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Denying the Crime and Pleading Entrapment: Putting the Federal Law in Order

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DENYING THE CRIME AND PLEADING ENTRAPMENT: PUTTING THE FEDERAL LAW IN ORDER

The federal law of procedure in entrapment cases is in profound disarray. Despite four attempts over the past fifty years to clarify the law of pleadings in entrapment cases,[1] the Supreme Court has yet to do so successfully. This Note focuses on these attempts, and analyzes the issue of whether to permit a defendant to plead entrapment while simultaneously denying the crime charged.

Part I reviews the historical development of the entrapment defense, the disagreement among the federal circuits with regard to alternative inconsistent defenses, and the arguments commentators have made for and against allowing alternative inconsistent defenses in entrapment cases. Part II illustrates the importance and outcome-determinative nature of this procedural issue through an analysis of the John Z. DeLorean trial.[2] Part III then reviews the theoretical justifications for entrapment—the so-called subjective and objective approaches to entrapment. Finally, Part IV demonstrates that allowing a defendant to plead alternative inconsistent defenses logically follows from both of these theoretical justifications for entrapment.

I. THE PROBLEM OF ENTRAPMENT

Entrapment is a criminal defense based upon a claim that law enforcement officials induced the accused to commit the crime charged.[3] The defense is relatively novel,[4] and it is unique to

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

2. *See* Berger, *Maverick Entrepreneur in Drug Case*, N.Y. Times, Aug. 17, 1984, at B6, col. 3; Cummings, *DeLorean is Freed of Cocaine Charge By a Federal Jury*, N.Y. Times, Aug. 17, 1984, at A1, col. 6.

3. 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 704 (S. Kadish ed. 1983); *see also* W. LAFAVE & A. SCOTT, CRIMINAL LAW 369 (1972):

American law.[5] *Woo Wai v. United States*,[6] decided in 1915, was the first case in which a federal circuit court of appeals acquit-

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According to the generally accepted view, a law enforcement official, or an undercover agent acting in cooperation with such an official, perpetrates an entrapment when, for the purpose of obtaining evidence of a crime, he originates the idea of the crime and then induces another person to engage in conduct constituting such a crime when the other person is not otherwise disposed to do so.

Cf. P. ROBINSON, CRIMINAL LAW DEFENSES 509-11 (1984) (noting a sharp disagreement as to the theory underlying entrapment and that the different theories, in turn, breed different formulations of the defense).

Whatever its formulation, entrapment is never a defense to a crime involving conduct that causes, or threatens to cause, bodily injury. MODEL PENAL CODE § 2.13(3) note on status of section (Proposed Official Draft 1962).

4. The earliest case in which a federal court considered a claim of entrapment was United States v. Whittier, 28 F. Cas. 591 (C.C.E.D. Mo. 1878) (No. 16,688). Although the *Whittier* court acquitted the defendant without reaching the entrapment question, *id.* at 593, a concurring opinion nevertheless declared, "No court should, even to aid in detecting a supposed offender, lend its countenance to . . . contrivances for inducing a person to commit a crime." *Id.* at 594 (Treat, J., concurring).

State courts considered the entrapment defense several years before the federal courts. In Board of Commissioners v. Backus, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864), the court quoted from *Genesis* 3:13 to argue that entrapment was not a valid defense: " 'The serpent beguiled me and I did eat.' That defence was overruled by the great Lawgiver . . . . [T]his plea has never since availed to shield crime . . . and it is safe to say that under any code of civilized, not to say [C]hristian ethics, it never will." *See* Groot, *The Serpent Beguiled Me and I (Without Scienter) Did Eat—Denial of Crime and the Entrapment Defense*, 1973 U. ILL. L.F. 254; Note, *The Serpent Beguiled Me and I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965).

The Groot article, *supra*, considers the same issue as does this Note, but takes a different approach. Groot focuses on several relatively narrow grounds to attack the rule that requires the defendant to admit the crime charged before pleading entrapment. He argues, inter alia, that it is not inconsistent for a defendant simultaneously to deny the mental element (scienter) of the crime charged and to plead entrapment, and that, in any case, to precondition the entrapment defense on admission of the crime is a due process violation. This Note, in contrast, takes a more general and theoretical approach, arguing that the courts can best solve the alternative defense question by reasoning from the underlying theories of entrapment. *See infra* text accompanying notes 75-93.

5. United States v. Henry, 727 F.2d 1373, 1376 n.3 (5th Cir. 1984) ("[T]he entrapment defense is a unique one, unacknowledged by any law but ours."); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 246 (1942) ("[E]ntrapment as an excuse to a charge of crime seems to be a purely American doctrine."); *see also* G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 594 (2d ed. 1983). English courts have considered the defense of entrapment, but have rejected it on the ground that it would be unworkable. *Id.* at 594 n.2. The Canadian courts have likewise considered and rejected the defense. *Id.* (citing Regina v. Bonnar, 34 C.R.N.S. 182 (Nova Scotia 1975)). *See generally* Barlow, *Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment?*, 41 MOD. L. REV. 266 (1978) (considering whether English law should incorporate a theory of entrapment).

6. 223 F. 412 (9th Cir. 1915). The prosecution charged Woo Wai with conspiring to bring illegal immigrants into the United States. The evidence at trial showed that a government agent had induced the defendant to commit the alleged offense, but the trial judge nevertheless held that entrapment was not a valid defense. *Id.* at 413. On appeal, the Ninth Circuit reversed, holding that it was error for the judge below to have refused to instruct the jury on the entrapment defense. *Id.* The court declared that to hold otherwise would be contrary to public policy.

ted a defendant because the government had entrapped him. Not until the 1932 Supreme Court case of *Sorrells v. United States*[7] did the defense finally achieve prominence in American criminal law.[8]

A. A Brief History of the Entrapment Defense

The rise of the entrapment defense was due to two simultaneous and related developments. In the late nineteenth century, a flurry of legislation proscribed activities such as prostitution, homosexuality, gambling, and trafficking in obscene materials, narcotics, and liquor. Because such vice offenses normally occur in private and involve a willing victim who will not complain, the then prevailing methods of police detection were inadequate.[9] To enforce the new statutes, law enforcement agencies thus had to rely on informants and undercover agents to a much greater extent than ever before.[10]

Although entrapment has now been a firmly established criminal defense for over half a century, courts have disagreed as to whether a defendant should be able to plead denial and entrapment as alternative defenses.[11] On one side of the issue is the

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7. 287 U.S. 435 (1932).

8. Nearly every American jurisdiction now recognizes the entrapment defense. P. ROBINSON, *supra* note 3, at 509.

9. *See* Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 874 (1963).

10. *See* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1098-99 (1951); Note, *Entrapment: Time to Take an Objective Look*, 16 WASHBURN L.J. 324, 326-27 (1977).

Organized law enforcement bodies were not prevalent in the United States until the middle of the nineteenth century. Therefore, not surprisingly, the entrapment defense, like the exclusionary rule, did not come of age until the early twentieth century. For an historical discussion of the use of police informers, see generally Donnelly, *supra*, at 1091-98.

11. For a discussion of the disagreement among the federal circuits on this issue, see *infra* notes 27-56 and accompanying text.

Other procedural problems that have significantly troubled the courts are (1) whether evidence of the defendant's past conduct should be admissible at trial; (2) whether the defendant should bear the burden of proof; and (3) whether the issue should be decided by the judge or by the jury. For an excellent discussion of all of these issues, see Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976). For materials specifically concerning the burden of proof in federal courts, see THE FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS §§ 103, 702(1) (1971); MODEL PENAL CODE § 2.13(2) (Proposed Official Draft 1962); Annotation, 23 A.L.R. FED. 767 (1976). For discussions concerning the admissibility of the defendant's past conduct, see Note, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 447, 450-52 (1959) [hereinafter Note, *Entrapment Doctrine*]; Note, *Entrapment: A Critical Discussion*, 37 MO. L. REV. 633, 648-50 (1972);

formidable "inconsistency" theory.[12] This theory recognizes that a defendant who denies the crime charged, while simultaneously alleging that a policeman or undercover agent entrapped him into committing that same crime, is presenting logically inconsistent and mutually exclusive defenses. The proof of one of the defenses disproves the other: with no crime, then, by definition, there could not have been an entrapment; conversely, with an entrapment, then, by definition, there must have been a crime.[13] Therefore, the inconsistency theory maintains that unless the defendant admits the crime charged, an instruction on the entrapment defense should be unavailable, for it would confuse the jury[14] and impede the search for truth.[15]

Three significant arguments countervail the inconsistency theory. First, the common law has always permitted criminal defendants to interpose alternative defenses, however inconsistent.[16] Moreover, the courts have never articulated a justification for excepting entrapment cases from the traditional common law rule.[17] Thus, just as a defendant may plead, for instance, "No, I didn't do it, but yes, if I did, I was insane,"[18] a defendant should

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Note, *The Defense of Entrapment: Next Move—Due Process?*, 1971 UTAH L. REV. 266, 269-71; Annotation, 61 A.L.R. 3D 293 (1975). For discussions regarding the function of the judge and jury, see P. ROBINSON, *supra* note 3, at 516; Starrs, *Comment on Entrapment*, in WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 303, 324-25 (1970).

12. The principal rationale for the position that the defendant may not simultaneously plead denial and entrapment is that the two defenses are inconsistent. Most courts and commentators refer to this rationale as the "inconsistency" theory. *See, e.g.*, United States v. Annese, 631 F.2d 1041, 1046 (1st Cir. 1980); Note, *Denial of the Crime and the Availability of the Entrapment Defense in the Federal Courts*, 22 B.C.L. REV. 911, 917 (1981).

13. *See* United States v. Kaiser, 138 F.2d 219, 220 (7th Cir. 1943), *cert. denied*, 320 U.S. 801 (1944). *But see* United States v. Greenfield, 554 F.2d 179 (5th Cir. 1977); Hansford v. United States, 303 F.2d 219, 221 (D.C. Cir. 1962) (en banc).

14. *See* Note, *supra* note 12, at 918 (citing Eastman v. United States, 212 F.2d 320, 322 (9th Cir. 1954)).

15. *See* Sears v. United States, 343 F.2d 139, 143 (5th Cir. 1965); Henderson v. United States, 237 F.2d 169, 172 (5th Cir. 1956).

16. 21 AM. JUR. 2D *Criminal Law* § 191 (1981); 22 C.J.S. *Criminal Law* § 54 (1961); *see also* United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc).

17. *Demma*, 523 F.2d at 985 ("There is no conceivable reason for permitting a defendant to assert inconsistent defenses in other contexts but denying him that right in the context of entrapment."). But see Groot, *supra* note 4, at 260-61 for a suggestion that courts may be reluctant to apply the normal common law rules because entrapment is typically used as a defense to violations of statutory, not common law, crimes. There is no authority for this proposition.

18. *See Demma*, 523 F.2d at 985 n.6 (citing cases allowing inconsistent defenses); *see also* Groot, *supra* note 4, at 259 n.27 (citing cases allowing a defendant to deny the criminal act and claim insanity or self-defense, or to plead an alibi and provocation or intoxication).

also be able to claim, "No, I didn't do it, but yes, if I did, the policeman entrapped me."

Further, an accused can never assert defenses that are based on facts that are totally inconsistent. Perjury will deter this; the threat of perjury should be adequate to preserve the truth-seeking function of the court. Moreover, should the defendant choose not to take the stand, he will be unable to assert any factually inconsistent defenses. The inconsistency rule thus prevents no more factual inconsistency than perjury has in the past.

Second, application of the inconsistency theory raises serious constitutional questions. Although the entrapment defense still has no judicially affirmed constitutional basis,[19] the Constitution may provide three powerful arguments:[20] (1) the fourth amendment right to unlawful searches and seizures, which may subsume the illegal fishing expedition involved in entrapment cases; (2) the fifth amendment right to be free from self-incrimination, which may preclude police from coercing an otherwise innocent individual to commit a crime; and (3) the fourteenth amendment right to due process of law.[21]

A rule that requires the defendant to admit the crime in order to plead entrapment effectively eliminates the most important part of the prosecution's burden of proof—proving the underlying offense beyond a reasonable doubt.[22] Once a court has relieved the prosecution of this burden, then it has also weakened, if not totally removed, the presumption of a defendant's innocence, thereby violating due process.[23] Whatever the merits of these constitutional arguments, they should at least give pause to those courts that adhere to the inconsistency theory.

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19. Comment, *The Assertion of Inconsistent Defenses in Entrapment Cases*, 56 IOWA L. REV. 686, 688 (1971).

20. *See id.* at 688-90.

21. *Id.*

22.

> When a defendant in an entrapment case is forced to admit the crime in order to assert the defense of entrapment the government is automatically relieved of proving the decisive issue in the case—commission of the crime beyond a reasonable doubt. The only burden of proof which must be sustained by the government is the negation of the defense of entrapment.

Id. at 691-92.

23. *See* Groot, *supra* note 4, at 271; *see also* United States v. Demma, 523 F.2d 981, 986 (9th Cir. 1975) (en banc) ("Continued adherence to [the inconsistency theory] would have generated serious constitutional problems by conditioning the assertion of a defense on the defendant's yielding his presumption of innocence, his right to remain silent, and his right to have the Government prove the elements of the crime beyond a reasonable doubt.").

Finally, the Supreme Court has itself indicated that denial and entrapment are permissible alternative defenses. Writing for the majority in the seminal *Sorrells* case, Chief Justice Hughes stated:

> It is assumed that the accused is not denying his guilt but is setting up special facts in bar upon which he relies regardless of his guilt or innocence of the crime charged. This, as we have seen, is a misconception. The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct. The federal courts in sustaining the defense in such circumstances have proceeded in the view that the defendant is not guilty. The practice of requiring a plea in bar has not obtained. Fundamentally, the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose.[24]

Some decisions construe this language to mean that entrapment is not a defense that assumes that the crime was committed; instead, entrapment negates that any crimes have occurred.[25] If this construction is correct, then a defendant could, consistently and simultaneously, claim that he is innocent and that the government entrapped him.[26]

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24. Sorrells v. United States, 287 U.S. 435, 452 (1932).

25. *See, e.g., Demma*, 523 F.2d at 983 ("In *Sorrells*, Chief Justice Hughes expressly rejected the Government's contention that a claim of entrapment necessarily involved an admission of guilt and that it was in the nature of a plea in bar.") (construing *Sorrells*, 287 U.S. at 452); *see also infra* note 26.

One should recognize, however, that the question of alternative defenses was not before the *Sorrells* Court because, at trial, the defense admitted the crimes charged and relied solely on the entrapment defense. *Sorrells*, 287 U.S. at 438-40. Hence, with regard to the alternative defense question, the language of the *Sorrells* opinion is dictum.

26. *See generally* Groot, *supra* note 4, at 261-62, which suggests that once *Sorrells* declared that entrapment was a negation of a crime, the inconsistency theory should have disappeared. Because courts had already developed their own rules regarding alternative defenses in entrapment cases and because the *Sorrells* Court did not deal directly with the issue, the theory persisted.

B. The Disagreement Among the Federal Circuits[27]

Most of the early court decisions that considered the question adopted the inconsistency theory, concluding that the entrapment defense should be unavailable where the accused refused to admit the charged offense.[28] By the middle of the 1950's, the federal courts almost unanimously subscribed to this view.[29] By the late 1960's, however, a large number of conflicting circuit court precedents existed on the issue. During the past fifteen

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27. For a more extensive discussion of the disagreement among the federal circuits, *see* Note, *supra* note 12, at 911-29. The author divides circuit court positions on the issue into four distinct categories: (1) where admitting the crime is a prerequisite to the entrapment defense (the Third and Seventh Circuits); (2) where the absence of a denial is the only precondition to pleading entrapment (the First, Second, Fourth, and Tenth Circuits); (3) where alternative defenses are allowed (the Ninth and District of Columbia Circuits); and (4) where the entrapment defense is available provided there is no testimony that is "too inconsistent" with that defense (the Fifth Circuit). *Id.*

To illustrate the controversy among the circuits, the present analysis relies heavily on the foregoing categories. The Note, *id.*, however, is out of date in its discussion of Fourth and Fifth Circuit precedents. The Fifth Circuit had long permitted a defendant to plead simultaneously denial and entrapment if, on the particular facts of the case, the inconsistent defenses would not "hinder the search for truth." *See, e.g.*, Henderson v. United States, 237 F.2d 169, 172-73 (5th Cir. 1956), United States v. Henry, 727 F.2d 1373, 1377 (5th Cir. 1984). The Fifth Circuit called this rule into question, however, by rejecting earlier cases holding that a defendant may deny culpable intent and still plead entrapment. The Fifth Circuit has since decided the issue en banc. *See* United States v. Henry, 749 F.2d 203 (5th Cir. 1984) (en banc). *See infra* notes 40-50 and accompanying text.

The Fourth Circuit has also recently come down against the assertion in testimony of a defense inconsistent with entrapment. *See* United States v. Dorta, 783 F.2d 1179 (4th Cir.), *cert. denied*, 106 S.Ct. 3274 (1986).

28. *See* Groot, *supra* note 4, at 260 (citing People v. Murn, 220 Mich. 555, 190 N.W. 666 (1922), and Nutter v. United States, 289 F. 484 (4th Cir. 1923)). In *Murn*, the court held that it was impermissible for the defendant to claim entrapment when he denied making the illegal liquor sale: "Defendant is in no position to urge that the act complained of was induced by entrapment of the officers, for he claims that he made no sale . . . ." *Murn*, 220 Mich. at 558, 190 N.W. at 666. In *Nutter*, the defendant both denied selling morphine and alleged that the government agent had entrapped him into selling the substance. The court declared that the entrapment allegation was inconsistent with the denial of the crime. *Nutter*, 289 F. at 485. As Groot points out, neither the *Murn* nor the *Nutter* court cited any authority for disallowing the entrapment defense simply because the defendant had denied the crime. *But see* Scriber v. United States, 4 F.2d 97, 98 (6th Cir. 1925) ("The [trial] court refused to submit the defense of entrapment, and did this on the theory that defendant's testimony was inconsistent with that defense. In a proper case, it would seem that defendant should have the benefit of this defense, even though such inconsistency exists.").

29. By 1954, the Courts of Appeals for the Second, Fourth, Fifth, Seventh, Eighth, Ninth, and District of Columbia Circuits had all held, or at least recognized by necessary inference, that a defendant must admit the crime charged before raising the entrapment defense. *See* Annotation, 54 A.L.R. FED. 644 (1981); Annotation, 61 A.L.R. 2D 677 (1958). Only the Sixth Circuit suggested that the alternative defenses were permissible. Scriber v. United States, 4 F.2d 97 (6th Cir. 1925).

years the controversy has not subsided. The courts continue to search for a conclusive answer to the problem.

Among the federal circuits,[30] four distinct positions currently prevail on whether a defendant may plead denial and entrapment as alternative defenses.[31] The Third and Seventh Circuits continue to adhere to a pure form of the inconsistency theory, holding that an accused must admit the crime charged in order to plead entrapment.[32] In contrast, the Ninth and District of Columbia Circuits now completely reject the inconsistency theory and hold that the accused need not admit the crime, nor any of its elements, in order to raise the entrapment defense.[33]

The First, Second, Fourth, and Tenth Circuits steer a middle course between the two foregoing positions. These jurisdictions neither will permit a defendant to plead entrapment if he denies committing the crime charged, nor will they require the defendant to take the stand in order to admit the crime affirmatively. In other words, entrapment and denial are permissible alternative defenses in these jurisdictions provided that the defendant does not testify.[34] The rationale for this compromise rule rests

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30. See Annotation, 5 A.L.R. 4TH 1128 (1981), for the positions of the state courts on alternative defenses in entrapment cases.

31. Despite earlier cases adhering to the inconsistency theory, the Eighth Circuit has recently reopened the question. *Compare* Kibby v. United States, 372 F.2d 598, 601 (8th Cir.), *cert. denied*, 387 U.S. 931 (1967) (leaving question undecided) *with* Ware v. United States, 259 F.2d 442, 445 (8th Cir. 1958) (finding denial of crime to preclude the entrapment defense).

32. *See* United States v. Liparota, 735 F.2d 1044, 1048 (7th Cir. 1984), *rev'd on other grounds*, 471 U.S. 419 (1985); United States v. Hill, 655 F.2d 512 (3d Cir. 1981); United States v. Shoup, 608 F.2d 950, 964 (3d Cir. 1979); United States v. Watson, 489 F.2d 504 (3d Cir. 1973); United States v. Johnston, 426 F.2d 112 (7th Cir. 1970).

33. *See* United States v. Demma, 523 F.2d 981, 985-86 (9th Cir. 1975) (en banc) (overruling earlier Ninth Circuit cases supporting the inconsistency theory); Hansford v. United States, 303 F.2d 219, 221 (D.C. Cir. 1962) (en banc).

34. In United States v. Annese, 631 F.2d 1041, 1045 (1st Cir. 1980), the trial court refused to allow the defendant to assert entrapment unless he testified, whereupon he took the stand. On appeal, the First Circuit reversed, holding that its earlier precedents precluding the alternative defenses of entrapment and denial were factually limited to instances in which the defendant voluntarily took the stand and denied the crime charged. *Id.* at 1046. The court then went on to decide that silence is not inconsistent with the entrapment defense and that, therefore, a defendant could plead entrapment as long as he does not affirmatively deny the charged offense. *Id.* at 1046-47.

Similarly, in United States v. Valencia, 645 F.2d 1158, 1172 (2d Cir. 1980), the court held that an accused may rely on the alternative defenses when he neither takes the stand nor introduces any other evidence suggesting that he did not commit the charged offense. *See also* United States v. Mayo, 705 F.2d 62 (2d Cir. 1983) (denying crime in testimony precludes assertion of entrapment defense).

In United States v. Worth, 505 F.2d 1206, 1209 (10th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975), the court stated that testimony from the accused was not a prerequisite to reliance upon an entrapment defense and that, accordingly, one need not take the stand and admit the crime charged in order to raise the defense.

on degrees of inconsistency, and, in an entrapment case, for a defendant to remain silent is less inconsistent than to deny the crime actively.[35]

The evolution of the Sixth Circuit's position represents an anomaly. Whereas most circuits originally adopted the inconsistency theory but eventually deviated from it, the Sixth Circuit originally rejected the theory[36] but eventually accepted it. As late as 1967, the circuit held that the inconsistency between denying the crime and pleading entrapment did not preclude submission of both pleas to the jury.[37] A few years later, however, the Sixth Circuit modified its prior rule by holding that a defendant may not deny every element of the charged offense and still plead entrapment.[38] Then, in a 1975 decision,[39] reaffirmed in

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The Note, *supra* note 12, at 916-19, characterizes the foregoing cases as standing for a "defendant may not deny" rule. This terminology is somewhat misleading, for the rule in these cases is really that the defendant need not admit the crime—he may exercise his fifth amendment privilege not to testify—in order to plead entrapment. Even if the defendant does not testify, these cases still permit the defendant to request an instruction on his participation in the crime and, thereby, to deny the crime by implication. Therefore, these cases more accurately stand for the proposition that the defendant "need not affirmatively admit the crime," or that he "may choose to remain silent."

Finally, in United States v. Dorta, 783 F.2d 1179 (4th Cir. 1986), the Fourth Circuit rejected a prior court decision and held that a defendant could not deny the crime in his testimony and simultaneously plead entrapment.

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> It is inconsistent for an accused to take the stand and deny the commission of the crime charged and then assert his right to a charge on the defense of entrapment. However, where there is evidence of governmental inducement, it is not fatally inconsistent for an accused to keep silent in the hope that the jury will not find that the government has proved its case beyond a reasonable doubt, but ask that the jury be charged on the defense of entrapment if it should find the commission of the allegedly criminal acts. *The law allows this much inconsistency.*

United States v. Annese, 631 F.2d 1041, 1047 (1st Cir. 1980) (emphasis added) (citations omitted) (quoting Gorin v. United States, 313 F.2d 641, 654 n.10 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963)).

36. *See* Scriber v. United States, 4 F.2d 97 (6th Cir. 1925); *supra* note 29.

37. *See* United States v. Baker, 373 F.2d 28, 30 (6th Cir. 1967) (citing Scriber v. United States, 4 F.2d 97 (6th Cir. 1925)).

38.

> The defendant here took the witness stand and absolutely denied that he did any of the acts necessary to constitute the crimes charged. In the course of his testimony he did state that he *would have been* unwilling to commit any of these crimes while denying that he did any of the acts. We . . . hold that the defendant may not absolutely deny every act necessary to constitute the offense and then claim entrapment on the part of the Government agents.

United States v. Shameia, 464 F.2d 629, 631 (6th Cir.), *cert. denied*, 409 U.S. 1076 (1972).

39. United States v. Mitchell, 514 F.2d 758 (6th Cir.), *cert. denied*, 423 U.S. 847 (1975). In this case, the defendant admitted receiving money from a government agent, but denied culpable intent, as had the defendants in *Scriber*, 4 F.2d 97, and *Baker*, 373 F.2d 28. The court, ignoring both of those precedents, held that "the district judge prop-

1983,[40] it totally rejected the permissibility of alternative defenses and adopted the inconsistency theory.

Finally, of the various positions on the alternative defense question, the Fifth Circuit's is the least clear-cut. Like most of the other jurisdictions, the Fifth Circuit once subscribed to the inconsistency theory.[41] In the late 1950's, however, the circuit created a novel formulation under which a defendant could plead both denial and entrapment provided that, in the particular case, the two defenses were not so inconsistent as to "hinder a search for truth."[42] In applying this formulation, the Fifth Circuit has, over the years, excepted the following cases, among others, from its general prohibition against alternative defenses: where the defendant admits committing overt acts in furtherance of a conspiracy but denies knowledge of that conspiracy,[43] where the government's own case-in-chief injects substantial evidence of entrapment,[44] and where the defendant admits the alleged physical acts but denies culpable intent.[45]

Nevertheless, in *United States v. Henry (Henry I)*,[46] the Fifth Circuit suddenly withdrew the last of the foregoing exceptions and held that a defendant must admit culpable intent in order to assert the entrapment defense.[47] The *Henry I* court's reasoning was threefold: first, unless the defendant has admitted culpable intent, he has not really admitted anything at all for if the

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erly precluded appellant from relying on the defense of entrapment." *Mitchell*, 514 F.2d at 761.

40. United States v. Whitley, 734 F.2d 1129 (6th Cir. 1984); United States v. Ranzoni, 732 F.2d 555 (6th Cir.), *cert. denied*, 469 U.S. 916 (1984); United States v. Bryant, 716 F.2d 1091 (6th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984).

41. *See* Marko v. United States, 314 F.2d 595, 597-98 (5th Cir. 1963) (citing Rodriguez v. United States, 227 F.2d 912, 914 (5th Cir. 1955)).

42. Henderson v. United States, 237 F.2d 169, 172 (5th Cir. 1956) ("The common goals of all trials . . . is to arrive at the truth, and it would seem that inconsistent positions should be permitted or not permitted according to whether they might help or hinder a search for the truth. Perhaps that may depend upon the degree of inconsistency."); *see supra* note 27.

43. *Henderson*, 237 F.2d at 173.

44. United States v. Greenfield, 554 F.2d 179, 182 (5th Cir. 1977), *cert. denied*, 439 U.S. 860 (1978).

45. *Id.* at 182-83. By removing the requirement that the defendant admit culpable intent, this case carved out an enormous exception to the general rule that the defendant must admit the crime in order to plead entrapment. In almost all entrapment cases, liability hinges on proof of the mens rea, not of the actus reus. The Fifth Circuit belatedly realized this and overruled *Greenfield*. *See infra* notes 46-50 and accompanying text.

46. 727 F.2d 1373 (5th Cir. 1984).

47. *Id.* at 1377.

intent was not culpable, then the act itself was not criminal;[48] second, the culpable intent exception is so large that it swallows up the general rule;[49] and third, originally no compelling reason to allow this exception existed.[50]

In *United States v. Henry* (*Henry I*),[51] however, the Fifth Circuit decided en banc to reverse *Henry I*. It decided that entrapment is neither an excuse nor a justification—rather, it simply makes an entrapment victim innocent—so a defendant should not be forced to concede guilt as a prerequisite to claiming entrapment.[52] The Fifth Circuit held that a defendant may either assert entrapment and not testify[53] or assert entrapment and deny culpable intent in testimony.[54]

The United States Court of Appeals for the Eleventh Circuit chose to follow old Fifth Circuit precedent.[55] It held that a defendant may plead entrapment but may not deny the act unless the government's own case-in-chief injects substantial evidence

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48. *Id.* With the exception of strict liability offenses, an act standing alone is, of course, never criminal, just as culpable intent standing alone is never criminal. The important point is that proof of criminal intent can turn a mere act into a criminal one, just as proof of a criminal act can turn mere culpable intent into criminal intent.

49.

> In crimes . . . of which culpable intent is an element, it is certainly at least as significant a one as any other, so that refusing to concede the commission of more than two-thirds or three-fourths of the elements of the crime is as effectively done by disputing intent as by disputing any of the crime's requisite factual elements.

Id.

The court should have phrased this argument in different words. In most entrapment cases, the evidence that the defendant committed the actus reus is overwhelming, *see infra* notes 50-59 and accompanying text, and the only real issue is whether he possessed the requisite mens rea. Thus, a requirement that the defendant admit the actus reus—which he could not refute to begin with—may often be no requirement at all.

50.

> By what rhyme or reason, we may fairly ask, does *Greenfield*, select [culpable intent] to exempt from the required concessions rather than any other? We ascertain none except the opinion's suggestion that it is somehow not "impermissibly" inconsistent to deny culpable intent with one breath and admit it in the next. That intent, however, is an element of the crime like any other, and while it may be easier to both admit and deny it than to do so as to a physical act, it seems to us every whit as inconsistent.
>
> Since we find no significant force in the reasoning by which an exception is made for the element of intent alone from the concessions required to raise the entrapment defense, we conclude that this element should be treated no differently from any other . . . .

United States v. Henry, 727 F.2d 1373, 1377 (5th Cir. 1984).

51. United States v. Henry, 749 F.2d 203 (5th Cir. 1984) (en banc).

52. *Id.* at 210.

53. *Id.* at 211.

54. *Id.* at 213.

55. United States v. Morrow, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977).

of entrapment into the case.[56] This decision occurred before *Henry II*, so, should the Eleventh Circuit choose to follow current Fifth Circuit precedent, *Henry II* may portend change in the Eleventh Circuit.

II. THE JOHN Z. DELOREAN TRIAL: A CASE STUDY ON THE OUTCOME-DETERMINATIVE NATURE OF ALTERNATIVE INCONSISTENT DEFENSES

In many cases, a court's choice of the type of pleadings allowed may be dispositive of the trial's outcome. Accepting the inconsistency theory to deter the defendant could, as will be shown, affect a defendant's trial outcome. In most entrapment cases, the prosecution has charged the defendant with a strict liability offense—such as liquor or narcotics possession violation—for which it need not prove mens rea.[57] Moreover, because the government can employ surveillance techniques, use marked money, and, where necessary, undertake searches immediately before and after the transaction,[58] the prosecution will normally have overwhelming evidence. A defendant who denies the crime under such circumstances would simply squander any credibility he might have had on the entrapment issue.[59] Furthermore, even if the charged offense does require proof of mens rea, and even if the evidence is not overwhelming, a skillful cross-examiner could still diminish the defendant's credibility by pointing out the inconsistency of the alternative defenses.[60] Thus, perjury is no more deterred than it would be without the inconsistency theory.

The decision whether to adopt the inconsistency theory may be decisive to the trial outcome. The applicable rule on alternative inconsistent defenses, far from having a merely neutral, procedural effect, will almost always carry implications for the litigating parties. Careful examination of the highly publicized case

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56. United States v. Haimowitz, 725 F.2d 1561 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984).

57. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 532 (5th ed. 1980).

58. *Id.*

59. *Id.*

60. *See generally* Comment, United States v. Demma: *Assertion of Inconsistent Defenses in Entrapment Case Allowed*, 1975 UTAH L. REV. 962, 966-68 (noting that a defendant would lose all credibility with a jury if he were both to deny the crime and plead entrapment, and arguing that either the judge should pass upon the entrapment defense or there should be a separate trial on the issue).

involving the automobile industry executive, John Z. DeLorean, vividly illustrates this point.

On October 19, 1982, the Federal Bureau of Investigation arrested DeLorean[61] for conspiring to sell more than twenty-four million dollars worth of cocaine.[62] On March 5, 1984, following nearly a year and a half of hearings, the trial finally began.[63] To prove its case, the prosecution produced overwhelming evidence:[64] sixty-five audio recordings and over five hours of videotapes, all showing DeLorean and two others plotting the drug deal with federal undercover agents.[65]

Responding to this evidence, the defense argued that the government had perpetrated an entrapment, impermissibly taking advantage of DeLorean's celebrated financial troubles to lure him into a fake investment.[66] The defense lawyers did not call DeLorean as a witness;[67] they primarily attacked the credibility of the prosecution's witnesses.[68]

Because the trial took place in the Federal District Court for the Central District of California, the Ninth Circuit's rule—allowing a defendant to plead entrapment without admitting the crime or any of its elements—applied.[69] Accordingly, even though DeLorean had not taken the stand to admit participation in the conspiracy, the district court judge instructed the jury on the entrapment defense.[70] On August 16, 1984, following

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61. Cummings, *supra* note 2, at B6, col. 2.

62. Berger, *supra* note 2, at B6, col. 3.

63. Cummings, *supra* note 2, at B6, col. 3.

64. Berger, *supra* note 2, at B6, col. 3.

65. Cummings, *supra* note 2, at B6, col. 3; *see also* Brill, *Inside the DeLorean Jury Room*, Am. Law., Dec. 1984, at 94, col. 1, 104, col. 2 (One of the videotapes showed DeLorean reaching for plastic bags of cocaine and exclaiming "It's good as gold . . . gold weighs more than this, for God's sake," then toasting to the group's success, whereupon the undercover agents arrested him.).

66. Cummings, *supra* note 2, at B6, col. 2.

67. Margolick, *A Case for DeLorean*, N.Y. Times, Aug. 17, 1984, at B6, col. 1.

68. Cummings, *supra* note 2, at B6, col. 5. The defense called only four witnesses—DeLorean's secretary and three government agents. Whereas the prosecution's case lasted three months, the defense's lasted a little over three weeks—twelve trial days. Brill, *supra* note 65, at 99, cols. 1, 2.

69. *See* United States v. Demma, 523 F.2d 981 (9th Cir. 1975) (en banc).

70. The judge submitted a list of 68 instructions, most of which referred to "the usual matters of proof beyond a reasonable doubt, circumstantial evidence, [and] the definition of conspiracy." Brill, *supra* note 65, at 101, col. 2. Instruction 56 concerned the entrapment defense. It listed only three requirements and did not say that the jurors had to find that DeLorean had admitted the conspiracy:

> 1) The idea for committing the acts had to have come from the "creative activity" of the government agents or informant;
>
> 2) DeLorean had to have been induced by the government into committing the acts; and

lengthy deliberations, the jury finally produced its verdict: not guilty on all eight counts charged in the indictment.[71]

Immediately after the trial, the press, legal commentators, and the defense lawyers universally presumed that DeLorean's guilt or innocence had played no part in the case and that, instead, the entrapment defense had persuaded the jury.[72] Subsequent interviews with the jurors, however, demonstrated that this interpretation was far from correct—while only four (perhaps five) jurors found an entrapment, eight (perhaps seven) concluded that DeLorean was innocent and thus never even considered the entrapment issue.[73]

The Ninth Circuit's rule on alternative defenses may have determined the outcome of the case. Assuming the jurors would not change their findings if the court retried the case applying the inconsistency theory, a hung jury, or even a conviction, could easily result.[74] One possibility is that DeLorean would again choose to plead entrapment. In this case, he would be required to take the stand and admit the crime. Besides losing his most persuasive argument—innocence—DeLorean would be forced to give the prosecution the opportunity to attack his entrapment defense on cross-examination. A hung jury could easily result

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3) DeLorean had to have not been "ready and willing" to commit the acts before the government agent or informant induced him into becoming involved.

Id. at 103, col. 3.

71. The first count was the basic conspiracy charge. Five other counts were dependent on the basic charge, and thus became moot once the jurors acquitted DeLorean on the first count. The two final counts related to traveling in interstate commerce with intent to sell drugs. *See* Brill, *supra* note 65, at 104, col. 1.

72. Margolick, *supra* note 67, at B6, cols. 1, 2 (quoting several law professors, including Alan Dershowitz of Harvard who remarked, "DeLorean's guilt or innocence played no role in this. All the attention was focused on the Government . . . ."); *see also* Lindsey, *Jurors Cite Entrapment and Failure to Prove Case: Jurors Tie Verdict to 2 Key Factors*, N.Y. Times, Aug. 17, 1984, at B6, col. 6 ("[Defense attorney Howard L.] Weitzman asserted that the jurors had condemned the Government as having entrapped Mr. DeLorean and that they wanted to 'send a message to the Department of Justice' that 'setting up' citizens to commit crimes was wrong.").

73. Brill, *supra* note 65, at 104, col. 1 ("Soon a vote was taken on the first count. It was 12-0 not guilty. In all, four, maybe five, jurors had been won over by the entrapment defense, while the others simply hadn't found the conspiracy."); *see also id.* at 105, col. 3 ("[T]here's something alluringly deceptive about a 12-0 verdict, for it implies more unanimity than really exists. The jurors here only agreed on the verdict, not on the reasons for it, *not on the entrapment issues*, and not on anything of policy import about the government's conduct." (emphasis added)).

74. One cannot conclude, however, that the result would *necessarily* be different. If DeLorean admitted the crime and pleaded entrapment, the eight jurors who thought that there was no conspiracy might still have found an entrapment. But assuming that DeLorean again chose not to testify, a hung jury would necessarily result. *See supra* note 73 and accompanying text.

because only one of the eight jurors who thought that DeLorean was innocent would need to find no entrapment.

The other possibility is that DeLorean would again choose not to testify. There would necessarily be a conviction or a hung jury, for DeLorean would forfeit his entrapment defense, and the four jurors who thought that he was entrapped would have no choice but to vote for conviction. Thus, the applicable rule on alternative defenses could have made a material difference in the outcome of this trial.

III. THE TWO THEORETICAL JUSTIFICATIONS FOR ENTRAPMENT

Because a defendant's fate can hinge on whether he is allowed to plead entrapment while simultaneously denying the crime, the courts should pay close attention to the particular procedure for pleading that they adopt. Whatever the strengths of the various rationales for and against alternative defenses, all have a common weakness—they ignore the theoretical basis for entrapment. Until the courts consider the doctrinal basis for entrapment, attempting to solve the procedural problems that the defense presents makes little sense. The courts should not develop procedural rules in a vacuum; instead, they should fashion those rules around a solid theoretical framework.

The Supreme Court first formulated the entrapment defense in *Sorrells v. United States*.[75] In that case, defendant Sorrells sold alcohol to a government agent in violation of the National Prohibition Act. The trial court held as a matter of law that there was no entrapment, and the Second Circuit affirmed. On appeal, the Supreme Court reversed, holding that where evidence exists that government officials implanted the criminal design in the accused's mind, for a court to withhold the entrapment issue from the jury is reversible error.[76]

The majority opinion, written by Chief Justice Hughes, rejected both estoppel and public policy as the doctrine's foundation.[77] The true basis for the defense, the Court declared, was that Congress did not intend criminal statutes to apply where the government's own agents induced an otherwise innocent person to commit the offense.[78] In determining whether the defense

75. 287 U.S. 435 (1932).

76. *Id.* at 441-42.

77. *Id.* at 444-51. *See generally* Note, *Entrapment Doctrine*, *supra* note 11, at 448-49 (discussing the doctrinal basis for the entrapment defense).

78. *Sorrells*, 287 U.S. at 448.

applied, i.e., whether the government induced an otherwise innocent person, the defendant's predisposition to commit the crime would be the pertinent issue.[79] Accordingly, *Sorrells* explained that the focus of the entrapment defense was the *subjective* blameworthiness of the defendant, not the *objective* propriety of the government agents' conduct.[80]

Justices Roberts, Brandeis, and Stone concurred in the result, but disagreed with the doctrinal foundation that the majority laid for the defense. Writing for the minority, Justice Roberts characterized the statutory construction approach as pure fiction.[81] Entrapment's true foundation, he stated, lies in public policy—it is a device to discipline police conduct, not to excuse the defendant.[82] Roberts also attacked the majority's "subjective" approach, arguing, "[This procedure], in effect, pivots conviction in such cases, not on commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment."[83] Thus, in the minority's view, the defendant's blameworthiness is irrelevant. The only significant issue is whether, objectively speaking, the police employed impermissible methods.

The dispute over the proper rationale for the defense continued. The Supreme Court again examined entrapment in *Sherman v. United States*,[84] and the result was as controversial as *Sorrells*. In *Sherman*, a government informer developed a relationship with the defendant, who was then being treated for narcotics addiction. After the informer repeatedly requested illegal drugs from the defendant, the defendant finally supplied them. The majority refused to abandon *Sorrells*, and Justice Frankfurter wrote a separate concurring opinion arguing that the Court should have followed Justice Roberts' position.[85]

In the Supreme Court's most recent decision on entrapment, *Hampton v. United States*,[86] only a plurality of the Court was willing to reaffirm the position of the *Sorrells* majority. *Hamp-*

79. *Id.* at 451.

80. *See* S. REP. No. 605, 95th Cong., 1st Sess., Pt. 1, at 111 (1977).

81. *Sorrells*, 287 U.S. at 455-56 (Roberts, J., concurring).

82. *Id.* at 458 ("Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors.").

83. *Id.* at 459.

84. 356 U.S. 369 (1958).

85. *Id.* at 380 (Frankfurter, J., concurring) ("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.").

86. 425 U.S. 484 (1976) (3-2-3 decision).

ton involved a defendant who was convicted of buying heroin from federal undercover agents. Because the defendant conceded that he was predisposed to commit the offense, the trial court had refused to instruct the jury on entrapment. On appeal, the defendant argued that, despite his predisposition, the public policy objective of entrapment to discipline overreaching police conduct entitled him to the defense. Accordingly, *Hampton* presented the unique situation in which the defendant's predisposition was clear and the police involvement was great. The outcome of the case thus depended on whether the Supreme Court would follow the subjective or objective approach.[87]

Writing for the plurality, Justice Rehnquist rejected outright the public policy rationale for entrapment and held that, because the defendant's predisposition was clear, the trial court was correct in disallowing the entrapment defense.[88] If, however, the government violated the defendant's due process rights by employing impermissible methods, then the defendant could prosecute the agents involved.[89]

The plurality opinion provoked another vigorous dissent, with three justices criticizing the plurality's reaffirmation of *Sorrells* and arguing in favor of the objective theory of entrapment.[90] Significantly, two justices wrote a separate opinion arguing that, in extreme cases, police over-involvement could rise to the level of a constitutional due process violation.[91]

Despite the Supreme Court's continued adherence to the subjective approach, several federal circuit courts have adopted the objective test.[92] Moreover, numerous states long ago abandoned the subjective in favor of the objective approach, and some have even done so by statute.[93]

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87. *See* P. ROBINSON, *supra* note 3, at 514.

88. *Hampton*, 425 U.S. at 488-89.

89. *Id.* at 490.

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

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

92. *See, e.g.*, Greene v. United States, 454 F.2d 783, 786-87 (9th Cir. 1971); Accardi v. United States, 257 F.2d 168, 172-73 (5th Cir.), *cert. denied*, 358 U.S. 883 (1958). *See generally* Note, *supra* note 10, at 329-40 (listing courts that ignore the *Sorrells* holding).

93. *See* MODEL PENAL CODE § 2.13(1) note on status of section (Proposed Official Draft 1962); *see also* Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5, 29-36 (1986).

IV. THE PROCEDURAL IMPLICATIONS OF THE TWO THEORIES

Under both theoretical justifications for entrapment, a defendant should logically be able to plead entrapment even if he has denied the charged crime. Under the subjective approach, entrapment is like any other legal excuse and should be accorded similar treatment, that is, allowing alternative inconsistent defenses. Furthermore, under the objective approach with the focus on police activity, not on the accused or his manner of pleadings, alternative inconsistent pleadings should be allowed.

A. The Subjective Approach

The subjective approach focuses on the accused. If a court follows the *Sorrells* majority position, then it essentially recognizes entrapment as an excuse. By focusing on the predisposition of the defendant, the court is asking whether the defendant is sufficiently blameworthy to be held accountable for the crime. Entrapment, so formulated, is not very different from excuses such as self-defense, defense of others, defense of property, and duress. Just as we will find not blameworthy, and therefore acquit, a defendant who was coerced to perform a crime, so too, with a subjective view of entrapment, we will find not blameworthy a defendant who was otherwise innocent.[94] Under the subjective approach, entrapment is "as closely associated with normative culpability as is the claim of duress. In one case the actor is seduced by the wiles of a duplicitous police officer; in the other he is coerced by the threats of an overbearing will."[95]

If entrapment in its subjective formulation is an excuse, then a court should apply the same rule concerning alternative inconsistent defenses that it applies to other excuses. Because all courts would permit a defendant to plead, "I didn't do it, but if I did I should be excused because I acted in self-defense," it follows that it is also permissible for a defendant to argue, "I didn't

94. A common misconception about the entrapment defense is that it operates by vitiating the mens rea element of a crime. One should recognize that culpable intent exists only if the defendant acted "knowingly" or "purposefully." This means that as long as the defendant's "conscious objective" was to perform the act in question, he is deemed to possess the requisite mens rea. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

95. G. FLETCHER, RETHINKING CRIMINAL LAW 542 (1978).

do it,. but if I did I was entrapped."[96] Courts should thus accord entrapment this same procedural treatment.

B. The Objective Approach

If a jurisdiction follows the Roberts-Frankfurter objective approach, then the defendant should also be allowed to plead entrapment as an alternative inconsistent defense. Where entrapment functions to guard against overreaching police activities, the focus should not be on the defendant, much less on his manner of pleading. Rather, the entire focus should be on the challenged governmental activity. The applicable principle in the objective view is one of public policy: "[The] courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy."[97] From an objective approach, entrapment should not focus on the accused and thereby allow inconsistent defenses.

CONCLUSION

A lack of harmony exists among the circuits in the federal law regarding pleadings in entrapment cases. This Note points out the outcome-determinative nature and importance of pleadings in an entrapment case through the example of the John Z. DeLorean trial. This Note then argues that defendants should be allowed to plead alternative inconsistent defenses—a plea of innocence coupled with a plea of entrapment. Unlike other commentators, this Note argues that the logic for allowing alternative inconsistent defenses naturally arises from the theoretical bases for entrapment, the so-called subjective and objective approaches to the defense.

The subjective approach leads to alternative inconsistent pleadings because it arguably treats entrapment as an excuse, and criminal cases involving an excuse allow alternative inconsistent pleadings. The objective approach also calls for the adoption of alternative inconsistent pleadings, because the focus of the inquiry is on the challenged government activity, not on the

96. *See supra* note 18 and accompanying text.

97. United States v. Sorrells, 287 U.S. 435, 459 (1932) (Roberts, J., concurring).

manner of the defendant's pleadings. Accordingly, both federal and state courts should allow alternative inconsistent pleadings in criminal entrapment cases.

—Richard C. Insalaco & Peter G. Fitzgerald