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# The Entrapment Defense - What Hath the Model Penal Code Wrought?

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# The Entrapment Defense — What Hath the Model Penal Code Wrought?

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Entrapment is a rather remarkable and clearly unique defense.[1] Unlike defenses ordinarily employed by criminal defendants, entrapment does not entail a denial of guilt or responsibility; rather, it has been said that the defense "concedes the commission of a criminal offense."[2] The defendant asserts that he would not have committed the offense if a government agent had not induced him, and he hopes thereby to convince the court that the conduct of the police should cancel his responsibility for the crime.[3]

Historically, the defense of entrapment has been justified through theories such as estoppel, statutory construction, and preservation of judicial integrity.[4] Today, however, the defense is essentially based on considerations of public policy.[5] The integrity of the crimi-

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1. The entrapment defense was not recognized in this country until just before 1900, having been regularly rejected prior to that time. *See, e.g.*, Board of Comm'rs v. Backus, 29 How. Pr. 33, 42 (N.Y. 1864) ("[T]his plea [entrapment] has never . . . availed to shield crime . . . and it is safe to say that under any code of civilized . . . ethics, it never will."). It is still rejected as a defense in Great Britain. *See generally* DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F.L. REV. 243, 244-52 (1967) [hereinafter cited as DeFeo]; Isles & Weissbard, *Defense of Entrapment*, in CRIMINAL DEFENSE TECHNIQUES § 30.02 (R. Cipes ed. 1969) [hereinafter cited as Isles & Weissbard]; Shafer & Sheridan, *The Defense of Entrapment*, 8 OSGOODE HALL L.J. 277 (1970); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942).

2. Commonwealth v. Jones, 242 Pa. Super. Ct. 303, 312, 363 A.2d 1281, 1285 (1976) (dictum). *But cf.* note 41 *infra* (courts split on whether a defendant can both raise the entrapment defense and deny his guilt).

3. MODEL PENAL CODE § 2.10(2), Comment 4 (Tent. Draft No. 9, 1959).

4. *Cf.* Tanford, *Entrapment: Guidelines for Counsel and the Courts*, 13 CRIM. L. BULL. 5, 5-6 (1977) (estoppel, due process, statutory construction, public policy, and preservation of judicial integrity) [hereinafter cited as Tanford]; DeFeo, *supra* note 1, at 252-59 (early Supreme Court entrapment decisions grounded on a novel "innocence" theory based on a very strained statutory construction reading, at least under majority view); Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63, 65 nn.14 & 15 (1967).

5. *See* Commonwealth v. Jones, 242 Pa. Super. Ct. 303, 363 A.2d 1281 (1976) (under Model Penal Code definition of entrapment, the defense is a kind of super exclusionary rule

nal justice system will not permit a conviction based on seriously reprehensible police conduct.[6]

The elements of entrapment are best explained in terms of either of two approaches—subjective or objective. The subjective theory of entrapment focuses on the culpability of the particular defendant, and the critical question is whether the accused would have committed the crime without persuasion from the police. If the defendant is found to have been ready to commit the offense, an assertion of entrapment will fail, even though the state agent used undue persuasion.[7] Before the court will release the defendant, it must decide that he was led astray by the conduct of the police.[8]

The objective approach to entrapment judges the actions of the police rather than the defendant's predisposition towards crime. If the agent's inducements would have caused a "reasonable man" to commit the crime, the defendant will be released.[9] The accused's intent is irrelevant. Under the objective approach, even a defendant ready and willing to commit the crime without police inducement may be acquitted.[10]

The inevitable clash between these two views has produced the so-called "entrapment controversy."[11] Pennsylvania resolved the controversy by adopting the generally more liberal objective approach incorporated in the Model Penal Code.[12] The Pennsylvania

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designed to deter "seriously objectionable police conduct"); W. LaFave & A. Scott, Handbook on Criminal Law § 48, at 372 n.24 (1972) (public policy is "the proper explanation of the entrapment defense") [hereinafter cited as LaFave & Scott]; Note, *Entrapment*, 73 Harv. L. Rev. 1333, 1335 (1960) (under subjective definition of entrapment, the defense "must be attributed to a social judgment that the particular defendant does not deserve to be punished") [hereinafter cited as *Entrapment*].

Cases appropriate for a claim of entrapment must be distinguished from those where an element of the crime, such as reliance upon the defendant's misrepresentation, is lacking. *See* LaFave & Scott, *supra*, § 48 at 370; R. Perkins, Criminal Law 1031-32 (2d ed. 1969).

6. *See* Sorrells v. United States, 287 U.S. 435, 437 (1932).

7. *See, e.g.*, United States v. Russell, 411 U.S. 423, 437 (1973).

8. *See* Park, *The Entrapment Controversy*, 60 Minn. L. Rev. 163, 165 (1976) [hereinafter cited as Park].

9. *See* People v. Benford, 53 Cal. 2d 1, 8-9, 345 P.2d 928, 935 (1959).

10. *See* Park, *supra* note 8, at 166.

11. *See id.* (a thoughtful and, indeed, rather devastating critique of the Model Penal Code definition of entrapment). *Compare id., and* DeFeo, *supra* note 1 (critical of Model Penal Code), *with* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 Yale L.J. 1091 (1951) [hereinafter cited as Donnelly]; Note, *Entrapment in the Federal Courts: Sixty Years of Frustration*, 10 New Eng. L. Rev. 179 (1974) [hereinafter cited as *Entrapment in the Federal Courts*]; *and* Tanford, *supra* note 4 (lead articles favoring Model Penal Code test).

12. Some confusion initially surrounded the meaning of the new test. *See* Commonwealth

Crimes Code[13] provides that a public law enforcement official[14] or a person acting in cooperation with such an official[15] perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of an offense,[16] he induces or encourages another person[17] to engage in conduct constituting such offense[18] by either: (1) making knowingly false representations designed to induce the belief that such conduct is not prohibited[19] or (2) "employing such 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."[20]

The above quoted language is based upon the minority view[21] espoused in three 5-4 landmark decisions of the United States Supreme Court.[22] The majority opinions in these cases adopted the subjective view of entrapment by focusing heavily on the defendant's predisposition to commit the crime. The majority's test for

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v. Mott, 234 Pa. Super. Ct. 52, 334 A.2d 771 (1976); Commonwealth v. Proietto, 241 Pa. Super. Ct. 385, 361 A.2d 712 (1976) (the court thought the new Code provision merely restated the prior "subjective" standard). The courts now realize that the Code provision adopted the Model Penal Code "objective" test. *See* Commonwealth v. Jones, 242 Pa. Super. Ct. 303, 363 A.2d 1281 (1976).

13. 18 PA. CONS. STAT. ANN. § 313 (Purdon 1973) [hereinafter the Pennsylvania Crimes Code will be referred to as the Code; the Model Penal Code will be referred to as the Model Penal Code.]

14. *See* Henderson v. United States, 237 F.2d 169, 175 (5th Cir. 1956). *See also* Holloway v. United States, 432 F.2d 775, 776 (10th Cir. 1970); Carbajal-Portillo v. United States, 396 F.2d 944, 947-48 (9th Cir. 1968); *see generally* Park, *supra* note 8, at 240-43; LAFAVE & SCOTT, *supra* note 5, § 48 at 370 n.7; Donnelly, *supra* note 11, at 1108-09.

15. *See* MODEL PENAL CODE § 2.10, Comment 6 at 23 (Tent. Draft No. 9, 1959) ("When private individuals or groups become part of law enforcement, through active or passive cooperation of officials, they must meet the standards appropriate to the officers themselves."); *Entrapment*, *supra* note 5, at 1341-43 (1960). *Cf.* State v. Davis, 175 N.W.2d 407 (Iowa 1970) (entrapment does not result from act of inducement by a private citizen).

16. No case law has been found dealing with this limiting language.

17. The use of the words "or encourages" may avoid possible causation problems. *See* Park, *supra* note 8, at 175-76, 210-11.

18. The fact that a person was induced to *sell* a drug does not necessarily mean that they were induced to *possess* the drug. *See* State v. Smail, 337 So. 2d 421 (Fla. Dist. Ct. App. 1976).

19. 18 PA. CONS. STAT. ANN. § 313(a)(1) (Purdon 1973). *Cf.* LAFAVE & SCOTT, *supra* note 5, § 48 at 372 n.17 (noting that where the government, even unintentionally, misleads a person into thinking that conduct does not violate the law, the defense of mistake of law may arise). *See also* People v. Kaeppel, 74 Misc. 2d 220, 342 N.Y.S.2d 882 (Crim. Ct. 1973); *Entrapment in the Federal Courts*, *supra* note 11, at 220-21 (this provision superfluous).

20. 18 PA. CONS. STAT. ANN § 313(a)(2) (Purdon 1973).

21. *See* MODEL PENAL CODE § 2.10, Comments 2 & 3 at 16-19 (Tent. Draft No. 9, 1959).

22. United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). *See also* Hampton v. United States, 425 U.S. 484 (1976).

entrapment was whether the officer created the criminal design or merely afforded an opportunity for the commission of an offense by a person "already disposed to commit the crime."[23]

Pennsylvania's present codification of entrapment is derived from an opinion of Justice Frankfurter:

> The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. . . .
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> . . . .
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> This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits. . . .[24]

Although there is little case law dealing with the Model Penal Code definition of entrapment, it would seem that the basic test is indeed "not easy of answer."[25] Since the objective standard prohib-

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23. Commonwealth v. Jones, 242 Pa. Super. Ct. 303, 310, 363 A.2d 1281, 1284 (1976).

24. Sherman v. United States, 356 U.S. 360, 382-84 (1958) (Frankfurter, J., concurring). *Cf.* MODEL PENAL CODE § 2.10, Comment 3 at 18-19 (Tent. Draft No. 9, 1959) (quoting the above language); Commonwealth v. Jones, 242 Pa. Super. Ct. 303, 311, 363 A.2d 1281, 1285 (1976) (quoting some of above language). For a listing of other states which, either by case law or statute, at least *may* have adopted the Model Penal Code definition of entrapment, see Park, *supra* note 8, at 167-69 (listing Alaska, Colorado, Hawaii, Iowa, Michigan, New Hampshire, New York, North Dakota, Texas, and Utah) and Isles & Weissbard, *supra* note 1, at § 30.06 (several other states are contemplating adoption of Model Penal Code standard, including California, Maryland, and New Jersey).

25. It is even possible, ironically, that the test is "an unmanageably subjective standard." *See* United States v. Russell, 411 U.S. 423, 435 (1973) (criticism of due process entrapment-like defense lower court had adopted prohibiting "over-zealous law enforcement"). *See also* Park, *supra* note 8, at 226-29 (even with time and experience, development of detailed rules will probably prove difficult).

its inducements that would pursuade the average, law-abiding citizen to commit a crime, and since it is arguable that such a citizen could virtually never be pressed into criminal service absent blandishments amounting to outright duress, the police clearly lack tangible rules to guide their conduct.[26] Furthermore, it would appear that Justice Frankfurter was mistaken in asserting that the defendant's predisposition to commit the crime is wholly irrelevant and that all evidence of the defendant's intent should be excluded. A fair assessment of the propriety of police conduct may not be possible without consideration of the government agent's knowledge of the defendant's prior criminal activity.[27] For example, it seems obvious that a court should allow more persuasive police tactics if their target is a repeat offender.

The types of inducements prohibited by the Model Penal Code's objective standard are not subject to detailed breakdown; rather each case must be decided on its own facts.[28] Clearly, the typical undercover drug purchase situation does not involve entrapment.[29]

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26. *See* Park, *supra* note 8, at 226.

27. *See id.* at 201-09. *See also* notes 48-51 and accompanying text *infra* (admissibility of defendant's other crimes or other evidence of predisposition).

28. *See* Park, *supra* note 8, at 171-76 (summary analysis of Model Penal Code test noting, inter alia, that the test is probably not based upon the proclivities of the average person, since to do so would mean that entrapment would hardly ever be found in cases involving serious offenses). Prior to United States v. Russell, 411 U.S. 423 (1973), the federal courts had developed a number of "quasi-entrapment" defenses which arguably could be used to give content to the Model Penal Code test. *See* Park, *supra* note 8, at 185-90 ("the due process defense"); *id.* at 190-95 ("the furnishing-contraband defense"); *id.* at 195-96 ("the contingent-fee defense"); *id.* at 196-98 ("the reasonable suspicion defense"). *See also Entrapment in the Federal Courts, supra* note 11, at 198-213.

The few cases decided so far under the Model Penal Code test lend some support to the view that the Model Penal Code test will not actually lead to results markedly different from prior law. *See* LAFAVE & SCOTT, *supra* note 5, § 48 at 371-72 ("No doubt, however, most cases would come out the same way in the end whichever view is taken."); *Entrapment, supra* note 5, at 1335-36 (1960). *See, e.g.*, People v. Joyce, 47 App. Div. 2d 562, 363 N.Y.S.2d 634 (1975) (no entrapment merely because undercover agent provided transportation to and from the burglarized house); State v. Baumann, 236 N.W.2d 361 (Iowa 1975) (facts that paid informant smoked marijuana with defendant, a high school acquaintance, and that sale took place at informant's apartment did not show entrapment as a matter of law); People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973) (despite numerous opportunities, defendant had shown no predisposition to sell drugs prior to final appeals to sympathy, including appeals by fictitious addict girlfriend); Grossman v. State, 457 P.2d 226 (Alaska 1969) (long period of male agent's ingratiation with female defendant deemed "weak" basis for entrapment claim, although case remanded). *See generally* Annot., 62 A.L.R.3d 110 (1975).

29. *See, e.g.*, Commonwealth v. Jones, 242 Pa. Super. Ct. 303, 363 A.2d 1281 (1976). *Cf.* MODEL PENAL CODE § 2.10, Comment 2 at 16-17 (Tent. Draft No. 9, 1959) ("Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a

Repeated requests for drugs, however, predicated on the undercover agent's supposed suffering, made to a person whom the agent knew was undergoing treatment for addiction would no doubt be deemed to create a substantial risk of criminal conduct on the part of persons other than those ready to commit the crime.[30] Thus, as a general rule, merely affording opportunities or facilities or other means for commission of an offense will not lead to a finding of entrapment.[31] But where government agents become thoroughly enmeshed in serious criminal activity, such conduct may satisfy the elements of the Model Penal Code's entrapment definition.[32]

The same rules are applicable when the alleged entrapment is performed by one who is not a government agent. For example, a simple contingent-fee arrangement, where the police pay an informer to incriminate another, would not appear to create entrapment.[33] Some courts, however, do not favor contingent-fee operations, perceiving an "intolerable" danger that informers might persuade innocent persons to commit crimes.[34]

## The Exception

The Code creates an exception to the entrapment defense: government agents are permitted to entrap a defendant if causing or threatening bodily injury is an element of the offense charged, and

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practical necessity. . . . An illegal sale of liquor to an undercover agent is conceived and procured by the agent . . . [y]et some such use of deception is essential to police work in certain fields.").

30. *See* Sherman v. United States, 356 U.S. 369 (1958) (unanimous Court, although using different theories, held that such conduct showed entrapment as a matter of law, both the minority and majority opinions emphasizing that the agent's conduct was reprehensible because it caused the defendant to return to a drug habit).

31. *See* People v. Joyce, 47 App. Div. 2d 562, 363 N.Y.S.2d 634 (1975); State v. Bacon, 319 A.2d 636 (N.H. 1974); Park, *supra* note 8, at 190-95. *See also* Hampton v. United States, 425 U.S. 484 (1976) (no due process violation in fact that heroin which defendant sold to government agents was supplied by a government informer). *But see* United States v. Russell, 411 U.S. 423, 436-50 (1973) (dissenters would have found entrapment where a government agent had supplied the defendant with an essential ingredient for drug manufacture which was difficult to obtain, though legally available).

32. *See Entrapment in the Federal Courts, supra* note 11, at 198-200 (1974) (noting federal cases which may have been supplanted by *Russell,* but which nevertheless may be adopted by states using the Model Penal Code definition of entrapment).

33. *See* United States v. Grimes, 438 F.2d 391 (6th Cir.), *cert. denied,* 402 U.S. 989 (1971). *See also* Park, *supra* note 8, at 195-96; *Entrapment in the Federal Courts, supra* note 11, at 203-04.

34. *See* Williamson v. United States, 311 F.2d 441, 444 (5th Cir. 1962).

the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.[35]

## Due Process as Possible Basis for Defense

Police conduct inducing commission of a crime may not only support an entrapment defense, but may rise to the level of a constitutional violation. Government tactics might be so outrageous that the due process clause would prevent the government from obtaining a conviction even though the defendant was found to be predisposed to commit the crime.[36] The Code's rather liberal definition of the defense, however, could make the due process issue somewhat moot (except on collateral attack), since any police conduct that is serious enough to violate due process would surely be classified as entrapment.[37]

## Burden of Proof

Under the Code, the burden of proving entrapment is on the accused. He must prove, by a preponderance of the evidence, that his conduct occurred in response to the entrapment.[38] The constitutionality of this burden of proof provision has been sustained,[39] hav-

35. 18 Pa. Cons. Stat. Ann. § 313(c) (Purdon 1973). *Cf.* Model Penal Code § 2.10, Comment 6 at 23-24 (Tent. Draft No. 9, 1959).

36. *See* United States v. Russell, 411 U.S. 423, 431-32 (1973) ("While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, . . . the instant case [involving sale of a scarce ingredient to the manufacture of methamphetamine, said ingredient being legal to possess] is distinctly not of that breed.").

37. *See* Hampton v. United States, 425 U.S. 484 (1976) (fact that heroin sold to agents was supplied to predisposed defendant by government informer did not violate due process). *See generally* Park, *supra* note 8, at 185-90; Tanford, *supra* note 4, at 22-23; LaFave & Scott, *supra* note 5, § 48 at 370 n.2; *Entrapment in the Federal Courts*, *supra* note 11, at 205-13; Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. Fla. L. Rev. 63 (1967).

38. 18 Pa. Cons. Stat. Ann. § 313(b) (Purdon 1973). *See also* Model Penal Code § 2.10, Comment 4 at 20-21 (Tent. Draft No. 9, 1959); Model Penal Code § 2.13(2) (Proposed Official Draft, 1962). *See generally* Park, *supra* note 8, at 262-67 (critical of placing burden on defendant); *id.* at 175, 210-11 (causation element).

39. Commonwealth v. Jones, 242 Pa. Super. Ct. 303, 363 A.2d 1281 (1976); People v. Laietta, 30 N.Y.2d 68, 281 N.E.2d 157, *cert. denied*, 407 U.S. 923 (1972). *See Entrapment*, *supra* note 5, at 1344-45 (1960); Annot., 28 A.L.R. Fed. 767 (1976).

ing been found justified by the nature of the defense: the defendant does not deny his guilt, nor does he attempt to excuse or justify his actions. His defense is a complaint against the state for its impermissible law enforcement methods. In effect, he becomes the plaintiff and should be forced to prove his case against the state.[40]

### Inconsistent Defenses

Although an assertion of entrapment admits guilt, it appears that Pennsylvania will follow the rapidly emerging trend toward permitting the accused both to raise the entrapment defense and to deny committing the offense.[41] As a matter of strategy, of course, a defendant would be wiser to choose one defense; offering inconsistent defenses can only destroy his credibility with the trier of fact.

### Judge and Jury Functions

Although the important issue of whether the question of entrapment should be tried to the court or to the jury was apparently left unresolved by the Crimes Code itself,[42] the Pennsylvania courts have thus far more or less merely assumed, without even considering the serious policy arguments pro and con, that the issue of entrap-

40. *See* Model Penal Code § 2.10, Comment 4 at 20-21 (Tent. Draft No. 9, 1959).

41. *See* United States v. Demma, 523 F.2d 981 (9th Cir. 1975), *noted in* 1975 Utah L. Rev. 962; People v. Johnston, 47 App. Div. 2d 897, 366 N.Y.S.2d 198 (1975); People v. Perez, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965) (en banc). *See generally* Groot, *The Serpent Beguiled Me and I (Without Scienter) Did Eat—Denial of Crime and the Entrapment Defense,* 1973 U. Ill. L.F. 254; Comment, *The Assertion of Inconsistent Defenses in Entrapment Cases,* 56 Iowa L. Rev. 686 (1971); Park, *supra* note 8, at 257 n.308; Annot., 61 A.L.R.2d 677 (1958).

42. *But see* S. Toll, Pennsylvania Crimes Code Annotated § 313, at 146 (1974) (argues that question is to be resolved by the jury merely because a provision providing for trial of the issue to the court was not enacted); Commonwealth v. Conway, 196 Pa. Super. Ct. 97, 173 A.2d 776 (1961) (under prior criminal code at least, entrapment was jury question). The courts elsewhere are about evenly divided on this judge-jury issue. *Compare* People v. Cushman, 65 Mich. App. 161, 237 N.W.2d 228 (1975) *and* Grossman v. State, 457 P.2d 226 (Alaska 1969) (entrapment a decision for the trial court) *with* State v. Baumann, 236 N.W.2d 361 (Iowa 1975) (where the evidence is in dispute as to facts or inferences to be drawn, entrapment is jury question) *and* People v. Moran, 1 Cal. 3d 755, 463 P.2d 763, 83 Cal. Rptr. 411 (1970). *See generally* Model Penal Code § 2.10, Comment 5 at 21-22 (Tent. Draft No. 9, 1959) (lists pros and cons on this issue); Park, *supra* note 8, at 268-70 (even more extensive analysis of arguments either way); *Entrapment, supra* note 5, at 1343-44 (1960) (recommends submission to jury); DeFeo, *supra* note 1, at 268-71, 276; *Entrapment in the Federal Courts, supra* note 11, at 213-15.

ment is for the jury.[43] The objective approach supports arguments for either view. On the one hand, the final judgment on the reprehensible nature of police conduct could be viewed as an altogether appropriate question for the jury. On the other hand, because the objective approach focuses on the conduct of the police, it can be argued that judicial opinion is needed which will not only decide the case at bar but also set guidelines for the police. In any event, even if the issue of entrapment is treated as generally being a jury question, where the evidence is uncontradicted, undisputed, and shows entrapment as a matter of law, the court must take the case from the jury.[44]

### Sufficiency of Entrapment Evidence to Raise Jury Issue

Given the fact that the Code's definition of entrapment does not focus upon the accused's predisposition to commit the offense, virtually any evidence of police inducement is sufficient to raise an entrapment issue for the jury.[45]

### Admissibility of Prior Crimes Evidence

One of the principle rationales for the adoption of the Model Penal Code's definition of entrapment was that unduly prejudicial evidence of the defendant's prior criminal activity, hearsay, and the like would not be admissible.[46] As previously noted, Justice Frank-

43. Commonwealth v. Mott, 234 Pa. Super. Ct. 52, 334 A.2d 771 (1975) (opinion in support of affirmance) (citing only pre-Code cases); *accord*, Commonwealth v. Clawson, 378 A.2d 1008 (Pa. Super. Ct. 1977) (citing only *Mott*).

44. Sherman v. United States, 356 U.S. 369, 373 (1958) (government's testimony itself showed entrapment). *See* Commonwealth v. Berrigan, 234 Pa. Super. Ct. 370, 343 A.2d 355 (1975) (dictum). *But see* Masciale v. United States, 356 U.S. 386 (1958) (jury entitled to disbelieve defendant's uncontradicted testimony of solicitation). *See generally* Park, *supra* note 8, at 178 n.44; Tanford, *supra* note 4, at 21 n.73.

45. *See* Sorrells v. United States, 287 U.S. 435 (1932). *But see* Commonwealth v. Mott, 234 Pa. Super. Ct. 52, 334 A.2d 771 (1975) (3-3) (clearly erroneous result, explained in part by the fact that the entire court mistakenly used the pre-Code definition of entrapment). *See also* Tanford, *supra* note 4, at 19-20 (reviewing federal law on this issue); Park, *supra* note 8, at 180-84.

46. *See* Model Penal Code § 2.10, Comment 3 at 20 (Tent. Draft No. 9, 1959) (rationale for not focusing upon the accused's predisposition; there is no explicit statement, however, that such evidence would be absolutely inadmissible); Park, *supra* note 8, at 201-02. *See also* State v. Mullen, 216 N.W.2d 375, 381 (Iowa 1974) (subjective test "comes with too much dangerous baggage of hearsay, suspicion and rumor evidence"); Commonwealth v. Jones, 242

furter, who advocated the objective approach, contended that the defendant's background should have no bearing on the inquiry because permissible police activity should not vary according to the suspicions of the defendant's activities.[47] Ironically, it is probable that such evidence will be relevant in assessing the wrongfulness of the police entrapment conduct.[48] Although relevant, predisposition evidence is not necessarily admissible because the prejudicial effect on the defendant in the eyes of the judge or jury may well outweigh relevance to the entrapment issue.[49]

## CONCLUSION

It is still too early to see whether Pennsylvania's adoption of the Model Penal Code's definition of entrapment will yield a significant shift in the analysis employed or in the results produced. This country's experience with the somewhat remarkable and clearly unique "defense" of entrapment has been far from a happy one. There are substantial indications that this unfortunate situation has been altered very little by the Model Penal Code.

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Pa. Super. Ct. 303, 311, 363 A.2d 1281, 1285 (1976) ("the inquiry . . . will not be concerned with the defendant's prior criminal activity or other indicia of a predisposition to commit crime").

47. Sherman v. United States, 356 U.S. 369, 382 (1958).

48. *See* Park, *supra* note 8, at 203 ("Sometimes no fair assessment of the decency of an agent's conduct can be made without considering what the agent knew about the defendant's propensity for crime [giving examples]. . . . The relevance of the particular defendant's predisposition to the decency of police conduct is not restricted to situations in which he displays criminality during negotiations attending the commission of the offense. Prior conduct can also be relevant [giving examples]."). *Cf. id.* at 201-16 (fine exposition of admissibility of predisposition evidence under Model Penal Code). *See also* Commonwealth v. Jones, 242 Pa. Super. Ct. 303, 309, 363 A.2d 1281, 1284 (1976) ("Evidence of a sale just two hours prior to the sale in question would be relevant on the issue of entrapment. . . ."); Commonwealth v. Berrigan, 234 Pa. Super. Ct. 370, 379, 343 A.2d 355, 360 (1975) (Hoffman, J., for reversal) ("elements of police conduct and the predisposition of the defendant will enter into the decision under either formulation"). *See generally* Annot., 61 A.L.R.3d 293 (1975).

49. *See, e.g.*, United States v. Johnston, 426 F.2d 112 (7th Cir. 1970), *noted in* 71 COLUM. L. REV. 157 (1971). *Cf.* Park, *supra* note 8, at 201-16, 247-55 (accepting the subjective approach does not necessarily entail admission of reputation and other hearsay evidence nor is the admissibility of prior criminal activity dependent upon anything inherent in the subjective approach; suggests limits on admissibility of such evidence); Tanford, *supra* note 4, at 24-25; Isles & Weissbard, *supra* note 1, § 30.03(3)(a); *Circuits Note: Criminal*, 63 GEO. L.J. 331, 543 (1974).