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California Entrapment Law— A Need For Statutory Clarification

The uncertainty which envelops the defense of entrapment runs the gamut from its theoretical basis to its practical application, and often strands both bench and bar on the shoals of confusion. The United States Supreme Court recently confirmed its traditional view that the predisposition of the defendant controls the application of the defense. Four dissenting members of the Court, however, advocated the objective, police conduct approach. California courts, while purportedly adopting this minority view, have reached a "compromise" position incorporating elements of both theories. This compromise stance has led to theoretical, procedural, and evidentiary difficulties. It is this compromise and its attendant difficulties which serve as the focal point of this comment. Following an analysis of the appropriate federal and California cases, the author calls for, and offers, a statutory provision which would embody the California approach and render the entrapment defense more certain.

On April 24, 1973, the United States Supreme Court, in *United States v. Russell*,¹ took the opportunity presented by the appeal of a narcotics offense prosecution to reiterate the long-standing federal rationale for the entrapment defense. The decision marks the third time in 41 years that a slim five-justice majority of the Court has held that the predisposition of the defendant, rather than the nature of the government's inducement, is the key to the entrapment defense. The *Russell* decision reversed a Ninth Circuit Court of Appeals finding that the defendant was entrapped as a matter of law when an undercover narcotics agent supplied the defendant, who was already engaged in the illicit manufacture of methamphetamines, commonly

1. 411 U.S. 423 (1973).

known as "speed," with an essential ingredient which was legally available but difficult to obtain.²

The *Russell* pronouncement is timely in that it comes in the wake of several lower federal court decisions which had considerably broadened the availability of the defense.³ In addition, the decision comes at a time when the number of prosecutions for drug-related offenses, which presently account for the vast majority of entrapment situations, continues to grow. Use of the defense has kept pace with the increased number of prosecutions.⁴

The defense of entrapment has never been codified at either the federal level⁵ or in the vast majority of the states.⁶ It has been created and developed solely by the courts, and the case-by-case evolution of standards for entrapment has understandably caused its application to be surrounded with uncertainty, both at the federal and state level.

This comment will explore the rationale for the entrapment defense in California and demonstrate the uncertainties, as manifested in California cases, pertaining to its use. Within the last fifteen years several major decisions in this state have failed to reduce the amount of confusion which attends assertion of entrapment.⁷ A premise of this comment is that any attempt to categorize California's formulation of the defense into one or the other of the contrasting approaches that have traditionally divided the United States Supreme Court would be misguided. An analysis of California cases will demonstrate that the entrapment defense in this state has evolved as a hybrid, or "compromise," between the two federal formulations. This rather unique

2. The court of appeals found that the agent had furnished "an intolerable degree of governmental participation in the criminal enterprise." *United States v. Russell*, 459 F.2d 671, 673 (9th Cir. 1972).

3. See, for example, *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970).

4. Interview with Judge Robert Puglia, Sacramento County Superior Court, Sacramento, Calif., Dec. 13, 1973 [hereinafter cited as *Puglia*].

5. Legislation before Congress in 1973 contemplated an express statutory formulation of the entrapment defense. S. 1, §1-3B2, 93d Cong., 1st Sess. (1973).

6. To date only four states have codified the defense of entrapment. ILL. ANN. STAT. ch. 38, §7-12 (1964); KAN. STAT. ANN. §21-3210 (Supp. 1971); N.Y. PENAL LAW §40.05 (McKinney Supp. 1970); WIS. STAT. §339.44 (1958). A statutory definition of entrapment is contained in legislation before the California Legislature in 1974. S.B. 39, 1973-74 Regular Session. Patterned after definitions found in many California entrapment cases, the proposed codification fails to identify the hybrid status of the entrapment defense as it has evolved in California decisions and which will be discussed within this comment. In its present form, the definition does little more than codify the present confusion which surrounds entrapment law in the State.

7. It has been suggested that sometimes a defendant's best approach towards use of the entrapment defense is to "entrap" the court over an uncertainty in regards to the law surrounding its application. *Puglia*.

position is workable and embodies the most appealing aspects of both federal formulations of the defense. Unfortunately, California's stance remains unarticulated and, as reflected in the cases, largely misunderstood. This points to the need for a statutory formulation of the defense which would embody the compromise approach as it has evolved in California cases.

The same factors which serve to make *Russell* a timely decision on the federal level apply equally to an exploration of California's approach to the entrapment defense and to the need for a statutory recognition of such. An initial analysis of the *Russell* decision will reveal the contrasting approaches to the issue of entrapment at the federal level which in turn serve as a focal point for disagreement in California.

THE FEDERAL APPROACH

A. Historical Development of the Defense

Both *Russell* and the two important cases that preceded it, *Sorrells v. United States*⁸ and *Sherman v. United States*,⁹ sharply divided the Supreme Court over the definition of the entrapment defense. At issue in all three cases was the proper basis, scope, and focus for the defense. These questions also constitute the root of uncertainties which adhere to application of the defense in California. Justice Rehnquist, writing for the majority in *Russell*, reaffirmed the stance the Court had adopted when it first recognized the defense of entrapment in *Sorrells*. The majority in *Sorrells* defined entrapment as

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.¹⁰

The majority formulation of the defense thus was designed to prohibit law enforcement officers from instigating a criminal act by "persons otherwise innocent in order to lure them to its commission and to punish them."¹¹ An inducement by law enforcement officers established the defense only if the defendant was not predisposed to commit the crime involved, and the determination of predisposition was delegated to the jury as a question of fact.

The majority rationale appears to have been predicated upon "an

8. 287 U.S. 435 (1932).

9. 356 U.S. 369 (1958).

10. 287 U.S. at 454.

11. *Id.* at 448.

unexpressed intent of Congress to exclude from its criminal statutes the prosecution and conviction of persons 'otherwise innocent,' who have been lured to the commission of the prohibited act through the Government's instigation."¹² This "subjective approach" therefore focuses, through an "origin of intent test," upon the conduct and propensities of the particular defendant—if the defendant is found to have been predisposed to commit the crime, he cannot avail himself of the defense regardless of the nature of the government's conduct. The *Russell* decision may have tempered the Court's apparent indifference to the nature of the police conduct towards a predisposed defendant by leaving open the possibility that sufficiently "outrageous" government behavior could immunize a defendant from prosecution regardless of his predisposition.¹³ In such a case, however, a defendant apparently would not assert an entrapment defense, but rather, argue that due process safeguards forbid such conduct.¹⁴

The concurring justices in *Sorrells* and *Sherman* agreed with the findings of entrapment, but based their rationale on grounds of public policy.¹⁵ The "police conduct" view of the defense taken by these justices was reflected in their articulation of the purposes for the defense. They rejected the majority rationale that the defense was grounded on an unexpressed intent of Congress to exclude from punishment "otherwise innocent" defendants, believing instead that the defense was designed to deter police conduct which fell below standards "to which common feelings respond, for the proper use of governmental power."¹⁶

The focus under the so-called "objective test" is thus upon the nature of the police conduct and not upon the particular propensities and predisposition of the defendant. The determination to be made under this view is whether, regardless of the defendant's predisposition, the government has acted in a manner likely to instigate a criminal offense. This determination is a question of law,¹⁷ to be ascertained by the trial court and not the jury. The purpose, focus, and scope of the entrapment defense can thus vary rather widely in certain instances depending on which formulation is adopted.

12. *United States v. Russell*, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting, in discussing the majority rationale to which he objected).

13. *Id.* at 431-32.

14. *See, e.g., Rochin v. California*, 342 U.S. 165 (1952).

15. "[C]ertain police conduct to ensnare . . . [a defendant] into further crime is not to be tolerated by an advanced society." *Sherman v. United States*, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring).

16. *Id.* at 382.

17. *Sorrells v. United States*, 287 U.S. 435, 457 (1932) (Roberts, J., concurring).

B. *The Russell Decision*

The majority in *Russell* specifically rejected an argument that the the defense of entrapment should be of constitutional dimensions. Defendant Russell had argued that the undercover agent's degree of involvement in the manufacture of methamphetamines, through the furnishing of a legally obtainable but scarce ingredient, was so excessive as to violate fundamental principles of due process, and that the same factors that led the Court to apply the exclusionary rule to illegal searches and seizures¹⁸ should be considered in regard to entrapment. Justice Rehnquist found the analogy imperfect for two reasons. First, dismissal of the entire prosecution would go much further than the exclusionary rule, which bars only evidence obtained illegally.¹⁹ Secondly, unlike the decisions in *Mapp v. Ohio*²⁰ and *Miranda v. Arizona*,²¹ the agent's conduct in *Russell* violated "no independent constitutional right of the respondent."²²

As an alternative to his constitutional argument, defendant Russell's second contention was that the Court should broaden the non-constitutional defense of entrapment. In disposing of this contention, Justice Rehnquist reaffirmed the continuing validity of the majority rationale as expressed in *Sorrells* and *Sherman*. He cited the need for both infiltration of drug rings and limited participation in unlawful manufacturing enterprises in view of the fact that "[t]he illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise."²³ Although acknowledging that that several decisions of the United States district courts and courts of appeals had gone beyond the majority rationale in *Sorrells* and *Sherman* by focusing on "over-zealous law enforcement,"²⁴ the majority in *Russell* cited precedent as establishing entrapment as a relatively limited defense which is rooted in the implied notion "that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense, but was induced to commit them by the government."²⁵ Thus it is only when a government agent or officer goes beyond the mere furnishing of an opportunity for the commission of the crime, and actually implants the criminal intent in the mind of the defendant, that the defense will lie.

18. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

19. 411 U.S. at 430.

20. 367 U.S. 643 (1961).

21. 384 U.S. 436 (1966).

22. 411 U.S. at 430.

23. *Id.* at 432.

24. See, for example, *Greene v. United States*, 454 F.2d 783, 789 (9th Cir. 1971).

25. 411 U.S. at 435.

The four dissenting justices²⁶ aligned themselves with the police conduct approach espoused by the concurring opinions in *Sorrells* and *Sherman*. Justice Stewart noted that both the Proposed New Federal Criminal Code²⁷ and the Model Penal Code²⁸ had adopted this objective approach. Although not cited by the dissenting justices, legislation before Congress in 1973, which would give the entrapment defense a statutory formulation, also appears to embody the police conduct approach.²⁹

CALIFORNIA'S COMPROMISE APPROACH

California's approach to the nature, purpose, and scope of the entrapment defense might appropriately be called a compromise between the contrasting formulations that have divided the United States Supreme Court in the three leading federal cases previously discussed. This middle ground approach has never been precisely articulated, however, and the resulting uncertainty has manifested itself in various ways.³⁰

Before 1959, the California Supreme Court adhered to the predisposition approach as it was articulated in the majority opinions in *Sorrells* and *Sherman*, and placed primary emphasis upon a determination of whether the defendant harbored a preexisting criminal intent when he was solicited by a police agent to commit a crime.³¹ The court also adopted the rationale that an entrapped defendant was *innocent* of the crime alleged, since the criminal intent was presumed to be lacking.³²

In 1959, the court rejected this view in *People v. Benford*,³³ declaring that entrapment is a defense not because the accused is innocent, but because of a judicial policy discouraging police officers from fostering crime.³⁴ Entrapment was said to rest upon grounds of "sound

26. Justices Douglas, Stewart, Brennan, and Marshall.

27. NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, PROPOSED NEW FEDERAL CRIMINAL CODE §702 (Final Report, 1971).

28. MODEL PENAL CODE §2.13 (Proposed Official Draft, 1962).

29. S. 1, §1-3B2, 93d Cong., 1st Sess. (1973). The terminology in the federal legislation is closely analogous to that used in the Proposed Official Draft of the Model Penal Code, except for the conspicuous absence in the federal legislation of committal of the determination of entrapment to the trial court, rather than the jury.

30. See text accompanying notes 51-92 *infra*.

31. See, for example, *People v. Malotte*, 46 Cal. 2d 59, 292 P.2d 517 (1956); *People v. Braddock*, 41 Cal. 2d 794, 264 P.2d 521 (1953).

32. *People v. Jackson*, 42 Cal. 2d 540, 268 P.2d 6 (1954).

33. 53 Cal. 2d 1, 345 P.2d 928 (1959).

34. "Entrapment is a defense not because the defendant is innocent but because . . . 'it is a less evil that some criminals should escape than that the Government should play an ignoble part.'" *Id.* at 9, 345 P.2d at 934, citing from *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring).

public policy,"³⁵ and the court adopted the reasoning of the minority justices in *Sorrells* and *Sherman*. The court acknowledged that the precise nature of this policy had not been spelled out in any California entrapment case, but stated that recognition of the defense was prompted by reasons similar to those that caused the court to adopt an exclusionary rule as to violations of constitutional guarantees.³⁶ However, the decision also acknowledged that the tests and definitions of entrapment actually utilized by the California courts reflected the federal origin of intent approach, with availability of the defense predicated upon a lack of predisposition on the part of the defendant, as determined by the finder of fact.

Uncertainty as to the proper basis and scope for the defense in California was further exhibited in the 1970 case of *People v. Moran*,³⁷ which quoted the *Benford* rationale approvingly but also realigned California with the predisposition test set forth by the majority opinions of *Sorrells* and *Sherman*. In *Moran*, predisposition of the defendant, or lack thereof, was said to be the controlling element as to availability of the defense.³⁸ The court, adhering to the police conduct rationale, cited *Benford's* premise that the entrapment defense was created as a control on illegal police conduct yet left the determination of applicability of the defense to the jury, which used the origin of intent test as advocated by the federal majority approach. The *Moran* case typifies California's present compromise approach to the entrapment defense. Although predicated upon a deterrence objective, the defense is successful only when the defendant convinces the finder of fact that the criminal intent originated in the mind of the police agent. The internal consistency of this approach will be explored below.

This rather unique stance assumed by the majority in *Moran* drew a strong dissent from Chief Justice Traynor, who favored the police conduct rationale of *Benford* and felt that theoretical consistency demanded that the determination of impermissible police conduct be made by the trial court.³⁹ He cited what he believed to be an inconsistency in application of the defense arising out of the fact that cases following *Benford* had repeatedly used the origin of intent test and committed the entrapment issue to the jury.⁴⁰ Traynor's dissent expressed concern that California had "departed from the rationale of

35. 53 Cal. 2d at 8-9, 345 P.2d at 933.

36. *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

37. 1 Cal. 3d 755, 463 P.2d 763, 83 Cal. Rptr. 411 (1970).

38. *Id.* at 760, 463 P.2d at 765, 83 Cal. Rptr. at 413.

39. *Id.* at 763, 463 P.2d at 767, 83 Cal. Rptr. at 415.

40. See, for example, *People v. Tambini*, 275 Cal. App. 2d 757, 80 Cal. Rptr. 179 (1969); *People v. Hawkins*, 210 Cal. App. 2d 669, 27 Cal. Rptr. 144 (1962).

the *Benford* case and seriously undermined the deterrent effect of the entrapment defense on impermissible police conduct."⁴¹ The dissent also noted that post-*Benford* cases, adhering to the rule that the defense should be determined by the jury, had not discussed the impact of the *Benford* case on that rule.

Despite Justice Traynor's objections, the California Supreme Court has continued to apply the rule that the availability of the entrapment defense depends upon whether the intent to commit the crime originated in the mind of the defendant or in the mind of the inducing police agent.⁴² However, the soundness of this approach has not been left unquestioned.

The only California entrapment case recent enough to analyze the *Russell* opinion is the July 1973 decision of *People v. Pijal*.⁴³ In *Pijal*, the court, citing Justice Traynor's *Moran* dissent, observed that "[s]trong and persuasive arguments have been made that since the defense of entrapment is based on policy considerations rather than on the issue of guilt or innocence, its determination should be made by the court."⁴⁴ The decision agreed with the *Moran* dissent that such should be the rule in California and intimated that *Russell* had been decided contrary to the soundness of this argument.⁴⁵ Nevertheless, the court in *Pijal* acknowledged that in California, despite *Benford's* adoption of the police conduct rationale, the issue of entrapment has continued to be left to the trier of fact.⁴⁶

A 1973 California Supreme Court case, *Patty v. Board of Medical Examiners*,⁴⁷ reaffirmed *Benford's* police conduct rationale and cited approvingly a federal district court's characterization of entrapment as "an affront to the basic concepts of justice."⁴⁸ Again, however, an origin of intent test for entrapment was applied as in *Moran*.⁴⁹ Neither the *Patty* case nor a second recent California Supreme Court decision⁵⁰ discusses the propriety or consistency of delegating the deter-

41. 1 Cal. 3d at 764-65, 463 P.2d at 768, 83 Cal. Rptr. at 416.

42. Recent cases include *People v. Uhlemann*, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973), and *Patty v. Board of Medical Examiners*, 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973).

43. 33 Cal. App. 3d 682, 109 Cal. Rptr. 230 (1973).

44. *Id.* at 694, 109 Cal. Rptr. at 237.

45. *Id.* at 693, 109 Cal. Rptr. at 236.

46. The *Pijal* decision described this development in California case law as "ironic." *Id.* at 694, 109 Cal. Rptr. at 237. Arguably, however, both Justice Traynor's *Moran* dissent and the *Pijal* decision over-relied on *Benford* for the proposition that the determination of entrapment was to be a function of the court, because nowhere in *Benford* does the court describe this determination as a question of law.

47. 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973).

48. *United States v. Chisum*, 312 F. Supp. 1307, 1312 (C.D. Cal. 1970).

49. The *Patty* decision contributed to California law on entrapment by extending availability of the defense to administrative proceedings.

50. *People v. Uhlemann*, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973).

mination of entrapment to the finder of fact when the rationale for the defense, as expressed in *Benford* and reaffirmed in *Moran* and *Patty*, is said to rest upon grounds of public policy dictating against impermissible police conduct.

UNCERTAINTIES OVER ASSERTION OF THE DEFENSE

Uncertainties pertaining to assertion of entrapment arise from the fact that in California the defense is based on a police conduct rationale while its practical application resembles the *Russell* origin of intent test.

A. *The Sua Sponte Issue*

As the *Pijal* case demonstrates, California defendants have argued on appeal that because the courts continue to expound the police conduct rationale, the duty should rest with the trial court to root out the effects of illegal police conduct upon its own initiative if necessary. The court in *Pijal* acknowledged that if California followed in practice what it had espoused in theory in *Benford*, then the obligation would "clearly rest upon the trial judge to sua sponte determine whether entrapment did or did not occur."⁵¹ But noting that the cases subsequent to *Benford* had "ironically" strayed from this theory, the court concluded that a California trial judge is under no duty to instruct the jury sua sponte on the issue of entrapment because entrapment is an affirmative defense and its assertion is purely a matter of tactics and strategy.⁵² The *Pijal* decision was contrary to the 1972 holding in *People v. Grantham*,⁵³ which was based upon dictum in *People v. Perez*.⁵⁴

B. *Allocation of the Burden of Proof*

In a number of cases defendants have raised the issue as to the quantum of evidence necessary to prove entrapment. Although several older California decisions appeared to place the burden on the defendant to prove entrapment by a preponderance of the evidence,⁵⁵

51. 33 Cal. App. 3d 682, 695, 109 Cal. Rptr. 230, 237 (1973).

52. It does not appear, however, that trial judges necessarily have an aversion to giving such an instruction sua sponte, and some have expressed no reluctance to raise the entrapment issue on their own initiative, if necessary, when the facts merit. *Puglia*.

53. 26 Cal. App. 3d 661, 103 Cal. Rptr. 262 (1972).

54. "When the evidence does show such conduct, the court has a duty to root its effects out of the trial upon its own initiative if necessary." 62 Cal. 2d 769, 775, 401 P.2d 934, 937, 44 Cal. Rptr. 326, 329 (1965).

55. See, for example, *People v. D'Agostino*, 190 Cal. App. 2d 447, 11 Cal. Rptr. 847 (1961); *People v. Ballard*, 145 Cal. App. 2d 94, 302 P.2d 89 (1956).

it was not until 1966 in *People v. Valverde*⁵⁶ that such was conclusively established. The issue, however, surfaced again in *Moran* where the argument was made that California Penal Code Section 1096, which requires the prosecution to establish the defendant's guilt beyond a reasonable doubt, is applicable to entrapment. This contention that the prosecution should be required to prove lack of entrapment beyond a reasonable doubt was soundly rejected by the court which reasoned, citing *Benford's* police conduct rationale, that the issue of entrapment is not subject to Penal Code Section 1096 because the defense in California is not based on the defendant's innocence.⁵⁷

Despite *Moran's* apparent resolution of this issue, recent cases indicate that the practical significance of the police conduct rationale, as articulated in *Benford* and reaffirmed in *Moran* and *Patty*, has not been fully realized by California defense attorneys. In *People v. Farley*,⁵⁸ a defendant unsuccessfully contended that the trial record contained sufficient evidence of entrapment to place the burden of proving its absence upon the prosecution. As recently as 1972, in *People v. Perez*,⁵⁹ a defendant made an unsuccessful argument similar to that pursued in *Moran* to the effect that California's jury instructions on entrapment⁶⁰ were in conflict with Penal Code Section 1096.⁶¹

C. Proof of Predisposition

Under a true police conduct approach, as delineated in the concurring opinions in *Sorrells*, *Sherman*, and the dissent in *Russell*, entrapment would be determined solely by examination of the police conduct, irrespective of a subjective consideration of the predisposition of the particular defendant.⁶² Even though *Benford* adopted this police conduct reasoning in theory, the decision also clearly acknow-

56. 246 Cal. App. 2d 318, 54 Cal. Rptr. 528 (1966).

57. See text accompanying notes 34-35 *supra*.

58. 19 Cal. App. 3d 215, 96 Cal. Rptr. 478 (1971).

59. 27 Cal. App. 3d 352, 103 Cal. Rptr. 669 (1972).

60. The defendant in *Perez* was referring to CALIFORNIA JURY INSTRUCTIONS—CRIMINAL [hereinafter cited as CALJIC] No. 4.63 (1970) which reads: "The defendant has the burden of proving by a preponderance of the evidence that he was entrapped into commission of the crime." California's current jury instructions on entrapment are contained in CALJIC Nos. 4.60-4.63.

61. Federal case law, at least in the Ninth Circuit, appears to take a contrary view on this issue, in that at least one case has held that it is the prosecutor's burden to establish guilt beyond a reasonable doubt and this burden must be accompanied by proving that the defendant was not wrongfully entrapped. *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966).

62. See *Sherman v. United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring).

ledged that the tests for entrapment used by California courts have placed "at least as much emphasis on the susceptibility of the defendant as on the propriety of the methods of the police."⁶³ Hence, an issue in several California cases has been the admissibility of evidence of prior criminal offenses to prove that the defendant harbored a preexisting criminal intent.

Federal courts allow the prosecution to prove a defendant's willingness to commit the crime by evidence that he has previously committed similar crimes or has a criminal reputation.⁶⁴ In California evidence of past criminal involvement to prove a preexisting criminal intent has traditionally been inadmissible.⁶⁵ However, a 1974 court of appeal decision, *People v. Foster*,⁶⁶ casts doubt upon this rule by holding that evidence of a prior conviction is, in the discretion of the trial court, properly admissible on the issue of entrapment. It is unclear how great an impact the *Foster* ruling will have. The California Supreme Court in *Benford* firmly stated that evidence of prior criminal conduct or reputation was inadmissible on the issue of entrapment. The court in *Foster* based its holding on a more recent supreme court case, *People v. Schader*.⁶⁷ In *Schader*, which dealt generally with the admissibility of evidence of prior offenses in a criminal prosecution, the court rejected the "mechanically automatic rules" which had evolved decisionally, and held that the use of such evidence depended "upon the trial court's consideration of the unique facts and issues of each case." The court adopted and emphasized language of an earlier authority:

When [the other offense's] probative value, addressed to the crime charged, is great to prove a vital issue as compared with the lesser likelihood that a jury will be led astray and convict an innocent man because of his bad record, the evidence should be admitted.⁶⁸

The logic of the *Foster* case is persuasive and may indicate the direction the California Supreme Court would take if faced with the specific question. Regardless of the eventual impact of the *Foster* holding, as a practical matter evidence of prior criminal offenses often slips into the record as evidence admissible to show the defendant's

63. 53 Cal. 2d 1, 9-10, 345 P.2d 928, 934 (1959).

64. See, for example, *Sherman v. United States*, 356 U.S. 369, 375 (1958).

65. *People v. Benford*, 53 Cal. 2d 1, 11, 345 P.2d 928, 935 (1959), is the authority most often cited in California cases for this rule. For a general discussion of the policy behind exclusion of character evidence, see C. McCORMICK, *LAW OF EVIDENCE* §186 *et seq.* (2d ed. 1972).

66. 36 Cal. App. 3d 594, 111 Cal. Rptr. 666 (1974).

67. 71 Cal. 2d 761, 457 P.2d 841, 80 Cal. Rptr. 1 (1969).

68. *Id.* at 774, 457 P.2d at 848, 80 Cal. Rptr. at 8, citing *People v. Sheets*, 251 Cal. App. 2d 759, 764-65, 59 Cal. Rptr. 777, 781 (1967).

criminal scheme and method,⁶⁹ his knowledge and criminal intent,⁷⁰ and for impeachment purposes.⁷¹

Although the admissibility of evidence of prior criminal offenses is uncertain, other types of evidence are admissible to show a general willingness on a defendant's part to commit a crime. Such evidence includes the readiness with which a defendant, following solicitation by a police informant or agent, commits the crime,⁷² the defendant's own testimony or extrajudicial admissions,⁷³ and the fact that the crime committed is one of a kind habitually committed.⁷⁴ Regarding the readiness of a defendant to commit a crime, however, one California decision has held that even "hair trigger susceptibility" to an agent's suggestion, "standing alone, does not negative entrapment as a matter of law."⁷⁵

D. Assertion of Inconsistent Defenses

Since California courts, on the authority of *Benford* and cases approving its rationale, reject the federal majority theory that the defense of entrapment goes to the guilt or innocence of the defendant, the issue has arisen as to whether a defendant may deny commission of the crime yet also allege that his actions were induced by law enforcement officers or their agents. Prior to 1965 the issue was unsettled. In *People v. West*⁷⁶ the presentation of inconsistent defenses was sanctioned, but later cases were contrary.⁷⁷ Finally, in *People v. Perez*, the California Supreme Court held that a defendant need not admit guilt to establish the defense.⁷⁸ The court's reasoning was that "a rule designed to deter such unlawful [police] conduct

69. See, for example, *People v. Schubin*, 166 Cal. App. 2d 267, 332 P.2d 737 (1958).

70. *People v. Pijal*, 33 Cal. App. 3d 682, 690-91, 109 Cal. Rptr. 230, 235 (1973).

71. *Id.* The point has been made that evidence of prior criminal conduct may indirectly be admitted in another way. A defendant necessarily must take the witness stand in order to give his version of the facts which he claims indicates evidence of entrapment. In doing so, if he should claim he was "never" criminally predisposed, evidence of prior criminal conduct may work its way into the record simply to clarify what the defendant meant by "never." Interview with Harold Truett, Marin County Public Defender, San Rafael, Calif., Dec. 28, 1973.

72. See, for example, *People v. Ramos*, 146 Cal. App. 2d 110, 303 P.2d 783 (1956); *People v. Caudillo*, 138 Cal. App. 2d 183, 291 P.2d 191 (1955).

73. See, for example, *People v. Raffington*, 98 Cal. App. 2d 455, 220 P.2d 967 (1950).

74. See, for example, *People v. Schwartz*, 109 Cal. App. 2d 450, 240 P.2d 1024 (1952).

75. *People v. Goree*, 240 Cal. App. 2d 304, 310-11, 49 Cal. Rptr. 393, 396 (1966).

76. 139 Cal. App. 2d Supp. 923, 293 P.2d 166 (1956).

77. See, for example, *People v. Herrera*, 232 Cal. App. 2d 558, 43 Cal. Rptr. 12 (1965); *People v. Benson*, 206 Cal. App. 2d 519, 23 Cal. Rptr. 908 (1962).

78. 62 Cal. 2d 769, 775, 401 P.2d 934, 937, 44 Cal. Rptr. 326, 329 (1965).

cannot properly be restricted by compelling a defendant to incriminate himself as a condition to invoking the rule.⁷⁹ The federal approach to the issue of pleading inconsistent defenses generally appears to be contrary to that of California.⁸⁰

The *Pijal* case discussed a practical problem in California which arises when the contradictory defenses of alibi and entrapment are pursued. A defendant electing to assert an alibi defense is necessarily prevented from making a strong evidentiary showing of entrapment.⁸¹ In such cases, since *Pijal* rejects the idea that a trial court faces a sua sponte obligation to instruct the jury on the question of entrapment, the defense will most likely fail.

E. Application of the Defense to Acts of Inducement by Private Citizens

A final issue which may not be entirely resolved at the present time, and which appears to have its source in the uncertain foundations for the entrapment defense in California law, is whether the defense applies to acts of inducement on the part of private citizens. In a 1970 decision, *People v. Gregg*, the Third District Court of Appeal considered this issue and held that any rule extending the defense of entrapment to a defendant induced to commit a crime by one not connected with law enforcement officers would be unsupported, contrary to case law, and isolated from the policy underlying the entrapment defense.⁸² The appeal was prompted by an endorsement in *Moran* of a trial court's jury instruction to the effect that if the crime was suggested by another person, whether or not a law enforcement officer, the entrapment defense could be applicable.⁸³ The *Moran* court's authority for approval was two jury instructions on entrapment published in *California Jury Instructions—Criminal* (CALJIC).⁸⁴ The *Gregg* decision classified the *Moran* endorsement as mere dictum⁸⁵ to which *stare decisis* principles need not apply. This

79. *Id.* at 775, 401 P.2d at 938, 44 Cal. Rptr. at 330.

80. Most circuits that have considered the issue have denied the right of a defendant to submit the inconsistent defenses of denial and entrapment. See, for example, *United States v. Shameia*, 464 F.2d 629 (6th Cir. 1972). But see *Crisp v. United States*, 262 F.2d 68 (4th Cir. 1954) (dictum).

81. 33 Cal. App. 3d 682, 696, 109 Cal. Rptr. 230, 238 (1973).

82. 5 Cal. App. 3d 502, 508, 85 Cal. Rptr. 273, 277 (1970).

83. 1 Cal. 3d 755, 761, 463 P.2d 763, 766, 83 Cal. Rptr. 411, 414 (1970).

84. CALJIC No. 851 reads: "The law does not tolerate one person, particularly a law enforcement officer, generating in the mind of another person who is innocent of any criminal purpose, the original intent to commit a crime . . ." The revision of CALJIC No. 851 into CALJIC No. 4.60, currently in use, does not appear to have remedied this problem. CALJIC No. 4.60 reads: "A person is not guilty of crime when he commits an act or engages in conduct, otherwise criminal, when the idea to commit the crime . . . originated in the mind of another . . ." (emphasis added).

85. 5 Cal. App. 3d at 506, 85 Cal. Rptr. at 276.

particular aspect of the CALJIC entrapment instructions, criticized by writers as based upon illusory authority,⁸⁶ was ignored in a 1965 California Supreme Court decision⁸⁷ that sustained a refusal to instruct on entrapment where there was no evidence that the "entraper" was a person working in cooperation with the police at the time of the inducement. This result and the approach taken in *Gregg* appear to be consistent with federal case law.⁸⁸

Because California's rationale for the entrapment defense is based on grounds of public policy in deterring impermissible police conduct, the *Gregg* decision would appear to be the only logical one regarding the issue of whether private citizens can entrap a defendant. On the other hand, defendants who misinterpret California's use of the origin of intent test as being consistent with the majority rationale of *Sorrells*, *Sherman*, and *Russell*, might justifiably question "the anomalous difference between the treatment of a defendant who is solicited by a private individual and one who is entrapped by a government agent."⁸⁹

A corollary issue is the determination of what kinds of persons are to be classified as "police agents" for purposes of applying the entrapment defense. There is very little case law dealing with this issue,⁹⁰ but a 1924 California decision⁹¹ constitutes authority for treating private detectives as police agents for purposes of the defense. Another California case has held that anyone who acts with official encouragement or assistance should be treated as a government agent.⁹²

CONSIDERATIONS IN FORMULATING AN APPROPRIATE STATUTORY DEFINITION

A. *A Preliminary Issue*

As suggested initially, a statutory formulation of the entrapment defense would be particularly helpful in resolving many of the uncertainties that continue to surround application of the defense in California courts. However, a statutory embodiment would be helpful only insofar as it recognizes the practical courtroom status of the de-

86. See Sinetar, *A Belated Look at CALJIC*, 43 CAL. S.B.J. 546, 547-49 (1968).

87. *People v. Perez*, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965).

88. See, e.g., *United States v. DeAlesandro*, 361 F.2d 694 (2d Cir. 1966); *United States v. Comi*, 336 F.2d 856 (4th Cir. 1964).

89. *United States v. Russell*, 411 U.S. 423, 433 (1973). Justice Rehnquist raised this issue in his majority opinion, but made no attempt to resolve it.

90. For a discussion of this issue see Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1109 (1951).

91. *In re Moore*, 70 Cal. App. 483, 233 P. 805 (1924).

92. *People v. Makovsky*, 3 Cal. 2d 366, 44 P.2d 536 (1934).

fense and the legal justification for its use, as these have evolved in California decisions. Thus an initial issue confronting any move toward a statutory definition of entrapment is whether the present California rule allowing the jury to make the determination on the question of entrapment is consistent with the underlying rationale for the defense, as articulated in *Benford* and reaffirmed in recent cases.

If California were to wholly adopt the police conduct approach advocated by former Chief Justice Traynor and set forth in the concurring opinions of *Sorrells* and *Sherman* and the dissent in *Russell*, consistency in legal theory would seem to compel that the determination of illegal police conduct be left to the trial court. On the other hand, if the constant utilization in California courts of the jury-determined origin of intent test were to be interpreted as reflecting verbatim the federal formulation of *Russell*, then the police conduct rationale underlying California's use of the defense would have to be disputed. The preceding analysis of California cases indicates, however, that California has not fully adopted either of the two contrasting federal formulations of the entrapment defense. Thus the problem is not that of choosing between the competing approaches to the defense which have traditionally divided the United States Supreme Court. Rather, the question is whether California's compromise stance, which combines the jury-determined origin of intent test with an underlying police conduct rationale, is consistent with the purpose of the defense in this state.

B. A Basic Formulation of California's Approach

There is no question that the purpose for the entrapment defense in this state is to deter "illegal police conduct,"⁹³ rather than to exclude from the provisions of its criminal statutes defendants who are not considered sufficiently blameworthy to warrant punishment because they were entrapped.⁹⁴ Likewise, a close reading of California cases reveals that there is no real disagreement that the measure for

93. As the *Moran* decision explained the California rationale, "[t]he courts have created the defense as a control on illegal police conduct 'out of regard for [the court's] own dignity and in the exercise of its power and the performance of its duty to formulate and apply proper standards for judicial enforcement of the criminal law.'" 1 Cal. 3d at 760-61, 463 P.2d at 765-66, 83 Cal. Rptr. at 413-14, citing from *People v. Benford*, 53 Cal. 2d at 9, 345 P.2d at 933.

94. This "diminished culpability" rationale still appears to be the federal approach. The *Russell* decision maintained that entrapment is rooted not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement," but instead in the notion that Congress could not have intended criminal punishment for a defendant who . . . was induced to commit [the crime] by the government. 411 U.S. at 435.

“illegal” police conduct is whether the police have “manufactured” the crime in the sense of originating the criminal scheme.⁹⁵ The unresolved question in California today thus concerns the correct *test* to employ in determining whether the police or their agents have manufactured a crime.

Moran and many entrapment cases before and after it⁹⁶ have employed the origin of intent test to determine whether a crime was truly created by the police, or whether the police have simply provided the opportunity for a predisposed defendant to fulfill his criminal design. Justice Traynor’s opposing view would approach the question “objectively,” ignoring the particular defendant’s predisposition, or lack thereof, and consider hypothetically whether the police conduct created a substantial risk of inducing into criminal activity persons unready and unwilling to commit a crime.⁹⁷ Thus, unlike the federal majority approach in which a non-predisposed defendant is considered to lack sufficient culpability to be punished,⁹⁸ under either California approach courts would not treat a finding of predisposition on the part of the defendant as an end in itself. Rather, a finding of lack of predisposition is simply a means to the end of ferreting out impermissible police conduct.⁹⁹

C. *Weighing the Merits of the Tests for Manufactured Crime*

Various arguments can be made both for and against the two California views as to the proper method of measuring police conduct that has “manufactured” crime, and a statutory definition for entrapment should take these into account in formulating a California standard for the defense. Justice Traynor, in his *Moran* dissent, made several arguments in favor of leaving the determination of impermissible police conduct to the trial judge. He felt that the crucial question was whether the judge or the jury could best achieve the purpose of the defense. A jury verdict of guilty or not guilty, he ar-

95. Chief Justice Traynor’s *Moran* dissent acknowledged such in stating: “[A police officer] may not engage in methods that might induce persons to commit offenses who would not otherwise do so, thereby *manufacturing* rather than preventing crime.” 1 Cal. 3d at 765, 463 P.2d at 769, 83 Cal. Rptr. at 417 (emphasis added).

96. See cases cited in note 40 *supra*.

97. 1 Cal. 3d at 765, 463 P.2d at 769, 83 Cal. Rptr. at 417.

98. See note 94 *supra*. Note that California’s police conduct rationale avoids the problem pertaining to the federal diminished culpability approach in regards to the anomalous difference between the treatment of a defendant induced by government agents and one induced by a private citizen.

99. Under a police conduct rationale, the courts deter impermissible police conduct by applying the entrapment defense, while impermissible conduct by private citizens that induces others into crime is controlled by prosecuting those private citizens for solicitation.

gued, tells the police nothing about the jury's evaluation of the police conduct. A guilty verdict might simply mean that the jury did not believe the part of the defendant's testimony that would have established entrapment. On the other hand, a not guilty verdict would be unenlightening because in California a defendant may assert entrapment and also deny that he committed the crime.¹⁰⁰ In addition, he pointed out that "[i]n other areas involving police conduct, we have recognized the paramount importance of committing the assessment of such conduct to the court,"¹⁰¹ and cited the fact that trial courts determine the admissibility of confessions and other evidence claimed to have been illegally obtained.¹⁰²

Weaknesses in this argument, however, were pointed out by the majority opinion in *Russell*. First, those "other areas" to which assessment of police conduct has been committed to the court involve violations of independent constitutional rights of the defendant, such as occurred in *Mapp* and *Miranda*, whereas *Russell* specifically rejects the notion that the entrapment defense is of constitutional dimensions.¹⁰³ And in no California case to date has the argument been made, as it was in *Russell*, that the defense should be elevated to a constitutional status.¹⁰⁴ Secondly, *Russell* points out that even if the courts were to recognize an analogy between the entrapment defense and the exclusionary rule, a police conduct approach would go further than the exclusionary principle since it would absolutely bar certain prosecutions.¹⁰⁵ Furthermore, the rules in *Weeks v. United States*¹⁰⁶ and *McNabb v. United States*,¹⁰⁷ under which courts exclude the fruits of illegal searches, seizures, and confessions, are based upon the courts' traditional power over exclusion and admission of evidence.¹⁰⁸

There are additional arguments to be made against complete adoption of the police conduct approach to the defense of entrapment. Under this objective approach, a particularly wary but predisposed defendant might require such a high degree of police encouragement

100. 1 Cal. 3d at 766, 463 P.2d at 769, 83 Cal. Rptr. at 417.

101. *Id.*

102. See *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955); CAL. EVID. CODE §405; CAL. PEN. CODE §1538.5.

103. See text accompanying note 22 *supra*.

104. Writers have argued that the entrapment defense should be of constitutional dimensions, and the constitutional guarantees suggested to be applicable to the defense include due process, the right against self-incrimination, and the fourth amendment probable cause requirement. See Comment, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63 (1967).

105. 411 U.S. at 430.

106. 232 U.S. 383 (1914).

107. 318 U.S. 332 (1943).

108. See Note, *The Defense of Entrapment*, 73 HARV. L. REV. 1333, 1334 (1960).

and involvement to overcome his hesitancy that a court focusing only upon the nature and degree of the police involvement would be compelled to find entrapment. The argument is made in *Russell* that it is not especially desirable to immunize from prosecution one who has planned to commit a crime, and then committed it, simply because the government's inducements "might have seduced a hypothetical individual who was not so predisposed."¹⁰⁹ Predisposed but wary defendants very often are the professional criminals, who constitute the greatest crime problem, and freeing them while disciplining the police might justifiably be considered too high a price for society to pay.¹¹⁰ It has been suggested that other methods ought to exist for dealing with undesirable police conduct in such cases, such as prosecuting the police officers or agents involved for solicitation.¹¹¹

A final compelling argument against adoption of the so-called objective test advocated by Justice Traynor relates to his remark in *Moran* that "the line must be drawn between methods likely to persuade those otherwise unwilling to commit an offense from methods likely to persuade only those who are ready to do so."¹¹² A question suggests itself: Other than mere requests to indulge in illegal activity, what methods would be likely to tempt *only* the hardened criminal?

There are several positive arguments which can be made in favor of using the jury-determined origin of intent test to ascertain whether the police or their agents have manufactured a crime. These, together with arguments previously made against complete adoption of a police conduct approach, appear to strongly outweigh the objections to California's current compromise entrapment approach. First, whereas the police conduct approach would have the tendency to adopt rather rigid standards in testing for entrapment in certain situations, use of an origin of intent test would offer a more flexible means for such. For instance, in *Williamson v. United States*,¹¹³ use of a police informant who was paid on a contingent fee basis was considered to constitute *prima facie* evidence of entrapment. A more flexible approach would appear to be that utilized in *People v. Rusling*,¹¹⁴ a California case which rejected such a rigid measure for entrapment and left the determination to the jury. A second argument for leaving the measure-

109. 411 U.S. at 434.

110. See MODEL PENAL CODE §2.13, Comment 3 (Proposed Official Draft, 1962).

111. See Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 PENN. L. REV. 245 (1942).

112. 1 Cal. 3d at 765, 463 P.2d at 769, 83 Cal. Rptr. at 417.

113. 311 F.2d 441 (5th Cir. 1962).

114. 268 Cal. App. 2d 930, 74 Cal. Rptr. 418 (1969).

ment of impermissible police conduct to the jury arises from the fact that in a great many of the entrapment cases the prosecution and defense offer widely divergent versions of the facts.¹¹⁵ Resolution of the conflicts would appear to be best left to the finder of fact.

Perhaps the strongest argument to be made in justification of California's current practice of combining the origin of intent test with an underlying police conduct rationale is that the combination does not appear to unreasonably deprive a defendant of the availability of the defense when it would otherwise be available had the federal minority formulation of the defense been employed. A classic example of this point is *People v. Goree*,¹¹⁶ in which the entrapment defense did apply when it would *not* have if the police conduct approach had been used. In *Goree* an undercover agent was shooting pool with the defendant, who happened to mention that he was saving his last fifty cents in order to buy a marijuana cigarette. Prior to this remark the narcotics agent had not suspected the defendant of any illegal activity. The agent then casually inquired as to whether the defendant would purchase one for him. The defendant did so as a mere favor, making no money on the transaction. As the court itself observed, it would be extremely difficult to condemn the police agent's conduct as unreasonable or overly conducive¹¹⁷ if viewed objectively, as Justice Traynor's approach would necessitate. Under such an application, the entrapment defense would fail. But left to a jury, not even the defendant's obvious "hair trigger susceptibility"¹¹⁸ would compel a finding that the defendant was predisposed to furnish the cigarette, and the jury in *Goree* acquitted the defendant of that particular charge.

D. Consistency and Workability of California's Approach

On the basis of the foregoing analysis and argument, the question framed earlier as to whether it is consistent for California courts to utilize the origin of intent test for entrapment when the defense in this state is based upon a public policy rationale can be answered in the affirmative. Just as the exclusionary rule has been created to deter unconstitutional infringements by the government, the entrapment defense, as it has evolved in California, is the device used by the courts to deter police conduct which is deemed impermissible, not because it

115. See, for example, *People v. Ramos*, 146 Cal. App. 2d 110, 303 P.2d 783 (1956).

116. 240 Cal. App. 2d 304, 49 Cal. Rptr. 392 (1966).

117. *Id.* at 307 n.3, 49 Cal. Rptr. at 393 n.3.

118. *Id.* at 310, 49 Cal. Rptr. at 395.

violates a defendant's constitutional guarantees, but because public policy dictates against the *production* of crime by law enforcement personnel.

Using such a rationale, California's delegation to the jury of the duty to determine whether police conduct is impermissible as to a particular defendant causes this state to assume a unique stance regarding use of the entrapment defense. The preceding analysis demonstrates that this compromise position can be a workable one and best reflects the purpose for the defense in California without unduly restricting its availability to defendants. However, as discussed earlier, this unusual stance is capable of misinterpretation and misapplication, and since the assertion of the entrapment defense grows steadily more popular in California courts as the number of drug-related prosecutions continues to rise, it is an appropriate time for the legislature to consider formulating a statutory definition of the entrapment defense that would reflect this compromise stance.

E. Guidelines for a Statutory Definition

Any such statutory embodiment should recognize the defense in California as a device to deter police conduct that is impermissible, with "impermissibility" to be measured by a determination as to whether the police involvement has "manufactured" the alleged crime. This determination, in turn, rests upon the defendant's predisposition, or lack thereof, and the responsibility for making such a finding should be statutorily delegated to the finder of fact. The burden of proving the defense by a preponderance of the evidence should likewise be ascribed to the defendant, since entrapment in California is not based upon the defendant's innocence and thus is not subject to the provisions of Penal Code Section 1096.¹¹⁹

To the extent that such could be codified, a statutory definition would provide a far better source for comprehending the nature, purpose, and applicability of the defense than does the present bulk of semantically confusing and sometimes conflicting California case law. A statutory definition would not require provision for the exceptional circumstance alluded to by Justice Rehnquist in *Russell*, in which "outrageous"¹²⁰ police conduct would absolutely bar the government from prosecuting a defendant. Regardless of the defendant's predisposition, where police conduct is sufficiently outrageous, the

119. See text accompanying note 57 *supra*.

120. 411 U.S. at 431.

due process principles embodied in *Rochin v. California*¹²¹ would appear to be fully applicable.

CONCLUSION

An analysis of California entrapment decisions reveals that the police conduct rationale, first enunciated in the 1959 *Benford* case, remains unquestioned to the present time, as indicated by *Moran* and more recently *Patty*. Uncertainty, however, has arisen over the means with which the stated public policy objective, deterrence of impermissible police conduct, is to be carried into practice. A weighing of arguments both for and against the two competing measures of impermissible police conduct points to use of the jury-determined origin of intent test as the more soundly based approach. Use of such a measure necessarily causes California to strike a middle position between the two contrasting federal formulations of the defense which have divided the United States Supreme Court for the past 41 years. California's approach, however, is both workable and desirable, and a statutory definition for entrapment embodying this compromise stance would come at a time when increased frequency of assertion of the defense and continuing uncertainties over its application combine to insure continued life for the entrapment issue in California courts.¹²²

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121. 342 U.S. 165 (1952).

122. The following proposed definition would embody the California approach by codifying both the deterrence rationale for the defense and the jury-determined origin of intent test for its practical application:

ENTRAPMENT

- A. It is a bar to prosecution that the defendant was entrapped by unlawful police conduct.
- B. Police conduct is deemed unlawful for purposes of this defense when a defendant proves by a preponderance of the evidence to the finder of fact that the alleged crime was produced by a public officer or employee, or agent of either, in whom the intent to commit the crime originated.