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## Cover Page Footnote

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# AN ARGUMENT FOR PRESERVING THE AGENCY DEFENSE AS APPLIED TO PROSECUTIONS FOR UNLAWFUL SALE, DELIVERY, AND POSSESSION OF DRUGS

*Scott W. Parker**

## INTRODUCTION

The United States has developed a comprehensive set of laws designed to combat the use of illicit drugs, on both the state and federal level. While most of these legislative schemes prohibit both the sale and possession of illegal drugs, the penalties for sale of drugs are consistently harsher than for mere possession.[1]

In order to be subject to prosecution for the unlawful sale of illegal drugs, a person need not actually "sell" a drug in the ordinary sense of the word.[2] In fact, a defendant can be charged with an unlawful sale of drugs even if he or she simply hands over a quantity of drugs to another person, without receiving any payment in return.[3] In these situations, the defendant is often acting as an agent or middleman on behalf of the ultimate purchaser of the drugs. Although these agents have not actually sold anything, in many states they are prosecuted for sale.[4]

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1. *See, e.g.*, N.Y. Penal Law §§ 220.03, 220.31 (McKinney 1989) (categorizing the criminal possession of a controlled substance as a Class A misdemeanor, while categorizing the criminal sale of a controlled substance as a Class D felony); Vt. Stat. Ann. tit. 18, § 4231 (Michie Supp. 1997) (imposing a penalty for the possession of cocaine of imprisonment for not more than one year or a fine up to $2000, or both, compared to a penalty for the sale of cocaine of imprisonment for not more than five years or a fine up to $100,000, or both); *see also* 720 Ill. Comp. Stat. Ann. 570/100 (West 1993 & Supp. 1997) ("It is not the intent of the General Assembly to treat the unlawful user or occasional petty distributor of controlled substances with the same severity as the large-scale, unlawful purveyors and traffickers of controlled substances.").

The penalties for sale are much more severe because "sellers are choosing to harm others and not merely electing to bear the risk of harm to themselves." Frank O. Bowman, III, *Playing "21" with Narcotics Enforcement: A Response to Professor Carrington*, 52 Wash. & Lee L. Rev. 937, 979 (1995).

2. *See* Black's Law Dictionary 1337 (6th ed. 1990) (defining a "sale" as a contract between two parties "by which the [seller], *in consideration of the payment or promise of payment of a certain price in money*, transfers to the [buyer] the title and the possession of property" (emphasis added)).

3. *See, e.g.*, Colo. Rev. Stat. § 18-18-102(33) (1997) (defining "sale" as "a barter, an exchange, or a gift, or an offer therefor"); N.Y. Penal Law § 220.00 (McKinney 1989) (defining "sell" as "to sell, exchange, give or dispose of to another, or to offer or agree to do the same"); State v. Allen, 292 A.2d 167, 171 (Me. 1972) ("[O]ur Legislature has broadened [the definition of 'sale'] to include the transfer of any narcotic drug from one person to another, for a price or without value recompense . . . .").

4. *See, e.g.*, State v. Kim, 785 P.2d 941, 941-42 (Haw. 1990) (defendant took money from an undercover agent, went to another part of the room, returned to the agent, and gave him a napkin containing cocaine); State v. Deering, 611 A.2d 972, 973

It is even possible for an agent or middleman to be convicted of unlawful sale in situations in which he or she did not handle the drugs at all, if the government can prove that the agent aided and abetted the commission of the sale to the ultimate purchaser.[5] Courts have upheld such convictions for individuals who simply introduced a buyer to a seller,[6] even if the defendant was not present at the actual exchange of drugs.[7] Further, individuals can also be convicted of unlaw-

(Me. 1992) (after informant gave defendant $100, defendant telephoned a drug supplier, left the apartment, returned to the apartment, and gave the informant 3/4 of a gram of cocaine and $20 change); State v. Lapan, 609 A.2d 970, 970-71 (Vt. 1992) (undercover officer gave defendant $1425 in cash and the defendant briefly got into another car, returned to the officer, and gave him a brown paper bag containing cocaine).

5. *See* 18 U.S.C. § 2(a) (1994) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); N.Y. Penal Law § 20.00 (McKinney 1998) ("When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when . . . he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."); Tenn. Code Ann. § 39-11-402(2) (1997) ("A person is criminally responsible for an offense . . . if . . . [a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense . . . ."); Wash. Rev. Code Ann. § 9A.08.020(3)(a) (West 1988) ("A person is an accomplice of another person in the commission of a crime if . . . he solicits, commands, encourages, or requests such other person to commit it; or aids or agrees to aid such other person in planning or committing it . . . ."); Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) ("In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.))).

6. *See, e.g.*, Johnson v. State, 642 So. 2d 924, 927-28 (Miss. 1994) (affirming the defendant's conviction for unlawful sale of drugs when the defendant drove an undercover agent to the supplier's house, introduced the seller to the officer, and observed the completion of the sale); People v. Armstrong, 553 N.Y.S.2d 169, 170 (App. Div. 1990) (finding that defendant had "accessorial liability" with the co-defendant for unlawful sale when the defendant brought the buyer to the seller and served as a lookout and guard during the completion of the sale); State v. Poplin, 289 S.E.2d 124, 130 (N.C. Ct. App. 1982) (upholding the defendant's conviction for aiding and abetting the sale of cocaine when the defendant arranged a sale at his home but laid on the couch while the transaction was completed, on the theory that the defendant was "ready to render assistance and encouragement to [the buyer] in the sale of the cocaine").

7. *See, e.g.*, People v. Cattaneo, 266 Cal. Rptr. 710, 713-15 (Ct. App. 1990) (upholding the defendant's conviction for aiding and abetting two sales of a controlled substance when the defendant had merely introduced an undercover officer to a seller of cocaine and was not present at the actual sales, on the grounds that the evidence established the defendant's intent to facilitate the sales); Wallace v. State, 344 S.E.2d 770, 770-71 (Ga. Ct. App. 1986) (affirming the defendant's conviction for sale of cocaine, based upon evidence that the defendant arranged the sale between a government informant and the defendant's brother, with the brother delivering the cocaine to the informant the following day); State v. Grilli, 230 N.W.2d 445, 449-50 (Minn. 1975) (holding that evidence indicating that the defendant telephoned a marijuana supplier and arranged a sale to an undercover officer was sufficient to support his conviction for unlawful sale).

ful sale by "steering" drug buyers to the drug sellers.[8]

The prosecution of purchasing agents has been the subject of much debate. Many have contended that a person who is merely acting upon a request from another person to purchase drugs for him, without receipt of any consideration, should not be prosecuted to the same extent as a person who sells drugs purely for profit.[9] Others have argued that, given the scourge of drug abuse, any participation in the drug trade should be severely penalized.[10] Many jurisdictions began to recognize a doctrine known as the "agency defense,"[11] based on the

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8. According to the expert testimony of New York City police officer Hector Vega, the role of a "steerer" in a drug transaction may be defined as follows:

> [A] steerer usually aids in the drug sale by standing a short distance away from the carrier of the drugs, soliciting or screening potential buyers, and guiding buyers to the carrier, who then completes the sale. A steerer may be part owner of the drugs being sold, or may simply receive a share of the proceeds after the sale.

United States v. Resto, 824 F.2d 210, 211 (2d Cir. 1987). In *Resto*, the Second Circuit upheld the defendant's conviction for aiding in the sale of crack within 1000 feet of a school, based upon evidence indicating that the defendant conversed with an undercover officer and directed the officer to a nearby alley, where the officer purchased three vials of crack. *See id.*; *see also* Stevens v. State, 436 S.E.2d 82, 82-83 (Ga. Ct. App. 1993) (affirming the defendant's conviction for sale of cocaine when the defendant asked two undercover officers what they were looking for, flagged down another car driven by the seller of the cocaine, and stood to the side as the seller sold the cocaine to the officers); People v. Abdul-Aziz, 628 N.Y.S.2d 272, 273 (App. Div. 1995) (upholding the defendant's conviction for unlawful sale based on the fact that the defendant led the buyers to the principals of a cocaine selling operation, even though the defendant "never negotiated with the [buyer], or handled the cash, the contraband or any of the drug selling paraphernalia"); People v. Hinton, 577 N.Y.S.2d 63, 64 (App. Div. 1991) (finding the evidence sufficient to prove that the defendant was acting "in concert to possess and sell narcotics" when the defendant allowed an undercover officer into a building to purchase cocaine after the officer gave a code phrase to the defendant).

9. *See, e.g.*, Hill v. State, 348 So. 2d 848, 855 (Ala. Crim. App. 1977) (holding that one acting solely on behalf of a purchaser of a controlled substance cannot be found guilty of unlawful sale); People v. McGhee, 677 P.2d 419, 422 (Colo. Ct. App. 1983) (same); State v. Schilling, 712 P.2d 1233, 1239 (Kan. 1986) (same); Roy v. State, 489 P.2d 1158, 1159 (Nev. 1971) (same); People v. Andujas, 588 N.E.2d 754, 757 (N.Y. 1992) (same); State v. Lapan, 609 A.2d 970, 970-71 (Vt. 1992) (same); Abraham Abramovsky, *The Agency Defense in New York Drug Prosecutions*, N.Y. L.J., Apr. 1, 1997, at 3 (suggesting that the New York Court of Appeals needs to more clearly define the agency defense in order to better protect defendants from New York's harsh drug laws).

10. *See, e.g.*, State v. Baltier, 505 P.2d 556, 557 (Ariz. 1973) (en banc) (holding that one who acts purely on behalf of the purchaser of drugs can still be convicted of unlawful sale); People v. Reyes, 4 Cal. Rptr. 2d 48, 52 (Ct. App. 1992) (same); Gay v. State, 471 S.E.2d 49, 51 (Ga. Ct. App. 1996) (same); State v. Allen, 292 A.2d 167, 170-71 (Me. 1972) (same); State v. Stone, 316 A.2d 196, 197 (N.H. 1974) (same); Stephen P. Foster, Note, *A Procuring Agent May Not Be Convicted of Narcotics Sale*, 22 Kan. L. Rev. 272, 280 (1974) (expressing concern that the agency defense might result in the government losing its leverage against agents to obtain evidence in prosecutions against drug sellers).

11. Some jurisdictions use the terms "procuring agent defense" or "buyer's agent defense" rather than "agency defense," although they all have an identical meaning. This Note uses the term "agency defense."

underlying assumption that someone who acts as an agent without consideration is not as culpable as the actual seller.

The fundamental theory of the agency defense is that "an individual who acts as an extension of the buyer should not be held any more culpable than the buyer himself."[12] In other words, one acting as an extension of the buyer should only be assigned the same degree of culpability as the buyer, not the seller. Courts began to protect purchasing agents from prosecution for the unlawful sale of drugs on both technical and culpability grounds.[13] This protection has been the subject of great controversy.

This Note conducts a thorough examination of the agency defense and its applications. Part I of this Note offers a history of the agency defense, how the defense works, and the justifications offered by courts for both its creation and preservation. Part II discusses the Federal Controlled Substances Act of 1970. In particular, part II explains how this federal statute resulted in the demise of the agency defense in federal courts and in some state courts. Part II also offers the courts' rationale for eliminating the defense. Finally, part II shows how, despite passage of the Controlled Substances Act, at least one state has preserved the defense. Part III of this Note argues for uniform adoption of the agency defense. By examining the entrapment defense, part III demonstrates how the agency defense reflects the appropriate level of criminal culpability for agents. Further, it presents the sound legal reasoning for preservation of the defense.

## I. The Origins Of The Agency Defense

This part looks at the beginnings of the agency defense and its subsequent developments, explaining in detail the exact applications of the defense. Further, this part examines the arguments given in support and in opposition of the defense.

### A. *History of the Agency Defense:* United States v. Sawyer

The agency defense was first recognized by the Third Circuit in *United States v. Sawyer*.[14] In *Sawyer*, the defendant appealed his conviction for the unlawful sale of heroin.[15] During the trial, the defendant had offered evidence that an undercover federal agent repeatedly requested the defendant to purchase heroin for him.[16] In the process, the undercover agent went so far as to feign a violent seizure to gain sympathy from the defendant.[17] "[M]oved by [the undercover agent's] apparent suffering," the defendant eventually complied with

12. Abramovsky, *supra* note 9, at 3 (footnote omitted).
13. *See infra* Part I.C.
14. 210 F.2d 169 (3d Cir. 1954).
15. *Id.* at 169.
16. *Id.* at 170.
17. *Id.*

the agent's request.[18] The defendant testified that he purchased the heroin at a nearby hotel, brought it back and gave it to the agent.[19] Based on this evidence, the defendant was convicted on the sale charge.[20] On appeal, the defendant argued that the trial judge erred by refusing to explain to the jury the "difference in fact and in law between dealing with a purchaser as seller and acting for him as a procuring agent."[21] In other words, the defendant suggested that a not-for-profit agent of the buyer should not be treated in the same manner as a for-profit seller.

The Third Circuit, finding this distinction quite meaningful, reversed the defendant's conviction.[22] The court held that, under these circumstances, the district court should have instructed the jury that:

> [I]f they believed that the federal agent asked the defendant to get some heroin for him and thereupon the defendant undertook to act *in the prospective purchaser's behalf rather than his own*, and in so doing purchased the drug from a third person with whom he was not associated in selling, and thereafter delivered it to the buyer, the defendant would not be a seller and could not be convicted under this indictment.[23]

The court added that the decision to fully acquit the defendant of all criminal charges resulted from the government's failure to charge the defendant with illegal possession of narcotics;[24] the court was not suggesting that this defendant was not guilty of a drug crime at all, but only that he was not guilty of selling drugs.[25] Thus, the court implied that a conviction for possession may have been justified; the court

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18. *Id.*
19. *Id.*
20. *Id.* at 169.
21. *Id.* at 170.
22. *Id.* at 171.
23. *Id.* at 170 (emphasis added). The court went so far as to declare that although the theory of agency might not be clear to a layperson, it is "obvious" to a lawyer. *Id.*
24. *Id.*
25. *Sawyer* represents the first case in which the agency defense was recognized in connection with a narcotics case. Courts had previously applied the theory of agency, however, in cases involving the sale of alcohol to a third party. *See, e.g.*, Chance v. State, 210 S.W. 208, 209 (Tex. Crim. App. 1919) (holding that "where the defensive theory raised by the evidence is that the accused was not interested in the sale and not acting as the agent of the seller, but acted solely for the accommodation of the purchaser in obtaining the liquor for him," a jury is required to acquit the defendant if the defendant proves this theory); *see also* Bonds v. State, 30 So. 427, 428 (Ala. 1901) (finding that one who acts solely as an agent for the ultimate purchaser of liquor cannot be convicted of sale); Anderson v. State, 13 So. 435, 436 (Fla. 1893) (same); City of Iola v. Lederer, 120 P. 354, 356 (Kan. 1912) (same); State v. Kilbreth, 159 A. 504, 504 (Me. 1932) (same). These courts all observed the rule that "one who [purchases liquor] at [the purchaser's] solicitation, and as his hired agent, and with his money, and for his use . . . did not commit the offense of selling." State v. Wallenberg, 197 N.W. 276, 277 (Minn. 1924). Under these cases, however, an agent could be convicted of such a crime if he had an interest in the sale. *See* Galbreath v. State, 216 S.W.2d 689, 690-91 (Tenn. 1948).

noted, however, that the defendant was charged only with sale and not possession, thus making a possession conviction impossible.

### B. *How the Agency Defense Works*

As an illustration of how the agency defense actually works, consider the following hypothetical. The defense typically arises as follows: X—who is usually either a government informant or a police officer[26]—asks Y to obtain some illegal drugs for X,[27] giving Y just enough money to cover the purchase price of the drugs. Y, acting solely upon X's request, purchases the drugs from Z, and then gives the drugs to X, without receiving any extra compensation in return.[28] According to most state statutes, however, Y has technically committed a sale of drugs when he hands the drugs to X, even though he may not have received any compensation for his actions.[29] Y can also be charged with possession of drugs, even though he may have possessed them only for an instant.[30]

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26. This individual is not required to be associated with the government in order for a defendant to be able to use the agency defense, although in the overwhelming majority of cases, the government is somehow involved. *See, e.g.*, Love v. State, 893 P.2d 376, 380 (Nev. 1995) ("[W]e have never expressly nor impliedly indicated that the [agency] defense is limited to situations where the buyer is acting as an agent of the State."); People v. Tower, 505 N.Y.S.2d 275, 276 (App. Div. 1986) (approving a set of jury instructions which discussed "the accommodation of a friend as a basis for a finding of agency").

27. Because the government is very frequently involved in cases such as these, defendants usually assert the defense of entrapment and the agency defense simultaneously. *See* United States v. Barcella, 432 F.2d 570, 572 (1st Cir. 1970) ("[I]t may be observed that assertion of the procuring agent theory as a defense frequently goes hand in hand with a claim of entrapment."). For a discussion of the entrapment defense, see *infra* Part III.A.1.

28. It is possible, however, for a defendant to invoke the agency defense even if he or she receives a nominal benefit from the transaction. *See infra* note 37 and accompanying text.

29. *See supra* notes 2-3 and accompanying text. Because the agency defense can be raised when a defendant actually transfers the drugs to the ultimate purchaser during the course of a sale, the defense also clearly applies to situations in which the defendant did not handle the drugs at all, but merely participated in some manner in the sale. *See, e.g.*, People v. King, 541 N.Y.S.2d 97, 98 (App. Div. 1989) (finding reversible error in the trial court's failure to instruct the jury on the agency defense when the defendant instructed an undercover officer how to complete a drug transaction with a third party); People v. Cierzniewski, 529 N.Y.S.2d 886, 886-87 (App. Div. 1988) (holding that the failure of the trial court to charge the jury with the agency defense constituted reversible error when the defendant did not handle any drugs, but simply introduced an undercover officer to two men who sold the officer cocaine). At least one state court found this distinction meaningful under a statute prohibiting the unlawful "delivery" of a controlled substance. *See* State v. Lott, 255 N.W.2d 105 (Iowa 1977). For a discussion of *Lott*, see *infra* notes 113-30 and accompanying text.

30. *See, e.g.*, Commonwealth v. Harvard, 253 N.E.2d 346, 349 (Mass. 1969) ("Possession ought not to depend on the duration of time elapsing after one has an object under his control."); People v. Sierra, 379 N.E.2d 196, 199 (N.Y. 1978) ("Crimes of possession of a controlled substance include but make no allowance or exception for fleeting or momentary contact.").

The distinction drawn by *Sawyer* between agency and sale was validated by other courts. As *Sawyer* also correctly implied, the protection offered by the agency defense does not extend to a charge of unlawful possession.[31] This is because the theory of the agency defense is that the agent should have the same degree of culpability as the ultimate purchaser of the drugs.[32] Because the ultimate purchaser can be convicted of unlawful possession, the agent should also be subject to a possession conviction. In other words, "even though an agent can be held no more culpable than the buyer, he is also no less culpable."[33]

There are other intricacies to the defense as well, all based on the common ideal that punishment should bear some relationship to moral culpability and legal responsibility. For example, if the defendant is charged with unlawful possession with intent to sell when acting on behalf of a purchaser, he or she can invoke the agency defense.[34] This merely extends the logic of *Sawyer*, because "[i]f a person acting

31. *See* United States v. Sawyer, 210 F.2d 169, 170 (3d Cir. 1954) ("The government having elected to charge the defendant with the crime of sale *rather than illegal possession*, the jury should have been alerted to the legal limitations of the sale concept . . . ." (emphasis added)); *see also* Buckley v. State, 600 P.2d 227, 228 (Nev. 1979) (refusing to allow the defendant to use the agency defense for a charge of criminal possession of a controlled substance); *Sierra*, 379 N.E.2d at 197 (same); State v. Carter, 636 S.W.2d 183, 184 (Tenn. 1982) (same). In *Sierra*, the New York Court of Appeals observed that "the theory [of the agency defense] does not fit within the ambit of mere possession . . . since [it] contains no element pertaining to or any exception in respect to an agent or person possessing on behalf of another." *Sierra*, 379 N.E.2d at 199.

Additionally, the defense may not be applicable if the defendant already had possession of the drugs before the ultimate purchaser made a request for drugs to the defendant. *See Love*, 893 P.2d at 380.

32. *See supra* notes 9 & 12 and accompanying text.

33. Abramovsky, *supra* note 9, at 3. Even in states which do not allow the use of the agency defense, an agent or middleman who is convicted of unlawful sale of drugs cannot be simultaneously convicted of possession of those drugs. For example, in Maine, a defendant is not permitted to use the agency defense. *See* State v. Deering, 611 A.2d 972, 974 (Me. 1992). The Maine Supreme Court, however, recognized that:

> Where the only possession of the narcotic drug is that incident to and necessary for the sale thereof, and it does not appear that there was possession before or after and apart from such sale, the State cannot fragment the accused's involvement into separate and distinct acts or transactions to obtain multiple convictions, and separate convictions under such circumstances will not stand.

State v. Allen, 292 A.2d 167, 172 (Me. 1972); *see also* Moon v. State, 222 S.E.2d 635, 637 (Ga. Ct. App. 1975) ("[T]he court must beware of a double conviction and punishment where possession is merged in the sale."); People v. Abdul-Aziz, 628 N.Y.S.2d 272, 273-74 (App. Div. 1995) (upholding the defendant's conviction in an agency case for unlawful sale of a controlled substance, but reversing his conviction for unlawful possession of a controlled substance). In *Abdul-Aziz*, the court reasoned that although the evidence of the defendant's "transitory and fleeting contemporaneous presence in the apartment" was sufficient to prove his participation in the sale, the defendant did not exercise "dominion and control" over the cocaine that was eventually sold to an undercover officer. *Abdul-Aziz*, 628 N.Y.S.2d at 273-74.

34. *See* Hillis v. State, 746 P.2d 1092, 1095 (Nev. 1987); *Sierra*, 379 N.E.2d at 197.

solely as an agent of the buyer is not a seller, neither does he possess the controlled substance for the purpose of selling it."[35]

After acting as an agent for another person in a drug transaction, the agent cannot invoke the agency defense if he or she received a significant benefit from the transaction.[36] Generally speaking, though, if the agent only receives a *slight* benefit as a result of the transaction, it does not negate the possibility of using the agency defense.[37] This is because the mere request for a tip from a buyer does not "necessarily or even ordinarily alter the relationship between the parties, the nature of the transaction or the defendant's culpability."[38] Along the same lines, if the defendant, while making a purchase of drugs for another, keeps some of the drugs from the transaction for personal use, he or she is not necessarily prevented from using the agency defense for the portion of the drugs that he gives to another.[39]

Further, it is important to note that the determination of whether a defendant is considered to be an agent of the buyer is generally a question for the jury, not the judge.[40] Therefore, as long as there is "some reasonable view of the evidence" that a defendant acted purely on behalf of a buyer of drugs, a judge is required to submit the agency defense to the jury in those jurisdictions accepting the defense.[41]

35. *Hillis*, 746 P.2d at 1095.

36. *See, e.g.*, People v. Roche, 379 N.E.2d 208, 212 (N.Y. 1978) ("[The agent's] function must be performed without any profit motive." (citation omitted)).

37. *See, e.g.*, Hill v. State, 348 So. 2d 848, 856 (Ala. Crim. App. 1977) (finding that the defendant's request for compensation and his acceptance of five dollars from an undercover officer, after the defendant had acted as a procuring agent for the undercover officer's marijuana purchase, did not preclude the defendant's ability to use the agency defense as a defense to the charge of unlawful sale); *Roche*, 379 N.E.2d at 213 ("That an agent does not act gratuitously would not necessarily be inconsistent with the defense of agency." (citations omitted)).

38. People v. Lam Lek Chong, 379 N.E.2d 200, 207 (N.Y. 1978).

39. For example, in *People v. Andujas*, 588 N.E.2d 754, 756 (N.Y. 1992), the defendant appealed his conviction for the unlawful sale of a controlled substance. The defendant testified that he purchased some cocaine for an undercover officer and shared it with the officer. *Id.* On appeal, the defendant argued that the jury instructions were erroneous because they "unfairly suggested that the agency defense is not available when, as was assertedly the case, defendant purchased part of the drugs for his own use and part for another person." *Id.* The New York Court of Appeals reversed the defendant's conviction and ordered a new trial. *Id.* at 757-58. The court agreed that the instructions were erroneous, because they potentially gave the impression to jurors that "because [the defendant] had an interest in obtaining [a portion of the] drugs for his own use, . . . somehow he could therefore not be an agent" for the portion of the drugs which the defendant gave to the officer. *Id.* at 756.

40. *See, e.g.*, People v. McGhee, 677 P.2d 419, 422 (Colo. Ct. App. 1983) (finding that "the jury, as the sole judge of credibility, must determine the validity of the [agency] defense" (citation omitted)); *Lam Lek Chong*, 379 N.E.2d at 206 ("The determination as to whether the defendant was [an agent of the buyer] is generally a factual question for the jury to resolve on the circumstances of the particular case.").

41. People v. King, 541 N.Y.S.2d 97, 98 (App. Div. 1989); *see also* State v. Osburn, 505 P.2d 742, 747 (Kan. 1973) (holding that if the agency defense is properly raised, a jury should be instructed on its application).

Nonetheless, the fact that the defendant behaved as a middleman, in and of itself, does not compel the use of the defense.[42] In other words, "[a]ll agents are, concededly, middlemen of sorts. But the converse is not true."[43] If there is, in fact, no reasonable view that a defendant acted purely on behalf of the purchaser of the drugs, the judge need not instruct the jury on the agency defense.[44]

### C. *Justifications and Criticisms of the Agency Defense*

The agency defense received a warm reception in both federal and state courts after the *Sawyer* decision.[45] The creation and development of the defense stemmed from a judicial desire to ensure fairness to defendants who "appear to be on the extreme fringe of drug trafficking activities,"[46] a fairness which might be compromised by mindless application of statutes proscribing the unlawful sale of drugs. Courts recognizing the defense understood that it makes little sense to assign the same degree of culpability to an individual who is merely an extension of a purchaser of drugs as to a dealer who sells solely for a profit.[47]

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42. *See, e.g.*, People v. Smith, No. 78,789, 1998 WL 81253, at *2 (N.Y. App. Div. Feb. 26, 1998) (holding that the defendant's "actions in this drug transaction, though intermediary in nature, did not warrant an agency charge" (citation omitted)); People v. South, 649 N.Y.S.2d 553, 555 (App. Div. 1996) ("Evidence that defendant may have been acting as a middleman in the drug transaction is insufficient to warrant a charge on the agency defense." (citation omitted)).

43. People v. Argibay, 379 N.E.2d 191, 194 (N.Y. 1978). The New York Court of Appeals further explained:

> 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.

*Id.*

44. *See, e.g.*, People v. Herring, 632 N.E.2d 1272, 1273 (N.Y. 1994) ("Before an agency charge is warranted, the evidence must be indicative of a relationship with the buyer [and] not merely raise ambiguities about the defendant's connection to the seller.").

45. *See* Garcia v. United States, 373 F.2d 806, 809-10 (10th Cir. 1967); United States v. Winfield, 341 F.2d 70, 71 (2d Cir. 1965); Lewis v. United States, 337 F.2d 541, 543-44 (D.C. Cir. 1964); Vasquez v. United States, 290 F.2d 897, 898-99 (9th Cir. 1961); Henderson v. United States, 261 F.2d 909, 912 (5th Cir. 1959); Commonwealth v. Harvard, 253 N.E.2d 346, 349 (Mass. 1969); People v. Branch, 213 N.Y.S.2d 535, 535 (App. Div. 1961); Durham v. State, 280 S.W.2d 737, 739 (Tex. Crim. App. 1955).

46. Elaine Marie Tomko, Annotation, *Criminality of Act of Directing To, or Recommending, Source From Which Illicit Drugs May Be Purchased*, 34 A.L.R. 5th 125, 125 (1995).

47. *See, e.g.*, People v. Andujas, 588 N.E.2d 754, 757 (N.Y. 1992) ("The [agency] defense simply reflects the logical proposition that if a defendant is acting solely in a capacity which is inherently inconsistent with being a seller—i.e., acting as an agent for the buyer—he cannot be a seller.").

The New York Court of Appeals has eloquently provided the following explanation for its adherence to the agency defense:

> It is . . . not to be assumed that all those who engage in procurement of illegal drugs are motivated by a criminal disposition rather than a desire to satisfy a personal craving to feed an irresistible habit or to aid one so afflicted. Thus, the "agency defense" in good part may be seen as a common-law attempt, in appropriate cases, 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.[48]

The Court of Appeals wisely determined that a deeper analysis of the agent's role in a drug transaction was required in order to determine the agent's proper culpability. The agency defense gives the criminal justice system the necessary leeway to mete out justice appropriately when dealing with the myriad of drug cases.[49]

These courts may have also considered it highly improbable that state legislatures would take an initiative to officially incorporate the agency defense into their drug statutes. Such an action would probably be unpopular with voters, who would likely perceive it as being too lenient on criminals.[50] Indeed, as one commentator observed, "What legislator wants to appear soft on crime by decreasing penalties for offenses involving violence or drugs?"[51]

In addition to the culpability considerations which justify the agency defense, there are also sound legal reasons for the defense. For instance, the Alabama Court of Criminal Appeals has concluded that it had "no authority by statute" to find that a defendant "is subject to criminal responsibility for the crime of 'selling,' if his conduct, according to the undisputed evidence, does not afford a reasonable inference that he participated with the seller in making the sale."[52] Such an observation suggests that, if an agent in no way acted on behalf of the seller, the agent has not committed the crime of unlawful sale.[53]

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48. People v. Roche, 379 N.E.2d 208, 211 (N.Y. 1978).

49. For a discussion of what constitutes "justice" for purchasing agents, see *infra* notes 157-61 and accompanying text.

50. *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 39 (1998) (observing the "public demise of people deemed 'soft on drugs'"); Jason A. Gillmer, Note, United States v. Clary: *Equal Protection and the Crack Statute*, 45 Am. U. L. Rev. 497, 564-65 (1995) ("With their constituents demanding action, any legislator failing to respond [to the drug issue] risked being labeled 'soft on crime' and faced almost certain defeat in the next election."); Laura A. Wytsma, Comment, *Punishment for "Just Us"—A Constitutional Analysis of the Crack Cocaine Sentencing Statutes*, 3 Geo. Mason Indep. L. Rev. 473, 511 (1995) ("Politicians simply will not reduce disproportionate drug penalties and bear the legitimate risk of being savaged as 'soft on crime.'").

51. Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Cal. L. Rev. 61, 123 (1993).

52. Hill v. State, 348 So. 2d 848, 855 (Ala. Crim. App. 1977).

53. *See* 35 N.Y. Jur. 2d *Criminal Law* § 3508 (1995) (observing that "when a defendant asserts the defense of agency, he denies that he made the sale").

The Vermont Supreme Court, in *State v. Bressette*,[54] offered another justification for the continued existence of the agency defense as applied to a charge of unlawful sale of drugs. The defendant, appealing a conviction for the sale of marijuana, argued that the lower court erred in refusing to offer to charge the jury in accordance with the agency defense;[55] he would not be a "seller" under the statute if the evidence showed that he acted solely on behalf of the purchaser of the marijuana.[56] The court reversed the defendant's conviction on the grounds that the lower court erred by refusing to submit the agency defense to the jury.[57] Explaining the rationale for its decision, the court stated:

> The defined crime here is one of selling, not merely of participating in a sale. The distinction is important, and it does not turn . . . upon the fact that defendant admittedly participated, in some capacity, in the making of a sale. Every buyer is, in a sense, a participant in a sale; the very term imports two parties to the transaction. But it begs the point here in issue to say that both become sellers, or that the purpose of the statute requires such strained construction. . . . [I]t does not follow, as the State would argue, that all parties to the transaction thereby become sellers.[58]

The court added that "[p]lainly put, we view the defendant's position as technically correct."[59] Focusing on the wording of the statute, the court found that the statute's purpose was to assign criminal liability only to sellers of drugs, rather than to buyers or their agents.[60] Ultimately, the court concluded that an agent of the buyer who in no way associated with the seller does not commit the crime of unlawful sale.[61]

Despite the formidable culpability and legal justifications for the agency defense, critics have taken issue with the defense, both in its theory and its application.[62] Most frequently, opponents of the agency defense often refer to the severity of the drug problem in the United States as a justification for refusing to allow the defense.[63] More specifically, critics claim that the legislature, when attempting to combat

54. 388 A.2d 395 (Vt. 1978).
55. *Id.* at 396.
56. *Id.*
57. *Id.* at 398.
58. *Id.* at 397.
59. *Id.* at 398.
60. *Id.*
61. *Id.*
62. One critic vehemently denounced the agency defense as an "unwarranted, unnecessary, and essentially unworkable judicial modification" of criminal law. People v. Roche, 379 N.E.2d 208, 214 (N.Y. 1978) (Gabrielli, J., dissenting in part).
63. *See* State v. Allen, 292 A.2d 167, 171 (Me. 1972) (rejecting the agency defense, on the grounds that "[i]t is clear that the legislative design in Maine is to eradicate the unauthorized traffic in narcotics"); State v. Reed, 170 A.2d 419, 425 (N.J. 1961) ("The [drug] statute was passed as an all-out offensive to combat the drug evil . . . ."); *see also infra* note 72 (noting Congressional reaction to the drug problem).

the drug problem in the most effective possible manner, could not have intended for agents to be free from liability for unlawful sale.[64] As the Supreme Court of Illinois observed, "[w]e are of the opinion that the definition [of sale] shows a legislative intent that the act of a person whether as agent, either for the seller or the purchaser, or as a go-between, in such a transaction constitutes a sale."[65]

Along the same lines, some have reasoned that because the purchasing agent makes it easier for others to obtain drugs, he or she should not enjoy the mitigated culpability of mere possession.[66] In other words, "[t]he agent who delivers to his principal performs a service in increasing the distribution of narcotics. Without the agent's services the principal might never come into possession of the drug."[67] According to this argument, the drug laws were designed to punish all "links" in the drug trafficking chain with equal severity.[68]

Further, a practical concern about applying the agency defense is the detrimental effect that it might have on the government's ability to present evidence at trial. As one commentator observed:

> As a result [of the agency defense], . . . prosecutors may have lost a substantial lever in obtaining incriminating evidence for use in prosecution against drug sellers. Conviction of a drug seller may depend entirely on a procuring agent's testimony. An agent's incentive to testify against a seller in exchange for a plea bargain may be diminished because he can now be charged with only possession. If the procuring agent does not wish to bargain for dismissal of the possession charge, the seller may have to be approached directly by undercover agents. This direct approach may be the only method to

64. *See* McKay v. State, 489 P.2d 145, 152 (Alaska 1971) ("We believe the courts that have rejected [the agency defense] have more accurately reflected the probable legislative intent underlying the rather expansive definition of 'sale' contained in [their drug laws]."); State v. Jacobson, 490 P.2d 433. 435 (Ariz. Ct. App. 1971) (finding that "the act of a person, whether as agent for the seller or purchaser, or as a go-between in a narcotics transaction constitutes a sale," because "the legislative definition of the word 'sale' [in the context of drugs] is broader in scope than the definition usually given to it in other branches of the law"); *Allen,* 292 A.2d at 171 ("The Legislature . . . intended the [drug sale law] to have the broadest scope to facilitate its enforcement.").

65. People v. Shannon, 155 N.E.2d 578, 580 (Ill. 1959).

66. *See, e.g.*, United States v. Wright, 593 F.2d 105, 108 (9th Cir. 1979) ("Congress intended to prevent individuals from acquiring drugs for whatever purpose on behalf of others and then transferring the drugs to those others."); Bowman, *supra* note 1, at 979 ("[T]o the extent that the criminal law imposes heavy punishment for a defendant's culpability in causing direct harms to drug users, it does so because sellers are choosing to harm others and not merely electing to bear the risk of harm to themselves.").

67. United States v. Swiderski, 548 F.2d 445, 451 (2d Cir. 1977).

68. *See* People v. Lam Lek Chong, 379 N.E.2d 200, 205 (N.Y. 1978) (suggesting that those who oppose the agency defense posit that the legislature "intended [an agent of the buyer] to be considered a seller because intermediaries, like sellers, are an essential link in the illicit drug traffic the statute was designed to eliminate").

> obtain sufficient evidence upon which to convict sellers who are insulated from buyers.[69]

Similarly, as a dissenting judge in a New York agency defense case stated, "[l]ooking to the realities of the rather murky world of the drug culture and of drug dealers, it is clear that [proof of the absence of agency] will often be well nigh impossible to obtain."[70] The judge further lamented that "it would appear that the use of a few fairly simple ruses by a dealer would suffice to throw an impenetrable veil of confusion and uncertainty over his dealings and his status."[71]

Irrespective of either the merits or the drawbacks of the agency defense, the increasing drug trade caused Congress to act. Its response, the Controlled Substance Act, imposed severe penalties on all participants in the drug trade. The statute, which was emulated by many states in their own laws, also marked the decline of the agency defense, which will be explored fully in part II.

## II. THE FALL OF THE AGENCY DEFENSE

This part of the Note explains the 1970 Congressional Act which adversely affected the agency defense. It also documents the interpretation of the Act by federal and state courts. Further, this part explains how, despite the passage of the Act, some state courts still managed to preserve the defense.

### A. *The Controlled Substance Act and its Effect in Federal Courts*

In 1970, Congress dramatically challenged the viability of the agency defense.[72] The "Drug Abuse Prevention and Control Act"[73]

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69. Foster, *supra* note 10, at 280. An agent's diminished incentive to testify likely stems from the fact that the penalties for sale are much more severe than those for mere possession. *See supra* note 1 and accompanying text. Because the agency defense prevents the defendant from being convicted for anything more than possession, he or she might not want to take the risk of testifying against the seller in exchange for a lesser sentence, for fear of retaliation. *See* Mireya Navarro, *Puerto Rico Accepts Plan For Witnesses*, N.Y. Times, Jan. 22, 1997, at A17 (reporting on the relocation to the United States of low to mid-level drug dealers who testified against leaders of drug organizations at trials).

70. People v. Roche, 379 N.E.2d 208, 218 (N.Y. 1978) (Gabrielli, J., dissenting in part). Proof of an absence of agency can be shown by, among other things, the defendant's exhibition of "salesman-like" behavior. *See infra* note 275.

71. *Roche*, 379 N.E.2d at 218 (Gabrielli, J., dissenting in part); *see* United States v. Simons, 374 F.2d 993, 995 (7th Cir. 1966) ("It makes no difference . . . whether the middleman . . . is acting for . . . the buyer or the seller. . . . 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 [sale statute] is nullified.").

72. Congress made the following finding and declaration: "[We have] long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances for nonscientific and nonmedical purposes, and [we have] provided strong and effective legislation to control illicit trafficking . . . ." 21 U.S.C. § 801a(1) (1994).

73. *Id.* §§ 801-971.

spelled the beginning of the end of the agency defense in federal courts. After it was enacted by Congress, Title II of this Act, known as the "Controlled Substances Act,"[74] was approved in 1970 by the National Conference of Commissioners on Uniform State Laws ("Commissioners").[75] After approval by the Commissioners, the Controlled Substances Act was adopted by nearly every state.[76] The significance of its widespread adoption with respect to the agency defense was dramatic; in expanding the scope of the law to define those who are in almost any way whatsoever involved in a drug transaction as sellers, the Controlled Substances Act effectively eliminated the agency defense. Specifically, the Controlled Substances Act stated that "it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."[77] The crux of the problem for the agency defense lay in the Controlled Substances Act's definition of "distribute," which is defined as "deliver[ing] . . . a controlled substance or a listed chemical."[78] Further, "deliver" is defined as "the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, *whether or not there exists an agency relationship*."[79] Thus, under the precise terms of the Controlled Substances Act, one who bought drugs on behalf of another and handed the drugs to that person, without receipt of any consideration for his or her efforts, is guilty of "delivery."[80] As a result, the agency defense is effectively eliminated under the Controlled Substances Act.

Due to the Controlled Substances Act's definition of "distribution," the federal courts applying the Act felt that they were no longer able to allow defendants to utilize the agency defense.[81] For example, in

74. *Id.* § 841.

75. Unif. Controlled Substances Act (amended 1994), 9 U.L.A. 5, Pt. II (1997).

76. In fact, 48 out of 50 states adopted the Uniform Controlled Substances Act of 1970 ("Uniform Act"), which was modeled on the Federal Controlled Substances Act. Unif. Controlled Substances Act (amended 1994), 9 U.L.A. 645-50, Pt. IV (1997). New Hampshire and Vermont did not substantially adopt the Uniform Act; their drug laws, however, contain "some similar provisions and [have] the same general purpose [as the Uniform Act]." *Id.* at 648, 650.

77. 21 U.S.C. § 841(a) (1994).

78. *Id.* § 802(11).

79. *Id.* § 802(8) (emphasis added).

80. Further, because the Controlled Substances Act prohibits constructive transfers in addition to actual transfers, *see supra* text accompanying note 79, a defendant need not actually handle the controlled substance in order to be convicted of unlawful delivery, either as an accomplice or as a principal. *See infra* notes 98-102 and accompanying text. This is because the Controlled Substances Act "defines the crime [of delivery] broadly enough to include acts which other statutes may have defined merely as aiding and abetting." United States v. Wigley, 627 F.2d 224, 226 (10th Cir. 1980).

81. In fact, every circuit which has considered the status of the agency defense after the implementation of the Controlled Substances Act has ruled that it is no longer applicable. *See* United States v. Porter, 764 F.2d 1, 11-12 (1st Cir. 1985); *Wigley*, 627 F.2d at 226; United States v. Snow, 537 F.2d 1166, 1169 (4th Cir. 1976);

*United States v. Pruitt*,[82] the defendant appealed his conviction for heroin distribution in violation of the Controlled Substances Act.[83] The evidence showed that the defendant handed over heroin to a government informant on two separate occasions.[84] The defendant alleged that the district court's failure to instruct the jury on his "procuring agent" defense was reversible error.[85]

Even assuming *arguendo* that the defendant fit the description of a "procuring agent,"[86] the Eighth Circuit rejected the defendant's argument and affirmed his conviction.[87] The court observed that the defendant, by his own admission, handed over heroin to a government informant; this clearly satisfied the elements of the crime of "distribution,"[88] which punished virtually all participation in a drug transaction.[89] The conclusion of the court was that the Controlled Substances Act eliminated the agency defense in a prosecution for unlawful "delivery,"[90] making the defendant's status as an agent irrelevant to the Controlled Substances Act.[91] Further, in reaching its decision, the court claimed to be adhering to the legislative intent underlying the Controlled Substances Act.[92]

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United States v. Oquendo, 505 F.2d 1307, 1310 (5th Cir. 1975); United States v. Pierce, 498 F.2d 712, 713 (D.C. Cir. 1974) (per curiam); United States v. Redwood, 492 F.2d 216, 216 (3d Cir. 1974); United States v. Masullo, 489 F.2d 217, 220-21 (2d Cir. 1973); United States v. Hernandez, 480 F.2d 1044, 1046 (9th Cir. 1973).

82. 487 F.2d 1241 (8th Cir. 1973).

83. *Id.* at 1242.

84. *Id.* at 1243.

85. *Id.* at 1242.

86. *Id.* at 1243.

87. *Id.* at 1246.

88. *Id.* at 1245.

89. *Id.*

90. *Id.* at 1243.

91. *Id.* at 1245.

92. The Eighth Circuit explained:

> The Comprehensive Drug Abuse Prevention and Control Act of 1970 is extremely broad in scope, no longer restricted to the narrower concepts of buy and sell, but all inclusive in covering the entire field of narcotics and dangerous drugs in all phases of their manufacturing, processing, distribution and use. All distribution is controlled or prohibited, legitimate or illegitimate.... Congress undoubtedly intended by this new Act to make an all-out attempt to combat illicit drugs by subjecting any individual who knowingly participates in the distribution to substantial, and in some cases severe, penalties while dealing less severely with, and attempting to aid, the unfortunate individuals who are the ultimate users of the illicit drugs.

*Id.* (citations omitted).

### B. *State Adoption and Treatment of the Controlled Substances Act*

#### 1. Breakdown of States Eliminating the Agency Defense Under the Controlled Substances Act

Following the federal lead, almost every state legislature adopted the Controlled Substances Act into its own statutory regime.[93] Due to the wording of the Act,[94] many state courts that had previously allowed defendants to utilize the agency defense interpreted the statute in the same manner as their federal counterparts, and began disallowing use of the defense.[95] Consequently, in these states, a defendant who merely acted as an extension of a purchaser of drugs and in no way associated himself with the seller, could no longer be protected from prosecution for unlawful "delivery" or "distribution" of drugs. The result of the Controlled Substances Act on state law was similar to its effect on federal law: the state laws greatly expanded the reach of the criminal justice system to penalize virtually all participants in a drug transaction.[96]

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93. *See supra* note 76. While almost every state has adopted the Controlled Substances Act in one form or another, however, not all states adopted the criminalization of "delivery." In the General Statutory Note to the Uniform Act of 1994, it is noted that while each state law modeled after the Uniform Act "is a substantial adoption of the major provisions of the Uniform Act, it departs from the official text in such manner that the various instances of substitution, omission, and additional matter cannot be clearly indicated by statutory notes." Unif. Controlled Substances Act (amended 1994), 9 U.L.A. 8-14, Pt. II (1997). But in those states that did adopt the criminalization of "delivery" of a controlled substance, the definition of "delivery" is usually identical to the federal version. *See, e.g.*, Alaska Stat. § 11.71.900(6) (Michie 1996) (defining "delivery" as "the actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship"); Conn. Gen. Stat. Ann. § 21a-240(11) (West 1994) (same); Neb. Rev. Stat. § 28-401(12) (Supp. 1997) (same); *see also* 720 Ill. Comp. Stat. Ann. 600/2(c) (West 1993) (defining "delivery" as "the actual, constructive, or attempted transfer of possession, with or without consideration, whether or not there is an agency relationship"); La. Rev. Stat. Ann. § 40:961(10) (West Supp. 1998) (defining "delivery" as "the transfer of a controlled dangerous substance whether or not there exists an agency relationship").

94. *See supra* notes 77-79 and accompanying text.

95. *See* State v. Burden, 948 P.2d 991, 993-94 (Alaska Ct. App. 1997) (finding that the defendant's status as an agent for the purchaser is irrelevant to a statutory scheme like the one at issue, where the proscribed activity is "delivery" rather than "sale"); Webber v. State, 692 S.W.2d 255, 256 (Ark. Ct. App. 1985) (same); State v. Theriault, 663 A.2d 423, 430 (Conn. App. Ct. 1995) (same); People v. Williams, 221 N.W.2d 204 (Mich. Ct. App. 1974) (same); State v. Sherman, 547 P.2d 1234 (Wash. Ct. App. 1976) (same); *see also* State v. Kelsey, 566 P.2d 1370, 1373-74 (Haw. 1977) (holding that a statute proscribing the "distribution" of drugs eliminated a defendant's ability to invoke the agency defense); Tipton v. State, 528 P.2d 1115, 1116-17 (Okla. Crim. App. 1974) (same); State v. Casias, 567 P.2d 1097, 1099-1100 (Utah 1977) (same). *Compare* Commonwealth v. Harvard, 253 N.E.2d 346 (Mass. 1969) (allowing the use of the agency defense), *with* Commonwealth v. Noons, 308 N.E.2d 915 (Mass. App. Ct. 1974) (holding that the defendant cannot invoke the agency defense, because the new statute prohibited the delivery rather than the sale of drugs).

96. *See supra* note 95 and accompanying text.

### 2. The Workings of the Controlled Substances Act and Similar State Statutes

An agent or middleman is susceptible to prosecution for the *sale* of drugs even in situations where he or she did not actually handle the drugs.[97] Similarly, a defendant can also be convicted of "delivery" or "distribution" without touching the drugs at all, if the government proves that the defendant aided and abetted the commission of the delivery.[98] A defendant can aid and abet the delivery of a controlled substance by bringing the buyer to the seller,[99] pointing out the seller to the buyer,[100] or serving as a translator between the buyer and the seller.[101] The government, however, need not charge the defendant with aiding and abetting the delivery; it can simply charge the defendant as a principal to the delivery itself.[102]

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97. *See supra* notes 5-8 and accompanying text.

98. For a discussion on the offense of aiding and abetting the commission of a drug sale, see *supra* note 5.

99. *See, e.g.*, United States v. Tyler, 758 F.2d 66, 70 (2d Cir. 1985) (finding that the evidence proved that the defendant aided and abetted the delivery of heroin when the defendant brought an undercover officer together with the seller and remained in their presence during the transaction); State v. Sharp, 662 P.2d 1135, 1136, 1139 (Idaho 1983) (affirming the defendant's conviction for aiding and abetting the delivery of a controlled substance when the defendant directed two buyers to a certain house, entered the house, returned from the house accompanied by a friend, and stood by while the friend sold the two buyers a quantity of PCP); Lacy v. State, 782 S.W.2d 556, 557 (Tex. Crim. App. 1989) (affirming the defendant's conviction of delivery of crack cocaine when the defendant led the officers to an apartment complex to complete the drug transaction but "did not physically deliver the drugs to the agents nor did he physically receive any money from the officers for his services").

100. *See, e.g.*, State v. Brown, 466 N.W.2d 702, 703-04 (Iowa Ct. App. 1990) (affirming the defendant's conviction for aiding and abetting the commission of delivery of a controlled substance when the defendant pointed out the supplier to the buyers and informed the buyers how they could get his supplier to stop the car).

101. *See, e.g.*, People v. Aguirre, 610 N.E.2d 771, 775 (Ill. App. Ct. 1993) ("One who acts as an interpreter or translator during a drug transaction is certainly facilitating the commission of the crime."); State v. Bargas-Perez, 844 P.2d 931, 932-33 (Or. Ct. App. 1992) (finding the defendant liable as an accomplice for the delivery of cocaine when the defendant served as a translator to the seller and directed the buyer to the seller for the purchase, because "the least degree of concert or collusion between the parties to an illegal transaction makes the act of one of them the act of them all").

102. The Tenth Circuit observed that:

> [The Controlled Substances Act] defines the crime [of delivery] broadly enough to include acts which other statutes may have defined merely as aiding and abetting. Activities in furtherance of the ultimate sale—such as vouching for the quality of the drugs, negotiating for or receiving the price, and supplying or delivering the drug—are sufficient to establish distribution.

United States v. Wigley, 627 F.2d 224, 226 (10th Cir. 1980); *see also* United States v. Oquendo, 505 F.2d 1307, 1310 & n.1 (5th Cir. 1975) ("[T]he fortuitous circumstance that [the defendant] did not physically touch the drugs involved in the . . . transaction does not take him from within this statute's coverage [as a principal]."); United States v. Bailey, 505 F.2d 417, 419-21 (D.C. Cir. 1974) (finding that the defendants, who served as intermediaries in a sale of heroin to two buyers, could "come under the rubric either of distributing heroin *or* aiding and abetting in its distribution" (emphasis added)); State v. Guyott, 239 N.W.2d 781, 782 (Neb. 1976) (holding that the statute

While penalizing a wide range of conduct, statutes which prohibit "delivery" or "distribution" have not been extended to include the purchase or possession of drugs.[103] This is because "[t]he purchaser of controlled substances commits the crime of 'possession' and not 'delivery,' and, thus, is not an accomplice to a defendant charged with unlawful distribution."[104] It is possible, however, to be convicted of delivery of a controlled substance even when the defendant merely possesses drugs, if the charge is criminal possession with the *intent* to deliver (and such intent is proven).[105]

Controversy exists as to whether, under the Controlled Substances Act, a person who purchases drugs to share with somebody else has "delivered" or "distributed" the drugs to this person. In an instance where two people simultaneously purchase a drug for their own personal use, courts have generally held that this does not constitute a "delivery."[106] This situation, however, has been distinguished from

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prohibiting delivery of a controlled substance includes "constructive and indirect" transfer as well as "actual, direct physical transfers").

103. *See, e.g.*, United States v. Harold, 531 F.2d 704, 705 (5th Cir. 1976) ("[T]o participate actively in the distribution of heroin to others one must do more than receive it as a user."); *see also* State v. Celestine, 671 So. 2d 896, 897 (La. 1996) (holding that the statute proscribing the "delivery" of drugs cannot be used against the ultimate recipient of those drugs); Robinson v. State, 815 S.W.2d 361, 364 (Tex. Crim. App. 1991) (same); State v. Morris, 896 P.2d 81, 82-83 (Wash. Ct. App. 1995) (same). One court declared that "[i]n our view, it would take Procrustes himself to fit 'to buy' or 'to offer to buy' into the statutory definition of 'to distribute.'" State v. Aluli, 893 P.2d 168, 171 (Haw. 1995).

104. Wheeler v. State, 691 P.2d 599, 602 (Wyo. 1984). This conclusion is consistent with the way in which courts have handled drug buyers in the context of statutes prohibiting the sale of drugs. *See infra notes* 242-44 and accompanying text. Courts have uniformly held that the ultimate purchaser cannot be convicted of sale on the theory that he or she aided and abetted the seller in the consummation of the sale. *Id.*

105. *See* 21 U.S.C. § 841(a) (1994) ("[I]t shall be unlawful for any person knowingly or intentionally to . . . possess with intent to manufacture, distribute, or dispense, a controlled substance."). In other words, if the government can prove that the agent purchased the drugs with the intention of delivering the drug to another person, the defendant is not shielded from prosecution for unlawful delivery. This is because the agent is not intended to be the ultimate recipient of the drugs.

106. One of the leading cases on this issue is *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977). In *Swiderski*, the defendant appealed his conviction of possession with intent to distribute. *Id.* at 447. According to the evidence, the defendant went to a studio apartment, accompanied by his fiancée, and purchased some cocaine. *Id.* at 448. He and his fiancée then proceeded to sample the cocaine. *Id.* The Second Circuit reversed the defendant's conviction and remanded for an entry of a judgment for simple possession, a lesser-included offense. *Id.* at 452. The court held that:

> [W]here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse—simple joint possession, without any intent to distribute the drug further. Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution. For purposes of the [Controlled Substances] Act they must therefore be treated as possessors for personal use rather than for further distribution. Their simple joint possession does not pose any of the evils which Congress sought to deter and punish through the more se-

one where the defendant purchased the drugs himself and shared them with another person at a later point in time.[107] In such a case, most courts have viewed these defendants as "the link between the person with whom [the defendant] intended to share the [drug] and the drug itself" and affirmed their convictions for unlawful delivery.[108] In contrast, at least one state court has held that one who purchases drugs and gives them to another person at a later point in time to share with that person has not "delivered" the drugs.[109]

### 3. States Refusing to Eliminate the Agency Defense Under the Controlled Substances Act

Most state courts, along with every federal court, eliminated the use of the agency defense after the adoption of the "delivery" and "distribution" portions of the Controlled Substances Act into their statutory regimes.[110] This elimination made the defense unavailable to agents who actually handled drugs in a transaction,[111] as well as to agents

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vere penalties provided for those engaged in a "continuing criminal enterprise" or in drug distribution.

*Id.* at 450; *see also* People v. Edwards, 702 P.2d 555, 559 (Cal. 1985) (en banc) (finding that individuals who are "truly 'equal partners'" cannot reasonably be said to have supplied heroin to each other). The *Edwards* court observed that it expects "there will be few cases involving a copurchase by truly equal partners," because a copurchaser who takes a more active role in the purchase is guilty of "furnishing" drugs to the less involved purchaser. *Id.* at 559 n.5.

107. *See, e.g.*, United States v. Speer, 30 F.3d 605, 608-09 (5th Cir. 1994) (holding that two defendants who purchased cocaine for later use by two other defendants could be found guilty of "distribution"); United States v. Wright, 593 F.2d 105, 107 (9th Cir. 1979) (holding that a defendant who left a woman's dwelling to purchase heroin and later returned to share it with her could be found guilty of "distribution" of a controlled substance); State v. Moore, 529 N.W.2d 264, 265 (Iowa 1995) (finding that a defendant who purchased methamphetamine by himself and later injected his wife with it was guilty of "delivery" of a controlled substance). The *Wright* court distinguished the facts in its case from the facts in *Swiderski*, observing that "[t]his is not a case in which two individuals proceeded together to a place where they simultaneously purchased a controlled substance for their personal use." *Wright*, 593 F.2d at 108.

108. *Wright*, 593 F.2d at 108.

109. In *State v. Carithers*, 490 N.W.2d 620 (Minn. 1992), the two defendants purchased heroin by themselves before sharing it with their respective spouses, who later died of drug overdoses. *Id.* at 621. The Supreme Court of Minnesota held that the defendants had not "transferred" or "delivered" the heroin, despite the fact that they obtained the heroin outside the presence of their co-purchasers. *Id.* at 622-23. The court found that "[i]f a husband and wife jointly acquire the drug, each spouse has constructive possession from the moment of acquisition, whether or not both are physically present at the transaction." *Id.* at 622. It is not clear from the court's decision whether the co-purchasers need to be a husband and wife in order for this holding to apply.

110. *See supra* notes 81 & 95 and accompanying text.

111. *See, e.g.*, Webber v. State, 692 S.W.2d 255, 257 (Ark. Ct. App. 1985) (holding that a defendant who actually transferred or attempted to transfer drugs could not use the agency defense); People v. Williams, 221 N.W.2d 204, 205 (Mich. Ct. App. 1974) (same); Wood v. Commonwealth, 197 S.E.2d 200, 202 (Va. 1973) (same).

who did not touch the drugs at all, but merely participated in some manner in the exchange.[112] At least one state court, however, has kept the defense alive in the latter situation. In *State v. Lott*,[113] the defendant appealed his conviction and sentence under the Iowa Code for delivery of cocaine.[114] In *Lott*, a government informant, Clifford "Kip" Moore, told the defendant that he and his partners would purchase as many drugs as the defendant could obtain.[115] The defendant agreed to the informant's proposition, and eventually arranged a meeting between the informant, undercover agent Roger Timko posing as an additional drug buyer, and an individual named Andrew Dains, who was to supply the drugs to Timko and Moore.[116] Dains eventually sold one-half ounce of cocaine to Timko and Moore.[117] Although the defendant did not actually hand the drugs to Timko and Moore, he was present at the sale.[118] The defendant was charged and convicted of unlawful delivery, on the theory that he aided and abetted the ultimate purchasers of the cocaine.[119] On appeal, the State argued that one who either purchases drugs, or aids and abets in the purchase of drugs, is guilty of delivery under the Iowa Code, modeled on the Federal Controlled Substances Act.[120]

The Iowa Supreme Court was not persuaded by the State's argument. The court observed that under Iowa law, an aider and abettor is culpable for the crime of his principal.[121] In the present case, the government argued that the principals of the crime of unlawful delivery were the ultimate purchasers of the cocaine, namely, Timko and Moore.[122] In response to this argument, the court held that a customer cannot be found guilty of participating in the delivery of cocaine under the Iowa Code,[123] and concluded that "because the deliverer is not the [customer], one who aids only the [customer] cannot be guilty of delivery."[124] In applying the agency defense to the

112. *See supra* notes 98-102 and accompanying text.

113. 255 N.W.2d 105 (Iowa 1977).

114. *See* Iowa Code Ann. § 124.401(1) (West 1997) (formerly codified at Iowa Code § 204.401) (prohibiting the "delivery" of a controlled substance).

115. *Lott*, 255 N.W.2d at 106.

116. *Id.* at 106-07.

117. *Id.* at 107.

118. *See id.* at 107-08.

119. *Id.* at 107.

120. *Id.*

121. *Id.*; *see also* Iowa Code Ann. § 703.1 (West 1993) (formerly codified at Iowa Code Ann. § 688.1) (providing criminal liability for one who "aids and abets" a principal in the commission of a crime).

122. *See Lott*, 255 N.W.2d at 107.

123. *Id.* The conclusion that the ultimate purchaser of drugs cannot be convicted of "delivery" is hardly unique to Iowa. For a look at other jurisdictions which conclude that the ultimate purchaser is not guilty of delivery, see *supra* note 103 and accompanying text.

124. *Lott*, 255 N.W.2d at 107.

defendant, the court relied on *United States v. Moses*,[125] a Third Circuit case decided "under an analogous federal statute."[126] Although the *Lott* court affirmed the defendant's conviction because the defendant did, in fact, aid and abet the seller in this particular case,[127] it accepted the viability of the agency defense in a situation where a defendant does not physically transfer the controlled substance to the ultimate purchaser,[128] despite the new statutory scheme which penalized the "delivery" of drugs.[129] Because of its unique interpretation of the Controlled Substances Act, however, Iowa has been the subject of criticism.[130]

Other states have also found ways to save the agency defense from statutes resembling the Controlled Substances Act. In a state where the proscribed activity is "delivery" or "distribution,"[131] the agency defense may still be viable in a case where the prosecution's bill of particulars alleges that a defendant committed the distribution of the drug exclusively by selling it.[132] For example, in the Hawaii case of *State v. Erickson*,[133] the defendant appealed from a conviction of pro-

125. 220 F.2d 166 (3d Cir. 1955).

126. *Lott*, 255 N.W.2d at 107.

127. The court found substantial evidence indicating that the defendant was too deeply involved in the transaction to be categorized as a mere extension of the buyer. *Id.* at 108. This included, among other things, the defendant's vouching for the quality of the cocaine to Timko and the defendant's willingness to arrange future sales between these men. *Id.* The court, therefore, refused to allow the defendant to use the agency defense as a protection against the delivery charge. *Id.*

128. There can be no doubt that the court knew it was applying the agency defense to the defendant. *See* State v. Burden, 948 P.2d 991, 994 (Alaska Ct. App. 1997) (observing that the "procuring agent" defense, in which "a person acting as the agent of the purchaser can[not] be charged as an accomplice to the delivery," only has support in Iowa); State v. Grace, 812 P.2d 865, 867 (Wash. Ct. App. 1991) (observing that Iowa is the only state "in which the procuring agent defense has been held to remain viable in a jurisdiction which has adopted the Uniform Controlled Substances Act").

129. In a later case, the Iowa Supreme Court made it clear that an agent who does, in fact, physically transfer a controlled substance to the ultimate purchaser may be convicted of unlawful delivery. *See* State v. Zaruba, 306 N.W.2d 772, 774 (Iowa 1981) (holding that one who acts purely on behalf of a buyer of cocaine may still be convicted of unlawful delivery when "the defendant makes the *actual* delivery of the controlled substance" to the buyer (emphasis added)).

130. *See Grace*, 812 P.2d at 867-68 (describing Iowa's interpretation of the delivery statute as "an anomaly" and suggesting that Iowa's "reliance on *Moses* as viable law in the Third Circuit is misplaced"); State v. Ramirez, 814 P.2d 227, 232 (Wash. Ct. App. 1991) (stating that Iowa's reasoning in *Lott* "is not persuasive"). For a more thorough discussion of the criticism of the *Lott* decision and a response to that criticism, see *infra* notes 224-37 and accompanying text.

131. *See supra* note 93 and accompanying text.

132. *See, e.g.*, Commonwealth v. Simione, 291 A.2d 764, 766-67 & n.9 (Pa. 1972) (holding that the government was limited by its bill of particulars to proving that the defendant committed a "sale" of a controlled substance, and that the government failed to prove that the defendant had engaged in "delivery" or "distribution").

133. 586 P.2d 1022 (Haw. 1978).

moting a detrimental drug in the first degree.[134] The trial court had ordered the State to furnish a bill of particulars to the defendant, including a detailed description of the facts surrounding the case.[135] The State complied with the court's request and alleged that the defendant offered or agreed to sell Sgt. Howard Tagomori, an undercover officer, some marijuana.[136] The evidence revealed that Sgt. Tagamori met the defendant at the house of a police informant, asked the defendant to obtain some marijuana for him, and arrested the defendant when he later returned to the house.[137] The State contended that these facts supported the defendant's conviction under Hawaii law, which defines "distribute" as "to sell, transfer, give, or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same."[138]

The Hawaii Supreme Court disagreed with the State and reversed the defendant's conviction.[139] The court initially observed that it agreed with "the substantial body of cases" which have held that one who acts as a purchasing agent of the buyer of an illegal drug cannot be convicted of selling the drug.[140] Next, the court held that although the charge against the defendant was "distribution" of drugs, the State was limited by the bill of particulars to prove that the defendant committed a "sale" or an agreement to sell.[141] Finally, the court concluded that because the State failed to prove that the defendant was associated with the supplier in the promotion of marijuana sales, the defendant could not be convicted of promotion of a detrimental drug.[142]

The Hawaii Supreme Court made it clear in later cases that the precedent of *Erickson* can only be applied to a narrow set of factual cir-

134. *Id.* at 1022-23. Under Hawaii law, one who promoted a drug means that one distributed it. *See* Haw. Rev. Stat. § 712-1247(1)(f) (1993) ("A person commits the offense of promoting a detrimental drug in the first degree if the person knowingly distributes . . . marijuana . . . .").

135. *Erickson*, 586 P.2d at 1023. The purpose of a bill of particulars is "to enable the defendant to prepare for trial and prevent surprise." State v. Harper, 620 P.2d 1087, 1091 (Haw. Ct. App. 1980). Furthermore, the government is not permitted to obtain a conviction of a defendant on charges other than those mentioned in the bill of particulars. *See* 41 Am. Jur. 2d *Indictments and Informations* § 160 (1995) ("It is the general rule that when facts are detailed in a bill of particulars, the prosecution will be confined at trial to proof of the facts so specified.").

It is within the discretion of the trial court whether to instruct the government to produce a bill of particulars. *See, e.g.*, State v. Reed, 881 P.2d 1218, 1225-26 (Haw. 1994) (holding that the defendant cannot force the government to produce a bill of particulars).

136. *Erickson*, 586 P.2d at 1023.

137. *Id.* As it turned out, the defendant ended up not buying any marijuana for the officer because he was "getting bad vibes." *Id.*

138. *Id.* (quoting Haw. Rev. Stat. § 712-1240 (11) (1993)).

139. *Id.* at 1024.

140. *Id.*

141. *Id.*

142. *Id.*

cumstances. In *State v. Reed*,[143] for example, the court stated that *Erickson* "simply stands for the limited proposition that the [agency] defense becomes available only when a bill of particulars alleges that the defendant distributed a dangerous drug exclusively by selling it . . . and fails to allege any of the other statutorily proscribed methods of distribution."[144] Implicit in the Hawaii Supreme Court's analysis is the broader proposition that courts recognize the inherent injustice in convicting purchasing agents of unlawful delivery. Thus, they take advantage of any legal opportunity, however rare, to protect the agents, without going as far as the Iowa court did in *Lott*.

Further, it is clear that in states which have adopted a "delivery," "distribution," or another similar statute, the courts did not necessarily abandon the agency defense as a result. Indeed, these courts have not generally rejected the theory that an agent of the buyer cannot be convicted of unlawful *sale*; rather, they have simply held that the defense is not applicable to statutes prohibiting "delivery" or "distribution."[145] This differentiation is especially significant in states which prohibit sale as a distinct offense from other, more all-encompassing activities (such as "delivery," "distribution," "furnishing," or "promoting"),[146] because the agency defense has more legal support when applied to sale statutes rather than "delivery" or "distribution" statutes.

143. 881 P.2d 1218 (Haw. 1994).

144. *Id.* at 1226.

145. *See, e.g.*, Commonwealth v. Murillo, 589 N.E.2d 340, 341-42 (Mass. Ct. App. 1992) (upholding the defendant's conviction for unlawful trafficking in more than 200 grams of cocaine, but acknowledging that "[w]hen a defendant is charged with *selling* narcotics and there is evidence that he acted in the transaction solely to assist the buyer in acquiring the narcotics, a procuring agent instruction may be appropriate" (emphasis added)).

146. *See* Ala. Code. § 13A-12-211(a) (1994) ("A person commits the crime of unlawful distribution of controlled substances if, except as otherwise authorized, he sells, furnishes, gives away, manufactures, delivers or distributes a controlled substance . . . ."); Ariz. Rev. Stat. Ann. § 13-3405(A)(4) (West 1989 & Supp. 1997) ("A person shall not knowingly transport for sale, . . . sell, transfer or offer to sell or transfer marijuana."); Cal. Health & Safety Code § 11352(a) (West 1991) (providing criminal liability for "every person who transports, imports into this state, sells, furnishes, administers, or gives away . . . any controlled substance"); Colo. Rev. Stat. § 18-18-405(1)(a) (1997) ("[I]t is unlawful for any person knowingly to manufacture, dispense, sell, distribute, possess, or to possess with intent to manufacture, dispense, sell, or distribute a controlled substance . . . ."); Kan. Stat. Ann § 65-4164 (Supp. 1997) ("[I]t shall be unlawful for any person to possess, have under such person's control, prescribe, administer, deliver, distribute, dispense, compound, [or] sell . . . any controlled substance . . . ."); Ky. Rev. Stat. Ann. §§ 218A. 010(24), 218A.1404(1) (Michie 1995) (prohibiting the trafficking of any controlled substance, while defining "traffic" as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance"); Me. Rev. Stat. Ann. tit. 17A, §§ 1101(17)(C), 1103(1) (West 1983 & 1997 Supp.) (prohibiting the "unlawful trafficking in a scheduled drug," while defining "trafficking" as "to sell, barter, trade, exchange or otherwise furnish for consideration"); Mont. Code Ann. § 45-9-101(1) (1997) ("A person commits the offense of criminal sale of dangerous drugs if the person sells, barters, exchanges, gives away . . . any dangerous drug . . . ."); Nev. Rev. Stat. § 453.321(1) (1996) ("[I]t is unlawful for a person to import, transport, manufac-

The importance of this distinction is highlighted by the Alabama case of *Hill v. State*.[147] In *Hill*, the defendant appealed his conviction under a statute holding that "any person who possesses, sells, furnishes, gives away, obtains, or attempts to obtain by fraud . . . controlled substances . . . is guilty of a felony."[148] The government charged the defendant under the "sale" portion of the statute, alleging that the defendant did "unlawfully sell marijuana."[149] After a thorough analysis of various applications of drug laws by different jurisdictions,[150] the court held that because the government charged the agent with sale, rather than another portion of the statute, the agent could not be held criminally responsible for unlawful sale if he did not participate with the seller in making the sale.[151]

Acceptance of the agency defense has been seriously eroded as a result of the Controlled Substances Act and similar state statutes. Nonetheless, a number of courts, recognizing the fundamental unfairness of applying such severe punishment to purchasing agents, continue to keep the defense alive in one form or another. Because of the meaningful culpability and legal justifications underlying the defense, discussed below in part III, courts that have completely abandoned the defense should consider resurrecting it.

## III. Reinventing The Agency Defense

In a number of states, the agency defense is still recognized as a defense to charges of unlawful sale[152] and, in Iowa, delivery.[153] Nonetheless, the agency defense has undoubtedly received far less than

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ture, compound, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance . . . ."); N.H. Rev. Stat. Ann. § 318-B:2(1) (1995) ("It shall be unlawful for any person to manufacture, possess, have under his control, sell, [or] purchase . . . any controlled drug . . . ."); N.Y. Penal Law § 220.31 (McKinney 1989) ("A person is guilty of criminal sale of a controlled substance . . . when he knowingly and unlawfully sells a controlled substance."); N.C. Gen. Stat. § 90-95(a)(1) (1996) ("[I]t is unlawful for any person [t]o manufacture, sell or deliver . . . a controlled substance."); Tenn. Code Ann. § 39-17-417(a)(1)-(4) (1997) (prohibiting the manufacture, delivery, sale, or possession of a controlled substance); Va. Code Ann. § 18.2-248.1 (Michie 1996) ("[I]t shall be unlawful for any person to sell, give, distribute or possess with intent to sell, give or distribute marijuana.").

147. 348 So. 2d 848 (Ala. Crim. App. 1977).

148. *Id.* at 849 (citation omitted). The current Alabama statute closely resembles the one in force when *Hill* was decided. *See supra* note 146.

149. *Hill*, 348 So. 2d at 848.

150. *Id.* at 850-55.

151. *Id.* at 855.

152. *See id.*; People v. McGhee, 677 P.2d 419, 421 (Colo. Ct. App. 1983); State v. Erickson, 586 P.2d 1022, 1024 (Haw. 1978); State v. Schilling, 712 P.2d 1233, 1239 (Kan. 1986); Commonwealth v. Harvard, 253 N.E.2d 346, 349 (Mass. 1969); Love v. State, 893 P.2d 376, 378 (Nev. 1995); People v. Roche, 379 N.E.2d 208, 214 (N.Y. 1978); State v. Day, 540 A.2d 1042, 1042 (Vt. 1987). Until very recently, Tennessee also adhered to the agency defense. *Compare* State v. Baldwin, 867 S.W.2d 358, 360 (Tenn. Crim. App. 1993) (recognizing the "procuring agent" defense), *with* State v. Porter, CCA No. 02C01-9501-CC-00029, 1997 WL 399335, at *2 (Tenn. Crim. App.

unanimous approval in federal and state courts in later years.[154] This can largely be attributed to the passage of the Federal Controlled Substances Act and similar state statutes.[155] Some states, however, have never recognized the agency defense as a defense to a charge of unlawful sale of drugs, irrespective of the Controlled Substances Act.[156] All states that do not allow the use of the agency defense should seriously reconsider doing so, for both culpability and legal reasons.

### A. *Culpability Reasons to Bring Back the Agency Defense*

The general goal of criminal law is to prevent crime,[157] although there is debate over what the justification for punishment should be.[158] As convicted defendants continue to face increasingly severe

July 16, 1997) (holding that the "procuring agent" defense was eliminated by the Tennessee Criminal Sentencing Reform Act of 1989).

The agency defense in Colorado and Kansas has been recently eliminated by these states' legislatures. *See* Colo. Rev. Stat. § 12-22-324 (1997) ("The common law defense known as the 'procuring agent defense' is not a defense to any crime . . . ."); Kan. Stat. Ann. §§ 65-4160(d), 4161(e), 4162(b), 4163(c), 4164(b) (Supp. 1997) ("It shall not be a defense to charges arising under th[ese] section[s] that the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance.").

153. *See* State v. Lott, 255 N.W.2d 105, 107-08 (Iowa 1977). Further, several states provide a reduced sentence for agents who can show that the transfer of certain controlled substances was solely an accommodation for another individual, with no intent to profit from the transaction. *See* Del. Code Ann. tit. 16, § 4763(b)(1)(c) & (b)(2)(d) (1995); Iowa Code Ann. § 124.410 (West 1997) (applicable to one ounce or less of marijuana); S.C. Code Ann. § 44-53-460 (Law Co-op. 1985); Va. Code Ann. § 18.2-248.1(b) (Michie 1996); Stillwell v. Commonwealth, 247 S.E.2d 360, 364 (Va. 1978) (observing that the accommodation statute "provides for the mitigation of punishment for those who are less culpable").

154. *See supra* notes 81 & 95 and accompanying text.

155. *See supra* notes 72-79, 93-95 and accompanying text.

156. These states include Arizona, California, Georgia, Illinois, Maine, and New Hampshire. *See* State v. Baltier, 505 P.2d 556, 557 (Ariz. 1973); People v. Edwards, 702 P.2d 555, 559 n.5 (Cal. 1985); Diana v. State, 298 S.E.2d 281, 281 (Ga. Ct. App. 1982); People v. Shannon, 155 N.E.2d 578, 580 (Ill. 1959); State v. Deering, 611 A.2d 972, 974 (Me. 1992); State v. Stone, 316 A.2d 196, 197 (N.H. 1974).

157. Andrew Ashworth, Principles of Criminal Law 11 (1991) ("[T]he overall or justifying aim of the criminal law is general prevention . . . .").

158. There are two general theories of criminal law: utilitarianism and retributivism. *See* Joshua Dressler, Understanding Criminal Law § 2.03[B]-[C], at 9-13 (2d ed. 1995) (observing that the two justifications for criminal punishment are utilitarianism and retributivism); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 454 (1997) (same). Utilitarianism focuses solely on the costs and benefits to society as a whole for determining punishment. *See* Dressler, *supra*, § 2.03[B][1], at 9 ("According to classical utilitarianism . . . the purpose of all laws is to maximize the net happiness of society." (footnote omitted)); Charles E. Torcia, Wharton's Criminal Law § 1, at 3 (15th ed. 1993) ("[T]he utilitarian theories . . . would use punishment as a means to an end—the end being community protection by the prevention of crime."); Leo P. Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, 10 Va. Tax Rev. 535, 573 (1991) ("With a purely deterrent model of punishment, the focus is away from giving the wrongdoer his just desserts [sic]; moral culpability, proportionality, and the gravity of the harm are irrelevant in determining the type and degree of punishment." (footnote omitted)); Louis Michael Seidman,

penalties under our drug laws,[159] lawmakers have apparently given little attention to determining the proper culpability level of these defendants.[160] The agency defense is, quite simply, an attempt to preserve fairness in our criminal justice system, by assuring that agents are assigned the level of culpability that is appropriate for their actions.[161] This concern with fairness is illustrated by comparing the agency defense to entrapment.

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*Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 Yale L.J. 315, 320-21 (1984) (noting that the utilitarian model does not equate "the degree of punishment to the degree of fault" and "permits extremely high (some might say barbarous) punishment levels"). Retributivism, on the other hand, determines punishment based upon the defendant's appropriate moral culpability, that is, giving the defendant his or her "just deserts." *See* H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 36 (1968) ("[N]o one shall be punished in the absence of the basic condition of *moral* culpability."); Jeffrie G. Murphy & Jules L. Coleman, Philosophy of Law: An Introduction to Jurisprudence 121 (1990) (stating that retributivism focuses on a "cluster of moral concepts: rights, desert, merit, moral responsibility, and justice"); Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. Rev. 157, 159 (1996) ("According to a retributivist approach, we get even by punishing a criminal according to his desert . . . ." (emphasis omitted)).

159. *See* Blumenson & Nilsen, *supra* note 50, at 42 (observing that recent Congressional crime bills have been "especially punitive to drug offenders"); Bowman, *supra* note 1, at 972 ("Harsher enforcement of drug laws has been only one component, albeit a prominent one, of a national movement toward tougher sanctions for all crimes."); Paul D. Carrington, *Good Sense and 21*, 52 Wash. & Lee L. Rev. 987, 987 (1995) (observing that "the penalties for drug law violations are excessive").

160. Presently, the legislators designing our drug laws seem to have adopted the utilitarian approach to punishment. *See* Sara Sun Beale, *What's Law Got to do With It?: The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 Buff. Crim. L. Rev. 23, 56 (1997) ("It seems doubtful whether drug offenses evoke the strongest retributive impulses."); Michele H. Kalstein et al., *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 Harv. C.R.-C.L. L. Rev. 575, 576-77 (1992) (suggesting that current policymakers have adopted the obedience model to crime, which is rooted in utilitarian logic and adopts a system "toward the extreme of punishing people with no regard for their culpability"); Ilene H. Nagel, Foreward, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 914 n.190 (1990) (suggesting that "in the area of crimes related to drugs, crime control goals rather than just deserts . . . prevail"); Joe Rigert, *Harsh Reality: Life Without Parole*, Star Trib. (Minneapolis), Dec. 14, 1997, at A16 ("Under U.S. drug laws, sentences are based more on drug amounts than on the degree of culpability.").

161. A more sensible approach to the drug problem is to adopt the retributive theory of criminal law. This is especially true for purchasing agents, whose culpability level appears to be more appropriately placed at the level of the buyer rather than the seller. In other words, treating an agent of the buyer identically with the buyer himself or herself is a more "just" result. *See* Steven B. Wasserman, *Toward Sentencing Reform for Drug Couriers*, 61 Brook. L. Rev. 643, 650 (1995) (contending that, in a drug case, if "the equitable principle of just deserts were paramount," a defendant's relationship to the supplier, as well as his or her "role and stake in the drug enterprise," would all be important issues); *see also* Susan F. Mandiberg, *Moral Issues in Environmental Crime*, 7 Fordham Envtl. L.J. 881, 881 (1996) (suggesting that the basis of criminal law is its "culpability-based moral underpinnings"); Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. Rev. 113, 121

### 1. An Analysis of the Entrapment Doctrine and its Similarities to the Agency Defense

A strong culpability justification for preserving the agency defense is already entrenched in United States jurisprudence for a similar defense available to criminal defendants: entrapment. The defense of entrapment commonly arises when the government induces an individual into committing a crime that he or she was not otherwise predisposed to commit.[162] If successfully applied, the entrapment defense results in a complete acquittal for the defendant.[163] Many states have officially codified the entrapment defense;[164] however, there is no federal entrapment statute.[165]

Although entrapment had previously been recognized in lower federal circuit courts,[166] the Supreme Court affirmed the validity of the defense for the first time in *Sorrells v. United States*.[167] In *Sorrells*, the defendant, a veteran of World War I, appealed his conviction for possession and sale of a 1/2 gallon of whisky in violation of the National Prohibition Act.[168] The evidence revealed that an undercover agent posing as a tourist visited the defendant's home, accompanied by three men who knew the defendant well.[169] The agent informed the defendant that he, too, was an army veteran and a former member of

(1996) ("[T]he moral legitimacy of the criminal law requires that offenders receive punishments that are proportionate to their culpability.").

Even under the utilitarian approach to drug control, it is questionable whether the costs to society of locking up so many individuals as sellers outweigh the benefits. *See infra* notes 222-23 and accompanying text (discussing the ineffectiveness of the current drug laws); Tracy Huling, *Women Drug Couriers: Sentencing Reform Needed For Prisoners of War*, 9 Crim. Just. 14, 61 (Winter 1995) (observing that some judges have refused to handle drug cases "because of the harsh sentences imposed on drug mules and other low-level drug offenders"); Stephen Chapman, Editorial, *Criminal Behavior: In the Drug War, Toughness Has Become Stupidity*, Chi. Trib., Feb. 9, 1995, at 27 (arguing that the tough sentencing of the criminal justice system "squanders far too many of its resources" on low-level drug offenders).

162. *See* John David Buretta, Note, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 Geo. L.J. 1945, 1945 (1996).

163. *See, e.g.*, N.J. Stat. Ann. § 2C: 2-12(b) (West 1995) ("[A] person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment.").

164. *See* Ariz. Rev. Stat. Ann. § 13-206 (West Supp. 1997); Conn. Gen. Stat. Ann. § 53a-15 (West 1994); Del. Code Ann. tit. 11, § 432 (1995); 720 Ill. Comp. Stat. Ann. 5/ 7-12 (West Supp. 1997); Ky. Rev. Stat. Ann. § 505.010 (Michie 1990); N.Y. Penal Law § 40.05 (McKinney 1998); Tex. Penal Code Ann. § 8.06 (West 1994); Utah Code Ann. § 76-2-303 (1995).

165. *See* Buretta, *supra* note 162, at 1955 ("Congress has specifically refused to adopt a federal entrapment statute despite repeated recommendations from practitioners and commentators.").

166. *See* Gargano v. United States, 24 F.2d 625, 625-26 (5th Cir. 1928); Butts v. United States, 273 F. 35, 37-38 (8th Cir. 1921); Woo Wai v. United States, 223 F. 412, 415-16 (9th Cir. 1915).

167. 287 U.S. 435, 437 (1932).

168. *Id.* at 438-39.

169. *Id.* at 439.

the same Division as the defendant.[170] The agent then asked the defendant at least three different times if the defendant could obtain some whisky for him.[171] After the third request, the defendant finally relented and purchased some whisky for the agent.[172] At his trial, the defendant attempted to use entrapment as a defense, but the trial court refused to allow him to do so.[173] The Fourth Circuit affirmed the defendant's conviction, holding that the entrapment defense was inapplicable to these facts.[174]

The Supreme Court held that the lower courts erred in failing to consider the entrapment defense.[175] The Court first observed that nearly every federal circuit had approved the use of entrapment as a defense.[176] In this particular case, the Court found that the government agent clearly "[took] advantage of the sentiment aroused by reminiscences of [the defendant and the agent's] experiences as companions in arms in the World War."[177] The Court next focused on the design of the National Prohibition Act itself; it held that in enacting the Prohibition statute, Congress could not have intended that the statute's "processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."[178] The Court further found that allowing the government to proceed as they did would be "abhorrent to the sense of justice,"[179] and concluded that the "requirements of the highest public policy" mandated reversal of the defendant's conviction.[180]

The Supreme Court has consistently divided between two different viewpoints on the culpability justifications for maintaining an entrapment defense. The subjective view of entrapment, which has been adopted by a majority of the courts,[181] focuses on whether the defendant was "predisposed," or previously inclined, to commit a crime, even before being approached by government agents or informants.[182] On the other hand, the objective view of entrapment considers only

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 438.
174. *See id.* at 442.
175. *Id.* at 452.
176. *Id.* at 443; *see supra* note 166.
177. *Sorrells*, 287 U.S. at 441.
178. *Id.* at 448.
179. *Id.* at 449.
180. *Id.* at 448.
181. *See infra* notes 182-83.
182. *See, e.g.*, United States v. Russell, 411 U.S. 423, 433-36 (1973); State v. Florez, 636 A.2d 1040, 1047 (N.J. 1994) ("Subjective entrapment occurs when the police implant a criminal plan into the mind of an innocent person who would not ordinarily have committed the offense."); McCoy v. Commonwealth, 385 S.E.2d 628, 631 (Va. Ct. App. 1989) ("Where one is predisposed to commit a criminal act . . . it cannot be said that the state provided an innocent person with the intent to commit a crime.").

whether the government engaged in overzealous tactics in its attempt to apprehend criminals, without regard to the defendant's criminal predisposition.[183]

The agency defense was created in response to very similar concerns to those that the doctrine of entrapment addresses, in terms of the assessment of the proper culpability of defendants. The fact that defendants often raise the agency defense simultaneously with entrapment "is not mere coincidence. Evidence of entrapment will often also be evidence that the defendant entered into the illegal transaction solely to help the buyer, and on his behalf."[184] Both agency and entrapment recognize that courts should be especially cautious when government agents are involved in instigating crime.[185] By closely analyzing the subjective and objective justifications for the entrapment defense, it becomes clear that these justifications have similar importance to the agency defense.[186] Thus, the agency defense can be justified for essentially the same reasons as entrapment.

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The subjective view of entrapment is currently the majority view, on both the state and federal level. *See* Vega v. People, 893 P.2d 107, 119 (Colo. 1995) (en banc); State v. Jurgensen, 681 A.2d 981, 988 (Conn. App. Ct. 1996); Vazquez v. State, 700 So. 2d 5, 10-11 (Fla. Dist. Ct. App. 1997); State v. Shuck, 953 S.W.2d 662, 666 (Tenn. 1997); State v. Lively, 921 P.2d 1035, 1040 (Wash. 1996) (en banc).

183. *See* Sherman v. United States, 356 U.S. 369, 383-84 (1958) (Frankfurter, J., concurring). The objective view of entrapment is a minority view. *See Shuck*, 953 S.W.2d at 666 ("The objective test [of entrapment] is the minority rule . . . ."). Nonetheless, it still enjoys strong support. *See* Ariz. Rev. Stat. Ann. § 13-206(c) (West Supp. 1997) ("The conduct of law enforcement officers and their agents may be considered in determining if a person has proven entrapment."); Jacobs v. State, No. A-5882, 1998 WL 66136, at *4 (Alaska Ct. App. Feb. 20, 1998); People v. Holloway, 55 Cal. Rptr. 2d 547, 550 (Ct. App. 1996); Commonwealth v. Clark, 683 A.2d 901, 904 (Pa. Super. Ct. 1996).

Further, some jurisdictions apply both the subjective and objective tests when considering an entrapment claim by the defendant. *See* State v. Riccardi, 665 A.2d 793, 796 (N.J. Super Ct. App. Div. 1995) (holding that the entrapment defense has both subjective and objective considerations); State v. Dartez, No. 17104, 1997 WL 816259, at *7 (N.M. Ct. App. Oct. 14, 1997) (same); State v. Barnes, 551 N.W.2d 279, 283 (N.D. 1996) (same).

184. United States v. Barcella, 432 F.2d 570, 572 (1st Cir. 1970).

185. *See* Foster, *supra* note 10, at 279.

186. One possible criticism of applying the culpability justifications of entrapment to the agency defense is that "[w]hile entrapment is available only when the party soliciting the transaction is a public official, the agency defense may be used regardless of the identity of the ultimate buyer." Elaine Robinson McHale, Note, *The Agency Defense in Narcotics Sales Prosecutions: A Judicial Loophole in the New York Drug Laws*, 52 St. John's L. Rev. 594, 615 (1978); *see also* Foster, *supra* note 10, at 280 (observing that the underlying justifications for entrapment do not apply to the agency defense unless an agent for the state is involved in a particular case). This criticism can be countered, however, because the vast majority of agency cases do involve either a government informant or an undercover officer, *see infra* note 200 and accompanying text, thereby raising the same morality concerns as the entrapment defense does. Further, there are additional culpability justifications besides those presented by the entrapment doctrine which justify the use of the agency defense. *See supra* notes 157-61 and accompanying text; *see also infra* Part III.A.2.

### (a) *Subjective Approach*

One focus of the entrapment defense is to prevent convictions of defendants who were not otherwise predisposed towards committing a crime.[187] The Supreme Court recently articulated that "[g]overnment agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the [g]overnment may prosecute."[188] The Court stressed that judges need to step in if government agents persist in creating this inducement.[189] Further, the significance of the entrapment doctrine is heightened when one considers that "recent Congresses have had decreasing sympathy for defendants, regardless of whether the defendants were 'induced' to commit crime."[190]

The agency defense shares the same underlying concerns as entrapment in the context of the defendant's predisposition to commit a crime. In order to successfully invoke the agency defense, a defendant must show that he or she was acting purely on behalf of a purchaser of drugs, and was in no way associated with the seller.[191] In other words, the agency defense can only be applied when the agent was not "predisposed" to act on behalf of the seller of the drugs.[192] By definition, then, such an agent had no previous inclination to commit the criminal act of possessing and selling drugs until the buyer made a request to the agent to do so. Therefore, the concerns presented by the Supreme Court regarding the defendant's predisposition to commit a crime should apply with equal force to a purchasing agent; it is simply improper for a defendant who had no previous intent to act on behalf of a drug seller, but merely acts upon request from the buyer, to be treated as though he or she is as culpable as a seller.

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187. *See* Thomas G. Briody, *The Government Made Me Do It - The Changing Landscape on the Law of Entrapment*, 45 R.I. B.J., Mar. 1997, at 15 ("A criminal defendant, induced by government agents to commit a crime when he or she lacked predisposition to engage in the illegal conduct, is entitled to acquittal."); Note, *Entrapment Through Unsuspecting Middlemen*, 95 Harv. L. Rev. 1122, 1122 (1982) ("The criminal defense of entrapment protects defendants against law enforcement conduct aimed at securing a prosecution by inducing the commission of a criminal offense.").

188. Jacobson v. United States, 503 U.S. 540, 548 (1992); *see also* Sherman v. United States, 356 U.S. 369, 372 (1958) (finding that Congress had no intention of punishing innocent people who are drawn into criminal violations by the government).

189. *Jacobson*, 503 U.S. at 553-54.

190. Buretta, *supra* note 162, at 1955.

191. *See supra* notes 9 & 36 and accompanying text.

192. *See* People v. Brathwaite, 655 N.Y.S.2d 766, 767 (App. Div. 1997) (holding that both entrapment and agency defenses "may be rebutted by evidence showing criminal predisposition"); State v. DeJesus, No. 66847, 1995 WL 79788, at *5 (Ohio Ct. App. Feb. 23, 1995) (finding that the defendant's "active solicitation of [drug] sellers . . . was a showing of a predisposition to sell drugs").

### (b) *Objective Approach*

In concurrence in a later Supreme Court case, *Sherman v. United States*,[193] Justice Frankfurter argued that the focus on the predisposition of the defendant to commit the crime was irrelevant, because such an approach "loses sight of the underlying reason for the defense of entrapment."[194] Rather, he recommended that the Court focus solely on the conduct of the government when determining whether a defendant was entrapped:

> No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, *certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society*. . . . Appeals to sympathy, friendship, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen.[195]

Justice Frankfurter suggested that the objective analysis of police conduct, unlike the subjective dissemination of the defendant's predisposition, is based on the sentiments that led to the creation of the entrapment defense in the first place.[196] He also observed that the objective approach advances the ultimate goal of entrapment cases—to secure public faith in the honest and equitable administration of justice.[197] Justice Frankfurter concluded that while the objective approach assures that "[p]ast crimes do not forever outlaw the criminal and open him to police practices . . . from which the ordinary citizen is protected,"[198] the subjective approach "runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes."[199]

The agency defense also recognizes the need for the protection of individuals from overzealous law enforcement tactics. This protection is especially vital "in an era where law enforcement officials, in an

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193. 356 U.S. 369 (1958).

194. *Id.* at 382 (Frankfurter, J., concurring).

195. *Id.* at 382-83 (Frankfurter, J., concurring) (emphasis added).

196. *Id.* at 384 (Frankfurter, J., concurring).

197. *Id.* at 380 (Frankfurter, J., concurring). The Hawaiian Legislature described the purpose of its entrapment statute as follows:

> The real basis for the defense of entrapment is a purpose to deter improper conduct on the part of law enforcement officials. The harm done by increasing the risk of penal conduct by otherwise innocent persons, the improper utilization of police resources, the suspicion that entrapment tactics are the result of personal malice, and injury to the stature of law enforcement institutions, all contribute to condemn entrapment. Providing a defense to conduct which would otherwise be a basis for penal liability because of improper tactics of law enforcement officials is an extreme measure, but no other, more effective, method presents itself.

Haw. Rev. Stat. § 702-237 (1993) (commentary on § 702-237).

198. *Sherman*, 356 U.S. at 383 (Frankfurter, J., concurring).

199. *Id.* (Frankfurter, J., concurring).

effort to combat the sale of illegal narcotics or other contraband, resort increasingly to the use of undercover agents."[200] Further, there is a particular concern for the increase in the use of confidential informants in these cases, who may be acting for promises of financial gain or reduced sentences.[201] The use of these credibility-deficient informants, combined with the natural eagerness of law enforcement officials to apprehend criminals, creates a "mixture with explosive potential for abuse."[202] The agency defense, by protecting defendants who often act purely on behalf of soliciting government officials, provides a check on this abuse by assuring that the government will meet its continuing obligation to prevent the instigation of crime among its citizens.[203]

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200. Briody, *supra* note 187, at 15; *see* Mark Curriden, *Secret Threat to Justice*, Nat'l L.J., Feb. 20, 1995, at A1 (observing that between 1980 and 1993, the number of federal search warrants relying exclusively on an undercover agent increased from 24% to 71%).

201. Briody, *supra* note 187, at 15; *see* Crowe v. State, 441 P.2d 90, 95 (Nev. 1968) ("[T]he use of informers is a dirty tactic for a dirty business that may raise serious questions of credibility."); Evan Haglund, Note, *Impeaching the Underworld Informant*, 63 S. Cal. L. Rev. 1405, 1407 (1990) ("[I]nformants are often tempted to lie in order to ensure continued rewards . . . . [C]ourts often underestimate [informants'] potential to implicate innocent persons."); John Milne, *Role of Informants Questioned*, Boston Globe, Dec. 27, 1995, at 17 (noting the great increase of the use of informants and the abuses resulting from the increase).

202. Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 Va. L. Rev. 1011, 1012 (1987). For example, the House Subcommittee on Civil and Constitutional Rights, in response to hearings on the FBI's use of undercover tactics in 1984, made the following observation:

> The infiltration by government agents, or criminals who are financed by the government, into the private lives of citizens; the spectacle of the United States Government spending large sums of money to tempt people into committing crimes; and the atmosphere of fear, suspicion, and paranoia which develops as the use of the technique expands, are all anathema to the values protected and cherished in our Constitution.
>
> . . . [T]hese [undercover] operations develop a momentum of their own, with little if any meaningful review by any objective observers.

*FBI Undercover Operations: Report of the Subcomm. on Civ. and Const. Rights of the Comm. on the Judiciary: House of Representatives Together With Dissenting Views*, 98th Cong. 2d Sess. 2-3 (Comm. Print 1984); *see also* Gary T. Marx, Undercover: Police Surveillance in America 1-16 (1988) (discussing the vast expansion of undercover work in the United States and the subsequent public policy concerns which are raised); Mark H. Moore, Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement, *in* ABSCAM Ethics: Moral Issues and Deception in Law Enforcement 18 (Gerald M. Caplan ed., 1983) ("In important areas of enforcement activity such as informants, undercover operations, and grand jury investigations, constitutional principles leave, perhaps, too much latitude to enforcement agencies."); Paul Finkelman, *The Second Casualty of War: Civil Liberties and The War on Drugs*, 66 S. Cal. L. Rev. 1389, 1390 (1993) ("As the nation moves to a 'semi-martial state' in the war on drugs it is likely that our fundamental liberties will continue to erode.").

203. Foster, *supra* note 10, at 280.

### (c) *Agency: The Perfect Compromise*

While there are convincing arguments for maintaining the entrapment defense, acceptance of entrapment is not universal.[204] In fact, both viewpoints of entrapment have been the target of a wide variety of criticism. This criticism stems from the debate over whether entrapment was designed to protect innocent defendants or to maintain the uprightness of law enforcement.[205] For example, a criticism of the subjective view of entrapment is that legislatures intended to penalize *all* criminal conduct, regardless of whether the government was involved in the defendant's inducement.[206] Further, these critics argue that an examination of the defendant's predisposition would allow the government to introduce "highly prejudicial evidence of the 'defendant's bad reputation or past criminal activities' which, in turn, may inflame the jury to convict the defendant because of the person's past reputation or conduct."[207] In defense, proponents of subjective entrapment argue that the objective standard "encumbers the police with too rigid a standard to govern its behavior."[208]

The agency defense deals with the concerns of both proponents and opponents of the doctrine of entrapment. First, agency furthers the subjective and objective concerns upon which the entrapment defense is based. It protects defendants who were not otherwise predisposed to act on behalf of a seller of narcotics against the harsh penalties of "sale" and "delivery" statutes, while also safeguarding defendants from disreputable informants and overzealous law enforcement tac-

204. *See, e.g.*, Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 Sup. Ct. Rev. 111, 113 (Philip B. Kurland et al. eds.) (arguing that the entrapment doctrine is "one of a number of adaptive mechanisms which compensate for our failure to develop a coherent theory of blame and choice to regulate the imposition of criminal punishment"); Leslie G. Bleifuss, Note, *Entrapment and* Jacobson v. United States: *"Doesn't the Government Realize That They Can Destroy a Man's Life?,"* 13 N. Ill. U. L. Rev. 431, 431 (1993) (observing that "the Supreme Court's ability to administer justice has been closely scrutinized and heavily criticized for its formulation of the entrapment defense").

205. Jennifer Gregg, Note, *Caught in the Web: Entrapment in Cyberspace*, 19 Hastings Comm. & Ent. L.J. 157, 183 (1996).

206. *Id.*; *see* Christopher D. Moore, Comment, *The Elusive Foundation of the Entrapment Defense*, 89 Nw. U. L. Rev. 1151, 1157 (1995) ("If a private actor induced the defendant to commit the offense, no entrapment defense would be available.").

207. Bleifuss, *supra* note 204, at 454 (quoting United States v. Russell, 411 U.S. 423, 443 (1973) (Stewart, J., dissenting)); *see* John D. Lombardo, Comment, *Causation and "Objective" Entrapment: Toward a Culpability-Centered Approach*, 43 UCLA L. Rev. 209, 212 (1995) (arguing that evidence of a defendant's past conduct "raise[s] a smokescreen and divert[s] . . . attention from the acts now charged").

208. Brian Thomas Feeney, Note, *Scrutiny for the Serpent: The Court Refines Entrapment Law in* Jacobson v. United States, 42 Cath. U. L. Rev. 1027, 1046 (1993); *see* Scott C. Paton, Note, *"The Government Made Me Do It": A Proposed Approach to Entrapment Under* Jacobson v. United States, 79 Cornell L. Rev. 995, 1031 (1994) (observing that the objective approach might establish strict standards of police conduct which may counter the needs of "effective government law enforcement through the use of sting operations").

tics. In addition to contributing this much-needed protection, however, the agency defense also responds to the criticisms and drawbacks of entrapment, because it still provides some measure of criminal culpability for purchasing agents. While a successful application of the entrapment defense results in the complete acquittal of a defendant,[209] a similarly successful use of the agency defense does not relieve a criminal defendant of all culpability, because he or she can still be convicted of unlawful possession of drugs.[210] Therefore, the application of the agency defense, as compared to entrapment, is "not as a broadsword, but as a scalpel."[211]

### 2. Additional Culpability Reasons for Preserving the Agency Defense

In addition to the culpability concerns preserved by the entrapment defense, there are additional reasons of fairness and morality that justify preserving the agency defense. Courts adopting the agency defense have recognized the "medical and sociological aspects which complicate the factual setting" in determining the proper culpability of defendants who act purely on behalf of purchasers of drugs.[212] As the New York Court of Appeals declared, the agency defense was at least partially designed to protect "those at the far end—who may include persons as diverse as impressionable students, victims of contributing socioeconomic or medical problems, and others who have been seduced by exposure to drugs to fall into a state of dependency on them."[213]

A criticism of the agency defense is that the agent makes it easier for buyers to obtain drugs, and that agents "are an essential link in the illicit drug traffic" who should be held to the same degree of culpability as pure sellers.[214] But this argument overlooks the fact that the agent's "entire standing in the transaction is derived" from the pur-

209. *See supra* note 163 and accompanying text.

210. *See supra* note 31 and accompanying text.

211. Frank M. McCullock, The NLRB in Action, Address at the Eighth Annual Joint Industrial Relations Conference of Michigan State University (Apr. 19, 1962) *in* 49 Lab. Rel. Reference Manual 74, 83 (1962).

212. People v. Roche, 379 N.E.2d 208, 211 (N.Y. 1978); *see also* Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 Vill. L. Rev. 335, 342 (1995) ("A wide range of psychological, social and economic incentives can combine to produce drug use and crime patterns that become firmly established in some persons.").

213. *Roche*, 379 N.E.2d at 211. Even a staunch opponent of the agency defense acknowledged that the idea that states "could not have wished to treat more severely than the actual buyer someone who can be denominated under some arcane mixture of agency and penal concepts an agent of the buyer" has "a certain appeal to one's innate sense of justice." *Id.* at 215 (Gabrielli, J., dissenting in part). For an analysis of what constitutes "justice" in the criminal law, see *supra* notes 157-61 and accompanying text.

214. People v. Lam Lek Chong, 379 N.E.2d 200, 205 (N.Y. 1978); *see also supra* notes 67-68 and accompanying text.

chaser.[215] In fact, drug sales could not even occur without the participation of willing buyers.[216] As one judge recognizing this fact observed:

> A cab driver who transports a buyer to the scene also "facilitates" a sale in this unrestricted sense of the word. Every purchaser of drugs makes it easier, by his or her conduct, for a seller to sell. Indeed, the purchaser's role is far more vital to the sale, and encourages it in considerably greater measure, than . . . a buyer-sponsored intermediary.[217]

The judge also warned that if the courts continue aggressive and mindless application of drug statutes, the prison system will continue to become crowded with minor, low-level drug offenders.[218] Because the buyer is just as crucial to the completion of a drug sale as the seller, the treatment of an extension of the buyer as a seller does not reflect the agents' true level of moral culpability.[219] The agency defense, therefore, can be viewed as "a means of determining the extent of the intermediary's culpability, and thus the nature of his crime, under a statutory scheme which reserves the most severe penalties for the 'tycoons of the trade.'"[220]

Further, the agency defense recognizes that our drug laws do not procure benefits which outweigh the cost to society.[221] As one judge

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215. *Roche*, 379 N.E.2d at 211.

216. *Lam Lek Chong*, 379 N.E.2d at 205.

217. Lowman v. United States, 632 A.2d 88, 96 (D.C. 1993) (Schwelb, J., concurring in part and dissenting in part). In *Lowman*, the Court upheld the conviction of the defendant for unlawful distribution of drugs on an aiding and abetting theory. *Id.* at 89. The evidence showed that the defendant was approached by an undercover officer and eventually introduced the officer to a seller of drugs. *Id.* In his partial concurrence, Judge Schwelb argued that:

> [I]f everyone who assisted a buyer of drugs were thereby rendered a distributor, then, *a fortiori*, every purchaser would also logically have to be deemed an aider and abettor to a felony, and would therefore be subject to a mandatory minimum sentence. The consequence of such a construction of the statute, however, would be "to write out of the Act the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which has led to his own possession."

*Id.* at 96 (Schwelb, J., concurring in part and dissenting in part) (quoting United States v. Swiderski, 548 F.2d 445, 451 (2d Cir. 1977)).

218. *Id.* at 101 (Schwelb, J., concurring in part and dissenting in part). The judge further noted that "[t]he 'big enchiladas [of the drug trade],' meanwhile, seldom venture out into the street, and are far less likely to be apprehended." *Id.* (Schwelb, J., concurring in part and dissenting in part).

219. *See supra* notes 157-61 and accompanying text. This argument also suggests that there may be legal problems, in addition to moral concerns, in charging a purchasing agent with aiding and abetting the seller. For a discussion on the inherent legal difficulties in charging an agent of the buyer with aiding and abetting the seller, see *infra* notes 242-73 and accompanying text.

220. *Lam Lek Chong*, 379 N.E.2d at 206.

221. An analysis of whether the benefits to administering punishment to defendants outweigh their costs, without regard to the defendants' actual culpability, is the utilitarian approach to criminal law. *See supra* note 158.

observed, "[the] pragmatic value [of criminal penalties for drug involvement] 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."[222] Indeed, the massive costs of spending on combating the drug problem arguably outweigh the benefits gained for imprisoning so many low-level drug offenders for so long.[223]

### B. *Legal Reasons to Bring Back the Agency Defense*

In addition to the culpability justifications which exist for the preservation of the agency defense, there is legal support for it as well. It is necessary to differentiate, however, between statutes prohibiting the "sale" of drugs and statutes prohibiting the "delivery" of drugs. This is because "delivery" statutes prohibit a wider range of activities than those encompassed in typical "sale" statutes. These reasons will be examined more fully below.

#### 1. Preserving the Defense to Prosecution for Unlawful "Delivery" of Drugs

It is possible to argue that the agency defense can be reconciled with the Controlled Substances Act and similar state statutes. As outlined earlier in this Note, the Iowa Supreme Court adheres to this view,[224] although it has been strongly criticized for maintaining such a position.[225] The fundamental criticism of the Iowa court in reaching its decision in *Lott* is that the court improperly relied on "a 1955 federal case decided before enactment of the current federal act under which a 'procuring agent' defense has been rejected."[226] The 1955 federal case to which the Iowa court referred is *United States v. Moses*.[227] The *Moses* court held that one who aids and abets the purchaser of drugs cannot be convicted of unlawful sale;[228] the *Lott* court

222. People v. Broadie, 332 N.E.2d 338, 346 (N.Y. 1975).

223. *See* Blumenson & Nilsen, *supra* note 50, at 39-40 ("[T]he Drug War has achieved a self-perpetuating life of its own, because however irrational it may be as public policy, it is fully rational as a political and bureaucratic strategy.... It operates invisibly, obscured by moral and policy rationales."); Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 Wis. L. Rev. 679, 745 (predicting that drug sentences "will never be seriously reduced until some future . . . president recasts the debate from crime to economics and declares that the *cost* of locking up so many drug sellers for so very long is just too great"); Chapman, *supra* note 157; Christopher S. Wren, *Drugs Surge as a Campaign Issue, But All the Talk Clarifies Little*, N.Y. Times, Sept. 17, 1996, at A1 (observing that the fiscal 1997 budget allotted $15.3 billion to combat drugs, a $2 billion increase over the fiscal 1995 budget).

224. *See supra* notes 120-29 and accompanying text.

225. *See supra* note 130 and accompanying text.

226. State v. Ramirez, 814 P.2d 227, 232 (Wash. Ct. App. 1991).

227. 220 F.2d 166 (3d Cir. 1955).

228. *See id.* at 168.

simply relied on *Moses* as precedent and held that one who aids and abets the purchaser of drugs cannot be convicted of unlawful delivery.[229] It is true that the *Moses* decision was decided under a different federal act than the one currently in force.[230] One could argue, however, that the difference between the current federal act and the one at issue in *Moses* is irrelevant to the Iowa court's ultimate conclusion.

In *Moses*, the federal statute in question proscribed the illegal sale of drugs,[231] which differs from the current federal law which prohibits the delivery of drugs.[232] But it has been universally held by federal and state courts—in addition to Iowa—that the ultimate purchaser of the drugs cannot be prosecuted for "delivery" or "distribution,"[233] just as the ultimate purchaser cannot be prosecuted for "sale."[234] In other words, the ultimate purchaser of the drugs is equally protected from prosecution for the "sale" of drugs as he or she is for the "delivery" of drugs. Therefore, if it is acceptable for courts to provide the protection of the agency defense to individuals who only aid and abet the ultimate purchaser when the charge is unlawful "sale,"[235] it should be equally acceptable for courts to provide identical protection to these individuals when the charge is aiding and abetting an unlawful "delivery."[236] This is because the agency defense is based upon the notion that an agent can only be guilty for the crime of his principal (the purchaser).[237]

Granted, the Iowa court did not properly articulate its reasons for permitting the use of the agency defense in a charge of unlawful deliv-

229. State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977).

230. *See infra* notes 231-32 and accompanying text.

231. *See Moses*, 220 F.2d at 167.

232. *Compare* 26 U.S.C. § 2554(a) (repealed 1970) (cited in Walder v. United States, 201 F.2d 715, 715 (8th Cir. 1953)) (prohibiting the sale of narcotics), *with* 21 U.S.C. § 841(a) (1994) (prohibiting the distribution of a controlled substance).

233. *See supra* note 103 and accompanying text.

234. *See supra* note 226 and accompanying text.

235. *See supra* note 9 and accompanying text.

236. Interestingly, courts have refused to uphold a conviction of unlawful delivery of a defendant who was only a mere purchaser of the drugs. *See supra* note 103 and accompanying text. But the Eighth Circuit described the Controlled Substances Act as being "all inclusive in covering the *entire field of narcotics* and dangerous drugs in all phases of their manufacturing, processing, distribution and use." United States v. Pruitt, 487 F.2d 1241, 1245 (8th Cir. 1973) (emphasis added). If this language is taken at face value, then a purchaser of drugs *could* be convicted of delivery, since the purchaser is well within the "entire field of narcotics." *Id.* But courts have refused to expand the definition of "delivery" to include the ultimate purchaser, on the grounds that it would "write out of the [Controlled Substances] Act the offense of simple possession." United States v. Swiderski, 548 F.2d 445, 451 (2d Cir. 1977). Because the Controlled Substances Act is, in fact, not all-inclusive after all, it lends further credibility to the Iowa court's decision in *Lott*.

237. *See* People v. Roche, 379 N.E.2d 208, 211 (N.Y. 1978) (holding that the theory of the agency defense is that "one who acts as a procuring agent for the buyer alone is a principal . . . in the purchase rather than the sale of the contraband" (footnote omitted)).

ery of drugs. When carefully analyzed, however, the argument does not appear implausible. This argument deserves consideration by other state courts with similar statutory regimes.

### 2. Preserving the Defense to Prosecution for Unlawful "Sale" of Drugs

There are several reasons as to why the agency defense should legally survive in a statutory scheme prohibiting the unlawful sale of drugs. As the Vermont Supreme Court thoughtfully observed, "[e]very buyer is, in a sense, a participant in a sale .... But it begs the point here in issue to say that both become sellers ...."[238] The court recognized that an agent's mere participation in a sale, in and of itself, is not enough to sustain a sale conviction when there is no proof that the agent acted on behalf of the seller.[239] As the "thrust" of drug laws "is not directed against purchasers,"[240] courts which hold an agent of the buyer "to a criminal responsibility that the buyer himself does not carry" under a sale statute are engaging in a "strained construction" of the statute itself.[241]

Further, the conviction of a defendant who merely helps the purchaser obtain drugs, and in no way acts on behalf of the seller, appears to be directly contrary to the theory of aiding and abetting in criminal law. To see why this is so, it is helpful to first look at the criminal liability of the ultimate purchasers of drugs. It has been universally held that purchasers of drugs are not considered to have aided and abetted the seller.[242] Courts have recognized that because state legislatures decided to separate the crimes of sale and possession, the purchaser should not share the same level of criminal culpability with the seller;[243] to hold otherwise would have the effect of "writ[ing] out ... the offense of simple possession."[244] Further, courts have reasoned that "[i]n a prosecution against the seller, where the statutorily proscribed conduct is the sale of the controlled substance, the buyer's

238. State v. Bressette, 388 A.2d 395, 397 (Vt. 1978).

239. *Id.* at 398.

240. *Roche*, 379 N.E.2d at 211; *see also supra* note 1 and accompanying text (discussing the immense discrepancy between the penalties for sale and possession of drugs).

241. *Bressette*, 388 A.2d at 398.

242. *See, e.g.*, Tyler v. State, 587 So. 2d 1238, 1242 (Ala. Crim. App. 1991) (holding that the purchaser of drugs is not an accomplice to the seller); People v. Edwards, 702 P.2d 555, 559 n.5 (Cal. 1985) (same) (citing People v. Label, 119 Cal. Rptr. 522 (Ct. App. 1974)); Charles E. Torcia, Wharton's Criminal Law § 38, at 252-53 (15th ed. 1993) ("A purchaser of narcotics [is not] an accomplice of the person charged with selling such narcotics." (footnote omitted)).

243. *See Tyler*, 587 So. 2d at 1242 ("[T]he purchaser is guilty of an offense independent from the sale."); State v. Dwyer, 172 N.W.2d 591, 596 (N.D. 1969) ("'Sale' or 'possession' of a narcotic drug under our statutes is each a separate offense."); *supra* note 1 and accompanying text (observing the different penalties for possession and sale).

244. United States v. Swiderski, 548 F.2d 445, 451 (2d Cir. 1977).

conduct would be 'inevitably or necessarily incidental' to the sale."[245] In other words, just as the seller is not an accomplice to the possession of drugs, the buyer is not an accomplice to the sale.

If purchasers of drugs do not aid and abet sellers, then, neither should agents of the purchasers be considered aiders and abettors of the sellers, especially those agents who do not actually handle the drugs in the transaction. This principle was clearly recognized in *United States v. Moses*.[246] In *Moses*, the defendant appealed a conviction for the unlawful sale of a controlled substance.[247] The evidence revealed that two undercover officers approached the defendant and asked her if she could help them obtain some drugs.[248] Although the defendant eventually introduced the officers to an individual who sold them drugs, she never handled the drugs and played no part in negotiations over the price or quantity of the drugs.[249] The district court, sitting without a jury, found the defendant guilty of sale under these circumstances;[250] it relied on a Congressional statute which states that one who "commits an offense against the United States *or aids, abets, counsels, commands, induces or procures its commission*, is punishable as a principal."[251]

The Third Circuit reversed the defendant's conviction and acquitted her of all charges.[252] The court first observed that in a drug transaction, the government must initially identify "the particular 'offense against the United States' in which the alleged wrongdoer has participated," because "the law treats selling and buying as distinct and separate offenses";[253] in other words, "a participant in a particular transaction must be punished either as a seller or as a buyer."[254] The court next observed that because the government indicted the defendant due to her connection with the crime of selling, her conviction must stand, "if at all, on her relation to the seller and his illicit enterprise."[255] The court held that the "undisputed facts" showed that the defendant acted purely on the request of the undercover officers; there was no evidence that she was associated in any way with the

245. *Tyler*, 587 So. 2d at 1242 (quoting Long v. State, 542 S.W.2d 742, 743 (Ark. 1976)); *see also* State v. Ford, Nos. 95-10-0183, 95-10-0187-0191, 1996 WL 190783, at *3 (Del. Super. Ct. Mar. 26, 1996) ("[T]he act and crime of purchasing drugs is 'inevitably incident' to the sale thereof . . . .").

246. 220 F.2d 166 (3d Cir. 1955).

247. *Id.* at 167.

248. *Id.*

249. *Id.* at 167-68.

250. *Id.* at 168.

251. *See* 18 U.S.C. § 2(a) (1994) (emphasis added). This statute closely resembles the aiding and abetting statutes found in state laws. *See supra* note 5.

252. *Moses*, 220 F.2d at 169.

253. *Id.* at 168.

254. *Id.*

255. *Id.*

seller.[256] The court concluded that although the defendant's conduct "was prefatory to the sale, it was not collaborative with the seller. For this reason, the conviction cannot be sustained."[257]

Although *Moses* was decided under a federal narcotics statute different than the one currently in force, its analysis in regard to statutes prohibiting the unlawful sale of drugs is clearly applicable today. Various state cases have recognized this principle, refusing to uphold sale convictions for agents of purchasers who did not aid and abet the seller.[258] Unfortunately, however, other courts have committed an unwarranted expansion of the application of aiding and abetting statutes by upholding sale convictions for defendants who admittedly participated in a drug transaction, but did not handle the drugs and merely aided and abetted the purchaser.[259] This approach, which only looks at whether the defendant "caused" the purchase and fails to analyze the agent's relationship with the seller, is a misconstruction of aiding and abetting statutes.[260]

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256. *Id.*

257. *Id.*

258. *See* Owes v. State, 638 So. 2d 1383, 1386 (Ala. Crim. App. 1993) ("[T]he participation of a defendant in, or his or her criminal linkage with, the sale is the basis of criminal liability, and not the actual act of the defendant in physically transferring the controlled substance to the buyer." (quoting Martin v. Alabama, 730 F.2d 721, 724 (11th Cir. 1984))); People v. Cierzniewski, 529 N.Y.S.2d 886, 886-87 (App. Div. 1988); Jones v. State, 481 P.2d 169, 173 (Okla. Crim. App. 1971) ("Although . . . one who 'aids and abets' is a principal in a crime, a conviction cannot be obtained if there is 'no proof of a conspiracy or prearranged plan' between the alleged abettor and the one who actually commits the crime." (citation omitted)); Commonwealth v. Flowers, 387 A.2d 1268, 1271 (Pa. 1978); State v. Catterall, 486 P.2d 1167, 1171 (Wash. Ct. App. 1971).

Although California does not recognize the agency defense, *see* People v. Reyes, 4 Cal. Rptr. 2d 48, 52 (Ct. App. 1992), it at least recognizes that a defendant must "facilitate" a drug transaction before he or she can be convicted of aiding and abetting a sale of drugs. *See id.* at 49 (holding that, in a case involving the sale of cocaine, the "[d]efendant was prosecuted primarily on an aiding and abetting theory, and under the law of accomplice liability the jury should have been required to find that he intended to facilitate or encourage the sale").

259. *See* Wallace v. State, 344 S.E.2d 770, 770-71 (Ga. Ct. App. 1986); State v. Davis, 695 A.2d 1183, 1185 (Me. 1997); State v. Grilli, 230 N.W.2d 445, 449-50 (Minn. 1975); Johnson v. State, 642 So. 2d 924, 927 (Miss. 1994); State v. Poplin, 289 S.E.2d 124, 130 (N.C. Ct. App. 1982).

260. *See* Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. Cal. L. Rev. 2169, 2171 (1988) ("In most instances, the law requires more than simple 'but for' causation."). In *Flowers*, the Supreme Court of Pennsylvania firmly rejected the causation approach to aiding and abetting in a narcotics case. The defendant appealed his conviction for unlawful sale of a controlled substance. *Flowers*, 387 A.2d at 1269. The evidence revealed that an undercover agent made a request to the defendant for narcotics; the defendant admitted that he did not have any. *Id.* at 1270. When a third party, George Shiner, approached the defendant, the defendant called the agent over and introduced Shiner to the officer. *Id.* The three people then drove in a car to Shiner's residence, where the officer eventually purchased marijuana. *Id.* Although the defendant was present at the transaction, he did not handle any money or drugs, and he had no involvement in the negotiations. *Id.* Both the trial court and the Superior Court of Pennsylvania sustained the defendant's convictions, reasoning

A poignant example of this inappropriate reasoning is the Florida case of *State v. Dent*.[261] In *Dent*, the defendant appealed a conviction for the sale of cocaine.[262] The evidence showed that the defendant arranged a drug transaction between an undercover officer and a drug seller;[263] as in *Moses*,[264] the defendant did not actually handle the drugs being sold, but was merely present at the exchange.[265] The court found the defendant liable for the sale, relying on its aiding and abetting statute.[266] In reaching its conclusion, the court held that "the evidence is undisputed that the sales would not have occurred but for [defendant's] arrangements."[267]

What the *Dent* court and others fail to recognize is that accomplice statutes do not penalize the aiding and abetting of the commission of a crime in general; rather, they penalize the aiding and abetting of a *principal* to a crime.[268] In other words, the government must identify "the particular 'offense . . .' in which the alleged wrongdoer has participated" by identifying which individual the defendant is allegedly connected with;[269] to do otherwise is simply a misapplication of aiding and abetting law.[270]

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that if the defendant had not brought the buyer and the seller together, the sale would never have occurred; thus, the conviction for aiding and abetting the seller could stand "without regard to whether [defendant] had any connection whatsoever with either the seller or his plans." *Id.*

The Supreme Court of Pennsylvania recognized this flawed logic and reversed the defendant's conviction. The court observed that "the causation test has been firmly rejected," *id.* at 1271, and that the lower courts, by "taking a causative approach and applying a 'but-for' test, . . . expressly rejected any consideration of the intent of the parties in their commission of the acts involved." *Id.* at 1270. In order to convict the defendant as an accomplice to the seller, "it was incumbent upon the prosecution to prove beyond a reasonable doubt that he was an active partner in the intent to make this sale." *Id.* at 1271. The court then found that "[n]one of the evidence proves beyond a reasonable doubt that [defendant] had any interest whatsoever in whether this sale ever took place." *Id.* The court concluded that "[i]f [defendant] can be said to have assisted anyone, it was the *buyer*, not the seller." *Id.* at 1272 (emphasis added).

261. 322 So. 2d 543 (Fla. 1975).

262. *Id.*

263. *Id.*

264. 220 F.2d 166 (3d Cir. 1955).

265. *See Dent*, 322 So. 2d at 544.

266. *Id.* at 544; *see* Fla. Stat. Ann. § 777.011 (West Supp. 1998) (formerly codified at Fla. Stat. Ann. § 776.011) (aiding & abetting statute).

267. *Dent*, 322 So. 2d at 544.

268. *See* Andrew Ashworth, Principles of Criminal Law 363 (1991) ("[A] principal is a person whose acts fall within the legal definition of the crime, whereas an accomplice . . . is anyone who aids, abets, counsels, or procures a *principal*." (emphasis added)); H.L.A. Hart & A.M. Honoré, Causation in the Law 344 (1959) ("The usual case [of aiding and abetting] is intentionally providing the means or opportunity for the principal's act." (footnote omitted)); 21 Am. Jur. 2d *Criminal Law* § 167 (1981) ("An aider or abettor is one who advises, counsels, procures, or encourages another to commit a crime." (footnote omitted)).

269. *Moses*, 220 F.2d at 168.

270. *See supra* notes 259-60, 268 and accompanying text.

That the causation approach is improper is especially evident when one considers that the ultimate purchaser of drugs technically "aids and abets" the seller in the sale of drugs by negotiating with the seller and buying the drugs;[271] in other words, the sale would not have occurred but for the buyer. Nevertheless, the purchaser is not punished as an accomplice to the seller.[272] In drug cases, therefore, courts should not apply "a test of causation, but a test of partnership or concert of action to determine guilt as an accessory."[273] Because the agency defense is based on such a partnership test, it assures that courts will apply aiding and abetting law in the proper manner.

## CONCLUSION

Predictions that the agency defense is "heading towards extinction in national American law"[274] have been premature. The agency defense is alive and well, in both New York[275] and a number of addi-

271. *See* State v. Catterall, 486 P.2d 1167, 1170 (Wash. Ct. App. 1971) ("As a matter of abstract logic, [the] cooperation [between the buyer and the seller] requires that the purchaser aid or abet the seller in making the sale.").

272. *See supra* notes 242-44 and accompanying text. In *Morei v. United States*, 127 F.2d 827 (6th Cir. 1942), the "oft-cited opinion" of the Sixth Circuit, Commonwealth v. Flowers, 387 A.2d 1268, 1271 (Pa. 1978), the court recognized the inherent problems in the "causation" approach to accomplice liability:

> If the criterion for holding that one is guilty of procuring the commission of an offense, is that the offense would not have been committed *except for such a person's conduct* or revelation of information, it would open a vast field of offenses that have never been comprehended within the common law by aiding, abetting, inducing or procuring.

*Morei*, 127 F.2d at 831 (emphasis added). The Sixth Circuit clearly recognized that a causation approach to aiding and abetting would lead to ludicrous conclusions.

273. *Flowers*, 387 A.2d at 1270. Of course, if the evidence in a narcotics case does, in fact, establish that the defendant aided and abetted the seller during the commission of the sale, a conviction for unlawful sale is appropriate. *See, e.g.*, People v. Armstrong, 553 N.Y.S.2d 169, 170 (App. Div. 1990) (finding that defendant had "accessorial liability" with the co-defendant for unlawful sale when the defendant brought the buyer to the seller and served as a lookout and guard during the completion of the sale).

274. William C. Donnino & Anthony J. Girese, *The Agency Defense in Drug Cases*, N.Y. L.J., Apr. 27, 1978, at 1.

275. The New York Court of Appeals has thoroughly articulated a set of conditions which must be considered to determine whether the agency defense should be applied in a given case. For instance, the court developed a comprehensive list of factors to decide whether a defendant has exhibited "[s]alesman-like behavior," which would "[connote] an interest that goes beyond representation of the buyer alone" and preclude the defendant's right to use the agency defense. People v. Roche, 379 N.E.2d 208, 212 (N.Y. 1978). These factors include considering whether the defendant touted the quality of the drug, *id.*, bargained over price, *id.*, suggested the purchase to the buyer, People v. Lam Lek Chong, 379 N.E.2d 200, 207 (N.Y. 1978), or apologized for the quality of the drugs or the manner of their delivery. *Roche*, 379 N.E.2d at 212. Other elements of "salesman-like behavior" include the prior relationship between the defendant and the buyer, *Lam Lek Chong*, 379 N.E.2d at 207, and the defendant's prior relationships with narcotics in general. *Roche*, 379 N.E.2d at 212. Further, a court may consider the amount of time a defendant took to complete the drug transaction. *See* People v. Leybovich, 607 N.Y.S.2d 982, 983 (App. Div. 1994) (finding that

tional states. Without question, the Controlled Substances Act contributed to the demise of the defense in many jurisdictions. The defense's numerous culpability and legal justifications, however, are compelling enough to support its complete revival. To assure an overall sense of integrity and uprightness in the criminal justice system, state courts that have not yet adopted the agency defense should do so. By so doing, the courts will guarantee that purchasing agents receive the punishment they deserve.

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the defendant's ability to complete a drug transaction with an undercover officer within several minutes indicated that he was "at the very least, a middleman if not an independent seller").