

## The Defense of Entrapment in the Federal Courts

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combination of federal and state enactments. The following specific changes in the law are therefore recommended:

(1) A federal statute requiring the acceptance or rejection of federal elective office immediately on accrual of eligibility therefor in the absence of sickness or other legitimate disability.

(2) A state statute or constitutional provision declaring a vacancy in the office of one to whom a right to take a second incompatible office has accrued and which second office has not been declined.

(3) A state statute or constitutional provision vesting the power to fill vacancies in elective state offices in one authority regardless of whether the Legislature is in or out of session.<sup>69</sup>

Unless some such effective safeguards are provided to cover these gaps in the existing law relative to filling vacancies in public offices, a recurrence of difficulties such as occurred in the Javits and La Follette cases is to be anticipated.



## THE DEFENSE OF ENTRAPMENT IN THE FEDERAL COURTS

### *Introduction*

Within the past two decades, a defense formerly interposed rarely has been pleaded with increasing frequency in the federal courts. Due to the tremendous growth of federal police legislation enacted during this period, it has become a recognized fact that a few unlawful practices are encouraged and condoned by a large class of citizens. As a result, federal police officers have found it necessary to resort to various artifices in order to enforce the law and punish its violation. Nevertheless, the primary duty of a law enforcement officer is to prevent, not to punish crime.<sup>1</sup> Therefore, where the criminal design does not originate with the accused but is conceived in the mind of a government official, the accused may validly claim the defense of entrapment.

The classic and most frequently cited definition of entrapment is that formulated by Supreme Court Justice Roberts in the case of

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<sup>69</sup> In the close of the legislative session, the Legislature passed a bill [A. Int. No. 2830] providing that if a vacancy occurs in the offices of Attorney General or Comptroller, while the Legislature is not in session, the duties of the office will be filled by a deputy until the Legislature can meet and appoint a successor.

<sup>1</sup> See *Newman v. United States*, 299 Fed. 128, 131 (4th Cir. 1924); *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921).

*Sorrells v. United States*:<sup>2</sup> "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer."<sup>3</sup> Court decisions vary as to the basis upon which to rest the doctrine. The greatest number apply the theory that it rests upon sound public policy, a policy which requires that convictions should not follow when government officials, whose duty it is to detect and prevent crime, instead create crime for the purpose of prosecuting an offender.<sup>4</sup> Other courts have allowed the defense of entrapment on the ground that the government is estopped by the conduct of its agents to contend that the defendant is guilty.<sup>5</sup> A New York State court has taken the position that there is nothing ethically or legally wrong with obtaining a conviction through entrapping methods.<sup>6</sup>

Formerly, the defense of entrapment would only arise if the defendant could allege that the criminal nature of his act was vitiated by the consent of the injured party.<sup>7</sup> A few familiar illustrations of this type of entrapment, arising in the state courts, will suffice to distinguish these situations from those in which a statute has literally been violated but the plea of entrapment bars prosecution by the government. In the first case a property owner, endeavoring to apprehend a suspected thief, solicits the accused to steal his goods. The court will rule that since the taking is not against the will of the owner, no crime has been committed, and hence the defendant cannot be convicted.<sup>8</sup> In a prosecution for conspiracy to rob a train, evidence was introduced to show that a detective, employed by the railroad, induced the defendant to participate in the robbery. The court held that since the railroad company had assented to the rob-

<sup>2</sup> 287 U.S. 435 (1932).

<sup>3</sup> *Id.* at 454 (concurring opinion).

<sup>4</sup> See, *e.g.*, *Casey v. United States*, 276 U.S. 413, 423 (1928) (dissenting opinion); *United States ex rel. Hassel v. Mathues*, 22 F.2d 979 (E.D. Pa. 1927); *Sam Yick v. United States*, 240 Fed. 60, 67 (9th Cir. 1917); *Woo Wai v. United States*, 223 Fed. 412, 415 (9th Cir. 1915).

<sup>5</sup> See, *e.g.*, *O'Brien v. United States*, 51 F.2d 674, 677 (7th Cir. 1931).

<sup>6</sup> "Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the pleas ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Law giver, and whatever estimate we may form, or whatever judgement pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will." *Board of Comm'rs v. Backus*, 29 How. Pr. 33, 42 (N.Y. 1864). See also *People v. Mills*, 178 N.Y. 274, 289, 70 N.E. 786, 798 (1904); *People v. Shacher*, 47 N.Y.S.2d 371, 372 (N.Y.C. Magis. Ct. 1944).

<sup>7</sup> See CLARK AND MARSHALL, *CRIMES* § 155 (5th ed. 1952).

<sup>8</sup> *People v. Frank*, 176 Misc. 416, 27 N.Y.S.2d 227 (City Ct. of Utica 1941). See also *People v. Mills*, 178 N.Y. 274, 70 N.E. 786 (1904). (The rule was recognized but it was held that it does not apply where the object taken was public property.)

bery there was no trespass and therefore no larceny. In answer to the contention that it was not for the larceny but for the conspiracy that the defendant was indicted, the court reasoned that since the act done would constitute no crime there could be no prosecution for a conspiracy to commit the act.<sup>9</sup> A final illustration involves a prosecution for burglary. A home owner, suspecting that his house would be burglarized, opened a door to facilitate the defendant's entry. The court held that since there had been no breaking, there had been no burglary and hence the defendant was acquitted.<sup>10</sup>

In all of these cases the true objection to a conviction rests upon the failure of the prosecution to establish a prima facie crime. One of the essential elements of the crime charged in the indictment is lacking and it is therefore immaterial whether the entrapping party be a government official or a private citizen.<sup>11</sup>

Entrapment in its more familiar connotation can only be pleaded when the entrapping party is a member of a law enforcement agency or is one of its agents. Essentially, it consists of the contention that the intent to commit the crime originated with a government agent and not with the accused.

### *Elements of the Defense of Entrapment*

In every entrapment situation, the greatest difficulty is encountered by the court when it seeks to answer the question—did the intent to commit the crime originate with the government agent or with the accused?<sup>12</sup> As an aid to discovering the origin of the criminal act, some courts inquire into the general reputation of the accused,<sup>13</sup> and into his connections with prior illegal transactions.<sup>14</sup> Evidence is sometimes admitted to show that the entrapping officer had reasonable grounds for believing that the accused was a criminal,<sup>15</sup> and even the good faith of the officer has been held to be a

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<sup>9</sup> Connor v. People, 18 Colo. 373, 33 Pac. 159, 160 (1893). The court said: "It is therefore evident that the crime is not committed when, with the consent of the owner, his property is taken, however guilty may be the taker's purpose and intent."

<sup>10</sup> See Love v. People, 160 Ill. 501, 43 N.E. 710 (1896); People v. McCord, 76 Mich. 200, 42 N.W. 1106 (1889); Bird v. State, 49 Tex. Crim. 96, 90 S.W. 651 (1905).

<sup>11</sup> See Anderson, *Some Aspects Of The Law Of Entrapment*, 11 BROOKLYN L. REV. 187, 198 (1942).

<sup>12</sup> See O'Brien v. United States, 51 F.2d 674, 679 (7th Cir. 1931); Gargano v. United States, 24 F.2d 625 (5th Cir. 1928); Capuano v. United States, 9 F.2d 41, 42 (1st Cir. 1925); People v. Bradford, 84 Cal. App. 707, 258 Pac. 660, 662 (1927).

<sup>13</sup> See Sorrells v. United States, 287 U.S. 435, 440-41 (1932); DeMayo v. United States, 32 F.2d 472 (8th Cir. 1929).

<sup>14</sup> See Newman v. United States, 28 F.2d 681 (9th Cir.), cert. denied, 279 U.S. 839 (1928); Silk v. United States, 16 F.2d 568, 569 (8th Cir. 1926).

<sup>15</sup> See Swallum v. United States, 39 F.2d 390, 393 (8th Cir. 1930); Rossi v. United States, 293 Fed. 896, 898 (8th Cir. 1923).

factor negating the defense.<sup>16</sup> However, the mere fact that trickery has been practiced and an opportunity offered by the government agents for the commission of the crime does not defeat the prosecution.<sup>17</sup> An offer to buy narcotics by agents in disguise has been deemed permissible.<sup>18</sup> The normal coaxing by an alleged liquor purchaser,<sup>19</sup> the common symptoms displayed by a drug addict,<sup>20</sup> the gaining of the confidence of a potential vendor by dressing as an ordinary laborer<sup>21</sup> or a statement that a friend of the defendant has sent the officer<sup>22</sup> have been held legitimate. The ultimate goal of this permitted activity is to reveal the criminal design or to expose the illegal conspiracy and thus to disclose the would-be violator of the law.<sup>23</sup> But any inducement that might overcome the reluctance of an innocent citizen, such as pleas of desperate illness,<sup>24</sup> offers of great sums,<sup>25</sup> continued and persistent coaxing<sup>26</sup> or "any effective appeal made by agents to the impulses of compassion, sympathy, pity, friendship, fear, or hope, other than the ordinary expectation of gain and profit incident to the traffic, introduces the issue . . . of entrapment. . . ." <sup>27</sup>

### *History of Entrapment*

Entrapment as a defense has long been recognized by federal and state courts.<sup>28</sup> Prior to the case of *Woo Wai v. United States*,<sup>29</sup> it was rarely used except in cases where lack of consent was an element of the crime.<sup>30</sup> More recently, however, due to the creation by statute of many new crimes governing the sale and transportation of liquor and narcotics, the cases in which entrapment by government

<sup>16</sup> See *Billingsley v. United States*, 274 Fed. 86, 89 (6th Cir. 1921).

<sup>17</sup> See *Sorrells v. United States*, 287 U.S. 435, 441 (1932); *Grimm v. United States*, 156 U.S. 604 (1895).

<sup>18</sup> See *Vamvas v. United States*, 13 F.2d 347 (5th Cir. 1926), *overruled on other grounds*, *Ballerini v. Aderholt*, 44 F.2d 352 (5th Cir. 1930); *C. M. Spring Drug Co. v. United States*, 12 F.2d 852 (8th Cir. 1926); *Perez v. United States*, 10 F.2d 352 (9th Cir. 1926).

<sup>19</sup> See *United States v. Wray*, 8 F.2d 429 (N.D. Ga. 1925).

<sup>20</sup> *Id.* at 430.

<sup>21</sup> See *United States v. Washington*, 20 F.2d 160 (D. Neb. 1927).

<sup>22</sup> See *United States v. Smith*, 43 F.2d 173 (S.D. Tex. 1930).

<sup>23</sup> See *Sorrells v. United States*, 287 U.S. 435, 441-42 (1932).

<sup>24</sup> See *Driskell v. United States*, 24 F.2d 525 (9th Cir. 1928).

<sup>25</sup> See *United States v. Wray*, 8 F.2d 429 (N.D. Ga. 1925).

<sup>26</sup> *Woo Wai v. United States*, 223 Fed. 412 (9th Cir. 1915).

<sup>27</sup> See *United States v. Washington*, 20 F.2d 160, 163 (D. Neb. 1927).

<sup>28</sup> See, e.g., *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921); *United States v. Eman Mfg. Co.*, 271 Fed. 353 (D. Colo. 1920); *State v. Mantis*, 32 Idaho 724, 187 Pac. 268 (1920); *People v. McCord*, 76 Mich. 200, 42 N.W. 1106 (1889).

<sup>29</sup> 223 Fed. 412 (9th Cir. 1915).

<sup>30</sup> *United States v. Whittier*, 28 Fed. Cas. 591, No. 16688 (C.C.E.D. Mo. 1878); *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 160 (1893); *Rex v. Mcdaniels*, 1 Fost. 121, 128, 168 Eng. Rep. 60, 63 (1755).

officers has been recognized as a defense have grown to an amazing total.<sup>31</sup> Because the "injured" party in these transactions are loathe to complain to law enforcement agencies, evidence of violations are almost impossible to obtain. For this reason, artifice and stratagem are necessary for effective enforcement.<sup>32</sup> Although much diversity of opinion existed at the intermediate appellate level, the Supreme Court repeatedly denied certiorari to entrapment cases, preferring evidently that each circuit decide for itself whether or not the defense of entrapment was available to a defendant in a federal court.<sup>33</sup>

In 1932, the Court granted certiorari and defined the doctrine in the case of *Sorrells v. United States*.<sup>34</sup> Sorrells, indicted for violation of the National Prohibition Act, entered a plea of not guilty and upon his trial relied upon the defense of entrapment.<sup>35</sup> The evidence showed that a prohibition agent, while posing as a tourist, called at the home of the defendant. The agent twice requested the defendant to procure some liquor for him but the defendant stated that he had none. During their conversation it was discovered that both were war veterans and that both had served as members of the same unit. After a further exchange of war reminiscences, the agent once again renewed his request, whereupon the defendant left his house and returned shortly with some liquor which he sold to the agent. Evidence was introduced to prove the good character of the defendant; and, in rebuttal, testimony was given that the defendant was generally reputed to be a "rum runner."<sup>36</sup> No evidence was adduced, however, that the defendant had in fact previously violated the liquor laws. The trial court refused to direct an acquittal or to submit the issue of entrapment to the jury, ruling that as a matter of law there was no entrapment.<sup>37</sup> The Supreme Court held that the evidence of entrapment was sufficient to warrant consideration by the jury. Supreme Court Justice Hughes, speaking for five members of the Court, held that entrapment is a defense under the general issue because a sale of liquor induced by methods amounting to an entrapment is not a crime within the purview of the Prohibition Act.<sup>38</sup> While it is true that the general language of the act was

<sup>31</sup> See *O'Brien v. United States*, 51 F.2d 674, 678 n.1, 678 (7th Cir. 1931).

<sup>32</sup> See Comment, 2 So. CALIF. L. REV. 283, 284 (1929).

<sup>33</sup> See *Sorrells v. United States*, 287 U.S. 435, 443 (1932); *Leon v. United States*, 290 Fed. 384 (9th Cir.), *cert. denied*, 263 U.S. 710 (1923); *Zucker v. United States*, 288 Fed. 12 (3d Cir.), *cert. denied*, 262 U.S. 756 (1922); *Smith v. United States*, 284 Fed. 673 (8th Cir.), *cert. denied*, 261 U.S. 617 (1922); *Billingsley v. United States*, 274 Fed. 86 (6th Cir.), *cert. denied*, 257 U.S. 656 (1921); *Fetters v. United States*, 260 Fed. 142 (9th Cir. 1919).

<sup>34</sup> 287 U.S. 435 (1932).

<sup>35</sup> *Sorrells v. United States*, 287 U.S. 435 (1932).

<sup>36</sup> *Id.* at 440-41.

<sup>37</sup> *Id.* at 452.

<sup>38</sup> *Id.* at 448. The Government had contended that the defense of entrapment must be pleaded in bar to further proceedings under the indictment and could not be raised under a plea of not guilty. The Court however declared

broad enough to permit a conviction obtained through entrapping methods, the Court evidently decided that they would not attribute to Congress an intent to accomplish a result contrary to what seemed to be the sound policy unless specific and unequivocal language allowed no other interpretation.<sup>39</sup> Under this doctrine it cannot be said that an accused, though guilty, may go free, but rather that the Government cannot be permitted to contend that the defendant is guilty of a crime where the government officials are the instigators of his conduct.<sup>40</sup> Although the Court intimated that on certain occasions, the instigation of the Government will be excused, no attempt was made to formulate a general rule setting forth these exceptions. Rather, the Court pointed out that: "The predisposition and criminal design of the defendant are relevant." In any event the controlling question becomes "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."<sup>41</sup>

### *Sorrells Doctrine as Applied in Later Cases*

Such a nebulous standard obviously required a more definitive statement from the courts. The only instance however in which a court has attempted to formulate a general rule was the case of *United States v. Becker*,<sup>42</sup> where three excuses for the inducement were suggested. They were: "an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so as evinced by ready complaisance."<sup>43</sup> Although many cases involving entrapment have been decided subsequent to the *Becker* case, the opinions have usually been limited to discussions of the evidence then at bar; any attempt at a generalization has been avoided. The inevitable result has been an uncertainty that is undesirable if it can be avoided.<sup>44</sup>

To illustrate this confusion, let us examine carefully two cases recently decided by the Second Circuit of the United States Court of Appeals. Both involved violations of the Narcotics Act<sup>45</sup> and

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that the Government could not be permitted to contend that a defendant was guilty where government officials are the instigators of his conduct. *Id.* at 452.

<sup>39</sup> "The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes. We conceive it to be our duty to construe the statute here in question reasonably, and we hold that it is beyond our prerogative to give the statute an unreasonable construction, confessedly contrary to public policy, and then to decline to enforce it." *Id.* at 452.

<sup>40</sup> *Id.* at 452. See text at note 2.

<sup>41</sup> *Id.* at 451.

<sup>42</sup> 62 F.2d 1007 (2d Cir. 1933).

<sup>43</sup> *United States v. Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933).

<sup>44</sup> *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (dictum).

<sup>45</sup> 35 STAT. 614 (1909), 21 U.S.C. § 174 (1952). (Narcotic Drugs Import and Export Act).

in both the defendants claimed entrapment by government agents. In the first, *United States v. Sherman*,<sup>46</sup> the defendant appealed from a conviction under an indictment in three counts, each charging him with violations of the Narcotics Act, *i.e.*, that the accused "did receive, conceal, sell and facilitate the transportation, concealment and sale' of heroin."<sup>47</sup> The evidence proved beyond dispute that Sherman, the accused, on three separated occasions had sold heroin to an informant employed by the Bureau of Narcotics "to go out and try to induce a person to sell narcotics."<sup>48</sup> The decoy and the defendant became acquainted at the office of the doctor where both were undergoing treatment to rid themselves of their addiction to drugs. After several meetings the defendant was asked if he could procure any narcotics for the decoy. Defendant replied that it would be difficult, but on three occasions he obtained a quantity which he shared without profit. The issue of entrapment was submitted to the jury and a conviction was obtained. On appeal, however, the court expressed the opinion that a verdict should have been directed in favor of the defendant though the judgment was reversed on other grounds.<sup>49</sup>

The second case, *United States v. Masciale*,<sup>50</sup> decided recently in the second circuit, upheld a jury verdict rejecting the defense of entrapment. In December 1953 Kowel, an informant, was informally employed by an agent of the Bureau of Narcotics as a "special employee" to help uncover narcotics "pushers." Kowel introduced the agent to the defendant, representing the agent to be a "buyer of narcotics in large quantities." The defendant told the agent that he "was primarily a gambler and that he was not a narcotics trafficker as such, that his business . . . [was] mostly gambling but that he knew the right people in the narcotics traffic. . . ." <sup>51</sup> Through admitted inducements by the government agents, the defendant arranged a meeting with a narcotics dealer; and six weeks after the initial meeting the sale that the defendant was charged with took place.

The majority opinion, to a great extent, relied upon dicta found in the *Sherman* case for their decision. The court ruled that sufficient evidence was produced to satisfy the jury that the "accused was ready and willing to commit the offence charged, whenever the opportunity offered itself" and also that the defendant "did not need any persuasion, but that he stood ready to procure heroin for any one who asked for it."<sup>52</sup>

<sup>46</sup> 200 F.2d 880 (2d Cir. 1952).

<sup>47</sup> *United States v. Sherman*, 200 F.2d 880, 880-81 (2d Cir. 1952).

<sup>48</sup> *Id.* at 881.

<sup>49</sup> *Id.* at 883.

<sup>50</sup> 236 F.2d 601 (2d Cir. 1956).

<sup>51</sup> *United States v. Masciale*, 236 F.2d 601, 602 (2d Cir. 1956), *cert. granted*, 352 U.S. 1000 (1957).

<sup>52</sup> *Id.* at 603. The court used these phrases, quoted from the *Sherman* case,



It was pointed out in both the *Masciale* case and *Sherman* case that when the issue of entrapment is raised, two questions of fact arise: (1) did the agent induce the accused to commit the crime? (2) if so, was the accused ready and willing, without persuasion, to commit the offence? On the first question the accused has the burden of proof; on the second, the prosecution has it.<sup>53</sup>

In both the *Masciale* case and in the *Sherman* case, the inducement by the Government to commit the crime was conceded. The prosecution was now burdened with the obligation to prove that the accused was "ready and willing, without persuasion to commit the offence."<sup>54</sup> It is significant to note that although it was proven in the *Sherman* case that the defendant was a drug addict, the court found that the Government had not met its burden of proof. The court ruled that the conviction could not stand, and refused to place any great significance upon the fact that the defendant was a drug addict because there was "no evidence that he was in the habit of dispensing heroin, any more than his habit of buying it illicitly for himself. . . ."<sup>55</sup> Nevertheless, the court found that *Masciale*, who had never been guilty of illegal dealings in narcotics, who had never been a drug addict and who needed six weeks to produce a single ounce of heroin was ready and willing to commit the offense charged whenever the opportunity offered. In distinguishing the *Sherman* case the court said: "In the *Sherman* case, it is true, it was held that the prosecution had failed to prove a valid reply to the defence of entrapment. In the case at bar, however, the evidence against the defendant is palpably stronger."<sup>56</sup> It is submitted that an objective comparison of the facts would reveal no such evidence that is "palpably stronger." Rather, it would seem that upon the facts the decision in the *Masciale* case conflicts with the decision in the *Sherman* case.

Circuit Judge Frank in a dissenting opinion upholds the defence upon another theory. The *Sorrells* case is interpreted by him to mean: "Only if the defendant's *conduct* justifies the belief that, without persuasion by a government officer, the defendant would have committed that crime or a substantially similar crime, is that persuasion valid. . . ."<sup>57</sup> In other words entrapment is always a good

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as a basis of comparison which would determine whether or not a case of entrapment had been proven.

<sup>53</sup> United States v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Id.* at 883.

<sup>56</sup> United States v. *Masciale*, 236 F.2d 601, 603 (2d Cir. 1956), *cert. granted*, 352 U.S. 1000 (1957).

<sup>57</sup> *Id.* at 604. He added: "[I]t is then and *then only* proper as a means of obtaining evidence of a crime, like that which would have occurred in any event, but which might have been difficult to detect other than by setting a trap, for 'artifice and strategem may be employed to catch those engaged in criminal enterprises.'" (emphasis added). *Ibid.*

defense if the defendant can prove that he has not been guilty of similar illegal conduct. At first glance it would seem that Judge Frank has taken a novel position in direct conflict with earlier authorities. However, a closer look at these authorities at this point will prove otherwise. It will be remembered that *United States v. Becker* is traditionally cited as setting forth three excuses for an inducement by government agents.<sup>58</sup> A closer examination of the case reveals that the court painstakingly pointed out that it was merely reciting excuses accepted by other courts to that date.<sup>59</sup> In deciding the case at bar the court said: ". . . we do not wish to commit ourselves to the doctrine that mere readiness is enough . . . . Even though only those may be induced to commit crime who are already so engaged, it would be a narrow limitation to require that the crime charged should formally be the same."<sup>60</sup> The *Sherman* case is cited by the majority in the *Masciale* case as setting forth the rule that the prosecution could discharge its burden by showing that "the accused was ready and willing to commit the offence charged, whenever the opportunity offered."<sup>61</sup> Judge Frank contends that the majority by reading these expressions out of their context have misconstrued the interpretation given to the *Sorrells* case.<sup>62</sup> In the *Sherman* case, it will be remembered the court of appeals reversed the decision of the trial court finding that no entrapment had been shown.<sup>63</sup> They found that there was no evidence that the defendant was in the habit of dispensing heroin and that it would have been proper for the judge to grant a directed verdict. However, they said: "We need not . . . decide that the refusal to direct a verdict required a dismissal of the indictment . . . upon a new trial there may be other evidence of Sherman's dealings in narcotics."<sup>64</sup> Certainly an inference that the defense of entrapment

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<sup>58</sup> See text at note 41 *supra*.

<sup>59</sup> See *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933). The court said: "It has been uniformly held that when the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation which will be no more than an instance in a uniform series. This, as already appears, was certainly implied in *Sorrells v. United States*; it gives the least scope to the doctrine. If it should eventually become settled in that form, an accused who raised the issue, would indeed open himself to an inquiry into his past conduct, but that might be more tolerable than to try out the basis of the officials' suspicions, or the accused's 'predisposition' to the crime laid. At any rate, it is as far as we need go here. . . ." *Id.* at 1008.

<sup>60</sup> *Id.* at 1009 (emphasis added).

<sup>61</sup> *United States v. Masciale*, 236 F.2d 601, 603 (2d Cir. 1956), *cert. granted*, 352 U.S. 1000 (1957).

<sup>62</sup> *Id.* at 606 (dissenting opinion).

<sup>63</sup> See *United States v. Sherman*, 200 F.2d 880, 883 (2d Cir. 1952). Although it is true that the case was reversed because of an erroneous charge to the jury, the court also stated that upon the evidence, a verdict should have been directed because there was no evidence introduced to substantiate a finding that the defendant was not entrapped. *Ibid.*

<sup>64</sup> *Ibid.*

will be overruled only upon presentment of evidence proving prior illegal narcotics transactions may be drawn from these statements.

### Conclusion

For the federal courts, the basic teaching on the entrapment doctrine is to be found in the Supreme Court case of *Sorrells v. United States*.<sup>65</sup> Yet, in applying the rules as formulated in this case, an appellate court has in one case upheld and in another reversed a conviction on substantially similar factual situations. Such a glaring difference of opinion obviously requires that a more precise standard be set by the Supreme Court. Although the authority of law enforcement officers must be limited if adequate protection is to be afforded to law abiding citizens, it is essential that the law itself must be definite if these officials are to know the scope of their authority. Perhaps in granting certiorari in the *Masciale* case, the Supreme Court will avail itself of this opportunity to clarify the law of entrapment in the federal courts.



### CY PRES IN NEW YORK

Testatrix executed a will in 1934 and died in 1938 a resident of New York. By the terms of the will a trust was created for the benefit of testatrix' sister for life with remainder to a charitable hospital in Great Britain. The life tenant died in 1950 and the remainder in trust ordinarily would have passed without question except that by 1948 the British government had taken title to all hospital property and nationalized all medical services.<sup>1</sup> Is the hospital still a charity within the intent of the testatrix as expressed in the will and the surrounding circumstances? Or, do the facts make appropriate an exercise by the court of its cy pres power? The answer, as provided by the New York courts in two recent cases,<sup>2</sup> makes timely an examination of current trends in the application of the cy pres doctrine in New York.<sup>3</sup>

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<sup>65</sup> 287 U.S. 435 (1932).

<sup>1</sup> See National Health Service Act, 1946, 9 & 10 Geo. 6, c. 81; National Health Service (Scotland) Act, 1947, 10 & 11 Geo. 6, c. 27.

<sup>2</sup> Matter of Perkins, 2 A.D.2d 655, 152 N.Y.S.2d 315 (1st Dep't 1956); Matter of Bishop, 1 A.D.2d 612, 152 N.Y.S.2d 310 (1st Dep't 1956).

<sup>3</sup> This note will be concerned mainly with cases decided after 1931 when the surrogate's court was empowered to apply cy pres. The cases before that date are few. See Note, 39 COLUM. L. REV. 1358 (1939).