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*Example:* A, knowing that B has amassed a fortune through illegal gambling, defrauds B in a real estate deal. Does B's unlawful gambling activity provide A with a defense to fraud? No.

## 6. Entrapment

Entrapment occurs if the intent to commit the crime originated not with the defendant, but rather with the creative activities of law enforcement officers. If this is the case, it is presumed that the legislative intent was not to cover the conduct and so it is not criminal. The defense of entrapment requires proof by a preponderance of evidence of two elements:

- (i) The *criminal design* must have *originated with law enforcement* officers; and
- (ii) The defendant must *not* have been in any way *predisposed* to commit the crime.

### a. Offering Opportunity to Commit Crime Distinguished

It is not entrapment if the police officer merely provides the opportunity for the commission of a crime by one otherwise ready and willing to commit it.

*Example:* A, an undercover police agent, poses as a narcotics addict in need of a fix. B sells narcotics to A. Does B have the defense of entrapment? No. By posing as an addict, A merely provided an opportunity for B to commit the criminal sale.

### b. Inapplicable to Private Inducements

A person cannot be entrapped by a private citizen. Inducement constitutes entrapment only if performed by an officer of the government or one working for him or under his control or direction.

### c. Availability If Offense Denied

If a defendant denies her participation in the offense, she has elected not to pursue entrapment and is not entitled to raise the issue, even if the facts would otherwise permit her to do so. Under the modern trend, however, a defendant may raise the defense of entrapment even while denying participation in the offense. The Supreme Court has adopted this rule for federal offenses. [Mathews v. United States (1988)]

1) **Putting Predisposition in Issue**

In cases where there is extended inducement by the government, the issue becomes whether the defendant was predisposed to commit the offense or whether the intent to commit it was instilled by the officers. Predisposition must exist prior to the government's initial contact with the defendant. A mere "inclination" to engage in the illegal activity is not adequate proof of predisposition. [Jacobson v. United States (1992)] However, even if predisposition is not proved, the mere introduction by the prosecution of potentially damaging evidence on the issue of the defendant's predisposition may cause a jury to convict on the basis of the extensive evidence of the defendant's culpable state of mind.

2) **Jury Hostility**

Under the general approach, since entrapment is an issue of guilt, it is decided by the jury. Some fear that juries are hostile to the defense and do not adequately evaluate whether it has been established.

e. **Minority Rule—Objective Test**

The minority rule would replace the rule set out above with a test based entirely upon the nature of the police activity. Under this test, a defendant would be entitled to acquittal if the police activity was such as was reasonably likely to cause an innocent (*i.e.*, unpredisposed) person to commit the crime. The defendant's own innocence or predisposition is irrelevant. Under this approach, the issue is decided by the judge rather than the jury.

f. **Provision of Material for Crime by Government Agent Not Entrapment**

The Supreme Court has held that under federal law an entrapment defense cannot be based upon the fact that a government agent provided an ingredient for commission of the crime, even if the material provided was contraband. [United States v. Russell (1973); Hampton v. United States (1976)] A few states, however, make the provision of essential material—such as ingredients for drugs or the drugs themselves—entrapment.