

# BUILDING A BETTER MOUSETRAP: RECONSTRUCTING FEDERAL ENTRAPMENT THEORY FROM *SORRELLS* TO *MATHEWS*

Laura Gardner Webster\*

What's this? What's this? Is this her fault or mine? The tempter, or the tempted, who sins the most?<sup>1</sup>

## I. THE SUBJECTIVE VIEW: A NARRATIVE

Several years ago, while working as a public defender in Philadelphia, I was temporarily assigned to the federal division of that office. I had requested the assignment due to persistent rumors, soon confirmed, that a joint federal and local investigation of judicial corruption in the Philadelphia courts had uncovered widespread illegality in the handling of criminal cases. Lawyers, judges and employees of the court system were implicated.<sup>2</sup> I worked in that system, knew many of the individuals involved, and had tried cases in front of many of the judges.<sup>3</sup> Not surprisingly, the disclosures precipitated a crisis and subsequent change in the Philadelphia courts and, somewhat more reluctantly, in myself.

The change was not swift, or easy, or entirely conscious, and its necessity was revealed to me only by increments as the facts of the investigation were exposed. Upon learning of the newly elected judge who was taped accepting

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\* Assistant Professor of Law, Walter F. George School of Law, Mercer University. B.A., 1976 University of Pennsylvania; J.D., 1980, L.L.M., 1989 Temple University School of Law. I express my thanks to Professors Ted Blumoff, Sidney Watson, and Mark L. Jones for their patient and persistent encouragement throughout the writing of this article; to Professor Ellen Podgor for her invaluable comments and suggestions on an earlier draft; to Lizbeth Potts for her research assistance; and to the students in my Lawyering Process class at Temple University School of Law 1987-88, whose ideas influenced much of this article.

1. W. SHAKESPEARE, *MEASURE FOR MEASURE* 85 (Penguin 1969).

2. For a description of the probe and its immediate effect on the court system, see Tulsky, *Fifteen Philadelphia Trial Judges Suspended in Payoff Probe*, Nat'l L.J., Feb. 16, 1987, at 16, col. 2. See also *Matter of Cunningham*, 517 Pa. 417, 538 A.2d 473 (1988) (disposing of disciplinary cases against eight Philadelphia judges).

3. The investigation was post Abscam. See Goldwasser, *After Abscam: An Examination of Congressional Proposals to Limit Federal Targeting Discretion in Federal Undercover Investigations*, 36 EMORY L.J. 75 (1987) (referring to the FBI sting operation known as Abscam in which public figures, including several U.S. Congressmen, agreed to exert influence in exchange for cash provided by the fictional entity Abdul Enterprises Ltd.). Greylord, another FBI sting operation, evolved in conjunction with the Cook County State Attorney's Office, in which the courts of Cook County were the subject of a corruption investigation. All Abscam defendants were convicted. See *infra* note 98. Greylord generated over twenty-one indictments. See Note, *The Greylord Investigation Guidelines: Protection For Greylord Attorneys?*, 16 LOY. U. CHI. L.J. 641, 641 n.1 (1985).

cash from a union official, and thereafter wore a federal wire to court, in chambers, and in private conversations with lawyers and other judges,<sup>4</sup> I sought removal from this absurdity to the anticipated sanity of federal court. I wanted distance from this place in which I had entrusted my professional integrity, a good portion of my life, and the liberty of my clients. With each new disclosure, I was forced to confront my own role in this universe as an unwitting participant rather than the hostile and un-implicated bystander whose persona was central to my effectiveness as defender of the indigent. Had I not been called upon at least once a week to assure some skeptical client that justice could not be bought in Philadelphia? Had I not performed this function assiduously, citing my record of not guilty verdicts in the bench trials that were my specialty? And had not my clients provided the daily quota of guilty verdicts to lend the appearance of legitimacy to the case lists which were otherwise predetermined?

As angry as I was at having my efforts compromised by bribery and corruption in Philadelphia County, I had an even more complicated reaction to the violation of the confidentiality which was key to my negotiating, to my plea discussions, and to my convincing clients to take the deals I worked out. Judges routinely provided privacy in a robing room or anteroom of the cramped and crowded courts in which I worked. The resulting conversations within these tiny spaces took many forms, most of which were not covered by the attorney-client privilege, but which nevertheless required absolute certainty that the subject matter would not be overheard or revealed. These included haggling with the D.A. over the case list, learning from the police liaison which officers had checked in, discovering from court personnel who was scheduled for the next jury demand and whether there were other ready cases, preparing defense witnesses out of the hearing of the prosecution, evaluating the temperament of the judge and the skill of the D.A., and explaining the merits of the case to my clients who had been offered a plea bargain. As often as not, I would obtain information which I had not previously heard or elicited when preparing the case. Thus, the courthouse rumor that a federal wiretap had invaded this domain rendered privacy permeable, and confidentiality improbable. It made no difference to me that the plunderers were, in effect, working for the FBI.

Despite the fact that Philadelphia had been the site of the ABSCAM sting operation, I had never thought seriously about the morality of law enforcement tactics, about the problems which secrecy created in institutions which were premised upon the significance of the oath, or about the separation of the executive branch of government from the judicial branch. In light of these events, I started thinking very hard about my profession. As it turns out, I did not think hard enough or go far enough away.

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4. See *Matter of Cunningham*, 517 Pa. 417, 538 A.2d 473. This investigative tactic, while used very successfully in Greylord, was somewhat less successful in Philadelphia. See, e.g., Tamarkin, *The Judge Who Wore A Wire*, 70 A.B.A. J. 76 (Feb. 1984). The differences may be ascribed to the motives behind informing: the Chicago judge was performing a classic undercover role based on his own sense of morality, while the Philadelphia judge was already subject to criminal and disciplinary action herself. Her testimony against a colleague in a federal criminal trial was apparently rejected by the jury, which acquitted the other judge. See *Matter of Sylvester*, 555 A.2d 1202 (Pa. 1989). See also *United States v. Sylvester*, No. 86-00449-0 (E.D. Pa. 1987).

## II. AN OVERVIEW

This article is about the tension between effective law enforcement and individual rights, and about the role of a judiciary increasingly uncomfortable in negotiating that tension. This conflict is reflected in recent developments in the United States Supreme Court concerning the federal entrapment defense,<sup>5</sup> its theoretical underpinnings,<sup>6</sup> and its place in the larger context of judicial retrenchment and societal hostility to criminal claimants.

The third section deals with the history and development of entrapment as a judicial expression of the institutional tensions within the federal system. Entrapment, ambiguously defined in the Supreme Court, illustrates a larger ambivalence concerning judicial control, decisionmaking and restraint.<sup>7</sup> In federal entrapment law, this ambivalence has been expressed in the doctrinal schism concerning which test to apply to the criminal event, and has resulted in increasingly opposing perspectives about judicial goals.<sup>8</sup> The subjective or majority view<sup>9</sup> focuses on the defendant's state of mind and his predisposition to commit the crime.<sup>10</sup> The objective or minority view<sup>11</sup> focuses on the level of governmental involvement in soliciting the crime.<sup>12</sup> These alternative

5. The term "defense" is a misnomer, for entrapment theory as developed in the Supreme Court is not based upon the organizing principles of the substantive criminal law. It is not seen as negating intent, as some formulations of the insanity defense do, or as mitigating culpability, as provocation does. It is rather a meta-defense which exonerates otherwise punishable behavior on grounds having little to do with traditional notions of individual responsibility, excuse or justification. See *infra* note 24 and accompanying text. To promote convenience at the expense of precision, I refer to entrapment throughout as a defense. See generally Robinson, *Criminal Law Defenses: A Systemic Analysis*, 82 COLUM. L. REV. 199 (1982) (explaining different types of defenses).

6. See *infra* notes 54-68 and accompanying text for a full discussion of the origins of subjective and objective tests.

7. This observation eventually becomes the most striking problem in entrapment commentary. Professor Carlson explains:

Courts and commentators still disagree over certain basic issues regarding the entrapment defense, including the reason for creating the defense, what policies the defense serves (or ought to serve), what restrictions it should place on government practices, and even whether the defense is part of the law of criminal procedure or the substantive criminal law.

Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1013 (1987) (footnotes omitted). For a collection of views and commentary on this point, see *id.* at 1013-23.

8. See *infra* notes 9-12 and accompanying text.

9. See, e.g., *United States v. Russell*, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting) (subjective approach explained as focusing "on the conduct and propensities of the particular defendant in each individual case: . . .").

10. For a thorough overview of predisposition as the crucial inquiry in the subjective test, see P. MARCUS, *THE ENTRAPMENT DEFENSE* 2.01-2.05 (1989).

11. See *Russell*, 411 U.S. at 441. The objective approach is described as one which focuses on whether the conduct of the governmental agent "is likely to instigate or create a criminal offense."

12. Demonstrating lack of predisposition, however, may still be a factor in the objective test, just as the type of inducement is considered in the subjective test. See P. MARCUS, *supra* note 10, at 3.02, 4.15. It is an evidentiary tool rather than a hurdle that the defense must overcome in order to make the entrapment claim at all. Marcus uses the example of the defendant in an objective test jurisdiction who wishes to show lack of prior criminal activity in support of an entrapment claim. *Id.* at 3.03. This may simply be a way of producing affirmative character evidence at a proceeding in which the defendant's state of mind and history of conformity

perspectives have dictated the decisional focus in Supreme Court entrapment opinions. Each entrapment case precipitates a crisis of perspective (which view will prevail?) while simultaneously failing to create a workable and unified analysis of the meaning of entrapment in the real world (what is it?).

The fourth and fifth sections discuss the five Supreme Court entrapment decisions. This line of decisions culminates in *Mathews v. United States*,<sup>13</sup> the Court's latest pronouncement on the defense. This case purports to retire the historical dispute concerning the definition of entrapment and to achieve a consensus on the use of the subjective view to prove entrapment in the federal courts.<sup>14</sup> The decision apparently also removed certain procedural barriers to raising the entrapment defense throughout the federal trial court system.<sup>15</sup> However, the underlying principle in the decision reflects the discernable flight

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with the law would not otherwise be relevant. See FED. R. EVID. 404(a)(1). Of course, once the defendant offers evidence of character to show lack of predisposition, the door is opened for the government to rebut. Interestingly, this appears to have been exactly the order of proof in *Sorrells v. United States*, 287 U.S. 435 (1932). It was only after the defense offered evidence of good character, which is generally admissible in any criminal trial, that "the Government called three witnesses who testified that the defendant had the general reputation of a rum runner." *Sorrells*, 287 U.S. at 440-41. As an evidentiary matter, the subjective test of entrapment developed from the *Sorrells* majority opinion would now permit the government to place this reputation evidence in its case-in-chief.

13. 485 U.S. 58 (1988).

14. See *infra* notes 135-54 and accompanying text for a full evaluation of the positions of individual members of the Court on the question of the prevailing doctrine of entrapment.

15. Prior to *Mathews*, the circuit courts took varied and frequently inconsistent approaches to the issue of whether a defendant who denied commission of the offense could raise the entrapment defense in the alternative. This was the express reason for granting certiorari. See *Mathews*, 485 U.S. at 59-60. The approach taken in the First, Second, Fourth and Tenth Circuits required that the defendant not deny the crime in order to plead entrapment. See *United States v. Anness*, 631 F.2d 1041, 1046-47 (1st Cir. 1980); *United States v. Mayo*, 705 F.2d 62, 72-73 (2nd Cir. 1983); *United States v. Dorta*, 783 F.2d 1179, 1181 (4th Cir. 1986), *cert. denied*, 477 U.S. 905 (1986); *United States v. Mora*, 768 F.2d 1197, 1198-99 (10th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986). In the Third and Sixth Circuits, the approach was the same as that in *Mathews*, which arose in the Seventh Circuit. The defendant was required to admit the offense as charged in order to plead entrapment. See *United States v. Hill*, 655 F.2d 512, 514 (3rd Cir. 1981); *United States v. Whitley*, 734 F.2d 1129, 1139 (6th Cir. 1984). The Ninth Circuit and the United States Court of Appeals for the District of Columbia permitted the defendant to deny all elements of the offense and still raise entrapment. See *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (en banc); *Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962). In the Eleventh Circuit, where entrapment was raised by the government's case in chief, the defendant could deny the elements of the crime and still plead entrapment, providing the inconsistency was not too great. See *United States v. Smith*, 757 F.2d 1161, 1169 (11th Cir. 1985). The Fifth Circuit is similar to the Eleventh, permitting denial of intent without denying the acts while also arguing entrapment. See *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (en banc). Only the Eighth Circuit has failed to consider the issue directly. It has, however implied that a denying defendant may not raise entrapment. See *Ware v. United States*, 259 F.2d 442, 445 (8th Cir. 1958). See generally Note, *Entrapment and Denial of the Crime: A Defense of the Inconsistency Rule*, 1986 DUKE L.J. 866 (authored by Karis A. Hastings); Note, *Evolution and Application of the Entrapment Defense: Abandonment of the Inconsistency Rule*, 11 HAMLIN L. REV. 351 (1988) (authored by Kristine K. Keller). *Mathews* resolved the inconsistency problem by permitting inconsistent defenses to be raised, but the procedural context in which entrapment is to be considered remains to be resolved as *Mathews* is applied in the district courts. It seems clear, however, that a proper reading of *Mathews* will result in entrapment being raised directly at trial. See, e.g., *United States v. Rodriguez*, 858 F.2d 809 (1st Cir. 1988) (holding that while the prosecution has the burden of disproving entrapment, the defendant has the initial burden of production of lack of predisposition and inducement to commit the offense).

away from serious judicial scrutiny of law enforcement conduct in the criminal law context. It is the thesis of this article that substantive entrapment theory in the Court has become increasingly tethered to the question of the defendant's factual guilt or innocence, while being expunged of its original concern with the power of the Court to evaluate the propriety of the police conduct. By placing entrapment in the hands of the jury along with other defenses, *Mathews* implies that entrapment affects proof of an element of the crime, instead of values distinct and separate from the demonstrable culpability of the accused.<sup>16</sup>

As a corollary observation, *Mathews* represents yet another example of the Court's divestment of its power to arbitrate and interpret individual rights of the criminally accused where those rights impose impediments to the determination of guilt.<sup>17</sup> The original and primary rationale for the unique defense of entrapment shares similar concerns to the contemporaneously developed fourth amendment exclusionary rule. Those concerns include a vision of judicial integrity uncompromised by overzealous law enforcement.<sup>18</sup>

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16. See *infra* notes 155-74 and accompanying text.

17. The judicial protection of individual rights which impede the guilt determination process is beyond the scope of this article. Suffice it to say that judicial divestment in favor of another entity notably occurs in either pre- or post-guilt determination procedures. Thus arrest, search and seizure, and pretrial bail are examples of recent Supreme Court circumscription of its own power of review in the pretrial area. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (congressional detention scheme violates neither fifth nor eighth amendments); *Bail Reform Act of 1984*, 18 U.S.C. §§ 3141-3156 (1982); *United States v. Leon*, 468 U.S. 897 (1984) (police good faith reliance on improperly issued warrant does not invalidate search). Judicial divestment in post-guilt procedures concern sentencing, particularly death sentencing, collateral attacks on criminal convictions, and the fourth amendment generally. See *Rummel v. Estelle*, 445 U.S. 263 (1980) (state statute imposing life sentence with possibility of parole for third non-violent felony is not violative of eighth amendment); *Barclay v. Florida*, 463 U.S. 939 (1983) (no federal constitutional violation in state court use of aggravating circumstance to sustain death penalty even if improper under state law); *Stone v. Powell*, 428 U.S. 465 (1976) (habeas corpus relief on fourth amendment grounds not available when state provides full and fair litigation of fourth amendment claims). See also *Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

18. Both the majority and concurring opinions in *Sorrells* refer to *Olmstead v. United States*, 277 U.S. 438 (1928), a federal wiretapping case in which the failure of the Court to find a fourth amendment violation prevented application of the exclusionary rule. See *Sorrells*, 287 U.S. at 443 (opinion by Hughes, C.J.), 454 (Roberts, J., concurring). Justice Brandeis advocated a judicial integrity model of exclusion in his dissent in *Olmstead*, similar to his view of the harms of entrapment. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting). In *Weeks v. United States*, 232 U.S. 383, 398 (1914), the Court appeared to establish that the exclusionary rule itself was constitutionally based. A constitutional basis was explicitly rejected for entrapment in *Sorrells*. However, the concern with judicial integrity became a persistent theme in early fourth amendment and entrapment litigation. At least one commentator has suggested that judicial integrity is no longer a serious premise for the exclusionary rule. See *Loewy, Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 907 n.1 (1989). It remains, nevertheless, an important concept in entrapment and in the exclusionary rule, for it was included as a principle in the first Supreme Court case relying on its supervisory power to exclude statements. See *McNabb v. United States*, 318 U.S. 332, 345 (1943). See also *Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1443 (1984). Entrapment and exclusionary rule rationales tend to overlap and influence each other. See *id.* at 1441. For an argument making the connection between the two explicit and proposing a fourth amendment type warrant requirement upon law enforcement sting operations and targeting decisions, see

This common purpose does not enhance the truth seeking function of trial.<sup>19</sup> In reaction to that purpose, the Rehnquist majority opinion in *Mathews* is informed by a continuing philosophy which places the question of governmental misconduct outside the reach of the criminal fact finding process. This is accomplished, paradoxically, by placing the entrapment finding squarely *within* that process, in the sacrosanct and unreviewable jury question.

The sixth section considers the difficulties entrapment creates in the courtroom, the central one being that factually guilty individuals do not "deserve" to be acquitted. If entrapment affected desert as an excuse or a mitigating factor in guilt, then private inducements as well as governmental ones would be cognizable as entrapment.<sup>20</sup> By adopting the solution of the subjective test, the Court attempts to create deservingness from the defendant's past, e.g., her<sup>21</sup> lack of predisposition, meaning in part the lack of prior criminal contacts.<sup>22</sup> This solution fails to consider that if entrapment is to exist

Whelan, *Lead Us not into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193 (1985).

19. Entrapment's other concern — police overreaching — can affect fact-finding. Indeed, one of the perceived problems of overzealous police who act in contravention of the law is that the adversarial system is compromised before the courthouse is ever reached. Illegally obtained evidence, like illegally created crime, skews truth-seeking in the most insidious ways, which are largely invisible to a system whose stated goals are limited to freeing the innocent and convicting the guilty. It is a relatively simple matter to manipulate such a system by creating facts upon which such truth-seeking depends and before that truth seeking begins. The station-house police are in such a position, and the temptation to manipulate facts can be great. Once created, facts receive the imprimatur of credibility and the goals of that system may be adequately discharged, producing results which gain in accuracy what they cannot achieve in fairness and integrity. As has been observed in the context of ineffective assistance of counsel, another area which evades classic, result-oriented concepts of fact finding,

[t]he difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. . . . [T]he assumption on which the Court's holding rests is that the only purpose of . . . counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.

*Strickland v. Washington*, 466 U.S. 668, 710-11 (1984) (Marshall, J., dissenting) (footnotes omitted).

20. A clear expression of this conceptual difficulty appears in the final report of the Senate Select Committee to Study Undercover Activities of Components of the Dep't of Justice. S. REP. NO. 682, 97th Cong., 2nd Sess. 369 (1982) [hereinafter *Senate Report*]. The report states:

[I]f society actually believes that those tempted into criminality are not culpable (a notion that the Select Committee rejects), the substantive criminal law should be modified to reflect that fact and to acquit persons tempted into crime, whether by governmental or by non-governmental actors.

*Id.*

21. My use of the feminine personal pronoun throughout in referring to a person accused of crime is deliberate and consistent with my wish to avoid a masculine language to denote the neutral and the general. However, this choice opposes my own experience of the criminal justice system. For a different choice explained in terms of personal experience, see Bonnie, *The Dignity of The Condemned*, 74 VA. L. REV. 1363, 1369 n.15 (1986).

22. "To determine whether entrapment has been established, a line must be drawn between a trap for the unwary innocent and the trap for the unwary criminal." *Sherman v. United States*, 356 U.S. 369, 372 (1958). The determination of who is an innocent and who is a criminal must logically be made based on prior conduct of the accused in the subjective model, which is premised upon fault allocation rather than police misconduct. Where one "intentionally

as a defense at all it is incapable of being earned or deserved by the entrapped criminal, at least as desert is ordinarily constructed. The contradictions within the proposition cannot be reconciled. This article, therefore, rejects the subjective test and instead suggests a rights-oriented analysis. The idea of unbridgeable, and therefore unearnable rights is not an unfamiliar one: the first ten amendments to the Constitution create several. They inhere in our condition as the governed. Indeed, in some instances they explicitly inhere in our condition as lawbreakers.<sup>23</sup> Their value is precisely their applicability to the most undeserving among us.

Entrapment, standing on a somewhat different footing than any provision in the Bill of Rights, may nevertheless be conceptually consistent with a personal rights analysis. In fact, the entrapment exoneration principle resembles a constitutional limitation which proscribes police from infringing upon some protected right of the accused. Indeed, several commentators have articulated such a foundation.<sup>24</sup> The Court, however, persistently fails to establish a rights-based theory for the entrapment defense. The Court, by rejecting this ground, missed the opportunity to create a coherent analysis of entrapment as a principle of substantive criminal law.<sup>25</sup>

The seventh section weighs the benefits of jury decisions against the need for clearly articulated rules in entrapment questions. This section surveys the difficulty that the Supreme Court has demonstrated in addressing these concerns. Finally, this section proposes a solution.

This article explains that part of the Court's difficulty in forging a consistent and workable theory may be traced to the Court's temperamental changes in this area. The five Supreme Court entrapment decisions<sup>26</sup> involve only federal cases. As a result, these decisions may be viewed in their purest form, uncomplicated by considerations of comity and federalism typically expressed as reasons for restraint in federal judicial review of state court

adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law . . . he intentionally breaks the law in the only sense in which the law ever considers intent." *Ellis v. United States*, 206 U.S. 246, 257 (1907). Therefore, the defendant claiming entrapment, having committed the crime, will always be an "unwary criminal" for the purpose of the statute defining the offense. Entrapment presumes culpable conduct with a criminal purpose, although among subjectivists, the fact of readiness to engage in the current criminal conduct may also indicate predisposition. Such circularity adds nothing to the factual dilemma presented by the concept of predisposition. See Blecker, *Beyond 1984: Undercover in America*, 28 N.Y.L. SCH. L. REV. 823, 983-86 (1984). "Innocence" in the subjective model must mean commission of the current criminal act, more or less readily done, by a person with a pristine background.

23. For example, whatever else the privilege against self-incrimination may protect against, it is clear that it shields the individual who has something to be incriminatory about. See U.S. CONST. amend. V. Even more to the point, the eighth amendment's proscription against cruel and unusual punishment presumes not merely the accusation of crime, but conviction of it. See U.S. CONST. amend. VIII.

24. Professor Carlson proposes that the entrapment defense protects personal rights of choice and autonomy, which are directly invaded when the government encourages crime. Carlson, *supra* note 7, at 1108. Professor Dworkin includes privacy and autonomy in his construction, but would proscribe entrapment because it is both unfair and incoherent to solicit forbidden acts. See Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and The Creation of Crime*, 4 LAW & PHIL. 17, 32 (1985).

25. See *infra* notes 175-205 and accompanying text.

26. *Mathews*, 485 U.S. 58; *Hampton v. United States*, 425 U.S. 484 (1976); *Russell*, 411 U.S. 423; *Sherman*, 356 U.S. 369; and *Sorrells*, 287 U.S. 435.

decisions.<sup>27</sup> Despite this, an additional impediment to clarity is that entrapment, unlike the fourth amendment whose concerns it mirrors, lacks a clear premise in the Constitution,<sup>28</sup> in the Court's supervisory power,<sup>29</sup> or in the federal common law.<sup>30</sup> Another obstacle is the slowness with which judge-made law gathers contours and depth. This is particularly true in American criminal jurisprudence where the governmental right to appeal is circumscribed.

Watching the Supreme Court struggle with the concept of entrapment over the course of this century is akin to focusing the lens of a camera. The image that emerges is of a Court whose once diffuse differences compose and resolve themselves into ever sharper distinctions and increasingly discrete approaches to the problem of judicial control of law enforcement. This section will demonstrate that the history reflected in the twin developments of entrapment and the fourth amendment reveal a Court uncertain as to why it acts, much less how or when it should act.

The unresolved historical and philosophical confusion over entrapment embodied in the pre-*Mathews* opinions has narrowed and hardened. In an age in which technique outpaces and overwhelms efforts at control,<sup>31</sup> the increasingly important question of the appropriate role of undercover law enforcement remains largely unanswered. This is because the Court vested responsibility for this control in a Congress which persistently has failed to

27. Judicial restraint takes many guises when both federal and state interests are involved, including federal abstention from interference in pending state criminal cases. See *Younger v. Harris*, 401 U.S. 37 (1971). The device more frequently seen in the Court's review of a final state court decision in the criminal area is that discretion is given to the state's decision based on independent and adequate state grounds. See e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976). On remand, the South Dakota Supreme Court held that an inventory search of an automobile, which the Supreme Court had determined did not violate the fourth amendment, violated the state constitution. *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976).

28. See *Russell*, 411 U.S. at 433, reiterated in *Mathews*, 485 U.S. at 66. See also *infra* note 191 and accompanying text.

29. The Court has never explicitly relied upon its supervisory powers in any entrapment decision, although entrapment cases in the Supreme Court have been exclusively federal cases involving federal criminal statutes, where the supervisory power would presumably be available. For an excellent discussion of the development and uses of the federal supervisory power, see Beale, *supra* note 18. See also *infra* note 195 and accompanying text.

30. The conventional application of the *Erie* doctrine prefers state law to federal common law in the diversity context. See *Erie R.R. v. Tompkins*, 304 U.S. 34 (1938). This doctrine, however, is not implicated in purely federal cases. Nevertheless, the Court separately rejected a federal common law of crimes in favor of congressional enactments. See, e.g., *Liparota v. United States*, 471 U.S. 419, 424 (1985). However, at least one recent member of the Court acknowledged that his "differences with the Court have been based on statutory interpretation and the federal common law, not on the Constitution." *Mathews*, 485 U.S. at 67 (Brennan, J., concurring). Indeed, it is likely the lack of constitutional resonance which permitted Justice Brennan to abandon the objective formulation of the entrapment defense. See *Hampton*, 425 U.S. at 495 (Brennan, J., dissenting). See also *Russell*, 411 U.S. at 436 (Douglas, J., dissenting), 439 (Stewart, J., dissenting).

However, in recognizing the continuing vitality of federal common law in the context of statutory interpretation, particularly criminal statutes, one is simply recognizing what it is that judges do. See *infra* notes 217 and accompanying text. See also English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HAST. L.J. 1, 1-2 n.3 (1988) (arguing for the preferability of "judge-made" law in developing principles of criminal nonresponsibility).

31. See Carlson, *supra* note 7, at 1011; Whelan, *supra* note 18. See also the 1987 ABA Criminal Justice Section Report regarding undercover operations (reprinted in P. MARCUS, *supra* note 10, at 678-707).

act,<sup>32</sup> and the jury system, which is incompetent to act, except in the single instance in which an individual jury is empowered to act. As a result, the Court abandoned a central function even as it seemed to expand the availability of the entrapment defense to particular defendants.<sup>33</sup>

The subjective test of entrapment permits governmental creation of a new crime, so long as it does so with an old criminal.<sup>34</sup> If the government's only burden is to establish the target's predisposition to commit the offense, as shown by the fact that she committed the offense, or by her prior history of committing other offenses,<sup>35</sup> then law enforcement's subsequent inducement tactics will be virtually unrestrained,<sup>36</sup> absent a clear due process violation.<sup>37</sup>

32. Hearings have been conducted into undercover activities after highly publicized "sting" operations. See, e.g., *Senate Report, supra* note 20, at 34-42. Additionally, at least two proposed entrapment statutes have emerged for federal courts, both espousing the objective test. The Proposed Revised Federal Criminal Code states:

707. Entrapment

(a) It is a bar to a prosecution for an offense that the defendant was entrapped into committing such offense.

(b) Entrapment occurs when a Federal, State, or local law enforcement agent, or a person cooperating with such an agent, induces the commission of an offense, using persuasion or other means likely to cause a normally law-abiding person to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

P. MARCUS, *supra* note 10, at 12.24 (citing H.R. NO. 4711, 97th Cong. 1st Sess. (1981)). The United States National Commission on Reform of Federal Law (1970) (the Brown Commission) similarly proposed:

702. Entrapment.

(1) Affirmative Defense. It is an affirmative defense that the defendant was entrapped into committing the offense.

(2) Entrapment Defined. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(3) Law Enforcement Agent Defined. In this section "law enforcement agent" includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.

P. MARCUS, *supra* note 10, at 12.26.

33. In the courtroom, the evidence to establish and to defeat an entrapment claim is simply a matter of judicial application of the *Mathews* decision within the boundaries of relevancy. See *infra* notes 169-71. *Mathews* affects judicial development of doctrine in the federal courts. See *infra* notes 163-73 and accompanying text.

34. See Whelan, *supra* note 18, at 1204 for the new criminal formulation. See also *infra* notes 66-69 and accompanying text.

35. See *infra* notes 69-72 and accompanying text for a discussion of this formulation of the subjective test.

36. Since entrapment is not considered by the United States Supreme Court to be of constitutional dimension but a matter of legislative intent, *Sorrells*, 287 U.S. at 448, or a matter of the Court's power to insure its own integrity, *id.* at 457 (Roberts, J., concurring), no express constitutional provision has yet been implicated in a federal entrapment decision. But see *infra* notes 204-05 and accompanying text for discussion of possible constitutional bases. Although the Court has never held that a separate due process violation occurred which would have sustained a constitutional premise for an entrapment case, the possibility remains open. See, e.g., *Russell*, 411 U.S. at 431-32 (standard would require "outrageous" police conduct on the level of the stomach pumping in *Rochin v. California*, 342 U.S. 165 (1952)); *Hampton*, 425 U.S. at 492, 499 (standard is outrageousness and egregiousness). Without such police overreaching a predisposed accused has no method of attacking law enforcement conduct under the subjective test. But see *Sherman*, 356 U.S. 369, in which Justice Frankfurter points out the shortcomings

Despite the urgent need for guidance, the *Mathews* decision does not concern itself with the construction of the law enforcement mousetrap. The Court analyzes without establishing parameters and containment of law enforcement. The message is clear that in evaluating the continued vitality of entrapment, lower federal trial courts need not focus on the bait, but on the character and past of the snared target. Building the post-*Mathews* mousetrap permits the use of all the skills, ruses and technology of modern law enforcement so long as a truly egregious inducement is avoided. Above all, it will mean choosing the right mouse.

### III. ORIGINS OF ENTRAPMENT

#### A. Developing Entrapment: Functions and Definitions

Despite the ubiquity of the Garden of Eden referent, which suggests that the charge of corrupt inducement is as old as human nature itself,<sup>38</sup> the entrapment defense is recent and peculiarly American.<sup>39</sup> Because English common law generally rejects the concept,<sup>40</sup> the origin of entrapment is novel and limited to American jurisprudence.

The problems of developing a workable theory of entrapment are not premised entirely on the Court's ambivalence. One problem in developing a cohesive model of entrapment is the very fact of its novelty: it eludes established legal categories familiar to the criminal law.<sup>41</sup> Initially a creature of the judiciary rather than the legislature, entrapment developed in concept and in application in the courtroom. The peculiarities of American criminal

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of the subjective test by stating: "Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected." *Id.* at 383 (Frankfurter, J., concurring).

37. The more benign, earlier predisposition formulations of *Sorrells*, 287 U.S. at 439-40, and *Sherman*, 356 U.S. at 373, permit the demonstrated reluctance of the target to commit the current offense to overcome predisposing factors in defendant's past. However, the opinion in *Russell* makes clear that once predisposition is shown, no governmental inducement that falls short of due process outrageousness will save the entrapment claim. *Russell*, 411 U.S. at 431-32.

38. See Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965); Groot, *The Serpent Beguiled Me and I (Without Scientist) Did Eat — Denial of Crime and Entrapment Defense*, 1973 U. ILL. L. F. 254; Dworkin, *supra* note 24; Whelan, *supra* note 18. The current writer chose the mouse metaphor upon discovering the plethora of snakes in the area.

39. The first use of the now time-worn illustration of Eve's fall is found in Board of Commissioners v. Backus, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864). Subsequently, the Michigan Supreme Court decided what appears to be the first entrapment case. *Saunders v. People*, 38 Mich 218 (1878). For a good history of the American developments, see DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application*, 1 U.S.F. L. REV. 243, 244-248 (1967). See also P. MARCUS, *supra* note 10.

40. The English common law viewed the defense as a variety of solicitation, as in Norden's Case, Fost. Crim. Cas. 129 (1774). In that case, a robber failed to convince the court to acquit by arguing that his victim had boasted of his goods to the accused in the hopes of being robbed. A later case rejected the entrapment defense where "the prisoners were solicited to commit the act proved against them, by the bank themselves." *Regina v. Holden*, 127 Eng. Rep. 1107, 1107 (1810). In a fact pattern more closely associated with the modern entrapment defense, the court held that an accomplice-informer could be used by the government without vitiating the conviction. *Regina v. Mullins*, 3 Cox Crim. Cas. 526 (1848)

41. P. MARCUS, *supra* note 10, at 1.02.

trial practice render it difficult to discover whether jury acquittals in trials were achieved because an entrapment defense was convincing, or for some other reason subsumed in the general verdict. American criminal juries are not ordinarily required to answer special interrogatories or to render logically consistent verdicts on all counts in an indictment.<sup>42</sup> Additionally, the jury has the inherent power to refuse to apply the law to any case, even if it is unaware that it has that power.<sup>43</sup> Thus, unless the jury itself discusses its deliberations post-verdict, it is impossible to say what a not guilty verdict means to the fact-finder. The legal consequences of that verdict are dictated by factors that the jury does not control and may have little to do with the reality of jury decision making.<sup>44</sup>

A second, related problem concerns recordation: not guilty trial determinations, even if based on insufficient or incredible defenses, are unchangeable and thus generally unreviewable.<sup>45</sup> Because successful defenses end the criminal process, those trials are not transcribed nor do they become the subject of published opinions. As a result, recorded examples of entrapment are limited to cases in which the accused *lost* below. This requires the trial record of someone found guilty who raised the entrapment defense and thereafter appealed on that ground.<sup>46</sup> However, because the burden in reversing a factual finding on appeal is far greater than that required to establish it at trial, the scope of appellate entrapment will necessarily be much narrower.<sup>47</sup>

American constitutional federalism also leads to a sparse number of decisions focusing on federal entrapment law. States are generally free to define their own crimes and defenses without regard to federal law or the law in other states.<sup>48</sup> In fact, many federal opinions which analyze state entrapment

42. See, e.g., *United States v. Powell*, 469 U.S. 57 (1984).

43. See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1973).

44. See, e.g., *Powell*, 469 U.S. 57; *Dougherty*, 473 F.2d 1113.

45. Principles of double jeopardy prevent the government from retrying cases that have resulted in factual determinations of insufficiency of evidence or lack of guilt. See *Fong Foo v. United States*, 369 U.S. 141 (1962). In the federal system, the requirement of an article III case or controversy as a predicate for judicial action is probably implicated in preventing a government appeal from such a determination. Since an appellate decision on an acquittal could only serve as an advisory opinion for future cases, and could not require the particular defendant to stand trial again, the case on appeal would be moot. See W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* 26.3 (a) n.5 (1985).

46. *Sherman*, 356 U.S. 369, is the sole example of this process in the Supreme Court in that it finds entrapment as a matter of law. The defendant, an admitted and convicted drug abuser, provided drugs on three separate occasions to an undercover informer whom he had met in a doctor's office while undergoing drug abuse treatment. *Id.* at 371. The informer repeatedly requested drugs from Sherman, relying on their shared history and suffering, and using the provided drugs with the defendant before setting him up to be observed delivering drugs and receiving money supplied to the informer by the government. The observation and subsequent arrest was effectuated by Bureau of Narcotics agents. See *infra* notes 92-98 and accompanying text.

47. When facts are reviewed on appeal, the prosecution is entitled to all reasonable inferences. A jury verdict will be disturbed only where it is clear that no reasonable fact-finder could have found sufficient evidence to support the verdict. See, e.g., *Jackson v. Virginia*, 443 U.S. 307 (1979) (constitutional sufficiency in federal habeas review of state court facts).

48. Constitutional requirements imposed upon the criminal law of the states have been primarily procedural rather than substantive, and are beyond the scope of this article. See, e.g., *In Re Winship*, 397 U.S. 358 (1970) (due process requires proof beyond a reasonable doubt in

law are largely irrelevant to the development of federal entrapment law. The absence of congressional legislation in the entrapment area also leaves the Court without guidance. As such, the Court was forced to derive its entrapment theory without the help of legislative enactment or established judicial precedent.<sup>49</sup>

Not only was there an insufficient legal foundation to build upon, but there was also uncertainty as to the court's source of authority to act in the entrapment arena. Neither legislative enactment nor constitutional compulsion empowered the Court to act. Moreover, according to the *Mathews* dissenters, supervisory imperative did not compel the entrapment defense.<sup>50</sup> The federal courts, uncertain as to the source of their authority, focused on issues regarding their power.<sup>51</sup> Consequently the courts failed to define a satisfactory essence for the entrapment defense to begin with.<sup>52</sup>

The lack of judicial or legislative guidance did not lessen the importance of the five Supreme Court decisions on federal entrapment. To the contrary, the lack of guidance gives the Court's pronouncements oracular significance. As such, the Court's dicta in this area is transferred into quasi-legislative proscriptions. The importance of these decisions, however, is somewhat illusory because the Court avoided its opportunity to lay a solid foundation for a cohesive entrapment theory. This opportunity was avoided because the Court delegated too much deference to the jury. As a result, the Court will soon be out of the business of making entrapment law even as it changes the focus of the defense in the lower federal courts.<sup>53</sup>

state criminal juvenile adjudication). Suffice it to say that, while many substantive aspects of the criminal juvenile law have never been subjected to constitutional scrutiny, the universality of some concepts, such as self defense, mens rea, and voluntariness suggest that the state power to define elements of crimes and defenses has a broad constitutional gloss. See, e.g., Sundry, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HAST. L.J. 457, 477-487 (1989) (suggesting that a course in constitutional criminal law would be short indeed). The fact that entrapment is recognized, by statute or judicial opinion, in every state may be authority enough to argue a constitutional basis for its existence, while permitting the individual states to define its elements. See MODEL PENAL CODE 2.13, comment 1 n.3 (Official Draft, 1962).

Entrapment first appeared as a defense in a state court proceeding, and entered the federal system thereafter. See *Saunders v. Michigan*, 38 Mich. 218 (1878). Justice Marston's concurrence is particularly epigrammatic and influential. *Id.* at 221 (Marston, J., concurring). See also P. MARCUS, *supra* note 10, at 11 (citing *United States v. Whittier*, 28 F. Cas. 591 (No. 16,688) (C.C.E.D. Mo. 1878) as the first federal entrapment discussion). It was not until *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915), however, that disapproval of police tactics gave rise to a defense in the federal court system. P. MARCUS, *supra* note 10, at 12.

49. The United States Supreme Court selected a view of entrapment not reflected in any model code, or suggested congressional legislation. The Model Penal Code, the Proposed Revised Federal Criminal Code, and the United States National Commission on the Reform of Federal Law (1970), have all adopted an objective view of entrapment. See *supra* note 32.

50. "[N]either the Constitution, nor a statute, nor the Criminal Rules, nor the bulk of authority compels us to reverse petitioner's conviction." *Mathews*, 485 U.S. at 70 (White, J., joined by Blackmun, J., dissenting). But see *supra* note 29 on the origins of supervisory power.

51. See *infra* notes 79-84 and accompanying text.

52. *Id.*

53. For example, a jury determination of guilt is only cognizable in a federal constitutional sense if it violates the "beyond a reasonable doubt" standard of *In Re Winship*. 397 U.S. 358 (1970). See also *Jackson v. Virginia*, 443 U.S. 307 (1979). Thus determinations of credibility and verdict inconsistency are inviolable on appeal even if a particular appellate bench

The black letter components of the federal entrapment defense include (1) excessive governmental inducement to commit a crime aimed at (2) a non-predisposed accused.<sup>54</sup> These two elements and the weight each receives account for most of the disagreement in the federal system on what constitutes entrapment. The prevailing view of the underlying purpose and function of the concept determines not merely its substantive elements, but the procedural posture in which it must be raised and the preliminary burden which must be met to place it in issue.<sup>55</sup> As has been suggested, even naming entrapment a defense is a linguistic inaccuracy which frequently informs the meaning which the Court attaches to it.<sup>56</sup> Specifically, what it is named, what it promotes and whom it protects have been utilized by the Justices to support divergent opinions concerning the Court's power to place the defense between individuals and illegal government acts in the first place.<sup>57</sup>

### B. *New Criminals, New Crime*

If the subjective view of entrapment turns upon whether or not the government has made a new criminal of an "unwary innocent,"<sup>58</sup> the objective test turns upon government creation of new crime.

To begin with the minority objective test for entrapment, the importance of the judiciary is to define clear boundaries for law enforcement and to identify instances in which law enforcement breaches that boundary.<sup>59</sup> The selection of a target adds little to an endeavor which is deemed overreaching from its inception. The objective view analyzes entrapment from a position protective of the judicial role in achieving convictions.<sup>60</sup>

*disagrees with the result.* *Dunn v. United States*, 284 U.S. 390, 393-94 (1932). In the fourth amendment area, the magistrate's determination of probable cause has recently assumed a similar importance; it is not to be reviewed *de novo* even by the trial court which handles the motion to suppress. *See generally Illinois v. Gates*, 462 U.S. 213 (1983). *See also LaFave, Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1186 (1983).

54. *Sorrells*, 287 U.S. at 441. *But see* Justice Scalia's concurring opinion in *Mathews*, suggesting an implied causation element as present in any affirmative defense. *Mathews*, 485 U.S. at 67-68 (Scalia, J., concurring).

55. *Sorrells* first defined the elements of entrapment and recognized it as a valid defense in the federal system. *Sorrells*, 287 U.S. at 443. The opinion also established the process by which the issue was to be presented in court. According to the majority, it is a defense raised by way of a plea of not guilty, rather than by a pretrial motion. *Id.* at 452.

56. *See supra* note 5.

57. *See infra* notes 79-91 and accompanying text discussing the initial expression of this divergence in *Sorrells*.

58. *Sherman*, 356 U.S. at 372.

59. This view was expressed by Justice Roberts, who stated: "The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." *Sorrells*, 287 U.S. at 457.

60. *See, e.g., Sherman*, 356 U.S. at 380-83 (Frankfurter, J., concurring) (arguing that entrapment does not exonerate accused but renders her unconvictable due to methods of law enforcement); *Sorrells*, 287 U.S. at 448-49 (urging "highest public policy in the maintenance of the integrity of administration . . . of justice" required entrapment defense); *Casey v. United States*, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting) (arguing that both control of governmental law-breaking and judicial integrity were reasons to recognize entrapment).

In its purest form, the objective test has four hallmarks. First, governmental involvement in the commission of crime is evaluated. Second, target behavior and the strength of the inducement are weighed against an external perspective of reasonableness, which focuses on reasonable latitude for law enforcement and reasonable firmness in target individuals. Third, only the current criminal act of the target is deemed relevant.<sup>61</sup> Fourth, a judicially controlled determination of entrapment is preferred to one left to the exigencies of the jury trial.<sup>62</sup>

It must also be understood what this view does not encompass. Some law enforcement techniques are seen as so inherently offensive as to violate due process.<sup>63</sup> However, acts which may constitute entrapment do not necessarily, or even frequently, support a demonstrable due process claim.<sup>64</sup> Furthermore, entrapment is something narrower than, although related to, the common law defense of duress.<sup>65</sup> The objective view posits a federal court system with the inherent power to reject the sully of that system by unethical and unsavory police conduct.<sup>66</sup> This is one of the premises which has historically informed the development of the fourth amendment exclusionary rule.<sup>67</sup> The resemblances between the objective test and the exclusionary rule are more than incidental; each values governmental legitimacy which can only be achieved through lawful executive enforcement. Although the parallels are not

61. *But see infra* notes 169-71 and accompanying text for a general discussion of evidentiary uses of good and bad character traits.

62. These four elements of the objective test are synthesized from the views of Brandeis and Frankfurter who expressed the most consistent form of the objective model, and who were the most concerned with judicial integrity as the motivating force behind the defense. *See Casey*, 276 U.S. at 424 (Brandeis, J., concurring); *Sherman*, 356 U.S. at 378 (Frankfurter, J., concurring). *See also infra* notes 87-89 and *supra* note 60.

63. *See Rochin v. California*, 342 U.S. 165 (1952) (stomach pumping to retrieve contraband from suspect).

64. The Supreme Court has never reversed an entrapment case on due process grounds, or rejected a due process claim while upholding an entrapment claim. *See, e.g., Russell*, 411 U.S. 423. However, the differences in the standards clearly make the due process claim more difficult to establish. *Russell*, 411 U.S. at 430; *Hampton*, 425 U.S. at 495 (Powell, J., concurring) (five justices concurring that a due process right could conceivably be violated in the entrapment context).

65. *See Robinson*, *supra* note 5, at 236-39.

66. "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced." *Sherman*, 356 U.S. at 380.

67. Indeed, the connection between entrapment and the exclusionary rule was made explicit by Justice Frankfurter in his concurring opinion in *Sherman*, in which he observed: "A statute prohibiting the sale of narcotics is as silent on the question of entrapment as it is on the admissibility of illegally obtained evidence." *Sherman*, 356 U.S. at 381 (Frankfurter, J., concurring). *Sherman* was decided three years before *Mapp v. Ohio*, 367 U.S. 643 (1961), which made the fourth amendment exclusionary rule applicable to the states. As such, at the time that Frankfurter wrote, the basis of the Court's activity in both areas remained limited to its relationship with lower federal courts and federal law enforcement. Although the exclusionary rule has gained constitutional status since that writing (and may since have lost it; *see infra* note 185 and accompanying text), Frankfurter's concurrence retains extraordinary, almost prophetic vitality in entrapment doctrine, which has yet to be elevated to a constitutional principle. His view has been codified in the Model Penal Code. MODEL PENAL CODE § 2.13.(1)(b) (Official Draft 1962). *See also Whelan*, *supra* note 18, at 1210 n.116.

accidental, they are entirely inconsistent with the subjective premise that entrapment bears on culpability.<sup>68</sup>

In the majority subjective construct, the defining question concerns the creation of a new criminal, rather than law enforcement's involvement in new crime. First, the subjective test balances the current reprehensibility of law enforcement against the past reprehensibility<sup>69</sup> of the target: where predisposition exists, entrapment cannot. Second, the test is desert-based in that it begins its analysis from the remedy of acquittal and works backwards to determine whether the accused merits it. Finally, the subjective view retains a fluid definition of entrapment which changes, not according to the nature of the inducement, but according to the characteristics of the accused who calls upon it as a defense.<sup>70</sup>

In this second vision of entrapment governmental inducement remains an element but the nature of the inducement, unless it is separately offensive of due process, is thereafter irrelevant. Where the history of the accused is the primary determinant, what amounts to entrapment with one target will not be entrapment with another. It is rather the accused who must establish that her participation in the crime is uncharacteristic of her; or to state it in recognition of the government's burden of proof, the prosecution must establish that the defendant, by her past history, was predisposed to commit the crime with or without governmental inducement.

The fact that the defendant performed the acts establishing the crime in the first place seems dispositive of the predisposition issue in any logical system.<sup>71</sup> Nevertheless, entrapment cases rarely turn on whether the defendant is factually guilty of the present crime. Instead, the question becomes, as Justice Frankfurter suggested, whether the defendant to be convicted of the present offense is guilty of his past.<sup>72</sup>

68. See *infra* text accompanying note 157 for the relationship between the subjective view and blameworthiness of the accused.

69. This language derives from Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1983).

70. This characteristic of the subjective test has been severely criticized. As Justice Frankfurter stated:

Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition.

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

71. This is the explicit objection leveled at the subjective definition of entrapment by Justice Frankfurter. See *Sherman*, 356 U.S. at 379 (Frankfurter, J., concurring). This objection was also made by Justice Stewart in his dissent in *Russell*:

[T]o say that such a defendant is "otherwise innocent" or not "predisposed" to commit the crime is misleading, at best. The very fact that he has committed an act that Congress has determined to be illegal demonstrates conclusively that he is not innocent of the offense. . . . That he was induced, provoked, or tempted to do so by government agents does not make him any more innocent or any less predisposed than he would be if he had been induced, provoked, or tempted by a private person — which of course would not entitle him to cry "entrapment."

*Russell*, 411 U.S. at 442 (Stewart, J., dissenting).

72. See *Sherman*, 356 U.S. at 383 (Frankfurter, J., concurring). See also DeFeo, *Entrapment as A Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243, 266 (1967).

The minority objective view achieves procedural and ideological consistency. The subjective or majority view has sought the same consistency. Under the subjective view entrapment is considered a defense. Despite this, it remains unclear whether subjective entrapment actually challenges the existence of an element of the crime. Does it, for example, negate the mental state of the accused and thus affect *mens rea*? Certainly, in the interests of theoretical consistency, any subjective, individually focused construct should promote the logic that entrapment modifies an element of the crime. The subjective view, after all, does not purport to apply a value unrelated to the accused or her culpability for the sake of a larger policy. Unfortunately, the conduct of the accused that becomes dispositive may be conduct that pre-existed the entrapment. Predisposition means both conduct that preceded the crime and readiness to commit the crime.<sup>73</sup> According to the Frankfurter-Stewart line of reasoning, precedent conduct adds too much to the evidence of entrapment.<sup>74</sup> Indeed, in positing predisposition as an element of this defense to be raised at trial for jury determination, the subjectivists permit some of the most troubling evidence: character, prior conduct and reputation. Readiness to commit the crime adds too little, and surely no more than exists in most criminal conduct. All criminal liability, after all, attaches to criminal behavior co-existing with a criminal intent.

In reality, the pre-*Mathews* disarray in the prevailing definition of entrapment reflected the uncertainty embodied in the Supreme Court decisions.<sup>75</sup> Despite the stated prevalence of the majority or subjective view throughout Supreme Court history, entrapment was never treated exclusively as a "normal" jury-determined defense. A recurring mix of subjective standards with objective constraints was concocted, with resulting over-involvement of trial courts in determining whether entrapment applied, while permitting the jury to make the ultimate decision. No real defense, which goes to the jury on a very small amount of evidence — generally "more than a scintilla"<sup>76</sup> — suffers such overseeing.

While *Mathews* purports to change the confusion surrounding the substantive and procedural problems in entrapment law, the decision may well create more confusion than it resolves. *Mathews* effectively ignores that entrapment is essentially a *sui generis*, policy-oriented form of criminal exoneration. It is other than an exercise of federal supervisory power in the courts, and other than a mere prophylactic rule of exclusion because, wherever and however shown, it is empowered to acquit a factually guilty individual. Even the application of the fourth amendment exclusionary rule does not achieve this result directly.<sup>77</sup> Entrapment is aimed at defendants as well as upon governmental methods of obtaining convictions. Moreover, it is perhaps

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73. See *Russell*, 411 U.S. 423, at 433-34.

74. See *supra* notes 70-71.

75. See *supra* note 15 for the pre-*Mathews* status of the circuits.

76. See *Rodriguez*, 858 F.2d at 814 (discussing preliminary burden of placing entrapment in issue).

77. Suppression of illegally obtained evidence may leave the prosecution with little or no proof for trial, but suppression is not a form of exculpation, nor does it guarantee acquittal. See, e.g., *Brewer v. Williams*, 430 U.S. 387 (1977), and *Nix v. Williams*, 467 U.S. 431 (1984) (so called *Williams I* and *II*, in which the Supreme Court affirmed the suppression of a statement, but not its fruits, and the state of Iowa was able to retry and reconvict the defendant).

most ineffective where it is most impenetrable — in the collective mind of a jury which, despite the inherent difficulty of reaching a decision, must ignore the wrongdoing of a defendant and return a verdict. Such a result furthers no policy, establishes no limits, and reveals no insight into the relationship between an individual and law enforcement.

#### IV. THE EARLY CASES: *SORRELLS* AND *SHERMAN*

Generally, appellate courts are constrained by the factual findings implicit in the verdict and developed in the record. While this is characteristic of all appeals, it is particularly problematic in entrapment cases in which one's choice of theory dictates the factual emphasis at trial. Where theory is unclear or undergoing evolution, the trial becomes a perilous course in which central themes may be left undeveloped. This gives the reviewing court the option of affirming the court below when the record is silent in an area later deemed crucial. An instructive example of this phenomenon appears in *Russell*,<sup>78</sup> where counsel waived objection to the subjective-predisposition jury instruction given at trial.

The first bona fide entrapment case considered by the United States Supreme Court, *Sorrells v. United States*,<sup>79</sup> displays many of the tensions between the power to decide and the contours of the decision. In the majority opinion, the Court did two things. First, it recognized entrapment as a form of criminal exoneration, and second, it created a basis for acting.

The facts in *Sorrells* showed that the defendant, introduced to a prohibition agent posing as a tourist and a World War I veteran from the same division as the defendant, was repeatedly importuned by the agent to help him acquire whiskey. Eventually, Sorrells did so. The defense presented character testimony which the government rebutted by reputation evidence. This reputation evidence demonstrated that the defendant was a "rum runner."<sup>80</sup> The Court held that the trial court erred when it refused to give an entrapment instruction to the jury. The Court then gave some indication of what this instruction should have contained.<sup>81</sup>

In recognizing entrapment as a defense, the Court held that "the weight of authority in the lower federal courts is decidedly in favor of the view that in such case as the one before us the defense of entrapment is available."<sup>82</sup> The Court further stated that the power to interpret congressional statutes gave it the authority to decide the case. The majority, in reading the National Prohibition Act,<sup>83</sup> held that Congress could not have intended for federal agents to provoke individuals to violate the Act. Thus, as a principle of statutory construction, the entrapment defense was born.<sup>84</sup> The majority concluded that both the "predisposition and criminal design of the defendant" as well as "the

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78. 411 U.S. 423. See *infra* notes 107-18 and accompanying text.

79. 287 U.S. 435.

80. *Id.* at 439, 441.

81. *Id.* at 444-45.

82. *Id.* at 443.

83. 27 U.S.C. § 1-85 (1926), *repealed in part* by U.S. CONST. amend. XXI.

84. *Sorrells*, 287 U.S. at 448-49.

creative activity of [the government] officials”<sup>85</sup> were relevant factors in entrapment theory. “Protect[ion] . . . from the illegal conduct of [governmental] officers” and “preserv[ation of] the purity”<sup>86</sup> of the federal courts were implicit purposes of the defense.

The concurring opinion relied instead on the need for judicial integrity as a basis for both the Court’s power to act and for its definition of entrapment. This second model was premised upon the view that police inducement to commit a crime one would not otherwise have committed is repugnant to the judicial system.<sup>87</sup> Writing separately, Justice Roberts expanded on the public policy aspects of entrapment, indicating that “courts . . . will not permit their process to be used in aid of a scheme for the actual creation of a crime by those whose duty is to deter its commission.”<sup>88</sup> This view of the institutional policies behind the entrapment defense does not contradict the substance of the majority opinion. Rather, this view expresses concern about the Court’s judicial power to recognize and manage this defense in the absence of legislation.<sup>89</sup>

Nevertheless, because the concurrence was primarily concerned with entrapment as an aspect of judicial power and control, Roberts veered sharply from the majority’s view of who should decide the question of entrapment, the jury or the court. He stated that “[r]ecognition of the defense of entrapment as belonging to the defendant and as raising an issue for decision by the jury called to try him . . . results in the trial of a false issue wholly outside the true rule which should be applied by the courts.”<sup>90</sup> The Roberts concurrence generated persistent and vociferous adherents for whom both the substance of the entrapment concept as a non-exculpatory defense and the question of judicial power to control its own processes were most effectively addressed in the objective, police-control entrapment model. However, the paths of the *Sorrells* majority and the Roberts concurrence did not immediately diverge, as they were not inconsistent with each other.<sup>91</sup> Rather, the distinctions in the two views

85. *Id.* at 451.

86. *Id.* at 446 (citing *Casey*, 276 U.S. 413).

87. *Id.* at 459 (Roberts, J., concurring).

88. *Id.* at 454.

89. Professor Carlson considers this problem extensively in his critique of the entrapment defense, and argues that the Court’s failure to distinguish the substance of the defense from the Court’s own authority to define entrapment has distorted all discussions of it.

The entrapment defense . . . raises two fundamental questions. First, what rationale justifies a departure from the liability-allocating rules of the criminal law? Second, if the defense is judicially created, what is the source of the judiciary’s authority to depart from the legislature’s determination that the defendant’s conduct should be considered criminal?

. . . the traditional theories of entrapment derived from *Sorrells v. United States* do not answer the first of these questions. Instead of explaining the substantive content of the entrapment defense, the traditional theories are oriented toward identifying the source of the judicial power to create the defense. At the time of the *Sorrells* case, the Court was preoccupied with a dispute over the Court’s power to control the general administration of criminal justice in the federal courts. The Court’s entrapment analysis in *Sorrells* therefore centered upon the problem of rationalizing the judiciary’s power to create the entrapment defense, and not upon a careful examination of the substantive rationales for the defense.

Carlson, *supra* note 7, at 1025-26 (footnotes omitted).

90. *Sorrells*, 287 U.S. at 458 (Roberts, J., concurring).

91. Professor Carlson tracks the similarities between the majority and concurrence in *Sorrells*:

involved a difference in emphasis, and remained a matter of emphasis in the next entrapment case taken up by the Court.

*Sherman v. United States*<sup>92</sup> displayed a Court unanimous in its holding and untroubled by the distinctions in reasoning which marred subsequent cases. In this case the two models of entrapment, whether primarily oriented in the subjective predisposition of the defendant or in the objective inducement offered by law enforcement, retained aspects of each other. The *Sherman* majority, like *Sorrells*, provoked only concurring opinions, indicating that the distinctions had not yet ripened into dissent. The Court continued to agree upon what constituted entrapment, and in *Sherman* this was determined as a matter of law. Although *Sherman* produced a concurrence by Justice Frankfurter<sup>93</sup> that has overwhelmed the Warren majority opinion, the *Sherman* facts are instructive for analyzing inducement and predisposition.

The defendant, who challenged his convictions for narcotics sales<sup>94</sup> to an undercover informer, met the informer, Kalchinian, while both were undergoing drug rehabilitation treatment with the same doctor. After several chance meetings, the informer and the defendant discussed their respective addictions. Finally, Kalchinian asked the defendant to name a narcotics source. The request was repeated, the defendant's sympathy elicited, and finally, the defendant capitulated, resulting in his return to drug use.<sup>95</sup> The defendant had two prior narcotics convictions which the Government produced on Sherman's retrial.<sup>96</sup> The Supreme Court not only rejected this as evidence of predisposition, but expressed repulsion at the government's encouragement which returned a struggling addict to his habit.<sup>97</sup> The only other possibility for showing predisposition, defendant's readiness to commit the charged offense,<sup>98</sup> was overcome by the overt reluctance displayed by the target.

Certainly on the basis of the current Court's expressed reasoning, both the *Sorrells* and *Sherman* decisions could easily have gone the other way, resulting in the convictions being affirmed. However, the nature of the inducement in each case certainly approaches the odiousness and severity of a due process violation. Both *Sorrells* and *Sherman* responded to appeals to their

Although the subjective approach as currently applied focuses exclusively on the defendant's culpability (as measured by his predisposition) . . . that position misreads *Sorrells*. In doing so, it obscures the strong parallels between the majority and concurring opinions in *Sorrells*. After stating the facts in *Sorrells*, Chief Justice Hughes opened the majority opinion by condemning the government's conduct, thus framing the defense as one aimed at discouraging government misconduct: . . .

Carlson, *supra* note 7, at 1026 n.66 (citation omitted).

92. 356 U.S. 369.

93. *Sherman*, 356 U.S. at 378 (Frankfurter, J., concurring).

94. The relevant statute was 21 U.S.C. 174 (1956) (repealed 1970)

95. *Sherman*, 356 U.S. at 370-72.

96. The first verdict was overturned by the circuit court. *United States v. Sherman*, 200 F.2d 880 (2d Cir. 1952) (L. Hand, J.). The appeal from the second conviction was taken from the affirmance of *Sherman*. 240 F.2d 949 (2d Cir. 1957).

97. *Sherman*, 356 U.S. at 373.

98. *Id.* at 372. This aspect of predisposition, in which "the defendant is said to be predisposed because he committed the act, and then is held responsible for the act because he was predisposed" has been subject to much criticism for its "pernicious circularity."

respective levels of humanity, rather than their levels of venality. It was altruism rather than self-interest that appeared to dictate the defendants' acts.<sup>99</sup> However, both the type of target and the method of inducement differed dramatically in the later Supreme Court considerations of the entrapment defense.

## V. THE REHNQUIST OPINIONS: *RUSSELL, HAMPTON, AND MATHEWS*

After *Sherman*, the Court remained relatively inactive in the entrapment area until *Mathews*.<sup>100</sup> *United States v. Russell*<sup>101</sup> was decided in 1973, fourteen years before *Mathews*. *Hampton v. United States*<sup>102</sup> was the only other pronouncement on entrapment during that time. That period coincided with some of the most notorious federal sting operations: Abscam and Greylord in 1980, and the John DeLorean investigation and trial in 1984.<sup>103</sup> At the district and circuit court levels the problems of creative law enforcement were at a critical stage and were met with Supreme Court silence. Certiorari was denied in each of the Abscam cases,<sup>104</sup> and an acquittal ended the DeLorean cocaine trial.<sup>105</sup> While public concern with the role of the FBI in the Abscam investigation resulted in congressional hearings, no legislation ensued.<sup>106</sup>

Although the *Russell*<sup>107</sup> opinion contains Rehnquist's bold assertions, the decision retains all the core disputes. These disputes were separately expressed in dissents by Douglas, with which Brennan concurred,<sup>108</sup> and Stewart, with which Brennan and Marshall concurred.<sup>109</sup> *Russell* involved an undercover FBI agent providing the precursor chemical phenyl-2-propanone (P2P) to a methamphetamine manufacturing business.<sup>110</sup> The participants were all actively engaged in making and selling the product. These participants had at least one other source of the difficult to obtain P2P besides the undercover FBI agent.<sup>111</sup> Thus, there was very little effort needed to persuade the targets to deal with the agent. Moreover, the crime itself was part of an ongoing scheme.

Gerschman, *Abscam, the Judiciary and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1581 (1982).

99. The dilemma presented to each resembles the Amy/Jake problem in moral decisionmaking identified and described in Carol Gilligan's work on gendered morality. No solution to a husband's need to get a drug he cannot afford to save his wife's life is without moral or legal risk. See C. GILLIGAN, *IN A DIFFERENT VOICE* 25-63 (1982).

100. 485 U.S. 58.

101. 411 U.S. 423.

102. 425 U.S. 484.

103. These investigations and their implications have been the subject of a number of scholarly articles. Some of the most comprehensive include Blecker, *supra* note 22 (arguing that protection of private activity requires special law enforcement scrutiny of public figures; entrapment test should be subjective plus due process); Whelan, *supra* note 18 (urging investigation target selection based upon reasonable suspicion); Goldwasser, *supra* note 3.

104. See Whelan, *supra* note 18, at 1193 n.5, 1203 n.80.

105. *Id.* at 1197-1200.

106. For an excellent discussion and overview of public and congressional response during this time period, see *id.* at 1194-97.

107. 411 U.S. 423.

108. *Id.* at 440 (Douglas, J., dissenting).

109. *Id.* at 439 (Stewart, J., dissenting).

110. *Id.* at 425.

The issue in *Russell* was whether the government's conduct in supplying a scarce ingredient in the manufacture of methamphetamine constituted entrapment as a matter of law, despite the defendant's concession of predisposition.<sup>112</sup> The majority discussed the predisposition issue as if it were the core dispute, even though the issue was waived by trial counsel's failure to object to the district court's subjective test charge to the jury.<sup>113</sup> This being the case, Rehnquist's extensive discussion of "the traditional notion of entrapment, which focuses on the predisposition of the defendant"<sup>114</sup> having already been conceded, was both unnecessary and incomplete. It was unnecessary because nothing in the *Russell* facts turned upon it. It was incomplete because it ignored the role that inducement played in both *Sorrells* and *Sherman*. Rehnquist charged that the circuit court "expanded the traditional notion of entrapment"<sup>115</sup> when it applied the objective test to the *Russell* facts. Rehnquist further suggested that a defense based upon governmental enmeshment in criminal activity would be a "new defense"<sup>116</sup> and not aligned with the traditional view of entrapment.

Unsurprisingly, the revisionism of the Rehnquist opinion generated intense disagreement among the membership of the Court. Justice Stewart, joined by Justices Brennan and Marshall, aligned himself totally with the Roberts-Frankfurter objective position articulated in *Sorrells* and *Sherman* respectively.<sup>117</sup> For the first time, however, this view was expressed as a dissent.

In *Russell*, the key focus of the entrapment defense began to divide the Court. Much of the assuredness displayed in the Rehnquist majority opinion concerning both the origins and purpose behind the entrapment doctrine was overstated.<sup>118</sup> In addition, the opinion was almost entirely dicta. Given the intensity of the disagreements within the Court, entrapment doctrine was left in tense disarray. After *Russell*, it was impossible to predict that *Mathews* would subsequently provide an opportunity to fashion a subjective vision of entrapment that was both necessary to the immediate facts, and that would command a majority of the court.

*Hampton v. United States*<sup>119</sup> centered on two issues. The first was the lower court's refusal to recognize an objective test of entrapment. The second issue focused on the efficacy of a due process allegation concerning the inducement. Subjective entrapment was neither raised nor available to this admittedly predisposed defendant.<sup>120</sup> Hampton sold heroin to a DEA agent

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111. *Id.* at 426.

112. *Id.* at 427, 436.

113. *Id.* at 427 n.4.

114. *Id.* at 427.

115. *Id.*

116. *Id.*

117. *Id.* at 442 (Stewart, J., dissenting).

118. See Carlson, *supra* note 7, at 1029-30 n.71.

119. 425 U.S. 484.

120. The predisposition concession was made by appellate counsel. *Id.* at 487 n.3. The requested jury instruction explicitly stated that predisposition would be irrelevant if the jury found that the government supplied the contraband. *Id.* at 487-88. Counsel thus rejected a subjective test of any kind in favor of a chance to get a favorable objective instruction to the jury.

supplied to him by the agent's informer.<sup>121</sup> Interestingly, Hampton raised the substantive defense that he did not know that the supplied substance was heroin. Instead, Hampton claimed that the informant told him that the substance was a counterfeit to fool the prospective buyer.<sup>122</sup> The jury rejected this version of the facts, which may help to account for the subsequent history of Hampton's due process claim. *Hampton's* plurality consisted of chief Justice Berger and Justices Rehnquist and White.<sup>123</sup> The plurality stated that the defendant's culpable conduct precluded a showing that the police conduct violated some protected right belonging to the accused.<sup>124</sup> It is on this point that the opinions diverge. Concurring Justices Powell and Blackmun rejected the sweep of the plurality on whether a predisposed accused could ever demonstrate a due process violation in the inducement to commit a crime.<sup>125</sup> The dissenters, Justices Brennan, Stewart and Marshall, disagreed with the use of the pure subjective test of entrapment and urged the Court to focus on the government activity.<sup>126</sup>

In *Mathews*, the divergent views of the justices crystallized. The specific issue which the *Mathews* Court was called upon to decide was whether "a defendant in a federal criminal prosecution who denies commission of the crime may nonetheless have the jury instructed, where the evidence warrants, on the affirmative defense of entrapment."<sup>127</sup> *Mathews*, an official in the Small Business Administration (SBA), was accused of using his position to accept loans from a small businessman in exchange for cooperation in obtaining SBA help. A businessman, James DeShazer, made a complaint about *Mathews'* requests for loans. Eventually DeShazer taped conversations between them at the direction of the FBI. *Mathews* claimed at trial that the money requested was personal and had nothing to do with his official duties, and thus that he lacked the requisite intent. He also moved *in limine* to have the jury presented with an entrapment defense, which the district court denied.<sup>128</sup> On appeal to the Seventh Circuit, *Mathews* specifically requested that the court reconsider the requirement of admitting the offense prior to raising entrapment.<sup>129</sup>

The facts reverse the typical entrapment pattern previously considered by the Court: it has been the private citizen who becomes enmeshed in a scheme created by the government who has heretofore been heard. Abscam, involving elected officials and public trust on the one hand and FBI operatives on the other, is perhaps the most notorious version of the *Mathews* circumstance of questioning government conduct on both sides of the courtroom. The Court chose not to hear any of the Abscam appeals.<sup>130</sup> In *Mathews*, a citizen-victim calls upon one branch of government to police another. *Mathews* was himself

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121. *Id.* at 489-90.

122. *Id.* at 487.

123. 425 U.S. at 484

124. *Id.* at 490.

125. *Id.* at 493 (Powell, J., concurring).

126. *Id.* at 495 (Brennan, J., dissenting).

127. *Mathews*, 485 U.S. at 59.

128. For the facts of the case see *United States v. Mathews*, 803 F.2d 325, 326 (7th Cir. 1986).

129. *Id.*

130. See generally Gerschman, *supra* note 98.

convicted of an offense<sup>131</sup> which aimed at governmental wrong-doing. His ultimate complaint about the conduct which led to that conviction created the opportunity for the Court to point out important distinctions in the standards to which governmental officials may be held both as targets and as operatives.<sup>132</sup> Certainly the law enforcement/public official sting operation has become increasingly prevalent in the investigation of political, bureaucratic and judicial corruption.<sup>133</sup> It may be that different institutional problems bear on the circumstance of the government policing itself. The opinion, however, did not distinguish between the inducement of private citizens and the inducement of government officials, despite the fact that relations between these two sectors was the bailiwick of the rejected minority view.<sup>134</sup>

The *Mathews* majority held that entrapment could be raised along with other inconsistent defenses.<sup>135</sup> Consequently, *Mathews* did not require the defendant to admit all the elements of the crime. Moreover, in its dicta the majority supported a pure subjective test.<sup>136</sup> Under this subjective test, the Court held that the issue of predisposition is a jury question. The opinion, written by Chief Justice Rehnquist, was joined by Justices Marshall, Stevens, and O'Connor.<sup>137</sup> Justices Brennan and Scalia each concurred in the judgment and wrote separately.<sup>138</sup> Justice White filed a dissenting opinion in which Justice Blackmun joined.<sup>139</sup> Justice Kennedy did not take part in the consideration of the decision.<sup>140</sup> Only Justice Brennan explicates the history of the assumptions within the majority concerning the proper approach to the entrapment defense:

Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the government's conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to *stare decisis*, and today join the judgment and reasoning of the Court.<sup>141</sup>

Brennan's defection from his previous commitment to the objective test established a probable majority of the Court as to the subjective approach, determined by a primary focus on the defendant's predisposition to commit the

131. 18 U.S.C. § 201(g) (1962) (accepting a gratuity in exchange for an official act).

132. See Kamisar, *supra* note 69 at 43 (wherein the author states, in response to the complaint that criminals and police officers are forced to play the game by different rules, "[i]f criminals didn't gouge and bite they wouldn't be criminals. And if police officers *did* gouge and bite they wouldn't be (or at least shouldn't be) police officers." That author, and consequently, this author, is uncertain to whom credit for the above observation belongs).

133. Operation Greylord in Chicago generated similar operations in Indiana and in Philadelphia. See Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMP. L. REV. 1323, 1336-37 (1988) (discussing Indiana operation). See also *supra* notes 2-4 (discussing Philadelphia judicial corruption).

134. But see Blecker, *supra* note 22, at 917-20 (advocating, with Professor Geoffrey Stone, a public official/private person distinction in the use of sting and undercover operations, with greater latitude being afforded law enforcement when it targets public corruption).

135. *Mathews*, 485 U.S. at 65.

136. *Id.*

137. *Id.* at 59.

138. *Id.* at 66 (Brennan, J., concurring), 67 (Scalia, J., concurring).

139. *Id.* at 68 (White, J., dissenting).

140. *Id.* at 58.

offense. This majority was achieved by adding Justice White to the count, whose dissenting opinion in *Mathews* was provoked by the Court's adoption of inconsistent defenses<sup>142</sup> rather than upon a philosophical dispute concerning the definition of entrapment. As White explicitly joined in the three justice plurality of *Hampton*,<sup>143</sup> and was part of the majority in *Russell*,<sup>144</sup> his position is clear. However, considering Brennan's recent resignation it is unclear whether this majority still exists.

Among the Justices who have never individually expressed a view while on the Supreme Court on the appropriate test for entrapment are Justice Stevens, who did not participate in the *Hampton* decision,<sup>145</sup> and whose views of police misconduct generally are a moderating influence on the Court,<sup>146</sup> the new appointee and the four other newest Justices, who may all be expected to view entrapment as the Chief Justice does.<sup>147</sup> The position of Justice Blackmun, who joined the White dissent in *Mathews*, is not as clear. While a part of the *Russell* majority, his special concurrence in *Hampton*<sup>148</sup> expresses reservations about the issue preclusion that predisposition effectuates under the subjective test, particularly in cases in which the inducement implicates due process.<sup>149</sup>

Moreover, Justice Marshall's inclusion in the *Mathews* majority, without joining in Justice Brennan's separate concurrence, or writing his own, is even harder to explain. Justice Marshall might have joined in the majority simply to enable defendants to raise inconsistent defenses. As such, Justice Marshall may have intended to join in the majority's holding, but not in the majority's dicta.<sup>150</sup> Prior to *Mathews*, he persistently joined in the condemnation of governmental instigation of crime, and preferred an objective test of entrapment.<sup>151</sup> Nevertheless, this argument is weakened because it was not necessary to decide on the prevailing test of entrapment in order to dispose of Mathew's claim that he was entitled to raise inconsistent defenses. Justice Marshall might, therefore, continue to hold the views he espoused in *Russell*<sup>152</sup> and in *Hampton*.<sup>153</sup>

However, even assuming continued reservations by Blackmun and Marshall, joined perhaps by Stevens, *Mathews* represents an anticipated consensus of five, with a reasonable possibility that all nine members of the

141. *Id.* at 67 (Brennan, J., concurring).

142. *Id.* at 68-73 (White, J., dissenting).

143. 425 U.S. at 484.

144. 411 U.S. 423.

145. 425 U.S. at 491.

146. *See, e.g.,* United States v. Karo, 468 U.S. 705, 707 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing that attachment of electronic monitoring device to personal property is a seizure within meaning of fourth amendment); *Payton v. New York*, 445 U.S. 573 (1980) (arrest warrant required for routine arrest in suspect's home). Justice Stevens appears to have a flexible standard concerning law enforcement actions, coupled with a recognition of the dangers of its own technology.

147. Justice-designee Souter can be expected to take an orthodox position on entrapment if his performance on his state's court is any predictor. *See, e.g.* State v. Monsalve, 574 A. 2d 1384 (N.H. 1990).

148. 425 U.S. at 491 (Blackmun, J., concurring).

149. *Id.* at 492 (Blackmun, J., concurring).

150. *Id.* at 495 (Marshall, J., concurring).

151. *See supra* notes 117-126

152. 411 U.S. at 439 (Stewart, J., dissenting).

Court now agree on the prevailing subjective test of entrapment. Despite this extraordinary accomplishment, the brief majority opinion<sup>154</sup> elicited three other views representing four of the eight justices who considered the case.

The *Mathews* decision, at first glance, appears to expand the protections of individuals subjected to government inducement. Nevertheless, while appearing to enlarge the availability of the entrapment defense to claimants, like *Mathews*, who wish to retain other options of defense, the majority almost violently curtails the value of what it grants. The *Mathews* majority's adoption of the pure subjective test of entrapment in federal courts forces courts to focus on the nature of the accused prior to scrutinizing the nature of the law enforcement inducement. Because the accused's state of mind is traditionally a question of fact in any criminal trial, the subjective test guarantees that a jury, rather than a judge, will determine this crucial issue. However, because part of the government's burden of proof under the subjective test is to demonstrate that the defendant was predisposed, an entrapment jury will have far more damaging information about the accused earlier in the case than would normally be permitted in trial.<sup>155</sup> Finally, by reducing judicial involvement in the entrapment question, *Mathews* reduces effective control of law enforcement misconduct without developing an adequate alternate method of evaluating and deterring that misconduct.<sup>156</sup>

As discussed above, the Court acted in this area without judicial, constitutional or legislative guidance. As such, having acted in *Sorrells*<sup>157</sup> on a dubious but creative statutory construction ground,<sup>158</sup> questions regarding the Court's authority to act continue to mold its entrapment theory.<sup>159</sup> This emphasis on who it controls, police, courts, or criminals, rather than *what it is*, has rendered some spectacularly uneven distinctions in federal entrapment law over the course of time, with the resulting need to unify expressed in *Mathews*.<sup>160</sup>

Despite the need for clarity, the *Mathews* majority analysis, centered on the Court's role in administering a claim of entrapment, provides no guidance for lower courts to confront and delineate the function of entrapment in

153. 425 U.S. at 495 (Brennan, J., dissenting).

154. *Mathews*, 485 U.S. at 59-66.

155. See *infra* notes 169-70 and accompanying text.

156. Cf. Kamisar, *supra* note 69, at 35 n.148, in which the author observes, "[t]he adequacies (or inadequacies) of alternatives to the exclusionary rule have been the subject of a vast literature. The general consensus is that civil suits, criminal prosecution, injunctions, review boards, and internal police discipline are sadly ineffective."

157. 287 U.S. 435.

158. The majority opinion, authored by Chief Justice Hughes, reads the National Prohibition Act as follows:

We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.

*Id.* at 448.

159. For a complete discussion of the current status of entrapment, and the continuing problem it presents despite apparent agreement on the appropriate test, see *supra* note 15 and accompanying text. An exhaustive study of current entrapment law in all jurisdictions appears in P. MARCUS, *supra* note 10.

relation to modern law enforcement methods.<sup>161</sup> Although a majority of the Court seems to agree on the subjective model of entrapment as the exclusive approach in federal courts, it agrees on very little else.<sup>162</sup> The deeper issues inherent in the concept of an entrapment defense, having never been effectively defined or acknowledged, still divide and perplex the Court. Part of that perplexity may result from the Court's relative inexperience in deciding principles of substantive criminal law, an area which the state courts negotiate with familiarity. Certainly, a measure of that perplexity is displayed in the almost breathtaking naivete with which the Court relegated the entrapment decision to the jury system.<sup>163</sup> In order to unravel that perplexity, it is necessary to articulate why the Supreme Court has failed to accomplish a satisfactory rationale for the defense even as it has uncomfortably settled on the subjective, predisposition test for entrapment and on the criminal trial jury as the appropriate determiner of the issue.

The problem is not simply that *Mathews* redefines entrapment to comport exclusively with the jury-determined, pure subjective model. The Rehnquist majority opinion briefly recreates the Court's history of this model, largely by referring to an earlier expression of the Chief Justice's own view.<sup>164</sup> In this recreation of entrapment history the Court maintains that entrapment is an "affirmative defense"<sup>165</sup> placed in issue, as any defense, by "[a] simple plea of not guilty."<sup>166</sup> Based upon this language, it is possible to read *Mathews* as among those opinions of a conservative Court which expand criminal rights where they enhance the accuracy of the fact-finding process, as opposed to limiting rights where they only enhance the fairness of that process. Certainly a cursory analysis of the majority opinion would be consistent with that view.

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160. See *supra* note 15 and accompanying text on the grant of review in the *Mathews* decision.

161. In entrapment's sixty year history, only five bona fide entrapment decisions have been handed down by the Supreme Court: *Sorrells*, 287 U.S. 435; *Sherman*, 356 U.S. 369; *Russell*, 411 U.S. 423; *Mathews*, 485 U.S. 58; and *Hampton*, 425 U.S. 484. *Hampton* dealt with the entrapment issue in the context of a due process violation. None of these cases placed entrapment within a familiar framework as either a principle of the substantive criminal law, or as a matter of fair procedure. See Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 492 n.137 (1989) ("Entrapment is an especially troubled doctrine, lacking an agreed upon rationale."). The circuits, reflecting the division in the Supreme Court, developed individual approaches to the defense and the procedures for raising it. See *supra* note 15 for a description of various pre-*Mathews* approaches.

162. See *supra* notes 127-34 and accompanying text for a discussion of the continuing difficulties apparent in the *Mathews* opinion.

163. It is the impact of entrapment as a jury determination which appears to trouble the dissenting Justices in *Mathews*. See 485 U.S. at 68 (White, J., joined by Blackmun, J., dissenting).

164. After identifying the "two related elements [of entrapment]: government inducement of the crime, and a lack of predisposition on the part of the defendant," the opinion goes on to weight the latter, "[p]redisposition, 'the principle element in the defense,'" over the former. *Mathews*, 485 U.S. 63 (quoting *Russell*, 411 U.S. at 433). The *Russell* opinion, also authored by Rehnquist, is the first such expression of the subjective test. This articulation is reiterated in Rehnquist's opinion in *Hampton*, 425 U.S. at 488-89. Professor Carlson argues that "the majority's favorable attitude towards predisposition . . . is, however, emphasized far too much." Carlson, *supra* note 7, at 1030 n.71. Thus the history of overweighted predisposition may simply be a history of the Chief Justice's view of entrapment, which commanded a scant majority in *Russell*, and a plurality in *Hampton*.

165. *Mathews*, 285 U.S. at 62-63.

Two overriding problems, however, prevent this reading. First, entrapment is not an element-negating affirmative defense, or it would be broadly available in private inducement settings.<sup>167</sup> It does not, alone, create doubt about the activity of the defendant, or her mental state in accomplishing that activity. Thus entrapment creates problems for a fact-finder which must sort substantive culpability from this non-exculpatory principle.

Second, under the pure subjective test of entrapment, fact-finding is skewed in favor of the government in ways that would be otherwise intolerable in a criminal jury trial. *Mathews* places the burden on the government to disprove entrapment when a defendant pleads not guilty.<sup>168</sup> Under the *Mathews* subjective test, the government must demonstrate that the defendant was predisposed to commit the crime in order to disprove entrapment. *Mathews*, therefore, makes predisposition an element of the government's case. The government can admit evidence of the defendant's past bad acts to prove predisposition. Because the government has a heavy burden of proof, and because the *Mathews* Court places predisposition at issue, *Mathews* permits the prosecution to frontload the available character evidence against the defendant. Very little of this character evidence could otherwise appear in its case-in-chief.<sup>169</sup> Normally, limited character evidence can only be used to impeach a testifying defendant during the defense's case.<sup>170</sup> In fact, most bad character evidence is ordinarily inadmissible. Therefore, this construct gives the jury more than it has under other affirmative defenses. Thus the enhancement of truth finding in the adversarial context is heavily weighted in favor of the

166. *Id.* at 64-65.

167. *See supra* note 20 and accompanying text.

168. *Mathews*, 485 U.S. at 65

169. This result presumes that the prosecution knows that one of the defenses will be entrapment even before the defense case begins. *Mathews* indicates that a not guilty plea "puts the prosecution to its proof . . . and raises the defense of entrapment" even if the defense does not give notice of its intentions of relying on entrapment. 485 U.S. at 65. However, it would be dangerously risky for a prosecutor to offer evidence of character to rebut an entrapment defense and to show predisposition prior to *knowing* that entrapment will be the theory of the defense, even if a questionable inducement comes into evidence during its case-in-chief. Nevertheless, the defense's cross-examination of the prosecution's law enforcement witnesses may make clear that entrapment is an issue in the case. In the absence of an expressed intention by the defense to raise entrapment, the special character evidence demonstrating predisposition would be available in the prosecution's case-in-chief should the defense demonstrate that it is pursuing an entrapment theory through cross-examination.

As to the evidence itself, under Federal Rule of Evidence 404(a), character evidence is admissible under very circumscribed conditions, but may be used to show, among other things, a common scheme, plan or design, identity and lack of mistake. FED. R. EVID. 404. If these aspects are relevant to prove an element, or to disprove an affirmative defense, the government may be able to present them in its case-in-chief. FED. R. EVID. 405(b).

170. Federal Rule of Evidence 608 limits impeachment by character evidence of a testifying defendant (defendant as witness) to opinion, reputation and in very limited circumstances, specific instances of conduct. The evidence must be relevant to *truthfulness*. FED. R. EVID. 405. Similarly, impeachment by prior conviction is admissible for the purpose of attacking credibility. FED. R. EVID. 609. All depend upon the status of the defendant as a witness, and therefore do not come in during the government's case. Additionally, all involve impeachment rather than substantive evidence. However, none of these limits would apply where the government must show predisposition in order to rebut the "defense" of entrapment. In that case, it does not matter whether or not the defendant is a witness: Rules 404 and 405 would govern. The timing of evidence, as well as its use, may alter jury perceptions. *See*

government. This is particularly ironic as it is the *government's activities which are already questionable*.

It will be particularly problematic for defendants who, like Mathews, have other true defenses to raise. Bad character evidence would not rebut a true defense or be permitted solely to show that the accused acted in a manner consistent with that evidence.<sup>171</sup> The admission of this bad character evidence and the higher quantum of proof may force defendants in the *Mathews* dilemma to forego the entrapment issue.<sup>172</sup> The need to abandon the defense results from both the predictable problems of inconsistent defenses, and the unpredictable prejudice that the predisposition evidence may create for those other defenses.

The point is that merely naming entrapment an affirmative defense and then requiring an adjudicatory process which is congruous with that fiction, does nothing to enhance criminal fact-finding or to curtail illegal governmental inducements. Both functions suffer in the process. *Mathews* is most damaging to the original conceptual framework of entrapment. *Mathews* removes the court from the very process of definition and evaluation, by placing predisposition, the accused's past character and reputation, as the core determinant of entrapment. Once that inquiry is resolved against an accused, whether by law or by fact, serious consideration of the inducement is foreclosed. However, it is only in evaluating the inducement that the court is able to draw and extend appropriate law enforcement parameters. That task, far more subtle, far more crucial, far more difficult to evaluate than evidence of the defendant's past, whenever reached under the *Mathews* model, will be reached by a fact finder lacking the requisite skills for the task.

As noted earlier,<sup>173</sup> the development of a principle of criminal justification through the appellate process suffers from a variety of limitations,<sup>174</sup> some generic, and in the case of entrapment, some quite specific. In the United States Supreme Court opinions in which the federal law of entrapment has emerged, these limits have affected the principle, perhaps unavoidably. Nevertheless, the effort to squeeze entrapment into the substantive law of criminal defenses threatens to confuse major portions of that law in order to avoid an unpleasant but limited result: the exoneration of a factually guilty individual. That effort also avoids the obligation of judicial scrutiny of police methods for obtaining convictions. This may, in fact, be the *Mathews* agenda, but if so it needs thorough and visible exploration.

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STERN, WINNING TRIAL ADVOCACY TECHNIQUES 152 (1985), on primacy, recency, frequency and vividness.

171. Federal Rule of Evidence 405(b) permits otherwise inadmissible evidence of specific instances of conduct "[i]n cases in which character or a trait of character . . . is an essential element of a charge, claim or defense." FED R. EVID. 405(b). Predisposition surely qualifies under the exception.

172. Justice Frankfurter predicted such a result in *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring).

173. See *supra* notes 45-47 and accompanying text.

174. *Id.* See also *supra* notes 69-70 and accompanying text.

## VI. CONSTRUCTING ENTRAPMENT AS A RIGHTS-BASED PRINCIPLE: A COMPARISON

The convenience of calling entrapment a defense has had the effect of dictating a morally exculpatory meaning to it. While entrapment does not excuse culpable conduct by making it less culpable, this fact is not an obvious one, even to the courts which have developed it. Defenses have many purposes and origins, not all of which are premised upon blameworthiness. For example, pleading a statute of limitations bar to a criminal case may be labeled a defense. However, this is only true if one includes in the definition of defense those policy determinations which prevent conviction. It is clear to most observers that the statute of limitations "defense" is not material to the determination of culpability.<sup>175</sup> The majority subjective test obscures the nature of the entrapment defense by couching the defense in language that focuses on the conduct and mental state of the accused. This focus is not unfair or inaccurate so much as it is irrelevant. That is, the moral evaluation of the defendant is irrelevant to entrapment's policy based theory. Because entrapment was designed to protect against government overreaching, the evaluation of the defendant's past conduct focuses on the wrong actor.

On the other hand, one articulation of the objective test confuses the issue because it also focuses on the accused's mental state. This form of the objective test appears to interject a tort standard into the criminal law, in the form of the hypothetically reasonable criminal confronted with the hypothetically unreasonable inducement. Like the subjective test, this standard fails because it is utterly unworkable, not because it is intrinsically unjust. It persists in defining entrapment by focusing on the criminal. With that focus one gains nothing.

The objective test is really two tests: the one described above, which cannot work, and the objective test which submits the government activity to evaluation. In this latter hypothesis the crime, the criminal, and the predisposition to crime (she committed the offense) are givens. The important variable, and the one on which the court must focus, is police activity in a specific context. This standard is objective, not because of the manner in which it measures the accused's mental state, which is irrelevant where the commission of the crime is a given, but because it looks at external events in order to apply a normative principle. Entrapment exists because we value certain normative measures of government conduct. Accordingly, it should only be abandoned when we no longer hold that value, or because we find its application too costly. The *Mathews* majority failed to articulate either as a reason for abandoning entrapment to the jury.

The overriding concern of entrapment litigation in the federal forum has changed. The concern shifted from restraining the government from obtaining convictions based on excessive law enforcement ruses to identifying the

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175. See MODEL PENAL CODE § 1.13(10) (Proposed Official Draft 1962), defining material element as one which "does not relate exclusively to the statute of limitations . . . or to any other matter similarly unconnected with . . . the harm or evil . . . sought to be prevented. . . ." See also Robinson, *supra* note 5, at 230.

deserving criminal, who, analogous to the deserving poor,<sup>176</sup> is deemed fit to receive the boon of the defense. It is the concept of desert that makes this philosophy particularly devastating in the entrapment area, in which the guilt of the accused is a prerequisite to raising the defense at all.<sup>177</sup> Entrapment posits the commission of a crime by definition.<sup>178</sup> Although there is some support for the view that government inducement in the crime alters mental state or culpability enough to make guilt itself questionable, the logical response to that view is that the defense would be expanded to instances of *private* inducement if it truly mitigated or excused otherwise culpable acts.<sup>179</sup> The better view is that the reasons for the defense originate outside and apart from the blameworthiness of the accused, and therefore, the question of desert is irrelevant.<sup>180</sup> This is a troublesome notion.<sup>181</sup>

176. The concept of desert is one which informs much of criminal law, particularly the sentencing decision. See, e.g., SHER, *DESSERT* (1987). The origins of the "deserving poor," however, is more obscure. The earliest American example of the concept apparently involved a bequest "for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans." *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489, 3 A. 557 (1886).

177. The jurisprudence of criminal sanctions, of reasons to punish, and of proportional punishment is beyond the scope of this article. However, the idea that the criminal act and punitive response are connected by normative principles to which we all subscribe, and that punishment functions both as an expression of those principles and in order to further them, is a position most closely held by a natural law theorist, such as John Rawls. See J. RAWLS, *A THEORY OF JUSTICE* (1971). In the specific area of entrapment, see Note, *Entrapment Reconsidered: A Nonexculpatory Defense Based on the Need for Reciprocity Between the Government and the Governed*, 35 WAYNE L. REV. 99, 115-18 (1988) for a discussion of a doctrine premised on the lack of government desert in a natural law philosophy.

178. See, e.g., Justice Frankfurter's concurrence in *Sherman*:

It is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers or informers. . . . In these cases . . . the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged. That conduct includes all the elements necessary to constitute criminality.

356 U.S. at 379 (Frankfurter, J., concurring). See also Carlson, *supra* note 7, at 1037-44, for collected authorities on entrapment's relationship to culpability.

179. See *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring). See also Carlson, *supra* note 7, at 1038:

[I]f government encouragement truly diminishes individual culpability for criminal conduct, then private encouragement should diminish culpability as well. But no one argues that the entrapment defense is proper in the case of private encouragement, because the law does not ordinarily view strong temptation as a factor that reduces blame.

Entrapment, besides being limited to governmental inducement, see *supra* note 20 and accompanying text, is also limited to non-violent or so-called "victimless" crimes in the Model Penal Code and in the seven states which have adopted this provision. See MODEL PENAL CODE § 2.13(3) (Official Draft, 1962) See also P. MARCUS, *supra* note 10, at 12.25, 638 n.45. The United States Supreme Court has never explicitly addressed this limitation, but all fact patterns have involved non-violent crimes. See *Hampton* 425 U.S. 484; *Russell*, 411 U.S. 423; *Sherman*, 356 U.S. 369; and *Sorrells*, 287 U.S. 435. This latter limitation, however, is more familiar to the substantive criminal law, which renders some defenses, such as necessity, unavailable to violent offenders, and some defenses, like self defense, available *only* to violent offenders.

180. Of course, desert is a far broader concept than individual blameworthiness in discrete criminal events. However, the common use of the term, and one which appears to inform many discussions of entrapment, involves limiting exculpation because the criminal does not "deserve" it. This ignores the Rawlsian mutuality of consent and desert as constructed in the

Other protections of defendants and constraints upon law enforcement are thought to inure to the benefit of the factually not guilty individual. The interface between *Miranda* warnings and involuntary and unreliable confessions<sup>182</sup> is such a circumstance: here the constable's blunder may as easily result in the innocent being convicted as the guilty going free.<sup>183</sup> The entrapment defense, properly understood, requires the accused to receive the benefit of acquittal despite having volitionally committed the acts which constitute the crime.<sup>184</sup> Obviously, such a result depends upon the judicial ability to evaluate individual rights and to enforce institutional restraints regardless of desert. It also requires a coherent and articulated policy for doing so. An independent judiciary, embodied in a Court whose members are appointed for life "during good Behavior"<sup>185</sup> and who are separated from political, majoritarian exigencies, is uniquely constituted to fairly evaluate individual rights. As such, the current Court's unwillingness to take this role is a matter of increasing concern.<sup>186</sup>

The demise of the objective, judicial integrity model of entrapment has tracked the similar but more spectacular demise of the fourth amendment exclusionary rule, *and for the same reasons*. A short comparison emphasizes the resemblance. First, entrapment requires the inducement leading to a criminal act to be traceable to the government; identical acts by a private citizen will not support the claim.<sup>187</sup> This requirement takes entrapment completely outside the realm of criminal defenses. Moreover, this requirement is

natural law. The legitimacy of governmental action is as serious, and as relevant a question in the context of natural law dessert, as the culpability of the accused. See Note, *supra* note 177.

181. Obviously, this conclusion will depend upon one's prevailing conception of dessert, whether based on the notion that culpable conduct achieved with the requisite mental state is morally blameworthy and deserving of punishment, or that volitional breach of the law, whether or not independently blameworthy, disrupts the notion of restraint under which the law operates. For a well-rendered account of a "just desserts" philosophy of criminal punishment, as well as a cogent argument that entrapment law furthers neither the utilitarian nor social contract theory of retribution, see Carlson, *supra* note 7, at 1059-96.

182. Whether one takes the view that the prophylaxis against unwarned self-incrimination of the *Miranda v. Arizona*, 384 U.S. 436 (1966) decision "rests entirely on the premise that the use of such evidence violates the Federal Constitution," *Oregon v. Elstad*, 470 U.S. 298, 370 (1985) (Stevens, J., dissenting), or the view that "[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself [and] may be triggered even in the absence of a Fifth Amendment violation", *Elstad*, 470 U.S. at 306, the pre-*Miranda* concern with coerced confessions included the recognition that they may be unreliable or untrue. See *Ward v. Texas*, 316 U.S. 547 (1942); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936). Therefore, whether or not the *Miranda* warnings protect more than the innocent at times, and more than the fifth amendment at times, they are grounded historically in the concept of dessert. They are also easy to administer.

183. *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.).

184. *But see* Magness, *The Defense of Entrapment—Definition, Bases and Procedure*, 3 TEX. TECH L. REV. 117 (1971) (entrapment negates mens rea).

185. U.S. Const. art. III, § 1.

186. It has been argued that the current Court is animated by a "majoritarian paradigm" which promotes a consensus oriented philosophy of judicial review, often at the expense of the personal views of the individual justices. See Chemerinsky, *The Supreme Court, 1988 Term, Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

187. This limitation is frequently observed but rarely justified or commented upon. See, e.g., Note, *Entrapment Through Unsuspecting Middlemen*, 95 HARV. L. REV. 1122, 1122 (1982), in which the student author writes that "[b]ecause entrapment is ultimately concerned

remarkably similar to the state action component of fourth amendment violations. To be sure, the analogy is imperfect: as the Constitution is first a limitation on the federal government, constitutional complaints have historically required demonstration that it is the central government which is abridging an identified right. Entrapment's requirement of government action might be considered jurisdictional.<sup>188</sup> In contrast, state action problems more typically arise in interpretations of the fourteenth amendment<sup>189</sup> through which many constraints on the central government were incorporated and made applicable to the individual states.<sup>190</sup> Because entrapment litigation in the Supreme Court has never involved the doctrine's applicability to the individual states, the question of state action has never arisen, although the question of government action is embedded in the definition of entrapment.

A second difference is that the Court has *never* expressed a constitutional basis for the entrapment defense, as it has for the exclusionary rule, except to hint at the right to assert any recognized defense.<sup>191</sup> This was reiterated in *Mathews*.<sup>192</sup> Moreover, there is no requirement that entrapment must be recognized by the states, or why entrapping conduct should be limited to governmental acts.<sup>193</sup> True defenses have no such requirement: one is privileged to act in self defense, for example, regardless of the source of the threat. However, the fact that this crucial limitation of government conduct, as opposed to private inducement, remains implanted in the defense suggests one of three explanations: (1) entrapment has constitutional dimensions, limiting the activities of the government and thus necessitating an act by the government as the substance of the claim;<sup>194</sup> (2) the entrapment defense, like some views of the

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with government conduct and only incidentally with criminal culpability, it offers no defense to persons who succumb to the criminal blandishments of private individuals acting alone."

188. The fourth amendment does not, by its own terms, limit its reach to governmental conduct: it states affirmatively that "the right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated. . ." suggesting a constraint on individuals as well as government. This language is in contrast to legislative infringement explicit in the first amendment, ("Congress shall make no law . . ."), but is consistent with the same general language of the fifth and sixth amendments. See *Burdeau v. McDowell*, 256 U.S. 465 (1921), for an articulation of the exclusionary rule as restraint on governmental rather than private acts.

189. The text of the fourteenth amendment requires that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . ." and is the derivation of the state action requirement for infringements upon constitutional rights originating in the states. See U.S. CONST. amend. XIV, § 1.

190. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating fourth amendment exclusionary rule to states through fourteenth amendment due process clause).

191. According to the majority, "[a] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews*, 485 U.S. at 63 (citing *Stevenson v. United States*, 162 U.S. 313 (1896)). This dictum, and the federal case to which it refers, leaves open the question concerning whether the entrapment defense must be recognized in state court, as a fifth amendment due process or a sixth amendment compulsory process right, or whether Rehnquist is speaking merely of defenses in federal court.

192. 485 U.S. at 63.

193. While other commentators have observed this limitation on the availability of the defense, no one has explained it in any other than tautological terms (it is defined that way because that's how it is defined). See generally Note, *supra* note 187.

194. See, e.g., *Leon*, 468 U.S. at 930 (Brennan, J., dissenting), for a comparable interpretation of the exclusionary rule, arguing that evidentiary use of illegally obtained evidence constitutes a part of the fourth amendment proscription against unreasonable searches and seizures.

exclusionary rule, is remedial in nature and protects an underlying constitutional principle while not itself being that principle; or (3) the entrapment defense is subconstitutional, but reflective of deep institutional concerns about the judicial process. Because the Court has looked only at federal cases, in which it has available several bases of action, including its supervisory powers,<sup>195</sup> the latter rationale may be the narrowest principle upon which to base an explanation for what the Court has actually done.<sup>196</sup> It is important to note, however, that these categories are not fixed: the exclusionary rule itself has moved over time from a category three to a category one, and now probably to a category two.<sup>197</sup>

To further analogize to the fourth amendment exclusionary rule, the objective view of entrapment regards the resolution of the entrapment issue as one of law for the court to decide. Before *Mathews*, several circuits required defendants to admit the facts establishing guilt before raising the legal issue of entrapment at trial.<sup>198</sup> This requirement, consistent with a view which focuses on police conduct rather than the accused's guilt, is antithetical to a view of entrapment as an element-modifying defense. As expressed by Justice Roberts' concurrence in *Sorrells*, "[v]iewed in its true light entrapment is not a defense to [an accused]; his act, coupled with his intent to do the act, brings him within the definition of the law."<sup>199</sup> Rather, it is the need for the court to protect its integrity which makes the issue one within "the province of the court and the court alone."<sup>200</sup> In handling the question of entrapment, Roberts offers trial courts several procedural alternatives, "[b]ut whatever may be the finding . . . the power and the duty to act remain with the court and not with the jury."<sup>201</sup>

The similarity between this view of entrapment and the procedural posture of a motion to suppress evidence based upon a fourth amendment violation is obvious. First, both are premised on the singularly judicial function of explicating the law. Any competent defense attorney intuitively knows the foolishness of requiring laymen to ignore relevant and damning facts concerning the guilt of the accused in making a crucial decision to exonerate because the governmental tactics were unfair. Yet these are the concerns around which entrapment law revolves. It is precisely because these types of

195. However, because *Sorrells* predated the first supervisory power case entrapment can be said to have originated as a matter of supervisory power only in hindsight. See *McNabb*, 318 U.S. 332.

196. It may also be that the concept is being refined before application to the states. Justice Stevens has argued that an issue must "percolate" among the lower courts to assure "that the issue is one of recurring national significance." See *California v. Carney*, 471 U.S. 386, 389 n.8 (1985) (Stevens, J., dissenting).

197. Compare *Weeks*, 232 U.S. at 398 (exclusionary rule applicable in federal courts with suggestion that it is constitutionally mandated), with *Wolf v. Colorado*, 338 U.S. 25 (1949) (fourth amendment applicable to states through fourteenth, but exclusionary rule is not), and *Mapp*, 367 U.S. 643 (overruling *Wolf* and applying exclusionary rule, as constitutionally mandated, to the states). But see *Leon*, 468 U.S. 897 (exclusionary rule is only to deter fourth amendment violations, and not of constitutional dimensions). The Court has swept full circle on this difficult issue.

198. For a pre-*Mathews* overview of the circuits which had such a rule, see *supra* note 15 and accompanying text.

199. 287 U.S. at 456 (Roberts, J., concurring).

200. *Id.* at 457 (Roberts, J., concurring).

201. *Id.*

issues reflect concerns that are inconsistent with and apart from the jury function that jurors are not asked to pass on the question of police illegality in the fourth amendment area.

The now-settled issue of whether entrapment is constitutionally compelled<sup>202</sup> has paralleled the prevailing sentiments concerning whether the exclusionary rule is similarly constitutionally based. Entrapment theory suffers conceptually because of this unexpressed relationship. But these are qualitatively different questions, and must sustain distinct answers.

The problems which plague the exclusionary rule involve the Court's power to enforce state compliance with its vision of the fourth amendment.<sup>203</sup> Entrapment, on the other hand, has never involved anything other than the Court's power to require minimum compliance with its own federal laws in its own federal courtrooms. The current architecture of the exclusionary rule as an expression of federal judicial power to apply constitutional principles among the states adds little to the federal entrapment definition. However, as both the fourth amendment exclusionary rule and entrapment were originally seen as effectuating principles of judicial integrity in response to police illegality within the federal system alone,<sup>204</sup> the primary constitutional question for both principles concerned the power of the federal judiciary, in article III terms,<sup>205</sup> to control other branches of the federal government. While that question changed and grew complicated in the arena of the fourth amendment exclusionary rule, it need not have done so in entrapment. Entrapment remains a problem of federal judicial power solely in relation to other branches of the federal government. The Court must take advantage of the opportunity to refine the precepts of entrapment law in this limited context *before* it confronts the issue of state application.

## VII. WHO DECIDES? A CRITIQUE AND A PROPOSAL

The right to have the issue of one's guilt or innocence submitted to a jury of one's peers reflects deeply held values upon which our criminal judicial system is based.<sup>206</sup> Tensions between lay-persons and the judiciary, between law and fact, between truth and fiction, between common sense and reason are all negotiated through this process. It is adversarial on multiple levels, and therefore cathartic. A criminal jury trial is a compellingly serious, stressful and chance-ridden event. Perhaps our societal tolerance for the possibility of a guilty person going free after a trial by jury is directed first, by our perception

202. *Russell*, 411 U.S. 423, rejected the constitutional claim raised therein.

203. *See Mapp*, 367 U.S. 643.

204. *Weeks*, 232 U.S. 383, applying the exclusionary rule to federal courts, belongs to the earliest part of the same era in which entrapment doctrine developed. *See Casey v. United States*, 276 U.S. 413 (1928) (discussing and rejecting entrapment). Professor Beale attributes the Supreme Court's concern for effective judicial constraints upon law enforcement to the explosion of congressional enactments "criminalizing consensual conduct, especially Prohibition offenses," and the concomitant reliance on undercover law enforcement techniques. Beale, *supra* note 18, at 1442. It must be recalled that the first successful entrapment defense in the Supreme Court involved a Prohibition violation. *See Sorrells*, 287 U.S. 435.

205. U.S. CONST. art. III, cl. 2.

206. The relevant constitutional provision states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

of the nature of the crime and second, by the extent to which the decisional process is a "trial" in the original sense of a test or ordeal. Having survived it, in whatever condition, an accused may be punished enough for all but the most heinous offenses. However, this principle can only operate if the overall jury system functions with clarity and dependability. Plea bargaining, bench trials, judicially administered rules, and the "technicalities" of criminal procedure all compromise our faith in this institution even as they diminish the exercise of the personal rights of the accused. We explain our collective dismay at the overuse of such devices, for they meet needs other than those of principled, dependable decision-making.<sup>207</sup>

However, it is a personal right that inheres in the right to trial by jury, not simply a societal one.<sup>208</sup> The guarantee, while appearing in the Constitution itself,<sup>209</sup> is one of the individual rights reserved in the Constitution in exchange for the individual's consent to be governed.<sup>210</sup> Ideally, the criminal jury system imposes itself between the individual and the other branches of government.<sup>211</sup> In its pure form, the jury distrusts the government, and therefore, helps assure that the defendant receives a fair and accurate trial. Society may benefit, but only incidentally.

More recently, however, it has been the accused, as the embodiment of a monolithic fear of crime, who is viewed with distrust.<sup>212</sup> In this model, the power of the criminal jury is indeed a societal one, to keep the forces of faceless violence at bay, to create a reality that is increasingly elusive. Courtroom procedure, rather than serving as a vehicle for ensuring fairness and achieving intuitively accurate results, becomes a way of obscuring truth with technicality. Juries believe that everyone in the courtroom already knows the truth and is keeping it from them; in this universe their job is not to create truth by their verdicts, but to uncover the persons who appear to have it.<sup>213</sup>

Vesting policy questions in the jury demonstrates a misunderstanding and misuse of that body. In light of the current atmosphere of public devaluing of individual rights in this relational equation, the choice of the subjective approach to the entrapment defense appears idiosyncratic at best, disingenuous

207. See *supra* note 185 and accompanying text.

208. The ability of the government or the court to refuse a jury waiver under Federal Rule of Criminal Procedure 23(a) was held valid in *Singer v. United States*, 380 U.S. 24 (1965). This would suggest that, at least in federal court, some concomitant right of the people co-exists with the individual right to trial by jury.

209. U.S. CONST. art. III, § 2, cl. 3.

210. See *supra* note 177 and discussion of Rawlsian social contract theory.

211. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (purpose of the right is to protect individuals from government).

212. For an excellent discussion of the influence that television has had on tolerance for police illegality in the name of effective crime control, see Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and Police As Television Heroes*, 42 U. MIAMI L. REV. 229, 278-83 (1987).

213. Herbert Stern's astute commentary on this point bears repeating:

[T]he jury knows that you know more about the case than they do — or will ever be permitted to know. . . . [K]nowing, then, that you have the ability to know the truth better than they, but also that you have a motive to lie, and the alibi to deceive them, they want to know whether you are the kind of person who would try to fool them.

STERN, WINNING TRIAL ADVOCACY TECHNIQUES 26-27 (1985)

at worst. The self-defining independence of the federal judiciary has the capacity to create an unpopular right. By giving the entrapment question to the jury, a majoritarian body, the judiciary abdicates this independence. Juries are unable to affirmatively promote, recognize and express the values which are compromised by police overreaching. They cannot distinguish and advise with regard to concerns about the legality of law enforcement activity. Further, it is clear from the *Mathews* opinion that no individual jury is expected to do so. It is to render its single inscrutable response in the entrapment circumstance as it does in any other criminal case. The only difference is that the entrapment case involves a presumptively undeserving individual, who committed the crime under conditions amounting to less than duress, and less than a due process violation, in collision with effective but unlawful governmental conduct. Balancing these interests is a singularly unjurylike function.

Also, it is unclear why a jury should be concerned with these interests, as these interests are quite antithetical to fact oriented justice. By vesting the jury with a responsibility it cannot discharge, even if it should be so inclined, the Court is effectively removing this responsibility from serious consideration by *anyone*. Even if certain forms of police overreaching are found so odious that the entrapment principle prevails in the jury room despite factual guilt, coherent entrapment theory is not furthered by such unpredictable results. Nor will federal juries be instructed in this manner, after the impact of *Mathews* reaches the district courts.<sup>214</sup> They will be instructed to the contrary, that the gravamen of entrapment lies in the defendant's conduct, not with the government. What remains to the fact-finder, usually without awareness, is the jury nullification power, expressed in the general verdict<sup>215</sup> and providing no guidance to law enforcement.

While divestiture in favor of the jury may be ill-considered, congressional legislation is no panacea for reform of entrapment questions either. Commentators who favor centering entrapment in the legislature are distressed by the lack of standards in the choice of the target.<sup>216</sup> While the kind of consideration afforded to search warrants would be welcome in targeting decisions, this sort of legislation prescribes future conduct. Determining

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214. A recent post-*Mathews* federal entrapment case out of the First Circuit serves as an example. In determining the amount of evidence needed to submit an entrapment claim to the jury, the appellate court stated:

In *Mathews*, the Court reminded us that predisposition is 'the principle element in the defense of entrapment, . . .' and that it 'focuses upon whether the defendant was an "unwary innocent" or instead, an "unwary criminal". . . .' Although '[t]he question of entrapment is generally one for the jury,' that is not invariably so. Entrapment comes into play only when the accused has successfully carried an 'entry-level burden.' To bear that burden, defendant must proffer some preliminary showing 'that a government agent turned him from a righteous path to an iniquitous one.'

United States v. Rodriguez, 858 F.2d 809, 812 (1st. Cir. 1988) (citations omitted). Because the accused had been importuned several times, and more importantly, because he "had no past record of trafficking nor any proven connection with prior drug deals" the case was remanded for trial. *Id.* at 815.

215. For the authorities on jury nullification, see *supra* note 43 and accompanying text. In federal criminal trials, special verdicts are limited to criminal forfeiture. See FED. R. CRIM. P. 31(e) and advisory committee notes.

216. See, e.g., Whelan, *supra* note 18, at 1216-24 (targeting decision should require anterior justification, based on reasonable suspicion).

whether a government agent has already overstepped appropriate boundaries in the inducement is a judicial determination censuring past conduct. Congress as the lawmaker is most suited to dictating and forbidding conduct which may occur in the future. The judiciary, on the other hand, is best suited for evaluating wrongs after they happen. Being tied to real cases and real issues, the judicial branch of government seems critical to the logical development of entrapment law.<sup>217</sup> A plea for continued judicial involvement is not without barriers, but divestment in favor of a jury or a legislature will not remove those barriers. The Court itself must recognize the obstacles in the way of a coherent theory, and eliminate them. The following proposal would equip the Court to manage entrapment decisions with the lucidity needed.

First, entrapment should be founded upon a constitutional standard. Aside from enhancing its intrinsic value, giving entrapment constitutional status will force the Court to analyze it carefully and seriously. As the Brennan concurrence in *Mathews* suggests, it is the lack of constitutional dimension in entrapment that permits careless and unprincipled evaluation.<sup>218</sup> Since the current composition of the Court requires the individual justices to choose battles of judgment carefully, entrapment with its groundlessness is a low priority item. Only a serious underpinning will result in serious consideration of the issues surrounding entrapment. Identifying the constitutional frame will also permit the court to exercise substantive control heretofore lacking in entrapment opinions.<sup>219</sup>

Second, entrapment decisions should be matters for the court to decide apart from any decision of guilt or innocence. A finding of entrapment would not be a finding of nonculpability, although it would effectively curtail prosecution. However, a loss on a material entrapment claim would permit a defendant to go forward to try whatever true defenses she might have. This would permit entrapment claims, and the broad amount of evidence available to rebut those claims, to be evaluated separately without confusing a jury. Court-determined issues on entrapment would have the advantage of articulated findings. What may be lost in perceptions of fairness or in the jury nullification power would be gained in the clarity and availability of the reasoning process that judge-made law provides. Entrapment in this construct would be a pre-trial determination cognizable on appeal should the ensuing trial be lost.

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217. Professor English remarks on the special expertise of the judiciary:

Rather than allowing Congress to articulate a standard based on abstractions, the better medium for formulating the proper test of personal accountability may be the individual case and the irreplaceable knowledge and contextual understanding gained by the judiciary in reviewing trial records that pose the controversies in real life rather than hypothetical postures.

English, *supra* note 30, at 1-2 n.3 (citation omitted).

218. 485 U.S. at 67 (Brennan, J., concurring).

219. I concur with Professor Dworkin that unfairness in a due process sense is threatened every time a government agent suggests breaking a law that the legislature has gone to the trouble of creating. See Dworkin, *supra* note 24, at 32. However, in the absence of such a broad reading of due process, the rights of privacy and personal autonomy seem to be appropriate principles upon which to base a constitutional entrapment theory. See Carlson, *supra* note 7, at 1055.

The third suggested solution is to permit government appeals from negative decisions in the trial court. Double jeopardy would not be implicated because entrapment under this solution would not be a decision on the merits. The pre-trial entrapment determination would occur before jeopardy attached.<sup>220</sup> This would provide for greater range of appellate case law and full development of all sides of the entrapment question.

These solutions would broaden the availability of an entrapment claim to reflect its kinship to the organizing of relations between individuals and law enforcement. It would remove the persistent confusion that entrapment issues cause in culpability determinations and settle once and for all the obvious: entrapment is not a defense to a crime. Calling it a defense complicates both the law of defenses and the law of entrapment. This solution, while broadening the availability of entrapment claims at the trial court level, will also affect a broadening of the appellate case law. More cases will be appealed from both sides of the adversary system. The advantage to having both governmental and individual points of view represented should lead to clearer written opinions and the development of a complete body of law.

The relationship between the individual and law enforcement is a thorny, sensitive and difficult one to negotiate. The *Mathews* decision does not repudiate entrapment so much as it renders invisible a crucial evaluative process, and thus also renders it unreviewable.<sup>221</sup> Through divestiture in favor of the jury, the Court may be expressing a genuine confusion concerning what entrapment is. Alternatively, the Court may be dismayed that entrapment can exonerate guilty people. Certainly a reading of *Mathews* sustains both possibilities, and others besides. These difficulties require careful reconstruction and analysis of entrapment, as well as an examination of the values implicit in the doctrine. But above all they require open, responsible and critical discourse in a forum with the capacity *and the authority* to balance individual rights against societal costs. As valuable a right as the criminal jury trial may be, it is folly to imagine that the opacity of its workings can shed light where the United States Supreme Court has failed.

### VIII. SUBJECTIVITY CONTINUED: A RETURN TO NARRATIVE

Frequently, my attempts to evade a problem have resulted in my running headlong into it. My sojourn as a defender in federal court was such an occasion, personified by a client who, in responding to a subpoena to testify in front of the federal grand jury investigating local judicial corruption in Philadelphia county, sought the advice of counsel. The assigned assistant United States attorney confirmed that the witness was not a target of the investigation, but was the victim of a scheme to extort money in exchange for favorable

220. See Whelan, *supra* note 18, at 1219-21 for a similar solution.

221. The Rehnquist Court has accomplished much the same result in its standard for review of a magistrate's determination of probable cause. In *Illinois v. Gates*, 462 U.S. 213 (1983), the magistrate's initial determination that "a probability or substantial chance of criminal activity" exists, *id.* at 244 n.13, is reviewed with such deference as to make the first determination of probable cause itself unreviewable. See Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 96-97 (1984).

disposition of an open criminal case in the local court system. As I was on intake, I interviewed the witness without any real sense of what was in store.

Even though the subsequent and very public revelations of the investigation have born out what I heard in my office on that January afternoon, this did nothing to decrease the difficulty I had in crediting the story. Initially I listened in my usual self-protective mode, evaluating the witness's demeanor and utility to the ongoing investigation, but felt myself slipping out of role as the client spoke. Because I had just completed a rotation in the very same local courthouse around which the extortion centered, I was in a unique position to weigh the credibility of the story. The client's knowledge of the peculiar process by which criminal cases were listed in Philadelphia, too byzantine to be guessed at, coincided with my own hard-won knowledge. This detailed awareness forced me to conclude that the story was at least possible. After listening further and longer, I grew increasingly convinced that it might be true. Finally, in a last effort to alleviate a growing and very personal sense of uneasiness, I asked a question.

Where had this happened, I asked. The witness named a floor.

What room? A number was given.

Overwhelmed by a sense of the familiar made strange, I called to mind the shabby, ill-designed courtroom named by the witness, so well known to me and now rendered dangerous and alien, a place where the impossible could, and clearly did, happen.

Today, separated from that past by years and miles, I recognize that instant as one of those life-altering moments which slow down one's experience of time. I consider the fortuitous, almost haphazard sequence of events which had contrived to place the witness in the chair opposite mine, and fervently wish I could retrieve that instant. Then, however, I only recognized the need to maintain an impassive outer mask while experiencing internally a rough tide of conflicting emotions. Wave after wave they pummeled me. I felt justifiable anger: the vulnerability of people accused of crime had been exploited for profit in that courtroom, and elsewhere in the Philadelphia court system, perhaps while I had been there, unseeing and unknowing. I felt the surface smugness of the insider: I now knew the robing room in which the rumored federal wiretap had been likely placed. I felt, additionally, a remote curiosity: how did the money change hands, what had I failed to see, what was the procedure? At bottom, and with the intensity of an assault, I felt fear: had I, a defender who had frequently staffed the wiretapped courtroom, said anything which had been picked up on the tapes that I would now regret?

## IX. SUBJECTIVITY REDUX: A NARRATIVE CONCLUDES

The costs of pretense are difficult to assess, and I still find it impossible to measure its effect on my life. Certainly, the events I have described coincided with an antecedent exhaustion and disillusionment known to everyone in service oriented professions as burnout; perhaps mine was seeking a cause to which it could attach itself, and the court crisis where I had worked was conveniently available.

More often, however, I think of the lost sleep, the prison visits, the intensity with which I pursued a vision of justice, and the finality which marked its loss. I felt betrayed by the identified culprits, many of whom I liked, for skewing the court system further against the impoverished clients I represented. Even more, I felt outraged by this person I imagined sitting in some federal office somewhere with earphones on, knowing that the justice I sought in the courthouse eight blocks away was a sham and a fraud, and letting me pursue it anyway. It is that person I cannot fathom, and without a guarantee that such vital information cannot be withheld from me in the name of some higher value, I am unwilling to enter a courtroom ever again.

Society may not care about the collateral victims of a deceptive government, but I think it is because society does not see them. For myself, it is not the unfairness of the results, the possibility that some people got more than they deserved, or that I learned to try a case while others learned to hand out money that angers me. It is that, in a matter of grave importance to me, I was lied to. As Sissela Bok observes:

Bias skews all judgment, but never more so than in the search for good reasons to deceive. Not only does it combine with ignorance and uncertainty so that liars are apt to overestimate their own good will, high motives, and chances to escape detection; it leads also to overconfidence in their own imperviousness to the personal entanglements, worries, and loss of integrity which might so easily beset them.<sup>222</sup>

Despite the loss of my illusions, I knew even then that an institution which compromises the very integrity it seeks to enforce and upon which it is premised, has lost far more than I did.

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222. 5 S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 26 (1978) (citation omitted).