CRIMINAL LAW—ENTRAPMENT ESTABLISHED AS A MATTER OF LAW WHEN PERSON ACTING IN CONCERT WITH POLICE PROVIDES ACCUSED WITH CONTRABAND AND THEN ARRANGES A SALE OF THAT SAME CONTRABAND TO AN UNDERCOVER OFFICER—*State v. Talbot*, 71 N.J. 160, 364 A.2d 9 (1976).

Anthony Federici, after having been arrested on a narcotics charge, agreed to aid the police by setting up transactions with drug dealers in exchange for a promise of lenient treatment.[1] John Talbot, a friend, was suggested and approved as a potential target.[2] Proceeding without specific police direction, Federici then sold a packet of heroin to Talbot, and later requested that Talbot resell it to an acquaintance " 'from somewhere out west.' "[3] Talbot, who had initially refused to buy the heroin, also objected to selling it, but later agreed to the sale after an appeal by Federici.[4] Talbot was subsequently visited by Federici and an undercover agent posing as the acquaintance, and he was arrested after selling the agent some of the heroin purchased from Federici.[5]

Talbot urged at trial that he had been entrapped as a matter of law since Federici, acting for the police, had supplied Talbot with the heroin and induced him to make the sale "for the express purpose of entrapping" him.[6] Furthermore, Talbot claimed that the evidence supporting entrapment was "uncontroverted," and that no " 'proper proof' " of Talbot's "predisposition" had been proffered by the state.[7] The trial judge rejected Talbot's motion for acquittal, however, and

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[1] State v. Talbot, 71 N.J. 160, 163, 364 A.2d 9, 10 (1976).

[2] *Id.*

[3] *Id.* at 163–64, 364 A.2d at 10–11.

[4] *Id.* at 163, 364 A.2d at 10.

[5] *Id.*; *see* Brief and Appendix for the State of New Jersey at 4, State v. Talbot, 135 N.J. Super. 500, 343 A.2d 777 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976) [hereinafter Brief for State].

[6] State v. Talbot, 135 N.J. Super. 500, 503, 343 A.2d 777, 778 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976).

[7] State v. Talbot, 135 N.J. Super. 500, 503, 343 A.2d 777, 778 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976). On the subject of predisposition, the New Jersey supreme court has stated that it "is evidenced by previous conviction of crime, reputation for criminal activities, ready compliance with minimal inducement, or easy yielding to the opportunity to commit the offense." State v. Dolce, 41 N.J. 422, 433, 197 A.2d 185, 191 (1964). In *Talbot*, the state showed that the defendant had been a marihuana user, and that he had pleaded guilty to both possession of narcotics in New York and injection of barbituates into the arm of a high school girl in Rhode Island. 135 N.J. Super. at 505, 343 A.2d at 779; Brief for State, *supra* note 5, at 11.

proceeded to charge the jury that the defense of entrapment was unavailable "unless Federici . . . 'was acting with the consent of the police and as their agent' " when he supplied the heroin to Talbot.[8] The jury found Talbot guilty and he appealed.[9]

The appellate division reasoned that determination of the entrapment issue was properly one for the jury because of the doubtful veracity of both Talbot's and Federici's testimony.[10] Reversible error was found to exist, however, in the trial judge's charge to the jury.[11] The court had instructed that entrapment could not be found by the jury unless Federici was shown to have consummated the transaction in question with the consent of the police.[12] The appellate division stated that the instructions "effectively insulated the [s]tate" from assuming its burden of proving that an entrapment had not occurred.[13] After remand for retrial,[14] the state's petition for certification was granted by the Supreme Court of New Jersey.[15]

In *State v. Talbot*,[16] the court held that entrapment is established as a matter of law when a person working in cooperation with the police provides the accused with heroin and subsequently orchestrates the sale of the drug to an undercover officer.[17] The court further held that entrapment exists even though narcotics are supplied without the permission or knowledge of the police and despite a

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[8] *See* State v. Talbot, 135 N.J. Super. 500, 503, 509, 343 A.2d 777, 778, 781 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976).

[9] State v. Talbot, 71 N.J. 160, 162–63, 364 A.2d 9, 10 (1976).

[10] State v. Talbot, 135 N.J. Super. 500, 507–08, 343 A.2d 777, 781 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976).

[11] State v. Talbot, 135 N.J. Super. 500, 509–10, 343 A.2d 777, 781–82 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976).

[12] State v. Talbot, 135 N.J. Super. 500, 509, 343 A.2d 777, 781 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976).

[13] State v. Talbot, 135 N.J. Super. 500, 509, 343 A.2d 777, 781 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976). Judge Allcorn, writing for the court reasoned that

> [t]he manufacture of crime, whether by the police or by an informant employed by the police, cannot be countenanced. However desirable and helpful the employment of an informant may be in the pursuit and discovery of criminal activity and evidence of crime, law enforcement authorities may not disavow him and disclaim responsibility for his actions when he entraps someone because they had no knowledge and did not approve of the entrapment.

135 N.J. Super. at 509, 343 A.2d at 782.

[14] State v. Talbot, 135 N.J. Super. 500, 512, 343 A.2d 777, 783 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976).

[15] State v. Talbot, 69 N.J. 81, 351 A.2d 9 (1975).

[16] 71 N.J. 160, 364 A.2d 9 (1976). Justice Schreiber wrote a concurring opinion in which Chief Justice Hughes joined. *Id.* at 169, 364 A.2d at 13; *see* notes 86–90 *infra* and accompanying text.

[17] 71 N.J. at 168, 364 A.2d at 13.

predisposition on the part of the defendant to sell the contraband.[18] The court did agree with the appellate division, however, that the evidence in the *Talbot* case was sufficiently contradictory to establish a jury question as to the plausibility of the testimony and affirmed the appellate court's order of a new trial.[19]

The doctrine of entrapment[20] has been regarded by commentators as primarily an American development.[21] While no clear exposition of its origin exists, it has been plausibly suggested that entrapment developed from the " 'consent' defenses" which were recognized at common law when a victim had "assisted the principle [*sic*] offender" in the perpetration of a crime.[22] Gradually, though, entrapment came

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[18] *Id.*

[19] *Id.* at 169, 364 A.2d at 13.

[20] The most durable definition of entrapment was proffered by Justice Roberts in a concurring opinion in Sorrells v. United States, 287 U.S. 435 (1932), when he stated "[e]ntrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." *Id.* at 454. *See generally* People v. Strong, 21 Ill. 2d 320, 324, 172 N.E.2d 765, 767 (1961). A slightly different formulation is found in 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 132, at 281 (R. Anderson ed. 1957) where the author states that

> [e]ntrapment in its literal sense means merely the act of trapping. . . . Through usage its meaning has been broadened, and it has come to mean the act of inducing or leading a person to commit a crime not originally contemplated by him, for the purpose of trapping him in its commission and prosecuting him for the offense.

Id. (footnote omitted).

[21] DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F.L. REV. 243, 244–45, 247–48 (1967); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 246 (1942). Professor Mikell discovered only one English case, Regina v. Titley, 14 Cox Crim. Cas. 502 (Cent. Crim. Ct. 1880), in which the accused was entrapped. Mikell, *supra* at 246 n.2. The defense, however, was not raised and the court did not consider it. *Id.*; *cf.* Rex v. Martin, 168 Eng. Rep. 757 (C.C.R. 1811) (excusing an entrapped defendant), *discussed in* R. PERKINS, CRIMINAL LAW 1031–32 (2d ed. 1969). For further discussion of early British development in this area, see DeFeo, *supra* at 245–47.

[22] Murchison, *The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine*, 47 MISS. L.J. 211, 214 n.11 (1976); J. MILLER, HANDBOOK OF CRIMINAL LAW § 59, at 179 (1934); *see* Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 40. Under this theory, for example, a defendant could assert a valid defense against a charge of larceny if the property had been taken with the consent of the owner. *See, e.g.*, State v. Adams, 115 N.C. 775, 782, 20 S.E. 722, 722 (1894); State v. Hull, 33 Or. 56, 61–62, 54 P. 159, 161 (1898). For an early treatise which defines entrapment in terms of consent, see W. CLARK, HANDBOOK OF CRIMINAL LAW § 2, at 12 (3d ed. 1915). Professor Mikell also offered an acceptable explanation of the origin of the doctrine, stating that

> [i]n truth there seems to be no rational basis for the doctrine. Its origin is to be found in the natural feeling, shared by judges, that a person should not be made the victim of what Mr. Justice Holmes called [in another context] "dirty business".

to be defined as a "suggestion of the criminal act . . . from the officers of the government."[23] This form of the defense was extensively developed during the thirteen years (1920 to 1933) of Prohibition, when the effective enforcement of the ban on sale and consumption of alcohol necessitated "provid[ing] suspects with the opportunity to commit an offense."[24] However, it was not until *Sorrells v. United States*,[25] decided during the last year of Prohibition, that entrapment was fully explored and defined by the Supreme Court.[26]

Mikell, *supra* note 21, at 263 (quoting in part from Olmstead v. United States, 277 U.S. 438, 470 (1927)); *see* Orfield, *supra* at 57. *See generally* People v. Turner, 390 Mich. 7, 15, 210 N.W.2d 336, 338–39 (1973) (tracing origin of the doctrine to Saunders v. People, 38 Mich. 218 (1878)).

[23] Woo Wai v. United States, 223 F. 412, 415 (9th Cir. 1915) (first acceptance of entrapment defense by a federal court). *See generally* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1098–99 (1951). In *Woo Wai*, officials working for the Immigration Commission, for the purpose of uncovering certain corrupt public servants, induced the defendant to enter into a plan to smuggle Chinese people residing in Mexico into the United States. 223 F. at 412–13. The court found that Woo Wai originally had been reluctant to participate in the plan, but eventually had acquiesced "to enter into the scheme which had been so assiduously and persistently urged upon him." *Id.* at 414. The court reversed Woo Wai's conviction, finding "that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes." *Id.* at 415.

Professor Orfield has noted that the first federal cases to suggest an entrapment defense, but without offering a "concrete delineation of the new doctrine," Orfield, *supra* note 22, at 40, were United States v. Whittier, 28 F. Cas. 591 (C.C.E.D. Mo. 1878) (No. 16,688), and United States v. Adams, 59 F. 674 (D. Or. 1894). Orfield, *supra* at 40–41. In *Adams*, the court found that the conviction of a defendant for unlawfully sending contraceptive information through the mail in response to a decoy letter written by a government agent could not be sustained because the inspector "was . . . not engaged in detecting crime, but in procuring its commission." 59 F. at 677. A comprehensive listing of early cases dealing with the defense of entrapment can be found in O'Brien v. United States, 51 F.2d 674, 678 n.1 (7th Cir. 1931).

[24] Murchison, *supra* note 22, at 211–12, 216–17. The need for some police artifice was later recognized by the drafters of the Model Penal Code, who stated that "in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses." MODEL PENAL CODE § 2.10, Comment, at 16 (Tent. Draft No. 9, 1959), *cited in* 2 NEW JERSEY PENAL CODE § 2C:2–12, Comment, at 75–76 (Proposed Final Draft 1971). *See also* 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, 313 (U.S. Gov't Printing Office 1970) [hereinafter cited as BROWN COMMISSION REPORT].

[25] 287 U.S. 435 (1932), *analyzed in* DeFeo, *supra* note 21, at 251–58; Donnelly, *supra* note 23, at 1099–1104; Murchison, *supra* note 22, at 225–36.

[26] *See* 287 U.S. at 443–46, 451–52; Murchison, *supra* note 22, at 216–25, 230; Orfield, *supra* note 22, at 43; Note, *Entrapment in the Federal Courts: Sixty Years of Frustration*, 10 NEW ENG. L. REV. 179, 184 (1974). Prior to *Sorrells*, the Supreme Court had recognized the use of decoys as an acceptable means of police detection. *See, e.g.*, Grimm v. United States, 156 U.S. 604, 610–11 (1895). But *cf.* Casey v. United States 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) (government may not use undercover

In *Sorrells*, a prohibition agent posing as a tourist visited Sorrells' home with some mutual acquaintances.[27] Conversation revealed that Sorrells and the agent, Martin, had served in the same army division during World War I. While reminiscing about wartime experiences, Agent Martin made several requests that Sorrells purchase liquor for him. After initially refusing, Sorrells finally acquiesced and procured a half-gallon of alcohol.[28] At trial, the federal district court ruled as a matter of law that there had been no entrapment.[29] The Fourth Circuit affirmed[30] and the Supreme Court granted certiorari to determine whether the defense of entrapment should have been submitted to the jury.[31] The Court indicated that conflicting testimony between the defendant and the government's witnesses created a factual issue, and that a jury could have found that the criminal design originated with the prohibition agent rather than with the defendant.[32]

A majority of the Court then adopted what has been termed the "subjective approach," which examines government conduct to determine if the criminal design originated with the police, but which places the ultimate focus on the predisposition of the accused.[33]

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agents to manufacture crime). In *Sorrells*, the Court noted that later holdings, permitting an assertion of the entrapment defense, were careful to note that the allowable use of decoys was "well settled." 287 U.S. at 441.

[27] 287 U.S. at 439.

[28] *Id.*

[29] *Id.* at 438.

[30] Sorrells v. United States, 57 F.2d 973 (4th Cir.), *rev'd*, 287 U.S. 435 (1932). The court of appeals affirmed the trial court's decision, reasoning that mere requests by an agent which result in violations of the law should not make the defense of entrapment available. 57 F.2d at 974. In reaching its decision, it was necessary for the circuit court to distinguish its earlier ruling in Newman v. United States, 299 F. 128 (4th Cir. 1924), which had stated in dictum that where the government implants a criminal scheme in the mind of the accused it must be "estopped" from prosecuting. *Id.* at 131. The court of appeals found that *Newman* should not be interpreted to mean that one who harbors a willingness to commit a crime and does so because of persuasion by the government should be excused. 57 F.2d at 976.

[31] 287 U.S. at 436, 439.

[32] *See id.* at 441, 452.

[33] Recent Development, 59 CORNELL L. REV. 546, 550 n.33 (1974); *see* 287 U.S. at 441–42, 451. After the *Sorrells* decision, the "twin elements of *inducement* and *predisposition*, when conjoined, form[ed] the . . . recognized basis for the entrapment defense." BROWN COMMISSION REPORT, *supra* note 24, at 306 (emphasis in original). If the criminal intent is found to have been the product of the law enforcement official, the defense of entrapment is available to the defendant; if instead, the design originated with the accused, he will be barred from asserting the defense. Donnelly, *supra* note 23, at 1102; Murchison, *supra* note 22, at 234–35. This view has been commonly called "subjective because the same course of police conduct could yield findings of both guilt and innocence when applied to different defendants with differing degrees of predis-

Under the majority's analysis, the defendant must withstand a "searching inquiry into his own conduct" to determine if he was predisposed.[34] Concluding that Sorrells could have been deemed a "law-abiding citizen" who was "otherwise innocent,"[35] the majority reasoned that the congressional intent underlying the prohibition laws, which Sorrells had been charged with violating, was not to extend liability to innocent people induced into crime by the actions of government officials.[36] Since a jury could have reached a verdict of

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position." Recent Development, *supra* at 550 n.33.

Professor Donnelly suggests that a major problem with the subjective approach arises from the misapprehension that intent "can easily be isolated and assigned in toto to either the defendant or the officer." Donnelly, *supra* at 1107–08. A further difficulty is the means employed to measure intent: if the evidence reveals past crimes of a similar nature committed by the defendant, the intent is said to have originated with the defendant and not the government agent. *Id.* at 1102, 1107–08. *See also* Mikell, *supra* note 21, at 252.

[34] 287 U.S. at 451. The Court noted that the government may introduce evidence concerning "the conduct and purposes of the defendant previous to the alleged offense" in order to show that he was not "otherwise innocent." *Id.* One reason suggested for the use of evidence concerning prior criminal conduct is that it permits an inference by the jury "that government conduct amounting to inducement did not *cause* the criminal act or that the defendant actually conceived the crime." Orfield, *supra* note 22, at 59 & n. 122 (emphasis in original).

The fact that the government may introduce evidence concerning the criminal history or bad reputation of the accused has been severely criticized. *See* Grossman v. State, 457 P.2d 226, 229 (Alas. 1969); State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974); People v. Turner, 390 Mich. 7, 21–22, 210 N.W.2d 336, 341–42 (1973); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 339, 411 (1959) ("[s]uch proof . . . is wholly irrelevant to the issue of [guilt;] [t]o allow . . . proof of defendant's character . . . gives the defendant the right to plead entrapment only at his peril and is inconsistent with [fair trial] safeguards"); 33 N.Y.U.L. REV. 1033, 1038 (1958) (application of the subjective test effectively deprives a defendant with a prior criminal record of the defense and leaves him vulnerable to "whatever instigative conduct the police may deem expedient").

[35] 287 U.S. at 441.

[36] *Id.* at 448. In stating that a statute must be construed in a reasonable manner, the Court noted that to interpret a law literally might lead to "absurd consequences or flagrant injustice." *Id.* at 446. The Court found that it was "not forced by the letter to do violence to the spirit and purpose of the statute." *Id.* at 448.

After *Sorrells*, the lower federal and state courts either ignored the statutory-intent rationale and instead based the defense on estoppel or public policy, or merely allowed "the defense without analysis of its foundation." DeFeo, *supra* note 21, at 256, 258; *see* Donnelly, *supra* note 23, at 1110. An interesting comment, proffered by the Brown Commission, characterized the statutory intent theory as

> a matter of historical accident. If the decision in *Sorrells* . . . had been announced only a few years later, it is likely that [the] Supreme Court, in the exercise of its then self-established supervisory power over the administration of criminal justice within the Federal courts, would not have had to turn to statutory construction to divine the source of the entrapment defense. The defense could then have stood on the same and firmer footing of the *McNabb-*

not guilty by finding that Sorrells was an innocent person lured into crime by a government agent, the trial court's decision was reversed and remanded.[37]

In a concurring opinion, Justice Roberts advocated an alternative theory, or "objective" approach, which focuses on the nature of the government's participation rather than on the predisposition of the defendant.[38] Under this "objective" test, the willingness of the accused to engage in the criminal act is not considered, but rather, the critical inquiry is whether the crime was actually manufactured or instigated by government agents.[39] Instead of a legislative intent or statutory construction rationale for the entrapment defense, as espoused by the majority, the concurring opinion rested its conclusion "on a fundamental rule of public policy."[40] Government agents should not be permitted to create crime, induce its commission, and subsequently present "so revolting a plan" before a tribunal for prosecution.[41] Following this rationale, Justice Roberts urged that a finding of entrapment should be within the province of the trial judge and not the jury.[42]

The Supreme Court next considered entrapment twenty-six years later in *Sherman v. United States*.[43] In that case a government infor-

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> *Mallory* exclusionary rule . . . . Indeed, but for the somewhat attenuated logic of the decision in *Sorrells*, entrapment might have become a matter of criminal procedure rather than the substantive defense to crime it is today.

BROWN COMMISSION REPORT, *supra* note 24, at 314 (footnotes omitted) (emphasis in original).

[37] 287 U.S. at 441, 452.

[38] *See id.* at 458–59.

[39] *Id.*; *see* Recent Development, *supra* note 33, at 550 & n.33. According to Justice Roberts, police conduct rises to an intolerable level of participation when "a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration." 287 U.S. at 454.

[40] 287 U.S. at 457. When a defendant has proved he was entrapped into committing the offense, Justice Roberts would mandate that the court stop further prosecution:

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

Id. at 459.

[41] *Id.* at 454–55; *cf.* Olmstead v. United States, 277 U.S. 438, 484–85 (1928) (Brandeis, J., dissenting) (expressing concern that the government must come to court with clean hands out of respect for our system of justice).

[42] 287 U.S. at 457.

[43] 356 U.S. 369 (1958). Despite the favorable *Sorrells* decision, until the 1940's, the entrapment defense was infrequently asserted during the period after the repeal of the eighteenth amendment in 1933. Murchison, *supra* note 22, at 233–34; Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 MISS. L.J. 573, 573

mant, Kalchinian, initially met Sherman in a doctor's office where both were "apparently" undergoing treatment for drug addiction.[44] During several accidental meetings between the two, conversation revealed mutual problems in receiving effective treatment.[45] Kalchinian told Sherman that the treatment being administered was not successful and repeatedly asked him to procure some drugs, to which Sherman, based on the informer's feigned suffering, finally agreed.[46] Kalchinian then reported this arrangment to officials of the Bureau of Narcotics, who observed Sherman give the drugs to the informer.[47]

The majority of the Court declined to follow Justice Roberts' opinion in *Sorrells* but utilized the subjective test and the statutory construction reasoning of the majority in that case.[48] The Court, concluding that Sherman had been entrapped as a matter of law,[49] reasoned that uncontradicted evidence in the record showed that Sherman was "an otherwise unwilling person" who had been lured into crime by the repeated requests of the government informer.[50]

& n.3 (1976). However, the use of undercover officers gradually has been extended to prosecutions of prostitution, homosexuality, gambling and narcotics, thus providing another major impetus to the entrapment defense. DeFeo, *supra* note 21, at 250.

[44] 356 U.S. at 371.

[45] *Id.*

[46] *Id.* Kalchinian paid for his portion of the drug as well as all necessary expenses incurred in obtaining it, including cab fare. *Id.*

[47] *Id.* The Court noted that Kalchinian had been convicted of selling narcotics and had received leniency for cooperating with the government. *See id.* at 374 & n.2. Even though the federal narcotics agents did not counsel Kalchinian in arranging transactions with drug addicts, the Court found that "[t]he Government cannot make such use of an informer and then claim disassociation through ignorance." *Id.* at 375.

[48] *Id.* at 372–73, 376. The Court declined to adopt a test focusing on government conduct not only because the majority in *Sorrells* had declined to accept this approach, but also because, as reflected by the record, the alternative theory had not been urged by the parties. *Id.* According to the majority, the adoption of the objective approach without argument would have been contrary to principles of stare decisis and would have produced two major ramifications. First, it would have imposed a "handicap" on the prosecution by barring it from offering proof of the defendant's predisposition. *Id.* at 376–77. Secondly, it would have altered the procedural aspects of the entrapment defense by submitting the issue of entrapment, based on the activity of the police, to the judge instead of the jury. *Id.* at 377. Justice Warren concluded that to disregard the test espoused by the majority in *Sorrells* and instead adopt the approach advocated by Justice Roberts, "would be creating more problems than we would supposedly be solving." *Id.* at 378.

[49] *Id.* at 373.

[50] *Id.* at 371–73. There was a companion case decided the same day as *Sherman*, Masciale v. United States, 356 U.S. 386 (1958), where the defendant also urged that his conviction should be reversed on the grounds that he was entrapped as a matter of law. *Id.* at 388. The Court, however, rejected this claim, holding that a credibility issue with respect to petitioner's own testimony of the transaction was properly submitted to the jury. *Id.*

Reiterating the principles enunciated in *Sorrells*, the majority stated that the issue of entrapment involves dual considerations—the level of official conduct and the defendant's predisposition to criminal activity.[51] The majority justified its holding by reasoning that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."[52]

Justice Frankfurter, joined by three other justices, concurred, but also indicated that he was ready to adopt the position urged by Justice Roberts in *Sorrells*.[53] Referring to the *Sherman* majority's statutory construction reasoning as "sheer fiction," Justice Frankfurter argued that the correct rationale for dismissing entrapped defendants was that "the methods employed on behalf of the Government to bring about conviction cannot be countenanced."[54] He contended that rather than concentrating upon the defendant's actions, a trial court should focus on whether the involvement of law enforcement authorities in the criminal enterprise has exceeded permissible limits.[55] Police may employ decoys and traps to apprehend law violators, but these techniques should not be directed to those "who would normally avoid crime and through self-struggle resist ordinary temptations."[56]

The objective approach advocated by Justice Frankfurter, and earlier by Justice Roberts, was favorably treated by commentators

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[51] 356 U.S. at 372–73. For a discussion of the subjective approach set forth in *Sorrells*, see notes 33–34 *supra* and accompanying text.

[52] 356 U.S. at 372. One commentator states that the use of this language expanded the statutory construction rationale developed from the National Prohibition Act, violated in *Sorrells*, into a "sweeping generalization." Murchison, *supra* note 43, at 575.

[53] *See* 356 U.S. at 378–79, 382. In response to the majority's argument that to adopt the objective approach would be to formulate important policies without benefit of argument, Justice Frankfurter stated that the solution would be to allow the parties to reargue the case. *Id.* at 379 & n.2.

[54] *Id.* at 379–80. Justice Frankfurter stated that the reason for excusing an entrapped defendant should be grounded upon "a supervisory jurisdiction over the administration of criminal justice" instead "of a wholly fictitious congressional intent." *Id.* at 381.

[55] *Id.* at 382, 385. In applying this test, the predisposition of the defendant becomes "wholly irrelevant." *Id.* at 382.

[56] *Id.* at 384. Commenting on the objective approach, the Brown Commission Report noted that:

> There is no room in the Roberts-Frankfurter appraisal for a subjective determination of the predisposition of a particular defendant to commit this or any other crime. . . . Evidence of predisposition is irrelevant. Emphasis is misplaced when predisposition is put in issue. . . . The standard of Justices Roberts and Frankfurter is objective, *i.e.*, is it likely that the questioned police action would induce only those who are then ready and willing into crime.

BROWN COMMISSION REPORT, *supra* note 24, at 316 (footnotes omitted) (emphasis in original).

after the *Sherman* decision and by the drafters of the Model Penal Code.[57] In addition, several lower federal courts were willing, in appropriate circumstances, to find entrapment as a matter of law solely on the grounds of excessive official conduct.[58] These courts based

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[57] Murchison, *supra* note 43, at 580. The objective approach was also adopted in MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962). The Model Penal Code provided, in an alternative formulation, that

> (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
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> (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
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> (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

Id. § 2.13 (1). The drafters noted that this version "sp[oke] only to the conduct of the police" and that it was their preferred solution. *Id.* Comment, at 19 (Tent. Draft No. 9, 1959). The Model Penal Code further provides that the issue of entrapment will be decided by the trial judge and not the jury. *Id.* § 2.13(2) (Proposed Official Draft 1962).

In proposing a federal entrapment statute, the Brown Commission Report commented that

> [t]he proposed statute changes the existing law by giving principal significance to the inducements of the government. Entrapment is continued as a defense to a crime, but the question of the accused's predisposition is removed and the issue is framed rather in the objective terms of whether persons at large who would not otherwise have done so would have been encouraged by the government's actions to engage in crime. The focus of the proposed statute is on the activities of the government and their relation to the reasonable man.

BROWN COMMISSION REPORT, *supra* note 24, at 306. For a collection of commentary critical of the subjective approach, see Murchison, *supra* at 580 & n.49; 25 MERCER L. REV. 957, 961–62 & n.41 (1974).

[58] *See, e.g.*, United States v. McGrath, 468 F.2d 1027, 1030 (7th Cir. 1972) (to allow a conviction to stand where the police manufactured and delivered counterfeit money would be "repugnant to the most elemental notions of justice"), *vacated and remanded*, 412 U.S. 936 (1973); Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971) (the government may not prosecute when it "involve[s] itself so directly and continuously . . . in the creation and maintenance of criminal operations"); United States v. Bueno, 447 F.2d 903, 905 (5th Cir. 1971) (the activity of the government in supplying the defendant with heroin in order to buy it back and charge him with the crime "greatly exceeds the bounds of reason"), *cert. denied*, 411 U.S. 949 (1973).

By 1973, the above mentioned "three circuits had clearly inched toward the objective test urged by Mr. Justice Frankfurter." Murchison, *supra* note 43, at 585–88. *See also* Recent Development, *supra* note 33, at 557, 562–63; 25 MERCER L. REV. 957, 962–63 (1974). Despite the fact that the circuit courts began to scrutinize government conduct with increasing frequency, the subjective approach remained the controlling test. *See* Murchison, *supra* at 588 & n.97. In United States v. Granger, 475 F.2d 1022, 1023–24 (9th Cir. 1973), the court rejected a defendant's attempt to cite as controlling precedents Greene v. United States, 454 F.2d 783 (9th Cir. 1971), and United States v. Russell, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973), in which findings of entrapment were based on excessive government participation, because

their decisions on a specific factual situation where either the government supplied contraband to a defendant or there existed a general pattern of extensive government participation and encouragement.[59] In one case, where the sole activity of the government was the supply of an essential ingredient for the manufacture of a drug to a a predisposed defendant, the Ninth Circuit court of appeals nevertheless concluded that the government not only had entrapped the defendant, but also had violated "fundamental concepts of due process."[60] The Supreme Court, however, in *United States v. Russell*,[61] reversed in a five-to-four decision and mandated a return to "the traditional notion of entrapment."[62]

Justice Rehnquist, writing for the majority in *Russell*, rejected the defendant's attempt to establish "a rigid constitutional rule" which would bar prosecution whenever a government agent is found to have supplied a necessary ingredient, either legally or illegally obtained, to further the criminal enterprise.[63] While the majority ac-

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> these two decisions carve out a narrow exception to the . . . prevailing rule in this circuit that an entrapment defense is not available to one who is shown to have a predisposition to commit the kind of offense in question.

475 F.2d at 1023. *See also* United States v. Abbadessa, 470 F.2d 1333, 1336–37 (10th Cir. 1972); Accardi v. United States, 257 F.2d 168, 171, 173 (5th Cir. 1958).

[59] *Compare* United States v. McGrath, 468 F.2d 1027 (7th Cir. 1972), *vacated and remanded*, 412 U.S. 936 (1973) *and* United States v. Russell, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973) *and* Greene v. United States, 454 F.2d 783 (9th Cir. 1971) *with* United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973). *See* Case Comment, *Entrapment Rationale Employed to Condemn Government's Furnishing of Contraband*, 59 MINN. L. REV. 444, 448–49 (1974).

[60] United States v. Russell, 459 F.2d 671, 674 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973). In *Sherman*, Chief Justice Warren had hinted that a constitutional rationale might underlie the entrapment defense when outrageous law enforcement tactics "become as objectionable . . . as the coerced confession and the unlawful search." 356 U.S. at 372. Since *Sherman*, however, "the courts have balked at elevating the defense to constitutional dimensions." Orfield, *supra* note 22, at 54. *But see* United States v. Chisum, 312 F. Supp. 1307, 1312 (C.D. Cal. 1970) (the court specifically based its holding upon constitutional safeguards, reasoning that "[e]ntrapment is indistinguishable from other law enforcement practices which the courts have held to violate due process").

[61] 411 U.S. 423 (1973), *noted in The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 243–52 (1973); Recent Decision, *The Defense of Entrapment is Available Solely to a Defendant who Lacked Predisposition to Commit the Crime*, 40 BROOKLYN L. REV. 802 (1974); Recent Development, *supra* note 33; 25 MERCER L. REV. 957 (1974).

[62] 411 U.S. at 427, 435–36. In *Russell*, the Supreme Court found that the activity of the agent in offering to supply the defendant with a legal but difficult-to-obtain ingredient in the manufacturing of an illegal drug was a permissible law enforcement tactic directed toward "an 'unwary criminal.' " *Id.* at 435–36 (quoting from Sherman v. United States, 356 U.S. at 372).

[63] 411 U.S. at 431. The defendant urged that the amount of the agent's participation

knowledged that a situation might exist where the government could not convict an entrapped defendant without also violating the due process clause, it rejected Russell's claim that this was such a case.[64] Criticizing the lower courts' expansion of the defense to include excessive governmental participation, the plurality stated that the defense was not meant to provide the federal courts with "a 'chancellor's foot' veto over" unacceptable law enforcement practices.[65] The Court declined to overrule the principles which were formulated in *Sorrells* and *Sherman* and found the defendant's predisposition "fatal to his claim of entrapment."[66] In *Russell*, the majority emphasized that the government had supplied only a legal, albeit scarce, ingredient for the manufacture of an illicit drug.[67]

The question, left unanswered in *Russell*, of whether the government can supply contraband to a defendant and subsequently prosecute him for selling it to an undercover agent was addressed by another divided Court in *Hampton v. United States*.[68] In *Hampton*,

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in the criminal scheme was such that to prosecute him would violate his due process rights. *Id.* at 430. Rejecting an analogy between entrapment and illegal searches and seizures, the Court found that the agent's participation had "violated no independent constitutional right." *Id.*

[64] *Id.* at 431–32. The Court cited Rochin v. California, 342 U.S. 165, 166 (1952), where the defendant's stomach was pumped to produce two capsules to be used in evidence against him at trial, as the type of a situation which invoked due process principles. 411 U.S. at 432.

[65] 411 U.S. at 435. After the decision in *Russell* was handed down, the reaction by the lower federal courts was varied. The Fifth Circuit continued to find entrapment when an illegal drug was furnished to the defendant by distinguishing *Russell* on the basis of its facts. There the agent had supplied a legal ingredient and not the contraband itself, *see* United States v. Soto, 504 F.2d 557, 559 (5th Cir. 1974); United States v. Mosley, 496 F.2d 1012, 1015–16 (5th Cir. 1974); United States v. Oquendo, 490 F.2d 161, 163 (5th Cir. 1974); other circuits found *Russell* controlling, *see, e.g.*, United States v. Jett, 491 F.2d 1078, 1081 (1st Cir. 1974). *See also* Murchison, *supra* note 43, at 596–601.

[66] 411 U.S. at 436. In two dissenting opinions, four justices expressed dissatisfaction with the majority's result, reiterating the need for an approach which focuses on government conduct. Justice Douglas, voicing agreement with the Roberts-Frankfurter approach, stated that "[f]ederal agents play a debased role when they become the instigators of the crime." *Id.* at 439. In the second dissenting opinion, Justice Stewart wrote that without regard to defendant's predisposition, entrapment exists

> when the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it.

Id. at 445.

[67] *Id.* at 432.

[68] 425 U.S. 484 (1976). A jury found the defendant guilty and he appealed, alleging error in the failure to instruct the jury that they must acquit if they found the drug was

the defendant urged that the language in *Russell*, to the effect that due process could be violated by "outrageous" government conduct, was applicable to him because a government informer had supplied the heroin, which he, in turn, had sold to government agents.[69] The Court, finding the difference between *Hampton* and *Russell* to be "one of degree, not of kind," rejected his attempt to invoke due process principles.[70] It was stated that the sole defense available to an accused who had unknowingly encouraged government participation in a crime would be a claim of entrapment.[71] Thus, a plurality of the Court foreclosed any possibility of a predisposed defendant ever asserting a due process defense.[72] In a dissenting opinion, Justice Brennan stated that he would find entrapment as a matter of law when the government is found to have supplied the contraband, and would allow for the applicability of due process principles "where the Government's conduct is as egregious as in this case."[73]

The trend of the lower federal courts toward the acceptance of

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supplied by the informer. *Id.* at 487–88. The Court of Appeals for the Eighth Circuit affirmed the conviction, stating, "we do not think that the extent of Government participation in the commission of the crime, under the facts claimed by Hampton, warrants an entrapment defense based upon Government conduct, apart from defendant's predisposition." United States v. Hampton, 507 F.2d 832, 836 (8th Cir. 1974), *aff'd*, 425 U.S. 484 (1976).

[69] 425 U.S. at 488–89. The Court noted that in light of the standards established by *Sorrells* and *Sherman*, Hampton's situation "does not qualify as one involving 'entrapment' at all." *Id.* at 489. Citing the findings in *Russell*, the Court stated that in circumstances where the defendant was predisposed it had eliminated the possibility of an entrapment defense based solely on "governmental misconduct." *Id.* at 488–89.

[70] *Id.* at 489–90.

[71] *Id.* Since Hampton had already admitted his predisposition to commit the crime, he was foreclosed from an entrapment defense. *Id.* The alternative due process claim was similarly rejected on the basis that no recognized constitutional right of the defendant was violated. *Id.* at 490–91. The plurality then noted that the proper "remedy lies . . . in prosecuting the police under the applicable provisions of state or federal law." *Id.* at 490.

[72] *See id.* at 488–90; Tanford, *Entrapment: Guidelines for Counsel and the Courts*, 13 CRIM. L. BULL. 5, 16 (1977). Mr. Justice Powell, in a concurrence in which Justice Blackmun joined, was unwilling to find that *Russell* "ha[d] gone so far" as to bar a predisposed defendant from employing constitutional safeguards. 425 U.S. at 492–93. Justice Powell agreed with the plurality opinion that Hampton's situation did not "constitut[e] a *per se* denial of due process," *id.* at 491 (emphasis in original), but recognized that either the supervisory power of the courts or constitutional principles could be invoked to bar a conviction where the government conduct is "outrageous," *id.* at 493–95.

[73] 425 U.S. at 499. The dissent attempted to distinguish *Russell* on the grounds that in that case the ingredient supplied by the agent was legal, and that the operation in *Russell* was a continuing scheme independent of the government's participation. *Id.* at 497–98.

an objective approach did not take root in New Jersey prior to *Talbot*. The standard employed by the state's courts was subjective,[74] although the New Jersey supreme court, in *State v. Dolce*,[75] did base the defense on a public policy rationale similar to that expounded by Justices Roberts and Frankfurter.[76] In *Dolce*, the defendant was arrested for possessing certificates of stolen vehicles after he had willingly accompanied an undercover agent to a machine which could validate them.[77] Citing *Sorrells* and *Sherman*, the court held evidence of the accused's "own cupidity and predisposition" admissible,[78] but implicitly rejected a statutory construction basis for the defense in favor of the rationale that "the courts will not allow their process to be used to consummate a wrong."[79] The court also noted the controversy over whether judge or jury should decide the question but declined to disturb the practice of submitting factual questions to the jury because the matter was not in issue.[80]

In *Talbot*, the Supreme Court of New Jersey reasoned that it was not bound by either *Russell* or *Hampton*, since those decisions involved the "construction of . . . federal statutes."[81] The majority also distinguished *Dolce* and the "few" New Jersey decisions concerning entrapment on the basis that, although these cases had "adverted

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[74] The position of the New Jersey courts in regard to entrapment was summarized by the supreme court in State v. Dolce, 41 N.J. 422, 197 A.2d 185 (1964):

> There are few cases in New Jersey dealing with entrapment. Those to be found in the reports indicate that assertion of the defense requires no departure at trial from the conventional procedure ordinarily followed in criminal cases, *i.e.*, full trial by court and jury unless the jury is waived. And when the trial is by jury, if a factual issue is presented as to the defense of entrapment, it is resolved by the jury like any other defense. . . .
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> . . . When a defendant interposes the defense of entrapment, the State may introduce evidence of his predisposition to commit crime. The purpose is to demonstrate that he was not an innocent person who would not have committed the offense were it not for the proposal and inducement of the police officers. Predisposition is evidenced by previous conviction of crime, reputation for criminal activities, ready compliance with minimal inducement, or easy yielding to the opportunity to commit the offense.

Id. at 433, 197 A.2d at 191 (citations omitted).

[75] 41 N.J. 422, 197 A.2d 185 (1964).

[76] *Id.* at 430–32, 197 A.2d at 189–90. The public policy basis for entrapment was utilized by New Jersey prior to *Sorrells* as early as 1914. *See generally* State v. Dougherty, 86 N.J.L. 525, 534–35, 93 A. 98, 102 (Sup. Ct.), *rev'd on other grounds*, 88 N.J.L. 209, 96 A. 56 (Ct. Err. & App. 1915).

[77] 41 N.J. at 426–27, 197 A.2d at 187–88.

[78] *Id.* at 429, 433, 197 A.2d at 189, 191.

[79] *Id.* at 431, 197 A.2d at 190.

[80] *Id.* at 433, 437–38, 197 A.2d at 191, 193–94.

[81] 71 N.J. at 166–67, 364 A.2d at 12.

to the subjective standard," the courts had not been confronted with "egregious police action."[82] Thus free to create its own "contours of the defense," the court held that entrapment occurs as a matter of law when a defendant is furnished contraband by an informer with the aim of having the defendant resell it to an undercover agent, notwithstanding predisposition on the part of the defendant.[83] This rule applied even though the informer's actions were "unknown to and contrary to" police guidelines.[84] Moreover, the court expressly invoked a due process standard by basing its holding "on the principle of fundamental fairness."[85]

In a concurring opinion, Justice Schreiber cautioned against a blanket application of the majority's holding.[86] He feared that a justifiable conviction of a defendant engaged in an illegal business could be voided if the police action "coincidentally triggers" criminal enterprise.[87] The Justice further noted that the possibility created by the majority's holding was at variance with the proposed New Jersey Penal Code (Code)[88] which requires that the criminal activity be " 'a

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[82] *Id.* at 167, 364 A.2d at 12–13; *see* notes 33–39 *supra* and accompanying text.

[83] 71 N.J. at 167–68, 364 A.2d at 12–13. While noting that predisposition is "[o]rdinarily . . . a relevant factor," the court found that the importance of defendant's intent decreases as government involvement increases, until a point is reached where police conduct is so " 'outrageous' " that a conviction cannot be sustained. *Id.* at 167–68, 364 A.2d at 12–13; *accord*, State v. Sainz, 84 N.M. 259, 261, 501 P.2d 1247, 1249 (Ct. App. 1972). The "point" at which official activity is no longer tolerable is to be determined by the trial judge. 71 N.J. at 168, 364 A.2d at 13.

[84] 71 N.J. at 168, 364 A.2d at 13. The appellate division had found prejudicial error in the trial court's instructions to the jury that they must find that the police acknowledged and consented to the agent's activities in order to sustain the defense of entrapment. State v. Talbot, 135 N.J. Super. 500, 509–10, 343 A.2d 777, 782 (App. Div. 1975), *aff'd*, 71 N.J. 160, 364 A.2d 9 (1976); *see* notes 6–9 *supra* and accompanying text. It is commonly held that the government cannot benefit from the wrongful activity of the informer and then disclaim responsibility on the basis of ignorance. *See, e.g.*, Sherman v. United States, 356 U.S. at 374–75; United States v. Bueno, 447 F.2d 903, 905 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973). *But see* United States v. Wilson, 501 F.2d 1080, 1081 (8th Cir. 1974). A comprehensive study of the use of the informer in apprehending criminals may be found in Donnelly, *supra* note 23.

[85] 71 N.J. at 168, 364 A.2d at 13.

[86] *Id.* at 169–72, 364 A.2d at 13–15. Justice Schreiber urged that in cases where the agent supplies the drug, a distinction must be made between "a professional engaged in the criminal enterprise" and an individual involved in a single transaction. *Id.* at 169–70, 364 A.2d at 14.

[87] *Id.* at 171, 364 A.2d at 15. Justice Schreiber cited *Russell*, approvingly, as an example of a situation in which the defense of entrapment was denied to a defendant "engaged in an ongoing course of illicit conduct." *Id.* at 169–70, 364 A.2d at 14.

[88] 1 NEW JERSEY PENAL CODE § 2C:2–12 (Proposed Final Draft 1971). This revision of the penal code is currently before the Legislature for decision. *See* N.J. Assembly Bill No. 642 (introduced Feb. 19, 1976).

direct result' " of the governmental action.[89] Before invalidating specific police conduct, Justice Schreiber urged consideration of "all the circumstances" surrounding the offense.[90]

The majority in *Talbot* attempted to narrowly circumscribe its holding by stating that entrapment as a matter of law occurs when (1) authorities furnish a defendant with an illegal drug (2) with the object of arranging a sale to an undercover officer (3) "which sale is then consummated."[91] A defendant who shows these elements is entitled to a finding of entrapment.[92] However, the majority's reliance upon the "fundamental fairness"[93] rationale might conceivably support a finding of entrapment, as a matter of law, in the case of a defendant who cannot prove all of the *Talbot* elements, but who, nevertheless, has been the victim of some other form of unconscionable police conduct.[94]

Justice Schreiber's concurring opinion noted that the majority holding provides little leeway once a governmental supply of contraband has been shown, and he questioned whether it was necessary for the court to proceed so far.[95] Not only has the proposed Code's pro-

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[89] 71 N.J. at 171–72, 364 A.2d at 15 (quoting from 1 NEW JERSEY PENAL CODE § 2C:2–12(a) (Proposed Final Draft 1971)). The Code provides, in relevant part, that entrapment occurs when an officer "induces or encourages and, as a direct result, causes another person to engage in conduct constituting such offense." *Id.*

[90] 71 N.J. at 171, 364 A.2d at 15. The concurring Justice suggested that the court consider such factors as "the nature of the crime, difficulty of apprehension, and the problem of obtaining witnesses," instead of merely focusing on whether the agent supplied the contraband. *Id.*

[91] *Id.* at 168, 364 A.2d at 13. Upon a showing of these facts, the court will not investigate the defendant's predisposition or whether the furnishing of the contraband occurred with the consent or knowledge of the police. *Id.*

[92] *Id.* at 168, 364 A.2d at 13. An additional element required is that the testimony concerning the government agent's furnishing of the drug must be uncontradicted in order to establish entrapment as a matter of law. *See* Sherman v. United States, 356 U.S. at 373; State v. Boccelli, 105 Ariz. 495, 497, 467 P.2d 740, 742 (1970) (en banc). *See also* People v. Strong, 21 Ill. 2d 320, 325–26, 175 N.E.2d 765, 767–68 (1961). Once the defendant has testified to facts which would excuse him, the government has the burden of coming forward with contrary evidence; failure to meet this burden warrants a finding for the defendant. *See* United States v. Bueno, 447 F.2d 903, 904 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973); State v. McKinney, 108 Ariz. 436, 441, 501 P.2d 378, 383 (1972).

[93] 71 N.J. at 168, 364 A.2d at 13.

[94] *See id.*

[95] *See id.* at 169–72, 364 A.2d at 13–15. Justice Schreiber relied upon an article authored by Professor Roger Park for the proposition that " '[m]echanical application of the rule' " absolving a guilty defendant when the government supplies the contraband might inhibit " 'legitimate law enforcement,' " as, for example, when large-scale drug operations are involved. *Id.* at 170, 364 A.2d at 14 (quoting from Park, *The Entrapment Controversy*, 60 MINN. L. REV. 164, 191 (1976)). However, Professor Park also acknowl-

vision concerning " 'coincidental' " police misconduct been "substantially undercu[t]," but the release of a defendant who successfully shows a governmental supply of contraband may now be constitutionally mandated even when the totality of the circumstances indicates culpability.[96] Should the proposed Code be enacted into law in its present form, the court will undoubtedly be called upon later to resolve both the inconsistencies and the unanswered questions created by this holding.

Many of the variances which exist between the proposed Code and the *Talbot* holding appear to stem from the majority's conclusion that if contraband is supplied by the police, a finding of entrapment is mandated.[97] For instance, in the "ordinary" entrapment case, *i.e.*, where furnishing of contraband is not involved, the Code calls for the complete abandonment of prediposition in favor of concentration upon police activity.[98] In contrast, *Talbot* apparently retains predisposition as a factor to be considered and balanced against the level of official involvement.[99] Thus, under *Talbot*, the prosecution is still free to introduce rebuttal evidence of predisposition when a defen-

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edged that

> [t]here will normally be no need to provide the target with contraband; a person who has been trafficking will have his own sources. Indeed, the fact that an agent found it expedient to provide contraband raises a suspicion that the target was not predisposed.

Id.

[96] 71 N.J. at 171, 364 A.2d at 15 (Schreiber, J., concurring). It may well be that the fundamental fairness basis employed by the court is an attempt to "immunize" its holding from legislative revision. *See generally* Comment, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655, 661–62 (1974). Should the court, after passage of the Code, be faced with a situation in which a defendant cannot claim entrapment "as a direct result" of police activity, but can show a supply of contraband, then at least two conceivable alternatives exist. 1 NEW JERSEY PENAL CODE § 2C:2–12(a) (Proposed Final Draft 1971). First, the statute could be declared violative of due process and unconstitutional. Second, the court, utilizing language in its own holding, could distinguish the above-mentioned situation by balancing the nature of police conduct with the predisposition of an accused:

> [A]s the part played by the State in the criminal activity increases, the importance of the factor of defendant's criminal intent decreases, until finally a point may be reached where the methods used by the State to obtain a conviction cannot be countenanced, even though a defendant's predisposition is shown.

71 N.J. at 167–68, 364 A.2d at 13.

[97] *See* 71 N.J. at 167–68, 364 A.2d at 12–13.

[98] 2 New Jersey Penal Code § 2C:2–12, Commentary, at 77 (Proposed Final Draft 1971). The legislature has recognized that by adopting the objective test of the Model Penal Code, it would "overrule" all New Jersey cases which followed the subjective approach because "[t]he MPC formulation . . . speaks only to the conduct of the police." *Id.*

[99] *See* 71 N.J. at 167–68, 364 A.2d at 12–13.

dant claims he was entrapped by police action other than the supplying of contraband.[100] Again, in the "ordinary" case, *Talbot* casts entrapment as an affirmative defense and retains the jury to decide the issue, while the Code makes the defendant bear the entire burden of proof and calls for a trial court ruling in all instances.[101]

Besides disagreement over the approach to be employed in conventional claims, the Code and *Talbot* also offer disparate rationales for the defense. The comment to the Code justified its adopted procedure as a specific method to provide a " 'full deterrent effect' " on unacceptable police practices.[102] The *Talbot* court, on the other hand, rested its decision on due process considerations which are embodied in "commonly accepted standards of decency of conduct to which government must adhere."[103] Presumably, the *Talbot* court concluded that this rationale would not be undercut by an entrap-

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[100] *Id.* at 165–67, 364 A.2d at 11–13; *accord*, State v. Dolce, 41 N.J. at 433, 197 A.2d at 191.

[101] 71 N.J. at 165, 364 A.2d at 11. As an affirmative defense, an accused claiming entrapment must bear the burden of introducing evidence to show he was entrapped, but "the State must prove beyond a reasonable doubt . . . that [the] defendant committed the crime" without excessive police inducement. *Id.*; *accord*, State v. Dolce, 41 N.J. at 432, 197 A.2d at 190–91. The Code, however, provides that

> 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. The issue of entrapment shall be tried by the Court in the absence of the jury.

1 NEW JERSEY PENAL CODE § 2C:2–12(b) (Proposed Final Draft 1971). In light of *Talbot*, entrapment remains an affirmative defense where the supply of contraband is involved, but the issue of whether the defendant was entrapped by egregious police conduct will be decided by the court. 71 N.J. at 165, 168, 364 A.2d at 11, 13.

On the relative merits of having either judge or jury decide the issue, the Brown Commission Report stated in favor of a judicial determination that

> [m]ost scholarly writing . . . favors a judicial determination of entrapment, whereas the courts hew closely to the majority view in *Sorrells* and *Sherman*, . . . which leaves the question to the jury, except in those rare instances where entrapment is established as a matter of law. It is possible that a judicial pronouncement on this subject will present the police with a more definite guide to future action, than will a jury verdict, which may or may not be directly related to the entrapment defense. After all, the entrapment defense is grounded in a serious desire to deter police misconduct. Thus, standards are necessary and the courts are most skilled in this pursuit.
>
> Concededly, entrapment will raise a host of factual issues, but the courts always resolve such matters when their jurisdiction is challenged. And the court is apt to decide factual issues unencumbered by the prejudice that will inevitably arise from proof of the defendant's predisposition.

BROWN COMMISSION REPORT, *supra* note 24, at 325 (footnotes omitted) (emphasis in original).

[102] 2 NEW JERSEY PENAL CODE § 2C:2–12, Commentary, at 77 (Proposed Final Draft 1971).

[103] 71 N.J. at 168, 364 A.2d at 13.

ment effected by methods other than the supply of contraband.

It is unclear why the New Jersey supreme court dichotomized the state's entrapment law providing, in effect, different sets of rules dependent upon the nature of the police action.[104] Perhaps this stems from a feeling that supplying a defendant with the means to commit the crime is an especially "egregious" activity.[105] The absence of logic in so restricting the defense becomes apparent, however, when one considers the defendant trapped not by a specific act, but by a general pattern of flagrant police action. Although *Talbot* did not address this question, it should, despite its concentration on the supply of contraband, provide support for the defense of one entrapped by excessive police conduct.[106] If the court fully intended its statement about "fundamental fairness," then the eventual extension of *Talbot* lies in its own proclaimed rationale.[107]

Notwithstanding the confusion resulting from judicial and proposed legislative action, the New Jersey law on entrapment can be summarized briefly. A judge-determined finding of entrapment should be made when a supplying of contraband by law enforcement officers is uncontrovertedly shown.[108] When a factual question exists as to whether the contraband was supplied by the government, that issue apparently should be presented for jury determination.[109] How-

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[104] Most other state courts which have adopted the objective approach have made it applicable in all instances. In State v. Mullen, 216 N.W.2d 375 (Iowa 1974), for example, the court stated:

> We believe and hold this is the standard which should be adopted in Iowa. It shall apply to the case *sub judice*, to all cases still appealable or on appeal in which the issue has been properly raised below, and of course to all cases subsequently tried. . . .

Id. at 382; *accord*, People v. Turner, 390 Mich. 7, 22, 210 N.W.2d 336, 341 (1973).

[105] *See* 71 N.J. at 168, 364 A.2d at 13; Park, *supra* note 95, at 190 & n.86, 191. The courts have expressed particular outrage at this form of activity. *See, e.g.*, People v. Strong, 21 Ill. 2d 320, 172 N.E.2d 765 (1961), where the court stated:

> [W]e cannot condone the action of one acting for the government in supplying the very narcotics that gave rise to the alleged offense . . . . This is more than mere inducement. In reality the government is supplying the *sine qua non* of the offense.

Id. at 325, 172 N.E.2d at 768 (emphasis in original).

[106] *See* 71 N.J. at 167–68, 364 A.2d at 13.

[107] *Id.*

[108] *Id.*

[109] *See id.*; 31 L. ARNOLD, NEW JERSEY PRACTICE § 1023, at 771 & n.31 (1976). The Talbot holding has been incorporated into the model jury charges presently in use, along with the comment that

> [t]his charge may also be adapted to situations where the defense alleges that burglar tools, counterfeit dies or other materials necessary to the commission of the crime in question were in fact furnished by the law enforcement officials

ever, in a case not involving the furnishing of contraband, a controverted claim of entrapment to be resolved by the jury.[110] The trial judge in this situation instructs the jury that an initial showing of entrapment from the evidence set forth from either side places "the burden . . . upon the State to prove beyond a resonable doubt that the defense of entrapment is untrue."[111] As *Talbot* indicates, predisposition remains a factor which the state can use to meet its burden.[112]

The *Talbot* decision represents an attempt by the New Jersey supreme court to inhibit the police practice of furthering the commission of an offense by supplying the required means. Moreover, the state legislature has been advised plainly enough that the state supreme court will be the final arbiter of the law on entrapment. Should the legislature choose to disregard the thoughts expressed by the justices, then "due process" will await the arrival of any contrary statute in the state courts.

Olivia Belfatto

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and agent or informant.

NEW JERSEY SUPREME COURT COMMITTEE ON MODEL JURY CHARGES, CRIMINAL, NEW JERSEY MODEL JURY CHARGE, CRIMINAL § 3.141, at 3 (approved Feb. 1, 1977) [hereinafter cited as JURY CHARGE] (entrapment charge).

[110] 71 N.J. at 165, 364 A.2d at 11. *See* JURY CHARGE, *supra* note 107, § 3.141, at 3.

[111] JURY CHARGE, *supra* note 107, § 3.141, at 2.

[112] 71 N.J. at 167, 364 A.2d at 12. *See* JURY CHARGE, *supra* note 107, § 3.141, at 1.