use of overzealous methods of law enforcement officials to trap the unwary innocent into commission of an offense . . . who is not ordinarily disposed to commit it." \textit{Id.} commentary at 125.
\textsuperscript{140} N.Y. PENAL LAW § 40.05 (McKinney 1975).
\textsuperscript{141} Id. § 25.00.
\textsuperscript{142} See People v. Roche, 45 N.Y.2d 78, 86, 379 N.E.2d 208, 213, 407 N.Y.S. 2d 682, 687 (1978) (citing Lewis v. United States, 337 F.2d 541, 543 n.4 (D.C. Cir. 1964)).
\textsuperscript{143} In his dissenting opinion in Roche, Judge Gabrielli expressed particular concern about the procedural difficulties inherent in the application of the agency defense. 45 N.Y.2d at 93, 379 N.E.2d at 218, 407 N.Y.S.2d at 692 (Gabrielli, J., dissenting in part). Noting that the procuring agent theory would have to be considered a "true defense" since only the legislature could create an affirmative defense, Judge Gabrielli pointed out that the prosecution would have the burden of proving the \textit{absence} of agency in every case. \textit{Id.} (Gabrielli, J., dissenting in part). In view of "the rather murky world of the drug culture," Judge Gabrielli concluded that such a burden would present an insurmountable obstacle to the prosecution in narcotics sale cases. \textit{Id.} (Gabrielli, J., dissenting in part).

While Judge Gabrielli's procedural analysis appears valid, his conclusion is subject to question. For purposes of determining the appropriate distribution of the respective burdens
Moreover, it may be significantly easier for the prosecution to negate an entrapment defense than to rebut an agency defense. Under New York's penal law, a defendant who invokes entrapment as a defense must show that he was "actively induce[d] or encourage[d]" to commit the crime.\textsuperscript{144} Generally, if the defendant was predisposed toward the particular criminal conduct, he cannot be acquitted.\textsuperscript{145} On the other hand, the existence of criminal predisposition alone does not appear to be inconsistent with the contention that the accused was a procuring agent for the buyer.\textsuperscript{146} Proof of an inclination to traffic in illicit drugs may be some evidence that the defendant was actually a professional "dealer" who is precluded from invoking the agency defense under the rationale articulated in Argibay.\textsuperscript{147} The determining factor, however, will be the economic and social relationships among the parties to the transaction.\textsuperscript{148}

It thus appears that, as a practical matter, the procuring agent theory may be a more effective defense to a narcotics sale charge than is the affirmative defense of entrapment. In light of the differences in the elements of the two theories, as well as the differences in the respective burdens of proof, there clearly will be circumstances in which a defendant who cannot establish an entrapment defense may nevertheless be exonerated under the procuring agent theory.

\textsuperscript{144} N.Y. PENAL LAW \S 25.00 (McKinney 1975). The burden on the prosecution does not arise, however, until the defendant comes forward with some evidence supporting his contention that he suffered from a legally sufficient mental impairment at the time he committed the crime. \textit{7 J. ZETT, NEW YORK CRIMINAL PRACTICE} \S 64.6 (1977). It is submitted that a similar approach may be used in cases where the facts suggest that the procuring agent theory may become an issue. Once sufficient facts are alleged, the prosecution would then be required to disprove beyond a reasonable doubt that a sale, rather than a transfer from agent to principal, took place.


\textsuperscript{146} A defendant who has had previous contact with the narcotics underground is not precluded as a matter of law from invoking the agency defense. See note 122 and accompanying text supra.

\textsuperscript{147} See note 83 and accompanying text supra.

\textsuperscript{148} See notes 75-86 and accompanying text supra.
CONCLUSION

After decades of silence on the issue, the New York Court of Appeals has vigorously endorsed the procuring agent doctrine at a time when most other jurisdictions have discarded it.\(^\text{149}\) The court's recent reaffirmation of the agency defense has particular significance when viewed in light of New York's unusually stringent system for punishing narcotics offenders.\(^\text{150}\) In its 1973 enactment of the Controlled Substances Offenses law,\(^\text{151}\) the legislature intended to preserve a flexible system of penalties for minor offenses,\(^\text{152}\) while creating a discretionless system for serious crimes involving narcotics abuse.\(^\text{153}\) In the 5 years since their enactment, these revisions to the penal law have been criticized as both ineffective\(^\text{154}\) and inhu-

\(^{149}\) Although most jurisdictions have discarded the agency defense, the study draft of the proposed Federal Criminal Code would penalize purchasing agents as "distributors." 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1104-05, quoted in G. UELMEN & V. HADDOX, DRUG ABUSE AND THE LAW 212 n.6 (1974). The Code creates an offense called "trafficking," which would constitute an A misdemeanor under the usual circumstances in which the agency defense is applied. PROPOSED FEDERAL CRIMINAL CODE § 1822(3), quoted in G. UELMEN & V. HADDOX, DRUG ABUSE AND THE LAW 213 (1974).


\(^{152}\) A significant change in the drug statute was effected in 1977, when the criminal penalties for possession of small quantities of marihuana were eliminated. Ch. 360, [1977] N.Y. Laws 1 (McKinney). Possession of up to 25 grams of marihuana is now a violation with a maximum fine of $100 for a first offense. N.Y. PENAL LAW § 221.05 (McKinney Supp. 1978-1979).


\(^{154}\) See NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE — FINAL REPORT OF THE JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION (March 1978); DRUG ABUSE COUNCIL, A PERSPECTIVE ON "GET TOUGH" DRUG LAWS (Washington, D.C. 1973). Former Chief Judge Breitel has observed:

[The] pragmatic value [of these penalties] might well be questioned, since more than a half century of increasingly severe sanctions has failed to stem, if indeed it has not caused, a parallel crescendo of drug abuse. The premises upon which the Legislature has proceeded have been subjected to vigorous dispute . . . . Indeed,
mane. Many of the critics have been particularly troubled by the inherent rigidity of the statute, which requires the trial court to impose extremely harsh sentences upon convicted narcotics offenders.

It is submitted that the court of appeals' revival of the procuring agent theory represents a judicial attempt to mitigate the harsh effects of New York's unusual drug law, which do not, by their terms, differentiate between the professional drug merchant and "persons as diverse as impressionable students, victims of contributing socioeconomic or medical problems, and others who have been the debate moves beyond the wisdom of substituting long mandatory prison terms in place of flexible sentencing, of emphasizing isolation and deterrence over rehabilitation. Even the questions whether 'the policy of criminalization, which raises the cost and increases the difficulty of obtaining drugs, does in fact make the drug user a proselytizer of others in order that he may obtain the funds to acquire his own drugs,' and whether 'the compulsion of the addict to obtain drugs and the moneys to purchase them causes him to commit collateral crime that otherwise he might not commit,' are questions about which reasonable men can and do differ.


156 Article 220 of the New York Penal Law imposes much harsher penalties than those imposed under prior law. See note 44 supra. Criminal possession under the Dangerous Drug Offenses ranged from a Class A misdemeanor, ch. 1030, [1965] N.Y. Laws 2343, 2441 (McKinney), punishable by up to 1 year of imprisonment, id. at 2368, to a Class C felony, id. at 2442, which was punishable by a 1- to 15-year term, id. at 2343. The revised penal law, provides for degrees of criminal possession that range from an A misdemeanor, N.Y. PENAL LAW § 220.03 (McKinney Supp. 1978-1979), with a maximum sentence of 1 year, N.Y. PENAL LAW § 70.15(1) (McKinney 1975), to an A-I felony, N.Y. PENAL LAW § 220.21 (McKinney Supp. 1978-1979), with a mandatory maximum penalty of life imprisonment. N.Y. PENAL LAW § 70.00(2)(a) (McKinney 1975). Similarly, the 1967 act prescribed a maximum term of years, ch. 1030, [1965] N.Y. Laws 2343, 2367 (McKinney), for the lowest degree of criminal sale classified as a Class D felony, id. at 2442. The highest degree was a Class B felony, id., carrying a maximum term of 25 years, id. at 2367. While the lowest degree of criminal sale under article 220 is still a D felony, N.Y. PENAL LAW § 220.31 (McKinney Supp. 1978-1979), with a maximum term of 7 years, N.Y. PENAL LAW § 70.00(2)(d) (McKinney 1975), the highest degree constitutes an A-I felony, N.Y. PENAL LAW § 220.43 (McKinney Supp. 1978-1979), with a mandatory maximum penalty of life imprisonment, N.Y. PENAL LAW § 70.00(2)(a) (McKinney 1975).

157 The court of appeals' recent agency defense decisions appear to be consistent with the legislative purpose of adopting a strict statutory scheme without becoming "so estranged from the traditions of the Common Law as to abandon its principle that not only should justice be done, but justice should appear to be done." DRUGS AND DRUG PENALTIES UNDER REVIEW: A DOCUMENTARY STUDY — INTERIM REPORT OF THE TEMPORARY STATE COMMISSION TO EVALUATE THE DRUG LAWS, 1973 N.Y. LEG. DOC. NO. 13, at 70.
seduced by exposure to drugs." By emphasizing criteria such as the economic and social relationships among the parties to a drug transaction, the court has ensured that the professional "pusher" will not benefit from a proper application of the agency doctrine. On the other hand, by refusing to articulate a series of inflexible rules, the court has left trial courts and juries free to exonerate defendants when a conviction for felonious sale and the consequent extended prison sentence clearly would be an injustice. In the final analysis, the court has concluded that the question whether a particular defendant was an interested drug merchant or a peripherally involved agent is one best left to a jury of laymen applying their senses and everyday experience to the facts before them.

Elaine Robinson McHale

---

160 See id. As noted by the dissent in Roche, the four agency defense cases illustrate "certain potential inconsistencies inherent in so vague a concept." Id. at 92, 379 N.E.2d at 217, 407 N.Y.S.2d at 691 (Gabrielli, J., dissenting in part). It appears, however, that the court of appeals was aware that the standards articulated were imprecise. Indeed, in his concurring memorandum, Chief Judge Breitel explicitly acknowledged the need for flexibility when he stated:

"Essentially, the defense is one submitted to the jury for assessment on broad grounds not susceptible of meticulous definition. If the defense were susceptible of meticulous definition it would limit the jury's perspective in determining whether the defendant was an independently culpable actor . . . [or] an abettor of the buyer. . . . Worse, it would clutter a court's charge with multifarious "ifs," "ands," and "butts," confusing the jury and making likely, to no substantial interest in achieving justice, error-prone charges by the most conscientious and able of Trial Justices."

Id. at 87, 379 N.E.2d at 214, 407 N.Y.S.2d at 688 (Breitel, Ch. J., concurring).