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Pleading the Entrapment Defense: The Propriety of Inconsistency

Michael H. Roffer

New York Law School, michael.roffer@nyls.edu

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NOTE

PLEADING THE ENTRAPMENT DEFENSE: THE PROPRIETY OF INCONSISTENCY

Of fortune no man tastes his fill.
While pointing envy notes his store,
And tongues extol his happiness,
Man surfeited will hunger still.
For who grows weary of success,
Or turns good fortune from his door
Bidding her trouble him no more?

—Aeschylus

INTRODUCTION

Were epitaphs to attach to the grave markers of certain recently fallen political careers, perhaps none would be more appropriate than Aeschylus' cynical commentary in Agamemnon. Once prominent leaders, these were men who had somehow fallen victim to both their own tragic flaws and the controversial undercover tactics of the very government of which they were a part. The political falls of such men as Messrs. Kelly, Lederer, Myers and Williams, to name but a few, by no means marked the first time in our history where respected and trusted public leaders had been forced to resign their offices amid allegations of scandal and public wrongdoing. Indeed, the annals of even our most recent history are replete with examples both tragic and contemptible. What distinguishes this most recent episode, however, is

2. Representative Richard Kelly (R.-Fla.).
3. Representative Raymond Lederer (D.-Penn.).
4. Representative Michael Myers (D.-Penn.).
7. An unfortunately realistic account of some of the most infamous falls from grace is
the manner in which the denouement came to be effected. While a recounting of the events leading to and the results stemming from the Abscam scandal is clearly beyond the scope of this note, no such recapitulation is necessary to refresh our all too vivid memories of what Abscam in fact represented—the increasing prominence of undercover governmental investigative tactics and a resurgence of the entrapment controversy.

In what remains the recent wake of Abscam, it is only too apparent that both public and judicial sensitivity to the entrapment issue is likely to intensify. With this heightened focus will doubtless come a renewed attention to aspects of the entrapment defense which have yet to be definitively resolved. While the Supreme Court has established and thrice reaffirmed its substantive interpretation of the entrapment defense, a number of equally important procedural matters have heretofore escaped its review. The focus of this note, therefore, will be an evaluation of one such procedural matter, viz., the availability of the entrapment defense where the assertion of that defense is inconsistent with the defendant's denial of guilt.


12. More precisely, the issue to be examined concerns the nature and propriety of what has come to be known as the "inconsistency rule." Essentially, the rule reflects a procedural doctrine which seeks to bar a criminal defendant from asserting defenses at trial deemed to be logically or factually inconsistent, e.g., "I didn't commit the crime, but if I did, I was entrapped." For various linguistic formulations of the rule, see infra notes 127 & 128 and accompanying text. For a discussion of inconsistent defenses other than entrapment, see infra notes 85-121 and accompanying text.
Part I\textsuperscript{3} will briefly survey the genesis and evolution of the entrapment defense in the federal courts. Part II\textsuperscript{4} will explore the general theories and availability of inconsistent pleadings and defenses in other areas of our criminal and civil jurisprudence. Part III\textsuperscript{5} will then set forth the nature of the debate in the specific context of the inconsistent entrapment defense, surveying the various circuit courts' positions which may be summarized as permissive, restrictive, or quasi-restrictive. Finally, Part IV\textsuperscript{6} will represent a prescriptive attempt to articulate support speaking to the ultimate propriety of inconsistent defenses.

I. History and Evolution of the Entrapment Defense\textsuperscript{7}

The history of entrapment is an ancient one, "first interposed in Paradise: 'The serpent beguiled me and I did eat.'"\textsuperscript{8} It is not surprising that the defense ultimately made its way to the federal courts, alas,

13. Infra notes 17-84 and accompanying text.
15. Infra notes 122-246 and accompanying text.
16. Infra notes 247-87 and accompanying text.
18. Board of Comm'rs v. Backus, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864) (quoting Genesis 3:13). In rejecting the entrapment defense, the court seemed comfortable in relying on what it doubtlessly perceived to be the ultimate authority:

That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will.

*Id.* While "the great Lawgiver" has never been explicitly overruled, at least as to the facts upon which His judgment was rendered, it is safe to say that entrapment has established itself as a viable legal defense in more modern times. For a discussion of cases recognizing the validity of the defense, see *infra* notes 26-82 and accompanying text.
only to prove initially unavailing. *United States v. Whittier,*\(^\text{19}\) while rejecting the entrapment defense, managed to anticipate the modern day debate over subjective and objective theories of entrapment.\(^\text{20}\) A concurring opinion suggested:

> It must be conceded that contrivances to induce crime (the contriver confederating for the purpose with the criminal) are most rigidly scrutinized by the courts, even when the contrivances are lawful in themselves. But when the contrivances are of an unlawful character, should courts not be even more strict?

> . . .

> No court should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime. Although a violation of law by one person in order to detect an offender will not excuse the latter, or be available to him as a defense, yet resort to unlawful means is not to be encouraged. When the guilty intent to commit has been formed, any one may furnish opportunities, or even lend assistance, to the criminal, with the commendable purpose of exposing and punishing him.\(^\text{21}\)

It was not until 1915 that the first successful entrapment defense was raised. In *Woo Wai v. United States,*\(^\text{22}\) the Ninth Circuit reversed defendants' convictions for a conspiracy to bring illegal aliens into the United States. The court premised its holding\(^\text{23}\) on two theories, suggesting not only that the defendants lacked any predisposition to commit the crime,\(^\text{24}\) but that it would be against public policy to permit law enforcement officers to induce the commission of crime by others.\(^\text{25}\)

The stage thus set, the Supreme Court's first major pronouncement was soon to follow. In *Sorrells v. United States,*\(^\text{26}\) a doctrinally

\(\text{19. 28 F. Cas. 591, 594 (C.C.E.D. Mo. 1878) (No. 16,688).}\)
\(\text{20. See infra notes 26-83 and accompanying text.}\)
\(\text{21. 28 F. Cas. at 594 (Treat, J., concurring).}\)
\(\text{22. 223 F. 412 (9th Cir. 1915).}\)
\(\text{23. Id. at 414-15. The court's holding was based on a finding that the evidence was insufficient to prove that there was in fact a conspiracy to commit a criminal act within the meaning of the statute. To the extent that "no violation of the law was to be accomplished by the act of the defendants, it follow[ed] that they could not be held for conspiracy to do that act." Id. at 415.}\)
\(\text{24. Id.}\)
\(\text{25. Id. at 415-16. For an excellent summary of the early growth of the entrapment defense, see Orfield, supra note 17, at 39-43.}\)
\(\text{26. 287 U.S. 435 (1932). The defendant in *Sorrells* had been charged on a two-count indictment with possession and sale of whiskey in violation of the National Prohibition Act. Id. at 438. A federal agent, posing as a tourist, managed to gain the confidence of}\)
divided Court set forth the theory of the defense and the terms of its application. Upholding the availability of the defense, the Court articulated what has come to be known as a subjective theory, focusing on whether or not a defendant was predisposed to commit the criminal act. Writing for the majority, Chief Justice Hughes explained that the entrapment defense prohibited law enforcement officials from instigating a criminal act by persons “otherwise innocent in order to lure them to its commission and to punish them.” The critical inquiry, therefore, was “whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.”

In a concurring opinion, Justice Roberts advanced a strong case for an alternative view of the nature of the entrapment defense. While the “Hughes opinion viewed the entrapment defense as a protection for the otherwise innocent individual who was entrapped, and as a collateral protection of the public from similar intrusions, Justice Roberts saw the defense as protection of the government from itself, with the collateral effect of excusing the entrapped individual.” Specifically, Justice Roberts noted that the doctrine rests 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

the defendant and persisted in asking the defendant if he could procure some liquor for him. Not until a third request did the defendant capitulate and provide the zealous agent with what he sought. Id. at 439-40. For a more detailed discussion of Sorrells, see Note, Criminal Law—Entrapment: Sorrells v. United States, 13 B.U.L. Rev. 293 (1933); Note, Entrapment of Public Officers as a Defense Against Criminal Prosecution, 38 Dick. L. Rev. 191 (1934); Note, Entrapment under the National Prohibition Act, 1 Geo. Wash. L. Rev. 371 (1933); Note, Criminal Law—Defenses—Entrapment as Defense under the General Issue, 46 Harv. L. Rev. 848 (1933); Note, The Nature of the Defense of Entrapment, 1 U. Chi. L. Rev. 115 (1933); Note, Entrapment as Defense in Prosecution for Prohibition Violation, 42 Yale L.J. 803 (1933).

27. 287 U.S. at 452.

28. Id. at 448.

29. Id. at 451. The Chief Justice was careful to point out that “[i]t is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprise.” Id. at 441. He noted, however, that “[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.” Id. at 442.

30. Id. at 453 (Roberts, J., concurring). Justice Roberts' concurrence was joined by Justices Brandeis and Stone. Id. at 459. Justice McReynolds dissented without opinion. Id. at 453 (McReynolds, J., dissenting).

and of the court alone to protect itself and the government from such prostitution of the criminal law.\footnote{32}

While Justice Roberts defined entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer,"\footnote{33} he could find it grounded on no other theory than public policy, that is, the need to retain the purity and integrity of the law enforcement process. Justice Roberts observed that there was

common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. . . . Public policy forbids such sacrifice of decency.\footnote{34}

In short, Justice Roberts would not permit the process of the courts "to be used in aid of a scheme for the actual creation of a crime by those whose duty it is to deter its commission."\footnote{35}

The \textit{Sorrells} holding remained undisturbed in the Supreme Court for nearly a quarter of a century. In 1958, when again presented with the issue of entrapment in \textit{Sherman v. United States},\footnote{36} the Court declined to reassess its earlier ruling. In setting aside the petitioner's conviction for narcotics sales violations, Chief Justice Warren expressly reaffirmed the Court's position on entrapment as detailed in \textit{Sorrells}, specifically noting that "[t]he intervening years have in no way de-
tracted from the principles underlying that decision."

In reaffirming the Court's earlier holding, the Chief Justice reiterated the view of his predecessor that "[e]ntrapment occurs only when the criminal conduct was the 'product of the creative activity' of law-enforcement officials." Accordingly, the Court's focus would necessarily be directed to the predisposition of a defendant to commit the crime with which he had been charged. In language that would come to be quoted extensively, Chief Justice Warren reasoned that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." Toward this end, the accused would be "subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence."

The majority explicitly refused to alter its analysis to conform to Justice Roberts' concurrence in Sorrells despite strong urging by Justice Frankfurter in his concurring opinion. Justice Frankfurter, dissatisfied with the basis of the Sorrells decision, argued strenuously for "reexamination to achieve clarity of thought," noting that "the prevailing theory of the Sorrells case ought not to be deemed the last word." Picking up on the Roberts concurrence, Justice Frankfurter endorsed an objective focus, arguing that "[t]he 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 the conviction cannot be countenanced." Indeed, he noted that

37. Id. at 372. The Chief Justice continued: "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. . . . Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." Id.
38. Id. (quoting Sorrells v. United States, 287 U.S. at 451) (emphasis by the Sherman Court).
40. Id. at 373 (quoting Sorrells v. United States, 287 U.S. at 451). Ultimately, the majority concluded that entrapment had been established as a matter of law and reversed the petitioner's conviction. 356 U.S. at 373.
41. See supra notes 30-35 and accompanying text.
42. 356 U.S. at 378 (Frankfurter, J., concurring). Justices Douglas, Harlan, and Brennan joined in the Frankfurter concurrence. Id.
43. Id. at 379.
44. Id.
45. Id. at 380. More particularly, Justice Frankfurter stated:
The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the "intention" to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of "the creative activity" of law-enforcement officials.
a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant’s past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. 46

Justice Frankfurter was unwilling to set forth with particularity the proper benchmark by which government tactics were to be evaluated. 47 Instead, the court was to fashion “as objective a test as the subject matter permits,” 48 leaving its application through condemnation of reprehensible police conduct to a careful case-by-case approach. The substance of an embellished Frankfurter analysis would be the basis of the next entrapment case to reach the High Court.

More than a decade after the Sherman decision, United States v. Russell 49 renewed an entrapment dialogue among the members of the Court. The split among the justices intensified as the doctrinal underpinnings of past concurring opinions now engendered dissents. Russell, like Sherman, involved a disputed narcotics conviction, 60 and provided the Court with the vehicle to reaffirm its now entrenched view of the foundation for the entrapment defense.

The essential question that emerged in Russell was whether or not the entrapment defense could properly be attributed to constitutional principles of due process. The Ninth Circuit, in expanding the traditional notion of entrapment, had held that the overinvolvement of law enforcement officials in inducing the culpable acts of the defendant represented “an intolerable degree of governmental participation in the criminal enterprise.” 61 It therefore grounded its theory of entrapment “on fundamental concepts of due process and evince[d] the reluctance

Id. at 382.

46. Id. at 382-83.

47. Id. at 383-84. The present Burger Court also seems hesitant to define the limits of proper government conduct. See infra notes 53-62 and accompanying text.

48. 356 U.S. at 384 (Frankfurter, J., concurring).


50. Russell had been convicted of three counts of unlawful manufacture, sale, and delivery of methamphetamine. Id. at 424. The Ninth Circuit reversed the conviction on finding that an undercover agent had supplied an essential chemical for manufacturing the drug and that there could not have been manufacture, delivery, or sale of the illicit drug had it not been for the government’s supply of the essential ingredient. Russell v. United States, 459 F.2d 671, 672 (9th Cir. 1972), rev’d, 411 U.S. 423 (1973). It concluded as a matter of law that “a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise.” 459 F.2d at 673.

51. 459 F.2d at 673.
of the judiciary to countenance 'overzealous law enforcement.'” In refusing to elevate the defense of entrapment to constitutional status, Justice Rehnquist, speaking for the Supreme Court majority, noted:

While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.53

Despite leaving open at least the possibility of a constitutionally grounded entrapment defense, Justice Rehnquist remained adamant in the Court's continued adherence to the doctrine as announced in Sorrells and Sherman, expressly rejecting any attempt to breathe judicial life into the minority views espoused by Justices Roberts and Frankfurter. For all practical purposes, the essential holding of Sorrells and the proper predicate for an entrapment defense therefore remained intact. Once more, entrapment was established to be a relatively limited defense . . . rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement," but instead in the

52. Id. at 674 (quoting Sherman v. United States, 356 U.S. 369, 381 (1958) (Frankfurter, J., concurring)).
54. Justice Rehnquist stated: "We decline to overrule these cases. Sorrells is a precedent of long standing that has already been once reexamined in Sherman and implicitly there reaffirmed. . . . [T]he defense is not of a constitutional dimension. . . ." 411 U.S. at 433.
55. For a complete discussion of these two minority views, see supra notes 30-35 & 42-48 and accompanying text. Indeed, Justice Rehnquist observed that "equally cogent criticism has been made of the concurreng views in these cases." 411 U.S. at 434.
notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements for a proscribed offense, but was induced to commit them by the Government.\textsuperscript{56}

There were two dissents in \textit{Russell}. Justice Douglas, joined by Justice Brennan, rigidly adhered to the earlier views of Justices Roberts and Frankfurter,\textsuperscript{57} noting that “[f]ederal agents play a debased role when they become the instigators of the crime, or partners in its commission, or the creative brain behind the illegal scheme.”\textsuperscript{58} Justice Stewart, joined by Justices Brennan and Marshall, added a separate dissenting opinion.\textsuperscript{59} Rejecting an emphasis on predisposition as misleading,\textsuperscript{60} Justice Stewart concluded that the “purpose of the entrapment defense . . . cannot be to protect persons who are ‘otherwise innocent.’ Rather, it must be to prohibit unlawful governmental activity in instigating crime.”\textsuperscript{61} In sum, Justice Stewart reasoned that

when the agents’ involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their

\textsuperscript{56} 411 U.S. at 435. The majority noted that circumstances may exist where the government’s use of deceit is the only practicable law enforcement technique available and stressed that it is only when this deception actually implants the criminal design into the defendant’s mind that the entrapment defense comes into play. \textit{Id.} at 436.

\textsuperscript{57} \textit{Id.} at 436 (Douglas, J., dissenting).

\textsuperscript{58} \textit{Id.} at 439. Justice Douglas reiterated Justice Roberts’ position that the “prostitution of the criminal law” was the evil at which the defense of entrapment is aimed. \textit{Id.} (quoting \textit{Sorrells v. United States}, 287 U.S. 435, 457 (1932) (Roberts, J., concurring)).

\textsuperscript{59} 411 U.S. at 439 (Stewart, J., dissenting).

\textsuperscript{60} \textit{Id.} at 442. Justice Stewart argued:

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. He may not have originated the precise plan or the precise details, but he was “predisposed” in the sense that he has proved to be quite capable of committing the crime. 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.”

\textit{Id.} at 443-44.

\textsuperscript{61} \textit{Id.} at 442.
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conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice.62

With the decision in Russell, the objective theory of entrapment was again laid to rest, albeit by the slimmest majority. Three years later, in Hampton v. United States,63 the majority would once again reaffirm its long standing position in what now appears to be the last word on the subject.64

Hampton had been convicted of two counts of distributing heroin in violation of federal narcotics law.65 At trial, Hampton contended that the drugs he sold (he denied knowledge that he was actually dealing in heroin) had all been supplied by one who ultimately proved to be a government informant. His requested entrapment instruction, however, was rejected by the district court.66 On appeal to the Supreme Court, Hampton urged that the due process dictum in Russell67 supported the overturning of his conviction.68 In particular, he argued that the government agents, in supplying him with the drugs he had been convicted of selling, had engaged in conduct "so outrageous that due

62. Id. at 445 (footnote omitted).
64. Hampton, too, was resolved by a sharply divided Court, with the subjective approach of the Russell majority again posited as the controlling standard. A plurality opinion authored by Justice Rehnquist was joined by Chief Justice Burger and Justice White. Id. at 485. Justice Powell, joined by Justice Blackmun, filed an opinion concurring in the judgment. Id. at 491 (Powell, J., concurring). Justice Brennan, joined by Justices Stewart and Marshall, filed a dissenting opinion. Id. at 495 (Brennan, J., dissenting). Justice Stevens took no part in the consideration or decision of the case. Id. at 491.
66. The instruction Hampton sought the district court to charge consisted of the following:
   The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.
   If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
67. See supra text accompanying note 53.
68. 425 U.S. at 489.
process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . .” In resolutely rejecting any such argument, Justice Rehnquist noted that “petitioner misapprehended the meaning of the quoted language in Russell . . . .” Indeed, in making a “determined effort to stamp out any vestige of the objective test for entrapment,” the plurality opinion of Justice Rehnquist unequivocally reaffirmed the predisposition focus of Russell and its ruling out of “the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.” Reiterating the “unavailability of the entrapment defense to a predisposed defendant under any circumstances,” the opinion clarified the due process reference in Russell:

The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant. Here, as we have noted, the police, the Government informant, and the defendant acted in concert with one another . . . . If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.

The concurring justices agreed both with the affirmance of the conviction and the premise that the entrapment defense should remain unavailable to a predisposed defendant. They remained unconvinced, however, that “the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.” Acknowledging that “the cases, if any, in which proof of predisposition is not dispositive will be rare,” Justice Powell nonetheless was “unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles.”

69. Id. (quoting Russell, 411 U.S. at 431-32).
70. 425 U.S. at 489.
71. Murchison, supra note 17, at 602.
72. 425 U.S. at 489.
74. 425 U.S. at 490.
75. Id. at 494-95 (Powell, J., concurring).
76. Id. at 492.
77. Id. at 495 n.7.
78. Id. at 493 (footnote omitted). Justice Powell cited with approval the opinion of
Justice Brennan, in dissent, echoed the earlier views of Justices Roberts, Frankfurter, and Stewart, and again urged adoption of an objective theory of entrapment. Arguing that the government in this case was "doing nothing less than buying contraband from itself through an intermediary and [then] jailing the intermediary," Justice Brennan concluded that the "Government's role has passed the point of toleration."

As a result of a full half century of Supreme Court pronouncements, the substantive parameters of the entrapment defense would seem to be securely fixed. Despite disagreement from some of its members, a majority of the Court appears unswerving in its adherence to a subjective approach to the doctrine. Though the decision in Hampton represents the prevailing view thus far, the issue can hardly be said to have been put to rest for all eternity. Indeed, since the decision in Hampton, a host of new cases replete with variant theories have been decided. While none have yet been granted Supreme Court review, it is not unreasonable to believe that there does somewhere loom a case to serve as the predicate for a renewed Supreme Court treatment.

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Judge Friendly in United States v. Archer, 486 F.2d 670 (2d Cir. 1973):

[T]here is certainly a [constitutional] limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction.

425 U.S. at 493 n.4 (Powell, J., concurring) (quoting 486 F.2d at 676-77 (footnote omitted)). Arguably, Judge Friendly's example would be of the type even the majority would endorse as deserving due process protection.


80. 425 U.S. at 495-97 (Brennan, J., dissenting).

81. Id. at 498.

82. Id.

Id. There is little, if any, law enforcement interest promoted by such conduct; plainly it is not designed to discover ongoing drug traffic. Rather, such conduct deliberately entices an individual to commit a crime. That the accused is "predisposed" cannot possibly justify the action of government officials in purposefully creating the crime. No one would suggest that the police could round up and jail all "predisposed" individuals, yet that is precisely what set-ups like the instant one are intended to accomplish.

Id.

83. While one may legitimately speculate as to the continued vitality of this approach in light of Justice O'Connor's appointment to the Court, such speculation may prove merely academic since Justice Stewart, her predecessor, had consistently dissented from the majority position on entrapment. Indeed, Justice O'Connor's appointment may well serve to enhance the unity among the justices rather than factionalize the Court's approach.

84. See supra note 53.
Equally likely, however, is the possibility that the next entrapment issue to reach the high Court will concern not the substantive make-up of the doctrine, but rather a peripheral procedural issue which has yet to be addressed. Indeed, such a likelihood is enhanced by the divisive split among the circuits with respect to one such issue, that of the inconsistent entrapment defense, the subject of the remainder of this note.

II. The Theory of Inconsistent Defenses

   A. Civil Actions

   There is in the folklore of the common law the famous Case of the Kettle. The plaintiff claimed damages for a kettle which he asserted the defendant had borrowed and had allowed to become cracked while it was in his possession. The defendant is supposed to have pleaded (1) that he did not borrow the kettle, (2) that it was never cracked and (3) that it was cracked when he borrowed it.85

   Despite its folkloric origins, the "Case of the Kettle" has nonetheless managed to work its way into our procedural jurisprudence. In Rudd v. Dewey,86 the Supreme Court of Iowa commented:

   Absurd as it may seem at first blush to allow defendant, charged with having negligently broken a borrowed kettle, to answer that he never borrowed the kettle, that it was broken when he borrowed it, and that it was sound when returned, nevertheless, when it is reflected that the controversy may be about a kettle borrowed by defendant's servant, as to which defendant had no knowledge whatever, and that, the servant having disappeared, defendant will be entirely dependent on such casual evidence as he may be able to scrape up in the neighborhood, the rule is not by any means unreasonable or without support in public policy. The defendant may not know what set of facts he will be able to establish . . . and he ought not to be defeated if on the trial any legitimate defense which he has pleaded is established by the evidence.87

86. 121 Iowa 454, 96 N.W. 973 (1903).
87. Id. at 458-59, 96 N.W. at 975 (citations omitted). Interestingly enough, Rudd involved more than a simple question of a bailment; rather, the case was an action for alienation of affections of plaintiff's wife where the defendant both absolutely denied having had sexual intercourse with the plaintiff's wife and testified as to a proposition
It should be noted that the Rudd decision marked somewhat of a departure from the strict forms of common law pleading whose “avowed object [was] to reduce the controversy of the parties to a Single Material Issue decisive of the case. If a defendant had Several Defenses, the Common Law required him to make his Election between them and rest his case on the one selected.”

Where a defendant had available to him more than one defense, he was required to rely on the one he deemed best. But,

as a mistake in that selection might occasion the loss of the cause, contrary to the real merits of the case, this restriction against the use of Several Pleas to the same matter, after being for ages observed in its original severity, was at length considered as contrary to the true principles of justice.

In modern civil jurisprudence, the notion of the ancient common law proscription against inconsistent pleadings has been wholly abandoned. Indeed, under contemporary rules of civil procedure it is “authoritatively accepted . . . [that] the pleader may allege matters alternatively or hypothetically, and except for . . . good faith requirements . . . , the allegations may even be inconsistent. The pleader cannot be required to elect among his allegations but is entitled to have all his claims and defenses considered by the trier of facts.”

Professors Wright and Miller offer compelling justification for this enlightened view:

Common law and code practice condemned inconsistency in pleading because it was believed that a pleading containing

made by the husband, which, if true, would have justified the defendant in believing that his sexual relations would not have been objectionable to the husband. Id. at 455-56, 96 N.W. at 973-74. Ultimately, the court reversed the decision of the trial court for having erroneously instructed on the issue of inconsistent defenses. Id. at 459-60, 96 N.W. at 975.


89. Id. at 477. Accordingly, “the defendant may Plead as many different matters as he shall think necessary for his Defence, though they may appear to be contradictory or inconsistent . . . .” Id. at 478 (quoting W. TIDD, PRACTICE OF THE COURT OF KING'S BENCH IN PERSONAL ACTIONS, c. XXXVIII, OF PLEAS IN BAR AND NOTICE OF SET-OFF, 610 (1st Am. ed., Philadelphia, 1807)).

90. C. WRIGHT, LAW OF FEDERAL COURTS 321-22 (1976) (footnotes omitted). See, e.g., Fed. R. Civ. P. 8(e)(2): “A party may set forth two or more statements of a claim or defense alternatively or hypothetically. . . . A party may also state as many separate claims or defenses as he has regardless of consistency. . . .” Id. Professors Wright and Miller have noted: “The draftsmen of Rule 8(e)(2) sought to free federal procedure from . . . insistence on certainty in the pleadings. They realized that flexible pleading was essential to a full presentation of all relevant facts and legal theories at trial and the final settlement of disputes on their merits.” 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1282, at 388 (1969).
inconsistent allegations indicated falsehood on its face and was a sign of a chicanorous litigant seeking to subvert the judicial process. All too frequently, however, valid claims were sacrificed on the altars of technical consistency. . . . In contrast to common law and code practice, the rules recognize that inconsistency in pleadings does not necessarily mean dishonesty, and that frequently a party, in good faith, must assert contradictory statements when he legitimately is in doubt about the factual background of his case or the legal bases for his recovery or defense.\textsuperscript{91}

Moreover, “if the facts he asserted in the pleadings were not confirmed by later proof, his action would fail even if his proof demonstrated a right to relief on some other theory.”\textsuperscript{92}

Though lacking any immediate intuitive appeal, the propriety of inconsistent pleadings does begin to assume some legitimacy upon further reflection. While our initial reaction to any logical inconsistency is understandably one of disapproval, further examination enables us to comprehend the part non sequiturs do play in the search for truth. Indeed, in an exaggerated sense, pleadings themselves are meaningless; only the evidence adduced at trial will serve to secure truth and presumably justice. Accordingly, our concerns should be less with the means to be employed than with the ends we seek. When viewed in this light, it becomes manifest that the small sacrifice of logical perfection secures for us the greater good of ultimate truth.

While few would deny the appropriateness of inconsistent pleadings in our civil system, the same cannot be said with respect to their place in the criminal law. As will be argued below,\textsuperscript{93} even stronger justifications may warrant their applicability there.

\textbf{B. Criminal Actions}

Despite the longstanding availability of inconsistent defenses in civil actions,\textsuperscript{94} our criminal jurisprudence has yet to develop a similarly well-settled philosophy. While at least one commentator has suggested that inconsistent defenses in the criminal context “seem to be a generally accepted principle in American jurisprudence,”\textsuperscript{95} there does not exist anywhere near the unanimity of opinion found in the civil con-

\begin{itemize}
  \item \textsuperscript{91} C. Wright & A. Miller, \textit{supra} note 90, § 1283, at 372-73 (footnotes omitted).
  \item \textsuperscript{92} Id. § 1282, at 368 (footnote omitted).
  \item \textsuperscript{93} See \textit{infra} notes 94-121 and accompanying text.
  \item \textsuperscript{94} See \textit{supra} notes 85-92 and accompanying text.
  \item \textsuperscript{95} Nagle, \textit{Inconsistent Defenses in Criminal Cases}, 92 Minn. L. Rev. 77, 79 (1981) (citing 21 Am. Jur. 2d Criminal Law § 141 (1965); 22 C.J.S. Criminal Law § 54 (1961)). See also United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc).
\end{itemize}
Indeed, even among those jurisdictions which ostensibly permit inconsistent defenses, there remains confusion as to in which circumstances and to what extent the defenses may be asserted. Nonetheless, an evaluation of those decisions permitting such defenses reveals abundant support for the general proposition that inconsistent defenses are properly to be accorded a criminal defendant.

Initially, it would be useful to examine the opinions that restrict the use of inconsistent defenses so as to evaluate their reasoning as compared to the more permissive jurisdictions. As will be discussed more thoroughly below, however, quests to unearth the substantive reasoning underlying these decisions will often prove disappointing. Rarely are more than the barest conclusory statements to be found in attempts to justify the rule. We turn then to a representative sam-

96. Nagle notes that such defenses have “specifically been permitted to some extent in seven federal circuits, 26 states, and the military. . . .” Nagle, supra note 95, at 79 (footnotes omitted). Nearly every case cited in arriving at these numbers, however, is followed by an indication of contrary authority within the same jurisdiction. See id. at nn. 9 & 10.

To some degree, the lack of uniformity is perhaps attributable to the absence of any Federal Rules of Criminal Procedure analogue to Rule 8(e)(2) of the Federal Rules of Civil Procedure, set forth supra in note 90. One court has noted that “no such provision would be appropriate in view of the fact that all possible defenses not raised by appropriate motion are embraced within the plea of not guilty.” Henderson v. United States, 237 F.2d 169, 172 (5th Cir. 1956) (citation FED. R. CRIM. P. 12(a)). For a discussion of Henderson, see infra notes 178-88 and accompanying text.

97. For example, a number of courts permit inconsistent defenses only to the extent they are found to be not too inconsistent; that is, where proof of one defense does not necessarily disprove the other. See, e.g., United States v. Greenfield, 554 F.2d 179, 182-83 (6th Cir. 1977), discussed infra notes 200-03 and accompanying text; Henderson v. United States, 237 F.2d 169, 172-73 (5th Cir. 1956), discussed infra notes 178-88; cf. State v. Burns, 15 Or. App. 552, 516 P.2d 748 (1973) (“mutually exclusive defenses”). Other courts speak in terms of permitting “alternative defenses.” See, e.g., Hansford v. United States, 303 F.2d 219, 221 (D.C. Cir. 1962) (en banc), discussed infra notes 233-36 and accompanying text; State v. Lora, 305 S.W.2d 452 (Mo. 1957) (alibi and insanity). Still other courts suggest the possibility of inconsistent defenses which historically have not been viewed as “so repugnant as to be impermissible. Two prime examples of this have been accident and self-defense, and denial and self-defense.” Nagle, supra note 95, at 82 (footnotes omitted).

98. See infra notes 140-45.

99. See, e.g., State v. Vitale, 23 Ariz. App. 37, 530 P.2d 394 (1975). Vitale had been charged with attempting to receive stolen property, and claimed both that he did not know the items were stolen and that he had been entrapped. The court observed that denial of the requisite knowledge, and therefore denial of the criminal intent and ultimate guilt, was wholly inconsistent with an entrapment defense. In disallowing the dual defenses, the court reasoned: “It would appear that the appellant is semantically going in circles. . . .” Id. at 43, 530 P.2d at 400. No further discussion was offered. See also State v. Kinchen, 126 La. 39, 47, 52 So. 185, 188 (1910) (“We agree with the view that a defendant cannot be allowed to occupy the inconsistent position . . . of denying the procurement, and at the same time contending that he repented and countermanded it.”).
pling of those courts which recognize the propriety of inconsistent defenses.

While not unique in its holding or rationale, the Maryland case of *Bartram v. State*\(^\text{100}\) provides an interesting judicial perspective on this entire controversy. Marilyn Bartram had been convicted of the second degree murder of her husband.\(^\text{101}\) Despite her defense that her husband's death was the result of suicide, Mrs. Bartram maintained on appeal that the trial judge had improperly instructed on the burden of proof with respect to the mitigating factor of provocation. In sum, she both denied commission of the crime and simultaneously sought to excuse it.\(^\text{102}\) Noting that Mrs. Bartram was "a woman rent by internal tension at least during the five years of her married life,"\(^\text{103}\) the court thought ironic

the masterfully thorough defense urged on behalf of appellant . . . also rent by internal tension. It consisted of an imaginative and meticulously prepared defense upon the merits; it also consists, at the present level, of four claims of constitutional error. The strategically compelled defense of suicide, on the one hand, tugged compellingly in one direction. . . . The thrust of three of the four constitutional contentions, on the other hand, is in a diametrically opposite direction.\(^\text{104}\)

Thus prompted, the court's frustration, doubtless representative of scores of judges faced with similar arguments, took for its expression the following: "One wants to say to the defense, 'Shorn of technicality, what do you really want? Which way would you have it? . . . Either position is legitimate, but choose. It ill behooves you to try to have it both ways.'"\(^\text{105}\)

Still, the court acknowledged: "To be sure, contradictory defenses are not impermissible in our jurisprudence,"\(^\text{106}\) and then artfully added in embellishment: "The net effect nonetheless is to reduce the consti-

Admittedly, many of those jurisdictions permitting inconsistent defenses are equally lacking in substantive discourse and simply state their conclusion that such defenses are permissible. This seems less objectionable, however, since non-interference, i.e., permissiveness, arguably requires less justification than affirmative attempts to curtail or restrict a defendant's procedural options.

101. *Id.* at 117, 364 A.2d at 1122.
102. In a realistic sense, this is perhaps the clearest case in which antithetical defenses should be acceptable. Mrs. Bartram, acutely aware of the strong likelihood that a jury would fail to credit her story of suicide, did whatever she could in an attempt to mitigate her guilt and thereby the punishment that would flow from the jury's findings.
103. 33 Md. App. at 117, 364 A.2d at 1122.
104. *Id.*, 364 A.2d at 1122.
105. *Id.* at 118, 364 A.2d at 1122.
106. *Id.*, 364 A.2d at 1123.
tutional arguments to the clever legalism of the debating chamber and to mute the anguish of outraged innocence." 107

A more substantially reasoned opinion was provided by the Supreme Court of Utah in *State v. Mitcheson*. 108 Mitcheson had been convicted of second degree murder. His appeal charged as error the refusal of the trial court to instruct the jury on the proffered defense of "using force in the protection of one's habitation." 109 Presumably, the trial court refused the instruction because it was inconsistent with Mitcheson's more general defense that the shooting was an accident. In holding that a defendant was entitled to assert inconsistent defenses, 110 the court wrote:

> In a criminal case the defendant need not specially plead his defenses. The entry of a plea of not guilty places upon the State the burden of proving every element of the offense beyond a reasonable doubt. *This gives the defendant the benefit of every defense thereto which may cause a reasonable doubt to exist as to his guilt, arising either from the evidence, or lack of evidence, in the case; and this is true whether his defenses are consistent or not.* 111

The justification for permitting inconsistent defenses is further suggested by the court's conclusion that "if the requested instruction had been given and the jury had considered the evidence, there [was] a reasonable likelihood that it may have had some effect upon the verdict rendered." 112 This of course cuts right to the heart of the importance of allowing contradictory defenses—preserving for the jury the right to decide all the facts of a particular case and thereby do justice to both the prosecution and the defendant. 113

Similar reasoning was employed by the Court of Appeals of Michigan in *People v. Hansma*. 114 There, the defendant had been convicted of first degree murder after unsuccessfully attempting to argue in defense both an alibi and intoxication as a mitigating circumstance. 115

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109. *Id.* at 1121.

110. Prior to this holding, the court concluded that in this case the defense of self-defense was not necessarily inconsistent with the defense of accident. *Id.* at 1122.

111. *Id.* (emphasis added) (footnotes omitted).

112. *Id.*

113. This notion is explored in greater detail *infra* at notes 276-87 and accompanying text.


115. *Id.* at 144-45, 269 N.W.2d at 506-07. The trial judge, in refusing to instruct the jury on the issue of intoxication, remarked:

> I didn't give the intoxication [instruction] because though there was a claim that
Holding preclusion of inconsistent defenses to be error, the court’s focus turned on making available to a defendant all defenses for which evidence was available. More specifically, to the extent evidence existed to support a requested charge to the jury, it would be error to deny the request.

A parallel, though more detailed, exposition of this analysis, was offered by the California District Court of Appeal in *People v. Keel*. In permitting a defendant to simultaneously deny having committed a murder and urge a theory of self-defense, the court emphasized the importance of permitting the jury to evaluate all the evidence. Quoting its earlier opinion in *People v. Degnan*, the court observed:

> The burden is upon the people to prove [all] elements, of course, and it is inconceivable that the defendant may not offer proof to rebut the evidence introduced by the prosecution in support of each of the . . . branches of the case. In civil actions

The defendant—the defendant testified and Tim Green testified that they had both been doing considerable drinking, smoking pot. I don’t know if anybody was using cocaine but most everything else. And so then the defendant takes the witness stand and testifies in detail everything [that] he did that night, where he was, what he did, what time it was, whether he was watching television, sitting at the dining room table, and I just don’t see how somebody can say now here is what I did all that evening and therefore I’ve got an alibi, but if you don’t believe my alibi, then I was totally intoxicated to do it. [It j]ust doesn’t ring true to me and I refuse to give the intoxication [instruction].

*Id.* at 144-45 n.1, 269 N.W.2d at 507 n.1 (emphasis by the appellate court).

Ultimately, the error was held to be harmless since the intoxication defense was unavailable in the non-specific intent crime of manslaughter. *Id.* at 148, 269 N.W.2d at 509.

See also *Womack v. United States*, 336 F.2d 959 (D.C. Cir. 1964) ("a defendant is entitled to an instruction on any issue fairly raised by the evidence, whether or not consistent with the defendant’s testimony or the defense trial theory"); *Love v. State*, 16 Ala. App. 44, 45, 75 So. 189, 190 (1917) ("While the excluded evidence is offered on a theory inconsistent with the defendant’s alibi, it is not inconsistent with the theory of the state, and has some tendency to rebut the state’s testimony tending to prove one of the essential elements of the statutory offense.").

*Id.* at 602, 267 P. at 163. The court accorded great weight to the Attorney General’s submission of 13 RULING CASE LAW 813 (1916), which advised:

> Whether it is the duty of the court in a prosecution for homicide to instruct the jury on the question of self-defense when defendant denies the killing seems to depend entirely upon the nature of the evidence introduced at the trial. . . . [I]f the evidence tends to raise the issue of self-defense although the defendant denies the killing, it seems that an instruction based on the theory of self-defense is proper and should be given. His denial of the act does not necessarily warrant the trial court in refusing to give an instruction based on the theory of self-defense.

*Id.* at 602, 267 P. at 163 (quoting 13 RULING CASE LAW 813 (1916)).
it is the well-established rule, expressed, in fact, in the statute . . . that a defendant "may set forth by answer as many defenses . . . as he may have"; and it is well settled that the terms of the section permit the allegation of inconsistent defenses. . . . These, of course, are rules of pleading, but a similar rule, as a matter of evidence and independent of statute, would seem necessarily to apply in criminal cases under the issue presented by a plea of not guilty.\footnote{121}

The insights to be gleaned from this small sampling of permissive jurisdictions speak favorably to the ultimate superiority of allowing inconsistent defenses. Despite the presence of purely formal logical infirmities, the assertion of such defenses preserves for defendants the ability to present their full case to the factfinding body. It thus also ensures that factfinding will not be artificially limited, but instead, permitted to cover the broad range of issues certain to emerge in the criminal trial.

III. INCONSISTENCY AND THE ENTRAPMENT DEFENSE

Despite the relatively settled nature of what constitutes entrapment,\footnote{122} widespread disagreement continues among the circuits\footnote{123} as to the availability of the entrapment defense when its assertion is deemed to be inconsistent with an accused's other defenses. To the extent this procedural sub-issue will often determine the availability of the defense itself, a critical understanding of the various views and the arguments informing each position is essential. Our inquiry will first address those jurisdictions which reject out-of-hand the use of inconsistent defenses ("restrictive jurisdictions").\footnote{124} This will be followed by an analysis of those jurisdictions which embrace a more moderate position and accept the defense in certain circumstances ("quasi-restrictive jurisdictions").\footnote{125} Finally, we will explore the decisions of

\begin{footnotes}
\footnote{121}{91 Cal. App. at 602, 287 P. at 163 (quoting 70 Cal. App. at 591, 234 P. at 139) (citations omitted).}
\footnote{122}{See, e.g., supra notes 63-74 and accompanying text.}
\footnote{123}{See, e.g., United States v. Valencia, 645 F.2d 1158, 1170 (2d Cir. 1980) ("The other circuits are both literally and figuratively spread all over the map on this question."); United States v. Bishop, 367 F.2d 806, 809 n.4 (2d Cir. 1966) ("A difference of opinion exists among the various circuits on this question."); Murchison, supra note 17, at 610-12; Orfield, supra note 17, at 65-66 ("The current status of federal law on entrapment may be approximately characterized as confused."); Comment, The Assertion of Inconsistent Defenses in Entrapment Cases, 56 Iowa L. Rev. 686, 686-87 n.6 (1971).}
\footnote{124}{Infra notes 127-76 and accompanying text.}
\footnote{125}{Infra notes 177-230 and accompanying text.}
\end{footnotes}
those courts which entirely approve of the assertion of an inconsistent entrapment defense ("permissive jurisdictions").

A. Restrictive Jurisdictions

Generally stated, the inconsistency rule precludes an accused from raising the defense of entrapment unless he admits to the crime charged. That is, the inherent inconsistency between a denial of guilt and the assertion of entrapment, precludes their contemporaneous use. The rule is said to have found its origins in People v. Mum, decided in 1922 by the Supreme Court of Michigan. The defendant, who had been charged with selling liquor illegally, claimed that his wife had made the sale, but that if he had made it, then he had been

126. *Infra* notes 232-46 and accompanying text.

127. "Admits" may prove to be an overgeneralization since some courts frame the rule in different terms. For example, while the Third and Seventh Circuits hold a defendant's admission of guilt to be a prerequisite to raising the entrapment defense, *see, e.g.*, United States v. Shoup, 608 F.2d 950, 964 (3d Cir. 1979); United States v. Johnston, 426 F.2d 112, 114 (7th Cir. 1970), the First, Second, Fifth, and Tenth Circuits require only that the defendant not deny his guilt in order to be entitled to the defense. *See, e.g.*, United States v. Valencia, 645 F.2d 1158, 1172 (2d Cir. 1980); United States v. Annese, 631 F.2d 1041, 1046-47 (1st Cir. 1980); United States v. Worth, 505 F.2d 1206, 1209 (10th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); United States v. Groessel, 440 F.2d 602, 605 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971). *But see* United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir.) ("to assert the defense of entrapment, the defendant must admit he committed the acts on which the prosecution is predicated"), *cert. denied*, 457 U.S. 1118 (1982); United States v. Gibson, 446 F.2d 719, 722 (10th Cir. 1971) ("an accused cannot raise the defense of entrapment unless he admits to the commission of the crime charged"). In those jurisdictions requiring the defendant to admit his guilt, it is still not clear precisely what will suffice to constitute an admission. *See, e.g.*, United States v. Shoup, 608 F.2d 950, 958, 964 (3d Cir. 1979); United States v. Johnston, 426 F.2d 112, 114 (7th Cir. 1970); Martinez v. United States, 373 F.2d 810, 811-12 (10th Cir. 1967); cf. United States v. Hendricks, 456 F.2d 167, 169 (9th Cir. 1972) (defense counsel's opening and closing arguments not sufficient to establish admission).

128. The precise rule has been variously stated. *See, e.g.*, United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir.) ("to assert the defense of entrapment, the defendant must admit he committed the acts on which the prosecution is predicated"), *cert. denied*, 457 U.S. 1118 (1982); United States v. Brooks, 611 F.2d 614, 618 (5th Cir. 1980) ("a defendant may not simultaneously plead entrapment and deny committing the acts on which the prosecution is predicated"); United States v. Shoup, 608 F.2d 950, 964 (3d Cir. 1979) ("defendant is not entitled to an instruction on the defense of entrapment unless he admits that there were present the elements of the crime with which he is charged"); United States v. Caron, 588 F.2d 851, 852 n.4 (1st Cir. 1978) ("the issue of entrapment does not arise until a defendant admits commission of the crime charged"); United States v. Gibson, 446 F.2d 719, 722 (10th Cir. 1971) ("an accused cannot raise the defense of entrapment unless he admits to the commission of the crime charged"); United States v. Johnston, 426 F.2d 112, 114 (7th Cir. 1970) ("absent admission of the act an instruction on entrapment will not be submitted to the jury").


130. 220 Mich. 555, 190 N.W. 666 (1922).
Citing no authority, the court held that the "[d]efendant is in no position to urge that the act complained of was induced by entrapment, . . . for he claims he made no sale. . . ."

The lack of precedent upon which to ground its decision did not seem to trouble the Michigan court, nor did the paucity of support seem to inhibit other courts who were early to reach the issue. Indeed, in terms of judicial precedent, most of the modern day decisions appear to rest precariously upon little more than an ill-supported house of cards. One of the most frequently cited authorities in support of the inconsistency rule is the decision of the Ninth Circuit in *Eastman v. United States*. The defendants in *Eastman* had been convicted of having

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131. *Id.* at 558, 190 N.W. at 666.
132. *Id.* The rule first appeared in the federal courts in Nutter v. United States, 289 F. 484 (4th Cir. 1923), in which a defendant who denied having sold morphine simultaneously urged that he had been entrapped. *Id.* at 485. The court wrote:

The defendant denies that any sale whatever was made, or that any drugs passed. Nevertheless his learned counsel claims here, as he did below, that the conviction should be set aside, because, as is alleged, the defendant was tempted or entrapped into doing what the jury found that he did. Such contention ignores, not only his own testimony that all of Williams' story was false, but the evidence of Williams that he had bought drugs from the defendant a hundred times before.

*Id.* at 485.

Ironically, while the Fourth Circuit was the first federal court to articulate a prohibition of inconsistent defenses, its own position was rather short-lived. See *Crisp v. United States*, 262 F.2d 68 (4th Cir. 1958). In *Crisp*, the defendant testified that he had not made an illegal sale of prescription drugs, but rather that government agents had snatched the bottle of pills from his hand. *Id.* at 70. The court held that such testimony did not preclude an instruction to the jury on the issue of entrapment: "We think it perfectly proper to allow a criminal defendant to submit to a jury alternative defenses." *Id.*


134. 212 F.2d 320 (9th Cir. 1954). Significantly, *Eastman* and its progeny were expressly overruled by the Ninth Circuit sitting en banc in United States v. Demma, 523 F.2d 981, 982 (9th Cir. 1975) (en banc), *discussed infra* notes 154-76 and accompanying text. Yet, ironically, in perpetuation of the precedentially unfounded inconsistency rule, these cases continue to be cited authoritatively outside the Ninth Circuit. For example, the Seventh Circuit, in United States v. Nicosia, 638 F.2d 970 (7th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), rejected the use of an inconsistent entrapment defense, relying on its earlier decision in United States v. Rovario, 379 F.2d 911, 914 (7th Cir. 1967), whose foundation can ultimately be traced back to *Eastman*. The faulty reliance on *Rovario* by the *Nicosia* court was clearly exposed in the dissent of Circuit Judge Swygert, 638 F.2d at 977-78 (Swygert, J., dissenting). In addition to observing that *Rovario* had stated the inconsistency rule in "cryptic terms," *id.* at 977, he noted:

It is significant that this court in *Rovario* cited for its sole support *Ortega v. United States*, 348 F.2d 874 (9th Cir. 1965). The significance lies in the fact that the *Ortega* decision, which followed an earlier Ninth Circuit case, *Eastman v. United States*, 212 F.2d 874 (9th Cir. 1954), was disapproved by the *Demma en banc* court.

*638 F.2d at 978. See also United States v. Hart, 546 F.2d 798 (9th Cir. 1976), cert. denied, 429 U.S. 1120 (1977).* The *Hart* court stated:
unlawfully imported, concealed, and facilitated the transportation of a
large quantity of opium. On appeal, the defendants argued that the
trial court had erred in refusing to instruct the jury on the issue of
entrapment. In affirming the convictions, the Ninth Circuit held:

Appellants, to say the least, take a very inconsistent position in
this respect. Appellants have maintained throughout that they
did not commit a crime. It logically follows that absent the
commission of a crime there can be no entrapment. The trial
court understood this situation and very properly refused to
inject into the case a question which could have no other result
than to confuse.

It is critical to note, however, that the authority cited by the East-
man court in support of the inconsistency rule, Bakotich v. United
States, was arguably misapplied. While the Bakotich defendant both
denied having committed the offense and sought an instruction on
entrapment, the court's holding foreclosed an entrapment defense solely
because of a lack of evidence. Indeed, no mention whatever was
made of the issue of inconsistency.

Thus, notwithstanding any more substantive infirmities, it ap-

In requiring [the defendant] to admit the offense as a condition to his asserting
entrapment, the district court relied on the Eastman line of cases that we over-
ruled in United States v. Demma. ... Demma mended a break in the law
caused by the aberrational Eastman cases and its spawn and reconciled the law
of our Circuit with [Sorrells, Sherman and Russell].

Id. at 803.

The First Circuit also relies on decisions based on Eastman in prohibiting the use
of an inconsistent entrapment defense. See, e.g., United States v. Caron, 588 F.2d 851, 852
n.4 (1st Cir. 1978) (citing Sylvia v. United States, 312 F.2d 145 (1st Cir.), cert. denied,
374 U.S. 809 (1963)).

Eastman similarly endures in the Third Circuit. For example, in United States v.
Levin, 606 F.2d 47 (3d Cir. 1979), the court cited United States v. Watson, 489 F.2d 504
(3d Cir. 1973) for the proposition that a defendant cannot avail himself of the entrap-
ment defense unless he admits that he committed the acts with which he is charged. 606
F.2d at 48. Watson cites United States v. Hendricks, 456 F.2d 167 (9th Cir. 1972) for the
same proposition, 489 F.2d at 507, and Hendricks in turn relies on Eastman, 456 F.2d at
169.

The situation in the aforementioned circuits calls to mind the admonition of Goethe
that “[w]hen an erroneous hypothesis becomes entrenched and generally accepted, it is
transformed into a kind of a tenet that no one is allowed to question and investigate; and
then it becomes an evil which endures for centuries.” J.W. von Goethe, 13 Göttches

135. 212 F.2d at 321.
136. Id. at 322 (citation omitted).
137. 4 F.2d 386 (9th Cir. 1925).
138. Id. at 387.
139. See Groot, supra note 31, at 260 n.31.
140. See infra notes 249-88 and accompanying text.
pears that the inconsistency rule remains questionable even in its origins. That scores of later decisions have grasped hold of Eastman for support is unfortunate and may lead one to seriously question their ultimate validity. Indeed, one may question the validity of these decisions in more general terms; even the most objective observer would be hard-pressed to find much, if any, analytical support among any of the decisions which cling steadfastly to the inconsistency rule. While language descriptive of the rule is certainly not lacking,\footnote{See supra note 128.} cogent argumentation proffered on its behalf, where not simply \textit{ipse dixit}, often takes the form of the following: "The rationale for the rule is based on the inherent inconsistency of saying at the same time, 'I didn't do it,' and 'the government tricked or seduced me into doing it' \footnote{United States v. Brooks, 611 F.2d 614, 618 (5th Cir. 1980). In fairness, it should be noted that the court recognized that "[t]he continued cogency of this position has been debated, . . . but as a panel we are bound by the law of the circuit." \textit{Id}. Indeed, the court noted that there was "a veritable legion of opinion in this Circuit' that a defendant may not simultaneously plead entrapment and deny committing the acts on which the prosecution is predicated. . . ." \textit{Id}. (quoting United States v. Greenfield, 544 F.2d 179, 181 (5th Cir. 1977), cert. denied, 439 U.S. 860 (1978)). It would appear, though, that the court had but added one more ring to the ever widening circumference of concentric circles in which it was already hopelessly enveloped; the "legion of opinion" upon which it relied had also described the rationale of the rule as "appear[ing] to be that to deny the very acts upon which the prosecution is predicated and at the same time to plead the defense of entrapment, which assumes that the acts charged were committed, is too inconsistent." United States v. Greenfield, 544 F.2d at 182. See also United States v. Daniels, 572 F.2d 535, 542 (5th Cir. 1978) ("too inconsistent and confusing") (emphasis added).} or, "Such a defense 'admits all elements of the offense,' and appellants' reliance on it would be 'unusual . . . in that he [would claim] he was entrapped into violating a law that he also [would claim] he did not violate in the first place.' \footnote{United States v. Mitchell, 514 F.2d 758, 761 (6th Cir. 1975) (quoting United States v. Lamonge, 458 F.2d 197, 201 (6th Cir.), cert. denied, 409 U.S. 863 (1972)); United States v. Posey, 501 F.2d 998, 1002 (6th Cir. 1974), cert. denied, 423 U.S. 847 (1975).} A somewhat more reasoned explanation of the rule suggests: "Since a defendant maintains this defense by asserting that the criminal action was not contemplated by him until he was induced to commit it by a government agent, the defendant must admit that he committed the act which constituted the crime." \footnote{Beatty v. United States, 377 F.2d 181, 186 (5th Cir.) (footnote omitted), rev'd on other grounds, 389 U.S. 45 (1967).} While none would find fault with the logical \textit{conclusions} thus reached—entrapment and denial are indeed logically inconsistent—such naive \textit{analyses} are readily discredited as conclusory. Inconsistency is therefore not an objec-

\begin{itemize}
\item \textbf{141. See supra note 128.}
\item \textbf{142. United States v. Brooks, 611 F.2d 614, 618 (5th Cir. 1980). In fairness, it should be noted that the court recognized that "[t]he continued cogency of this position has been debated, . . . but as a panel we are bound by the law of the circuit." \textit{Id}. Indeed, the court noted that there was "a veritable legion of opinion in this Circuit' that a defendant may not simultaneously plead entrapment and deny committing the acts on which the prosecution is predicated. . . ." \textit{Id}. (quoting United States v. Greenfield, 544 F.2d 179, 181 (5th Cir. 1977), cert. denied, 439 U.S. 860 (1978)). It would appear, though, that the court had but added one more ring to the ever widening circumference of concentric circles in which it was already hopelessly enveloped; the "legion of opinion" upon which it relied had also described the rationale of the rule as "appear[ing] to be that to deny the very acts upon which the prosecution is predicated and at the same time to plead the defense of entrapment, which assumes that the acts charged were committed, is too inconsistent." United States v. Greenfield, 544 F.2d at 182. See also United States v. Daniels, 572 F.2d 535, 542 (5th Cir. 1978) ("too inconsistent and confusing") (emphasis added).}
\item \textbf{144. Beatty v. United States, 377 F.2d 181, 186 (5th Cir.) (footnote omitted), rev'd on other grounds, 389 U.S. 45 (1967).}
\end{itemize}
tionable reason for the rule but rather a situation suitably dealt with at trial. 145

Despite the weakest of foundations, the inconsistency rule is well established in at least five circuits; the First, 146 Third, 147 Seventh 148

145. See infra notes 276-88 and accompanying text.
146. See, e.g., United States v. Caron, 588 F.2d 851, 852 n.4 (1st Cir. 1978); Sylvia v. United States, 312 F.2d 145, 147 (1st Cir. 1963). But cf. United States v. Annese, 631 F.2d 1041, 1046-47 (1st Cir. 1980) (inconsistency rule not applicable where defendant does not take stand to deny crime).

The Caron decision contains an interesting qualification regarding cases where the defendant had acted merely as a “procuring agent.” The court stated that in such instances

we [find] no inconsistency between trying to convince the jury that the acts alleged did not add up to the crime charged and trying to convince the jury that one was entrapped into such innocent acts. A defendant can claim that he was induced by the government to perform acts which were, after all, innocent and which he contends did not constitute a violation of law of the sort for which he was indicted.

588 F.2d at 853.

147. See, e.g., United States v. Shoup, 608 F.2d 950, 964 (3d Cir. 1979); Virgin Islands v. Hernandez, 508 F.2d 712, 717 n.5 (3d Cir. 1975); United States v. Watson, 489 F.2d 504, 507 (3d Cir. 1973); cf. United States v. Levin, 606 F.2d 47 (3d Cir. 1979) (per curiam). The Levin court concluded:

[I]t would impair the effectiveness of the adversarial process to permit a criminal defendant to allude to a theory of entrapment, and thus to plant the defense in the jurors’ minds, without putting the government on notice so that it can meet its burden of proving that the defendant was not entrapped. Therefore, we hold that a defendant is not entitled to an instruction on entrapment unless he explicitly pleads, at a sufficiently early point in the trial, that he was entrapped.


In none of the cited cases, nor in any other case that has come to my attention has the Third Circuit Court of Appeals been squarely presented with the question of the availability of an entrapment defense to a defendant who, while admitting the operative facts, disputes mens rea, or challenges a jurisdictional element. I am reasonably confident that, properly understood, the Third Circuit cases go no further than to establish that a defendant must admit whatever action he claims to have been entrapped into performing. . . . There is neither factual nor legal inconsistency when a defendant takes the position, “I do not agree with the Government’s claim that I performed acts A and B. I admit that I did do act C, but I was entrapped into doing it.” If acts A, B and C are all essential ingredients of the crime charged, the defendant is entitled to acquittal if there is a reasonable doubt as to any of the essential elements, that is, reasonable doubt as to whether he committed acts A or B, or reasonable doubt as to whether his performance of act C was the result of entrapment. Any contrary rule would do violence to fundamental constitutional concepts.

Id. at 1201-02.

and Tenth\textsuperscript{149} Circuits appear to have never permitted the assertion of inconsistent defenses, while the Sixth Circuit has only recently adopted this position.\textsuperscript{150}

The continued allegiance of these circuits to the inconsistency rule has attracted its share of criticism, both from other courts\textsuperscript{151} and from the commentators.\textsuperscript{152} The most significant assault, and one which threatens the lowest and most fragile tier of the house of cards,\textsuperscript{153} came in 1975 from the Ninth Circuit Court of Appeals sitting en banc in \textit{United States v. Demma}.\textsuperscript{1154} The two defendants in \textit{Demma} had been convicted of conspiring to import and distribute heroin.\textsuperscript{1155} Their appeal was premised on the failure of the trial judge to instruct on the issue of entrapment.\textsuperscript{1156} In “set[ting] the circuit’s entrapment law in order by holding that a defendant may assert entrapment without being re-

\begin{thebibliography}{99}
\bibitem{149} See, \textit{e.g.}, United States v. Gibson, 446 F.2d 719, 722 (10th Cir. 1971); Martinez v. United States, 373 F.2d 810, 811-12 (10th Cir. 1967). \textit{But see} United States v. Worth, 505 F.2d 1206 (10th Cir. 1974), \textit{cert. denied}, 420 U.S. 964 (1975), perhaps suggesting a slight modification of the rule in holding that “testimony from an accused is not a prerequisite to his reliance upon the defense of entrapment.” \textit{Id.} at 1209 (footnote omitted).
\bibitem{150} See, \textit{e.g.}, United States v. Mitchell, 514 F.2d 758, 760-61 (6th Cir.), \textit{cert. denied}, 423 U.S. 847 (1975); United States v. Shameia, 464 F.2d 629, 631 (6th Cir.), \textit{cert. denied}, 409 U.S. 1076 (1972). The earlier view of the Sixth Circuit had been that the “arguable inconsistency between [the] defenses [did not] rule out submission of both to the jury.” United States v. Baker, 373 F.2d 28, 30 (6th Cir. 1967); \textit{see also} Scriber v. United States, 4 F.2d 97, 98 (6th Cir. 1925).
\bibitem{152} See, \textit{e.g.}, W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 373-74 n.29 (1972) (“There is authority for the proposition that the defendant may not use the defense of entrapment if he denies that he engaged in the forbidden conduct. . . . However, it would seem that he should be allowed to use the defense under the circumstances.”) (citations omitted); Cronin, \textit{supra} note 73, at 1234-37; Groot, \textit{supra} note 31; Murchison, \textit{supra} note 17, at 610-12; Orfield, \textit{supra} note 17, at 65-67; \textit{Note, Entrapment, 73 HARV. L. REV. 1333, 1343 (1960); Comment, Criminal Law—Defenses—Defense of Entrapment is Available in Federal Prosecution Although Inducement was by State Officer and Although Defendant Denies Acts Charged, 70 HARV. L. REV. 1302, 1303-04 (1957); Comment, The Assertion of Inconsistent Defenses in Entrapment Cases, \textit{supra} note 123.}
\bibitem{153} \textit{See supra} text accompanying note 134.
\bibitem{154} 523 F.2d 981 (9th Cir. 1975) (en banc).
\bibitem{155} \textit{Id.} at 982.
\bibitem{156} \textit{Id.} The district court refused the instruction believing that the defense was available only to a defendant who conceded both the acts and state of mind necessary to constitute the crime charged. \textit{Id.} Prior to the en banc \textit{Demma} decision, this was, of course, the law in the Ninth Circuit. \textit{See, e.g.}, United States v. Baxter, 492 F.2d 150, 178 & n.17 (9th Cir.), \textit{cert. dismissed}, 414 U.S. 801 (1973), \textit{cert. denied}, 416 U.S. 940 (1974); United States v. Mehciz, 437 F.2d 145, 149 & n.17 (9th Cir.), \textit{cert. denied}, 402 U.S. 974 (1971); Ortiz v. United States, 358 F.2d 107, 108 (9th Cir. 1966); Ortega v. United States, 348 F.2d 874, 875 (9th Cir. 1965).
\end{thebibliography}
quired to concede that he committed the crime charged or any of its elements,” 157 the Demma panel chose to explicitly overrule its earlier view, noting that “[t]he Eastman rule must be rejected for several reasons.” 158 Beginning with an analysis of Sorrells v. United States, 159 the court proceeded with the notion that this approach assumed that the acts necessary to constitute any federal crime must be non-entrapped acts. 160 That is to say, non-entrapment is taken to be an “essential element of every federal crime which is put in issue whenever evidence is introduced suggesting that an unpredisposed defendant was induced by the Government to commit the acts charged.” 161 It then recognized Chief Justice Hughes' express rejection in Sorrells of the government's contention that a claim of entrapment necessarily involved an admission of guilt:

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. 162

The Eastman rule, the court reasoned, with its requirement that the defendant concede a state of mind, was therefore “in direct conflict with the Sorrells conception of entrapment.” 163

Articulating a second, though less fundamental critique of the Eastman rule, the court concluded that it could not even be justified by the inconsistency theory itself, ostensibly the rule's raison d'être. 164

157. 523 F.2d at 982.
158. Id. “First, in some of its applications, . . . the rule conflicts with prevailing Supreme Court authority. Second, in other of its applications, the rule has become detached from its theoretical moorings and cannot be justified by the inconsistency theory. Third, the inconsistency theory itself is seriously infirm.” Id.
159. 287 U.S. 435 (1932). For a discussion of Sorrells, see supra notes 26-35 and accompanying text.
160. 523 F.2d at 983.
161. Id.
162. Id. (quoting 287 U.S. at 452).
163. 523 F.2d at 983. More specifically, the court recognized that:
Under Sorrells, whenever the element of non-entrapment is put in issue the Government must prove beyond a reasonable doubt that the acts charged were non-entrapped acts. The Government bears this burden whether or not the crime charged involves a subjective, mental element and whether or not the defendant concedes any mental element involved. The Eastman rule relieves the Government of this burden whenever the crime charged involves a mental element which the defendant refuses to concede. Relieving the Government of the burden of proving that the necessary acts were non-entrapped acts conflicts fundamentally with the Sorrells conception of entrapment.
Id. at 983-84.
164. Id. at 984.
More specifically, the court reasoned that the inconsistency theory speaks to those instances in which the defendant actually denies commission of the crime charged.\textsuperscript{165} It observed, however, that if a defendant declined to testify at trial, or otherwise refused to comment on the charge, then he had not denied the crime.\textsuperscript{166} Were entrapment then to be raised at trial,\textsuperscript{167} there would be no inconsistency since the defendant would not have denied the crime. In this situation, the \textit{Eastman} rule could not be applied to preclude an entrapment defense not only because there would be no factual inconsistency, but because its “application... would foreclose the possibility of finding entrapment as a matter of law where a defendant has neither denied nor conceded the elements constituting the crime charged. ...”\textsuperscript{168}

Finally, the court reached what it perceived to be the most fundamental flaw of the \textit{Eastman} rule: “The theoretical basis of the \textit{Eastman} rule—that factually inconsistent defenses may not be asserted—is seriously infirm and deserves rejection for that reason alone.”\textsuperscript{169} Beginning with the well-established premise\textsuperscript{170} that “a defendant in a criminal prosecution may assert inconsistent defenses,”\textsuperscript{171} the court noted:

The rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution. That established policy bespeaks a healthy regard for circumscribing the Government’s opportunities for invoking the criminal sanction.\textsuperscript{172}

\textsuperscript{165} Id. Compare id. with supra notes 127-28 and accompanying text.
\textsuperscript{166} 523 F.2d at 984.
\textsuperscript{167} Despite silence on the part of a defendant, the court suggested two ways in which entrapment may nonetheless become an issue at trial: “[I]f (1) the Government’s case-in-chief suggests that the defendant who was not predisposed was induced to commit the crime charged, or (2) a defense or a government witness gives evidence suggesting entrapment.” 523 F.2d at 984.
\textsuperscript{168} Id. “Where the Government’s own evidence establishes that the defendant was entrapped, the Government’s case must be dismissed, even if the defendant has neither denied nor conceded the elements constituting the crime charged.” Id. (citing Sherman v. United States, 356 U.S. 369 (1958), discussed supra notes 36-48 and accompanying text). A similar stance has been taken by a number of quasi-restrictive courts. See supra notes 178-231 and accompanying text.
\textsuperscript{169} 523 F.2d at 985.
\textsuperscript{170} See supra notes 94-121 and accompanying text.
\textsuperscript{172} 523 F.2d at 985.
It then censured the Eastman pronouncement as an exception to this general rule for which justification was lacking,\textsuperscript{173} noting that "[t]here 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."\textsuperscript{174}

Despite recognizing that it would be "very unlikely that a defendant would be able to prove entrapment without testifying, and in the course of testifying, without admitting that he did the acts charged,"\textsuperscript{175} the court felt compelled to overrule Eastman and put its house in order, "harmonizing the law of the circuit with the rationale of Sorrells, Sherman, and Russell and eradicating [its] aberrant cases."\textsuperscript{176}

In large measure, perhaps it has been a dissatisfaction with, and a recognition of, the irrational limitations of this all-or-nothing approach which has led a number of jurisdictions to modify their stances on inconsistency and permit, in certain circumstances, its use. It is to these quasi-restrictive jurisdictions that we now turn.

B. Quasi-Restrictive Jurisdictions

The Fifth Circuit appears to have considered the issue of the inconsistent entrapment defense more frequently than most others. To some degree, this may be the result of the large number of exceptions it has sought to engraft upon its generally restrictive view.\textsuperscript{177}

The first major discussion came in 1956 in Henderson v. United States.\textsuperscript{178} The three appellants had been convicted of a conspiracy to

\textsuperscript{173} Id.

\textsuperscript{174} Id. Indeed, the court found a compelling reason for not making an exception to the entrapment defense in that "[t]he primary function of entrapment is to safeguard the integrity of the law enforcement and prosecution process." Id. This rationale, however, may be placing undue reliance on the minority/objective view of entrapment. See 523 F.2d at 988 (Wallace, J., concurring in part and dissenting in part). For a discussion of the objective and subjective views of entrapment, see supra notes 18-72 and accompanying text.

The court suggested one further reason for overruling Eastman: "Continued adherence to Eastman 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." 523 F.2d at 986 (footnote omitted). The court was careful, however, to admonish that it did not rest its decision on constitutional grounds. Id.

\textsuperscript{175} 523 F.2d at 985.

\textsuperscript{176} Id. at 986.

\textsuperscript{177} One court has suggested that the Fifth Circuit has "begun to question the propriety of the general ban." United States v. Valencia, 645 F.2d 1158, 1171 (2d Cir. 1980) (footnote omitted).

\textsuperscript{178} 237 F.2d 169 (5th Cir. 1956), noted in Comment, Criminal Law—Defenses—Defense of Entrapment is Available in Federal Prosecution Although Inducement was by State Officer and Although Defendant Denies Acts Charged, supra
violate certain provisions of the Internal Revenue Code which pro-
scribed various activities relating to the distilling of moonshine whis-
key. Henderson, the primary defendant, had become involved with a
government "plant" named Wood and the two of them commenced the
manufacture of illicit whiskey. At trial, Henderson admitted to his par-
ticipation in the operation of the distillery, but denied that he was oth-
erwise a party to the conspiracy with which he had been charged.
The trial court denied Henderson's requested charge on entrapment,
despite clear evidence that his participation had been induced solely
by Wood, apparently based on its inconsistency with Henderson's de-
\footnote{152.}{violator of conspiratorial participation.}

The court of appeals agreed with the trial court in its reasoning
that Henderson's illegal acts did not "constitute him a conspirator un-
less he did so with some knowledge of the conspiracy," and, there-
fore, that Henderson's denial of his participation in or knowledge of
the conspiracy would not be consistent with his claim that he was en-
trapped into committing that offense. However, while it would have
been technically inconsistent for Henderson to \textit{plead} both not guilty
and entrapment, the court reasoned that the real question necessitated
a shift in focus from the pleadings to the \textit{proof}. In other words, actual
inconsistency could only be evaluated from proof adduced at trial and
could not be preliminarily assessed at the earlier pleading stage. Analog-
gizing the criminal trial to the philosophical underpinnings of its civil
counterpart, the court acknowledged that "\textit{t}he common goals of all
trials, civil and criminal, of issues of fact is to arrive at the truth, and it
would seem that inconsistent positions should be permitted or not per-
mittted according to whether they might help or hinder a search for

\footnote{152.}{
179. 237 F.2d at 170.
180. \textit{Id.} at 171.
181. \textit{Id.} Specifically, the court ruled:
\textit{I am going to deny your requested charge on entrapment because entrapment
insofar as Henderson is concerned I do not think it is applicable to him. I am
going to tell the jury insofar as he is concerned he denied every overt act with
which he is charged in this indictment other than those that connect him with
the operation of the stills.} \textit{Id.} at 171 n.1.
182. \textit{Id.} at 171 (footnote omitted).
183. \textit{Id.} at 171-72. The court acknowledged that the trial court may well have relied
on earlier Fifth Circuit language holding that "\textit{e}ntrapment is a valid, positive defense,
in certain circumstances, the invocation of which necessarily assumes that the act
charged was committed." \textit{Id.} at 172 (quoting Hamilton v. United States, 221 F.2d 611,
614 (5th Cir. 1955)). While the court noted that the actual holding in Hamilton permitted
the appellant to have the entrapment issue submitted to the jury, it recognized that
other courts had "\textit{definitely held that a defendant's denial of one specific act charged
\ldots would necessarily preclude him from relying on the defense of entrapment." 237
F.2d at 172 (footnotes omitted).}
If the evidence fails to prove by the required standard that the defendant committed the act charged or had the requisite criminal intent, then, of course, the defense of entrapment is unnecessary. Usually, however, that cannot be foretold when the proof is being offered in advance of the jury's verdict. Then, according to the circumstances and the nature of the case, proof of entrapment may or may not be so contrary or repugnant to proof that the defendant is otherwise not guilty, or rather to a lack of the required proof that the defendant is otherwise guilty, that the proof of one necessarily disproves the other.\(^{186}\)

Applied to the case before it, the court observed that

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\text{[t]he defendant could admit operating the illicit still, deny being a party to the conspiracy charged, and still defend on the ground that such overt acts as he did commit were done as a result of entrapment; he could say, "I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped." The two defenses do not seem to us so repugnant that proof of the one necessarily disproves the other.}^{187}\]

Accordingly, the court ruled that Henderson should have been afforded an entrapment instruction and reversed his conviction, remanding for a new trial.\(^{188}\)

In Sears v. United States,\(^ {189}\) decided nine years after Henderson, a second exception to the rule against inconsistency emerged. While recognizing that "where commission of the crime is denied, the evidentiary base for the defense of entrapment will usually be lacking,"\(^ {190}\) the

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184. 237 F.2d at 172.
185. Id.
186. Id.
187. Id. at 173.
188. Id. at 173, 177.
189. 343 F.2d 139 (5th Cir. 1965).
190. Id. at 143.
court nonetheless found the situation possible where substantial evidence of entrapment was introduced by testimony of the government's own witnesses. In such a case, the defendant would not be taking an inconsistent position in the sense of offering entrapment evidence contradicting his primary defense that he didn't commit the crime. More specifically, the court held that

where, as here, the government's own case in chief injected substantial evidence of entrapment into the case, the defendant is entitled to raise the defense by motion for acquittal and by requested instruction to the jury. We do not think it is impossibly inconsistent for a defendant to deny the acts charged, yet urge the court on motion for acquittal that the government's own evidence establishes entrapment as a matter of law. . . . We feel that the ultimate goal of the criminal trial, the ascertainment of truth, permits no other course. A criminal defendant should not forfeit what may be a valid defense, nor should the court ignore what may be improper conduct by law enforcement officers, merely because the defendant elected to put the government to its proof. 191

The aftermath of Sears saw a limitation of its holding in attempts to align the decision with Henderson. In both Beatty v. United States192 and McCarty v. United States,193 the Sears test was expressly qualified and held to be applicable only in those situations where a defendant admits having committed the overt acts but denies any participation in the conspiracy.194

Later cases limit the exception even further.195 In United States v.

191. Id. at 143-44 (citation omitted).
194. The Beatty court noted that "Sears is factually distinguishable from the present case. In Sears, the defendant charged with conspiracy introduced the issue of entrapment in regard to a particular overt criminal act and the court held that his defense of entrapment was not inconsistent with his denial of the charge of conspiracy." 377 F.2d at 186 n.9. Likewise, the McCarty court observed that in both Sears and Henderson, proof that the defendant was not a member of a conspiracy would not have necessarily disproved that he was entrapped into committing a particular overt act. In the instant case, however, proof that McCarty did not commit the acts constituting the sole offense charged necessarily disproves that he was entrapped into doing the offense. We hold this to be too great a degree of inconsistency in defenses to be permitted.
379 F.2d at 286-87 (citations and footnote omitted). See also United States v. Valencia, 645 F.2d 1158, 1171 n.16 (2d Cir. 1980) (Sears limited to cases in which defendant admits committing overt acts, but denies participation in a conspiracy).
195. At least one decision appears to represent a rather generous reading of the rule's exception. United States v. Groessel, 440 F.2d 602 (5th Cir.), cert. denied, 403 U.S. 933 (1971), would permit the entrapment defense where a defendant does not admit to par-
O'Leary, the court restricted the availability of inconsistent defenses to situations where a defendant admits to a culpable, overt act; admission of purely innocent conduct on the part of a defendant would not be sufficient to catapult the defendant outside the rule against such defenses. United States v. Morrow limits the holding of Sears solely to cases where the government's own case-in-chief injects substantial evidence to support a theory of entrapment.

Despite these limitations, a more recent Fifth Circuit holding suggests the possibility of at least one new exception. United States v. Greenfield, decided in 1977, held that a defendant could raise the defense of entrapment if he admitted the physical acts alleged but denied any criminal intent. Noting that the "rule in this circuit . . . is not unbending," the court rationalized that the "entrapment defense is not so inconsistent with the defense of lack of intent under the circumstances of this case as to preclude the alternative defenses.

Finally, despite the Fifth Circuit's continued adherence to the rule, there has appeared language evincing some concern over its continued vitality. While not suggesting its abandonment, the court in United States v. Daniels acknowledged that "[t]his theory justifica-
bly has been attacked by this court and by other courts.

Nonetheless, the Fifth Circuit has yet to relinquish entirely its established doctrine.

In claiming it need "go no further than the Fifth Circuit," the Second Circuit has both implicitly conformed its decisions to one of the Fifth Circuit exceptions, as well as evaded almost entirely its task of setting a definitive precedent. Despite having confronted the question in decisions dating back thirty years, the Second Circuit has yet to speak conclusively on the subject. While two early cases seemed to have suggested the circuit would take a restrictive approach to the question, that position was called into question by United States v. Bishop and thenceforth treated as an open question. The most ex-

205. *Id.* at 542 (emphasis added). The Fifth Circuit noted that the rule against raising entrapment as an alternative defense could not be justified solely by the inconsistency theory since criminal defendants are permitted to assert inconsistent defenses in other contexts. *Id.*

206. See, e.g., United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir.), cert. denied, 457 U.S. 1118 (1982); United States v. Crossman, 663 F.2d 607, 610 (5th Cir. 1981); United States v. Sedigh, 658 F.2d 1010, 1014-15 (5th Cir. 1981); United States v. Webster, 649 F.2d 346, 351 n.10 (5th Cir. 1981) (en banc). These decisions consistently denied the entrapment defense where the defendant did not admit committing the acts on which the prosecution was predicated.

207. United States v. Valencia, 645 F.2d 1158, 1172 (2d Cir. 1980).


209. United States v. DiDonna, 276 F.2d 956 (2d Cir. 1960) (affirming refusal by the trial court to instruct the jury on the entrapment defense where the defendant denied having knowledge of the criminal act); United States v. Pagano, 207 F.2d 884 (2d Cir. 1953) (refusal to charge as to entrapment was not erroneous where the defendant did not admit having committed the crime).

210. 367 F.2d 806, 809 (2d Cir. 1966). The Bishop court expressly declined to address the question whether an entrapment defense would be foreclosed by failure to admit the criminal acts. The court did hold, however, that a defendant must give the court or prosecution reasonable notice that such a defense would be raised, or otherwise be precluded from raising the defense for the first time on appeal. *Id.*

211. United States v. Valencia, 645 F.2d at 1170. In United States v. Alford, 373 F.2d 508 (2d Cir.), cert. denied, 387 U.S. 937 (1967), the court indicated that whether a defendant was entitled "both to deny the transaction and 'to urge that if the jury believed it did occur the [sic] government's evidence as to how it occurred indicated entrapment' was an open question in the circuit." *Id.* at 509 (quoting Hansford v. United States, 303 F.2d 219, 221 (D.C. Cir. 1962)). The question was again left open in United States v. Braver, 450 F.2d 799, 802 n.7 (2d Cir. 1971), cert. denied, 405 U.S. 1064 (1972) and likewise in United States v. Licursi, 525 F.2d 1164, 1169 n.5 (2d Cir. 1975). Finally, in United States v. Swiderski, 539 F.2d 854 (2d Cir. 1976), the circuit reiterated its evasive position of the last 20 years. *Id.* at 859 & n.4; see also United States v. Brown, 544 F.2d 1155, 1159 (2d Cir. 1976). It may be plausible to suggest that with the decision in
tensive early discussion is found in United States v. Swiderski,\textsuperscript{212} decided in 1976. Unfortunately, even there little light is shed on the circuit's position,\textsuperscript{213} as the court found defendant's testimony to be not inconsistent with a claim of entrapment.\textsuperscript{214}

Not until 1980, in United States v. Valencia,\textsuperscript{215} did the Second Circuit attempt to articulate to any substantial degree its policy with respect to inconsistent defenses. The two defendants in Valencia had been convicted in the district court on three counts of possessing, distributing, and conspiring to distribute cocaine.\textsuperscript{216} One issue on appeal

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\textsuperscript{212} United States v. Swiderski, 539 F.2d 845 (2d Cir. 1976).

\textsuperscript{213} Id. See supra note 211.

\textsuperscript{214} 645 F.2d 1158 (2d Cir. 1980). Interestingly enough, the question of inconsistent defenses was but an ancillary issue before the court. The major thrust of the opinion concerned the issue of vicarious entrapment, that is, whether or not a defendant may urge the entrapment defense having been induced not directly by a government agent, but, rather, by a co-defendant. Id. at 1168-70.

\textsuperscript{215} Id. at 1160. Defendant William Valencia was acquitted on count one, charging him with conspiracy to distribute cocaine. Defendant Olga Valencia was convicted on all three counts. Id.
concerned the government’s contention that the defense of entrapment should not be available to a defendant who completely denied having participated in the criminal enterprise.217 After extensive discussion of the divergent views of the other circuits,218 and a recognition that its own decisions had theretofore consistently reserved the question,219 the court was prepared to take at least a limited position. It wrote that

where the circuits appear to be in conflict, our own cases are not altogether consistent, and the Supreme Court cases do not address the question,[220] we hold that William Valencia, hav-

217. Id. at 1170.
218. Id. at 1170-72 & nn.12-17.
219. Id. at 1170; see supra note 211.
220. Arguably, the Supreme Court opinions do address the issue, if only implicitly, and even then without any real cohesion among the opinions. The clearest indication of at least one justice’s position is found in the concurring opinion of Justice Frankfurter in Sherman v. United States, 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring), discussed supra at notes 42-49 and accompanying text. In detailing his view as to the basis of the entrapment defense, Justice Frankfurter suggested that “[t]he 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.” Id. at 380 (Frankfurter, J., concurring) (emphasis added). While certainly the Justice was not entertaining a question as to the availability of inconsistent defenses, his remarks are telling. Usage of the phrase “even if his guilt be admitted” suggests the clear possibility of allowing the entrapment defense in all cases, i.e., whether guilt be admitted or denied. Unfortunately, this may be a rather parochial reading of the term “admitted.” It is debatable whether Justice Frankfurter used the word as referring to the admission by the defendant of his guilt, or, in a sense of denoting recognition by the court of the defendant’s guilt, in which case no allusion to inconsistent defenses may rightfully be imputed to such language. See also Hampton v. United States, 425 U.S. 484, 495, 496 (1975) (Brennan, J., dissenting) (adopting Justice Frankfurter’s analysis), discussed supra notes 79-82 and accompanying text.

Support, though somewhat less clear, is also found in Sorrells v. United States, 287 U.S. 435 (1932), discussed supra notes 26-35 and accompanying text. In rejecting the government’s contention that the defense of entrapment was properly raised only by a special plea in bar, Chief Justice Hughes wrote:

This contention presupposes that the defense is available to the accused and relates only to the manner in which it shall be presented. The Government considers the defense as analogous to a plea of pardon or of autrefois convict or autrefois acquit. 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. Id. at 452 (emphasis added). At least one reasonable inference to be drawn from the language of the Chief Justice is that entrapment as a defense does remain available to a defendant who denies his guilt.

Finally, and contrary to the opinions discussed above, attention is directed to the dissenting opinion of Justice Stewart in United States v. Russell, 411 U.S. 423, 439
ing put the Government on notice in counsel’s opening statement of the assertion of the dual defenses of entrapment and non-involvement, is entitled to raise the defense of entrapment since he did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved.221

Apparently on uncomfortable ground, the court sought to equate its position with the moderate approach taken by the Fifth Circuit:222

In reaching this conclusion, we need go no further than the Fifth Circuit in making the entrapment defense available to a defendant who, having duly notified the Government of the assertion of dual defenses, chooses not to testify and does not introduce any evidence inconsistent with the defense of entrapment.223

Judge Van Graafeiland, concurring in part and dissenting in part,224 reasoned that because there was no error in the trial court's

(1973) (Stewart, J., dissenting), discussed supra notes 59-62 and accompanying text. Arguing that “since by definition, the entrapment defense cannot arise unless the defendant actually committed the proscribed act,” Justice Stewart seems, at least implicitly, to suggest the impossibility of urging inconsistent defenses. Id. at 442. That is, to the extent the entrapment defense presumes the guilt of the defendant, it cannot be advanced except by an admitting defendant.

221. 645 F.2d at 1172 (footnote omitted). The court went on to note:

Although William’s counsel in summation articulated his client’s position that William was in no way involved in the sale of cocaine and although counsel’s examination of Olga was only to elicit the response from her that William never had anything at all to do with cocaine, that is insufficient to withdraw the entrapment from William. Id. The suggestion implicit in the excerpted language is reasonably understood to permit the introduction of at least some evidence of non-participation as long as such evidence is not in the form of testimony from the accused. Even this reading is uncertain, however, in light of the opinion’s next paragraph, ostensibly precluding the use of any inconsistent evidence. See infra text accompanying note 223.

222. For a discussion of the Fifth Circuit’s holdings, see supra notes 178-206 and accompanying text.

223. 645 F.2d at 1172 (footnote and citations omitted). The court continued: “We therefore need not decide whether we would follow the District of Columbia, Fourth, and Ninth Circuits in making the entrapment defense available to a defendant who actually testifies that he did not participate in the alleged criminal activity or uses alibi witnesses to make the same point.” Id. Like the court in Demma, see supra text accompanying note 175, the Second Circuit recognized that “[s]ince an entrapment defense still cannot be raised without some evidence of inducement by a government agent, a defendant who wishes to argue entrapment will often, as a practical matter, still have to admit participation in the criminal activity notwithstanding the rule that we have announced.” Id. at 1172 n.19 (citation omitted). In the case before it, however, the defendant was able to raise the defense because of evidence introduced by his co-defendant. Id.

224. 645 F.2d at 1172 (Van Graafeiland, J., concurring in part and dissenting in part).
charge on entrapment, "it was unnecessary for the majority to reach out and decide the issue of inconsistent defenses." However, because his colleagues saw fit to do so, Judge Van Graafeiland felt compelled to add his own comments. Essentially, Judge Van Graafeiland was concerned only with the procedural question of at what point the entrapment defense may be raised. Specifically, he suggested that "if a defendant is to be permitted to rely on these inconsistent defenses, he should make clear his intention to do so. He should not be permitted to claim only lack of involvement and then, after the proofs are closed, ask for a charge on entrapment." Once the issue of entrapment has been raised, the government has the burden of establishing the defendant's predisposition to commit the crime. It is therefore essential that the government be allowed to offer such evidence. "Defense counsel should not be allowed to maneuver the Government out of introducing whatever proof it has on the issue of defendant's predisposition."

The Eighth Circuit has arguably adopted a posture not unlike that of the Second Circuit, expressly leaving the question undecided despite earlier cases suggesting the impermissibility of inconsistent defenses. More recent cases, however, suggest that the court may be creeping into accord with the restrictive jurisdictions.

While the moderate approaches taken by these quasi-restrictive jurisdictions are to be commended as attempts to free enlightened ju-

225. Id. at 1176.
227. United States v. Warren, 453 F.2d 738 (2d Cir. 1972), held that evidence showing acts similar to those charged was admissible to show defendant's intent to violate the law and to negate the defense of entrapment. Id. at 745. The court in United States v. Koska, 443 F.2d 1167 (2d Cir. 1971), found "[t]he evidence was relevant to show the propensity and predisposition of appellant to commit the crime charged in order to counter appellant's defense of entrapment." Id. at 1169.
228. 645 F.2d at 1176 (Van Graafeiland, J., concurring in part and dissenting in part) (citation omitted).
229. Ware v. United States, 259 F.2d 442 (8th Cir. 1958), held that a defendant who had denied the commission of a crime was precluded from asserting the claim of entrapment. Id. at 445. In Kibby v. United States, 372 F.2d 598 (8th Cir.), cert. denied, 387 U.S. 931 (1967), the court noted the existence of "considerable authority" holding inconsistent defenses unavailable to a criminal defendant, but declined "to make a full review of that issue." Id. at 601. The court found as a matter of law that entrapment could not be proven and therefore was reluctant to inject itself into what it perceived to be troubled waters. Id.
dicial thought from the shackles of poor reasoning, one may question whether such efforts have carried the torch far enough. Notwithstanding their liberalization of the inconsistency rule (to the point of allowing inconsistent defenses in situations where a defendant at least has not denied the criminal act), these courts still would preclude a defendant from offering exculpatory testimony on his own behalf should he choose to advance an entrapment defense. In contradistinction to the results that obtain in the restrictive jurisdictions, that is, a forced surrender of the right against self-incrimination and an evaporated presumption of innocence, here, the undesirable consequences of the rule effectuate rather opposite ills; for now, a defendant is foreclosed, indeed denied, the opportunity to testify in negation of his own guilt. One's skepticism in acceding to such a position would of course be wholly justified; so limiting the options of the criminal defendant bespeaks a less than casual respect for the right to offer evidence on one's own behalf. To put the argument in other terms, a defendant wishing to argue entrapment must nonetheless be entitled to rebut any evidence of guilt offered by the prosecution. This must necessarily include the right to personally controvert the prosecution's case. 231

It would seem, then, that even moderate attempts to limit the avenues of defense run afoot of some rather basic principles of fairness. Thus, we turn now to the permissive jurisdictions.

C. Permissive Jurisdictions

Only two circuits have steadfastly and continuously rejected application of the inconsistency rule since it first emerged in the federal courts in 1923. 232 The most frequently cited case authority in support of abandonment of the rule has traditionally been the en banc decision of the Court of Appeals for the District of Columbia in Hansford v. United States. 233 While not generous in analysis, the Hansford court 234 held a defendant's twofold defense, that he did not sell any narcotics but that if he did he had been entrapped, to be not inconsistent. 235 The


232. The Fourth and District of Columbia Circuits have rejected the inconsistency rule. See, e.g., Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962) (en banc); Crisp v. United States, 262 F.2d 68 (4th Cir. 1958). But see supra note 132.

233. 303 F.2d 219 (D.C. Cir. 1962) (en banc).

234. The decision of the en banc panel was unanimous. The Hansford opinion was joined by Chief Justice (then Judge) Warren Burger. Id. at 219.

235. Id. at 221.
court reasoned that \[\text{"[t]he defenses were alternative but not inconsistent. It was consistent with defendant's denial of the transaction to urge that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment."}\] 236

Similarly, the Fourth Circuit, equally terse in its analysis, has long held: \[\text{"We think it perfectly proper to allow a criminal defendant to submit to a jury alternative defenses"}\] 237

The most outspoken permissive circuit seems to be the Ninth, commencing with and following its decision in United States v. Demma. 238 Equally deserving of attention, however, are some of California's more prominent state court decisions and their denunciation of the inconsistency rule. One of the most well-reasoned opinions is that of then Chief Justice Traynor speaking for the California Supreme

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The District of Columbia and the Fourth Circuits have characterized the defense as one properly viewed as an \[\text{\"alternative.\"}\] Paradoxically, this both begs the question and suggests a resolution. Such a construction is tautological in that alternativity does not avoid the \[\text{\"fundamental\"}\] inconsistency with which the restrictive jurisdictions are concerned, but rather assumes it away. Even conceding that the two defenses are not urged simultaneously, the ultimate result is nonetheless to permit a defendant to argue antithetical positions. However, precisely because the positions are posited alternatively, in fact, somewhat hypothetically, any inconsistency becomes at once less objectionable (e.g., to a logic-insistent juror) and wholly proper. To the extent an alternative defense is based upon uncertainty as to which set of facts a jury will ultimately hold to be true, there is simply no reason to reject out of hand any one of the two proffered defenses. Since both defenses may prove to be true, inconsistency is more appropriately determined by a verdict than in a pleading. \[\text{See infra notes 276-88 and accompanying text.}\]

This reasoning, of course, requires a defendant to structure his defenses in an \[\text{\"even if\"}\] mode, and precludes any conjunctive assertions. That is, the defendant must claim \[\text{"I did not commit the crime, but, if the evidence suggests otherwise, then I was entrapped."}\] He may not contend \[\text{"I did not commit the crime and I was entrapped."}\] The distinction, though subtle, arguably even trivial, is essential to legitimate the ostensible inconsistency.

238. 523 F.2d 981 (9th Cir. 1975) (en banc). For a discussion of Demma, see supra notes 154-76 and accompanying text. Since 1975, Demma has been consistently reaffirmed in unequivocal terms. \[\text{See, e.g., United States v. King, 587 F.2d 956, 965 (9th Cir. 1978) \("alternative defenses, of course, are proper, even if inconsistent\"); United States v. Pico-Zazueta, 564 F.2d 1367, 1372 (9th Cir. 1977) \("a defendant may assert entrapment without conceding that he did the acts charged\"); United States v. Paduano, 549 F.2d 145, 148 (9th Cir. 1977) \("Under Demma, \text{\"a defendant may assert entrapment without being required to concede that he committed the crime or any of its elements.\"}\") (quoting Demma, 523 F.2d at 982); United States v. Hart, 546 F.2d 798, 803 (9th Cir. 1976) \(\text{\"a defendant is not required to \"admit the offense as a condition to his asserting entrapment\"\")\), cert. denied, 429 U.S. 1120 (1977).}
We disagree with the . . . contention that to invoke the defense of entrapment a defendant must admit committing the criminal act charged. Although the defense is available to a defendant who is otherwise guilty . . . it does not follow that the defendant must admit guilt to establish the defense. A defendant, for example may deny that he committed every element of the crime charged, yet properly allege that such acts as he did commit were induced by law enforcement officers. Moreover, a defendant may properly contend that the evidence shows unlawful police conduct amounting to entrapment without conceding that it also shows his guilt beyond a reasonable doubt. . . . Entrapment is recognized as a defense because "the court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime." A rule designed to deter such unlawful conduct cannot properly be restricted by compelling a defendant to incriminate himself as a condition to invoking the rule. . . . To compel a defendant to admit guilt as a condition to invoking the defense of entrapment would compel him to relieve the prosecution of its burden of proving his guilt beyond a reasonable doubt at the risk of not being able to meet his burden of proving entrapment. To put the defendant in that dilemma would frustrate the assertion of the defense itself and would thus undermine its policy.240


240. Id. at 773, 401 P.2d at 937-38, 44 Cal. Rptr. at 329-30 (quoting People v. Benford, 53 Cal. 2d 1, 9, 345 P.2d 928, 933 (1959)) (citations omitted). At least one lower California court had posited a similar rationale at least 10 years earlier. People v. West, 139 Cal. App. 2d Supp. 923, 926, 293 P.2d 166, 168 (Super. Ct. 1956) ("A defendant may present inconsistent defenses. We find nothing in any of the cases cited, or read, which raises a doubt in our minds that a defendant who, as a witness, denies some essential element of an offense charged, may nevertheless have the benefit of evidence that she was entrapped into committing the offense."). Until the Perez decision, however, the California courts had generally taken the position that the denial of the criminal act was inconsistent with the defenses of entrapment and therefore not permitted. See People v. Wallace, 199 Cal. App. 2d 678, 681-82, 18 Cal. Rptr. 917, 918-19 (Dist. Ct. App. 1962); People v. Lee, 9 Cal. App. 2d 99, 109, 48 P.2d 1003, 1007 (Dist. Ct. App. 1935). For an analysis of the various California views, see Note, The Defense of Entrapment in California, 19 Hastings L.J. 825 (1968); Comment, Criminal Law—Denial of Act and Entrapment as Inconsistent Defenses, 30 S. Cal. L. Rev. 542 (1957).
A similar position seems to have been adopted in the New York courts. In *People v. Johnston*, the court was quite specific in holding that "in New York a defendant may raise inconsistent defenses and may not be compelled to admit his guilt as a condition of invoking the defense of entrapment." The focus of the opinion seemingly centered, at least implicitly, on constitutional grounds. The trial court had instructed the jury that by claiming the defense of entrapment, the defendants had conceded their participation in the crime for which they stood accused. In holding this instruction erroneous, the appellate division noted that the "basic and fundamental error in this instruction is obvious for it asserted the guilt of defendants as a fact, thus relieving the prosecution of its burden of proving their guilt beyond a reasonable doubt and afforded defendants an opportunity for an acquittal only if they proved their defense of entrapment." While a review of all state jurisdictional views would not be practical, it is sufficient to note that a number of state courts are in accord with the general permissive view.

While, quantitatively, the permissive jurisdictions represent somewhat of a minority view on the subject, it may be argued that in terms of substantive analysis, it is this position which should ultimately prevail. This suggestion is treated at length in the following section.

IV. THE VALIDITY OF THE INCONSISTENT ENTRAPMENT DEFENSE

To be sure, however rational it may be to permit the assertion of inconsistent defenses, as a practical matter, in most instances, it will be unwise for a defendant brazenly to pursue such a course. Given that a
defendant's ultimate fate will rest essentially in the hands of the jurors, credibility, and not procedural legerdemain, will often prove to be his most potent weapon. Indeed, a defendant will often be "ill-advised as a matter of tactics to deny that the act was done. To make that denial in the face of overwhelming proof destroys whatever credibility the defendant might have had when he gave his version of the entrapment facts."

Whatever value this pragmatic approach may possess, it is important to bear in mind that our more fundamental concern must be with the theoretic and normative issue of the doctrine's place in our criminal jurisprudence. In short, the question that remains is whether a court may justifiably (and, perhaps, constitutionally) deny a defendant the privilege (right?) of asserting inconsistent defenses. In addressing this concern, a number of issues immediately present themselves, each of which will be discussed in turn.

A. Constitutional Concerns

While it has long been established that the entrapment defense per se is not to be accorded constitutional status, the possibility re-

247. Groot, supra note 31, at 263 (footnote omitted). See United States v. Brown, 544 F.2d 1155, 1161 (2d Cir. 1976) (Bartels, J., concurring) ("good defense tactics" to concentrate on entrapment defense); United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc) (high risk makes use of inconsistent defenses unlikely as a strategic matter) (For a discussion of Demma, see supra notes 154-76 and accompanying text.); Johnson v. United States, 428 F.2d 651, 656 (D.C. Cir. 1970) (although a defendant has the right to argue inconsistent defenses, "it would not be surprising if this position reflected unfavorably on Appellant's credibility"); People v. Johnson, 47 A.D.2d 897, 900, 366 N.Y.S.2d 198, 203 (2d Dep't 1975) ("Entrapment is obviously a defense fraught with great risk to a defendant who seeks its benefits and at the same time also denies commission of the acts charged"); Cronin, supra note 73, at 1236 (a defendant's assertion of inconsistent defenses "risks undermining the credibility of his entire defense"); Park, supra note 17, at 257 n.308 ("Such a posture would normally be unwise . . . ."); Ranney, supra note 17, at 164 ("offering inconsistent defenses can only destroy [defendant's] credibility with the trier of fact"); Note, Entrapment, supra note 152, at 1343 (inconsistent testimony is "always deterred by perjury sanctions and by even minimal respect for the intelligence of the jury").

248. For a discussion of the constitutional ramifications of denying a criminal defendant the use of inconsistent defenses, see infra notes 249-75 and accompanying text.

249. For a discussion of the Supreme Court's refusal to elevate the defense of entrapment to constitutional status, see supra notes 51-55 and accompanying text; see also Cronin, supra note 73, at 1237 & n.212 ("The entrapment defense is not constitutionally mandated and is therefore subject to congressional revision."); Orfield, supra note 17, at 53-57 ("The defense of entrapment in the federal courts exists without any judicially articulated basis in the Constitution . . . . [T]he courts have balked at elevating the defense to constitutional dimensions."); Comment, The Assertion of Inconsistent Defenses in Entrapment Cases, supra note 123, at 688 ("The entrapment defense has no judicially affirmed constitutional basis."). But see Cowen, The Entrapment Doctrine in the Federal Courts and Some State Court Comparisons, 49 J. Crim. L., Criminology &
remains that some of the doctrine’s ancillary applications, particularly procedural ones, will call into question some rather fundamental constitutional issues. The most devastating constitutional infirmity is suggested by the theory that prohibiting the use of inconsistent defenses may well obscure, if not remove entirely, the presumption of innocence. To the extent the inconsistency rule compels a defendant to admit his guilt or forgo an entrapment instruction, the prosecution is relieved of its burden of proving the crime beyond a reasonable doubt whenever a defendant has forcibly admitted to the crime’s commission. This scenario is palpably in conflict with the due process requirement that the innocence of the accused be presumed. Since “the prosecution must have the burden of proving every element of the crime beyond a reasonable doubt . . . the inconsistency rule, by requiring an admission of crime in order to have an entrapment instruction . . .” violates due process by “reliev[ing] the prosecution of any practical burden of proving the crime. . . .”


250. Groot, supra note 31, at 269. The most glaring example of the denial of the presumption of innocence may be found in the theory that absent commission of a crime there can be no entrapment. While as an abstract matter this is entirely correct, it ignores the fact that in any particular case the guilt of a defendant pleading entrapment is presumed without any attempt to decide the question of guilt or innocence.

251. Admittedly, in the general case, when a defendant pleads guilty the prosecution is also relieved of its burden; none would suggest a due process violation in these cases. Here, however, the defendant is procedurally coerced into a posture which is greatly at odds with his ultimate position of claiming innocence. That is to say, he wants to plead not guilty but must sacrifice that option in the hopes of convincing the jury that he was in fact entrapped. See, e.g., Sylvia v. United States, 312 F.2d 145, 147 (1st Cir.) (“[A] defendant’s testimony to the effect that he did not commit the crime cannot raise an issue of entrapment.”), cert. denied, 374 U.S. 809 (1963). This case is therefore manifestly distinguishable from the normal entry of a guilty plea. The issue of coercion is more fully discussed infra notes 255-75 and accompanying text.

252. See Coffin v. United States, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

253. Groot, supra note 31, at 271 (footnote omitted). See also United States v. Demma, 523 F.2d 981, 986 (6th Cir. 1975) (en banc) (“Continued adherence to Eastman 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.”); People v. Johnston, 47 A.D.2d 897, 900, 366 N.Y.S.2d 198, 203 (2d Dep’t 1975) (“The basic and fundamental error in this instruction is obvious, for it asserted the guilt of the defendants as a fact, thus relieving the prosecution of its burden of proving their guilt beyond a reasonable doubt and afforded defendants an opportunity
In essence, the focus of the jury will have been redirected, away from consideration of the crime itself and turned solely to the issue of entrapment. While, technically, the prosecution must still now prove non-entrapment beyond a reasonable doubt,254 the presumption of innocence has been effectively eviscerated.255

A second constitutional concern, and certainly at least equally as important as the evaporated presumption of innocence, is the effect the inconsistency rule has in presenting to a defendant the Hobson's choice of having to forfeit certain constitutional rights in order to avail himself of the entrapment defense. More particularly, in those jurisdictions which observe the rule, a defendant wishing to plead entrapment will be required as a matter of law to surrender his fifth amendment privilege against self-incrimination266 and its corollary prohibition of coerced confessions.267 While only the briefest mention of this constitutional defect has been made by the courts,268 a number of commen-

254. For a discussion of the burden of proof of non-entrapment, see supra notes 159-63 and accompanying text. The defendant generally retains the burden of production. W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 373 n.28 (1972). An exception arises when “the Government's case-in-chief discloses entrapment as a matter of law (an unusual phenomenon),” in which case, the “defendant must come forward with evidence of his non-pre disposition and of government inducement.” United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc) (citation omitted).

255. Professor Groot offers a more comprehensive version of this argument. See Groot, supra note 31, at 269-71.

256. The fifth amendment provides in pertinent part that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The fifth amendment privilege against self-incrimination applies to both federal and state prosecutions and has been recognized as a limitation upon the permissible reach of the substantive criminal law. W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 161 (1972). The policies and purposes of the privilege reflect the “preference for an accusatorial rather than an inquisitorial system of criminal justice.” 3 WHARTON'S CRIMINAL PROCEDURE, § 391, at 2 (C.E. Torcia 12th ed. 1975). See, e.g., Malloy v. Hogan, 378 U.S. 1, 7-8 (1964) (“[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.”) (citations omitted).

257. The prohibition against coerced confessions stems from society's general abhorrence of techniques of coercion and from the belief that statements given involuntarily are unreliable evidence. C. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE 163 (1978). The Supreme Court has stated that a confession is free and voluntary if it is “not extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.” Malloy v. Hogan, 378 U.S. 1, 7 (1964).

258. See United States v. Annese, 631 F.2d 1041, 1047 (1st Cir. 1980) (reversing the district court's ruling that the defendant could not both refuse to take the stand and claim entrapment; “to hold otherwise would raise a serious fifth amendment question”). But see State v. Montano, 117 Ariz. 145, 148, 571 P.2d 291, 294 (Ct. App. 1977) (requir-
tors have offered persuasive argumentation suggesting it as ample reason for rejecting the inconsistency rule. These arguments generally take as their starting point analogous Supreme Court doctrines which have struck down as unconstitutional similar forced choices. While it is well-established that a criminal defendant may legitimately be put to tactical choices, it is equally well-settled that certain forced choices are indeed unconstitutional. The major Supreme Court pronounce-

ing a defendant to admit the substantial elements of a crime before allowing him to raise the defense of entrapment does not violate the fifth amendment).


260. See, e.g., Spencer v. Texas, 385 U.S. 554, 560-61 (1967) (testifying defendant risks impeachment); Brown v. United States, 356 U.S. 148, 154-57 (1958) (testifying defendant risks cross examination); United States v. Calderon, 348 U.S. 160, 164-66 (1954) (testifying defendant risks supporting government's case). One of the most thorough Supreme Court analyses of this issue is found in Corbitt v. New Jersey, 439 U.S. 212 (1978). In Corbitt, the Court rejected appellant's contention that a New Jersey statute, which imposed a mandatory sentence of life imprisonment upon conviction of first degree murder when tried to a jury while allowing for a sentence of less than life imprisonment upon a plea of non vult, was unconstitutional. The Court noted that its cases "have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." Id. at 218 (footnote omitted). The Court relied on its earlier decision in McGautha v. California, 402 U.S. 183 (1971) where it held:

The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

439 U.S. at 218-19 n.8 (quoting 402 U.S. at 213).

The Court quoted Chaffin v. Stynchcombe, 412 U.S. 17 (1973), in which it was held that "[w]hile confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" 439 U.S at 220 (quoting 412 U.S. at 31). In conclusion, the Corbitt Court stated:

It cannot be said that defendants found guilty by a jury are "penalized" for exercising the right to a jury trial any more than defendants who plead guilty are penalized because they give up the chance of acquittal at trial. In each instance, the defendant faces a multitude of possible outcomes and freely makes his choice. Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decisions.

439 U.S. at 226.

261. See Simmons v. United States, 390 U.S. 377, 393-94 (1968) (defendant cannot be forced to waive fifth amendment protection in order to receive fourth amendment protection); Groot, supra note 31, at 273.
ment came in Simmons v. United States, in which the defendant, in order to obtain standing for a motion to suppress evidence alleged to have been the product of an illegal search, was required to admit to ownership of the incriminating evidence. Viewing the collision of the defendant's fourth amendment right to question the search with his fifth amendment right to be free of self-incrimination as an intolerable invasion of constitutional protections, the Court proceeded to evaluate the issue of compulsion. Since Simmons' testimony at the suppression hearing was intended to secure for him a benefit, i.e., standing to contest the illegal search, it may well have been only voluntary. Acknowledging that "[a]s an abstract matter," this may have been true, the Court went on to explain:

A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. . . . In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

To be sure, the usefulness of the Simmons analysis is limited by the fact that the entrapment defense has yet to be recognized as a constitutional right. Accordingly, a defendant forced to admit his guilt in order to claim the defense is not compelled to choose between two constitutionally equivalent privileges. Yet, while Simmons pointed to an "intolerable" situation as resulting only from the playing off of one constitutional right against another, it nonetheless suggested that primary concern was still to be addressed to the overall importance of the right sacrificed. In other words, Simmons may be read as forbidding a forced trade-off of protections even if one right is not constitutionally grounded, as long as that right remains at least fundamentally important.

263. Id. at 391.
264. Id. at 393.
265. Id. at 393-94.
266. For a discussion of the Court's refusal to accord constitutional status to the entrapment defense, see supra notes 51-55 & 249 and accompanying text.
267. 390 U.S. at 393-94.
268. Id.
Arguing that the policies underlying the entrapment defense are identical to those supporting the fourth amendment and the exclusionary rule, "—prevention of unwarranted governmental intrusion into the lives of its citizens—," Professor Groot has suggested that there must then "be a determination as to 'whether compelling the election impairs to an appreciable extent any of the policies behind [that] right.' " To the extent the entrapment defense may be equated with the fourth amendment right, then it seems that a persuasive constitutional argument for rejecting the inconsistency rule may be advanced. Professor Groot's paralleling of the entrapment defense with the constitutional guarantee of the fourth amendment flows directly from his view that it "manifests the same policy [as the fourth amendment] in protecting each individual's psychic privacy." That is to say, "[t]he government should not have the power . . . to intrude upon a citizen's mental state in order to suggest or stimulate conduct which is even questionably prohibited." 

Despite the intuitive appeal of Professor Groot's reasoning, the fact of the matter remains that the Supreme Court has not yet equated the entrapment defense with any constitutional right. Despite the ostensibly equivalent policies underlying both doctrines, the defense of entrapment continues to be regarded as less fundamentally important than the traditional fourth amendment protections.

While any constitutional proscription therefore seems unlikely, this does not end the matter entirely. The case for a constitutional pro-

269. Groot, supra note 31, at 274.
270. Id. (quoting McGautha v. California, 402 U.S. 183, 213 (1971)).
271. Groot, supra note 31, at 274 (emphasis added). The fourth amendment is aimed at the physical privacy of the citizenry, and "was intended to be broader than simply protecting those suspected of crime; it was designed to protect all citizens from physical interference." Id.
272. Id. Groot's reading of the entrapment defense as articulated over the years points to continued references to the mental integrity of the accused. For example, the Sorrells opinion is replete with language posing the question in terms of whether the accused was "lured," "induced," "instigated," or "encouraged" into the criminal activity. 287 U.S. at 441, 442, 444, 445, 448 (1932). His conclusion follows quite naturally that such "statements must be read only as recognition of the fact that the entrapment defense protects against psychic intrusions by the state." Groot, supra note 31, at 275.
273. Indeed, the prospect for any such doctrine seems less than likely. To date, the furthest the Court has been willing to go is to suggest the possibility of an entrapment-induced due process violation, stemming from egregious government conduct. See supra notes 51-55 and accompanying text.
scription, though failing in its ultimate ambition, is arguably strong enough to impel a rethinking of the inconsistency rule. Indeed, this may be particularly so in view of "the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution."274 Clearly, the arguments advanced by the restrictive jurisdictions in favor of the rule are not marked by any degree of incisive reasoning.275 When weighed against the near-constitutional concerns discussed above, the better approach becomes apparent. Absent any cogent support for the continued existence of the rule, it is not unreasonable to suggest that it must give way to the paramount considerations, those at least bordering on constitutional guarantees, which speak to its abolition.

B. Fundamental Non-constitutional Concerns

It will be recalled that our earlier discussion suggested the underlying ambition of civil trials as manifesting a conscious attempt to bring truth to bear.276 This fundamental policy is unquestionably no less relevant in the context of the criminal trial. Indeed, "[t]he common goals of all trials, civil and criminal, of issues of fact is to arrive at the truth. . . ."277 It would seem then, that any procedural rule directed at or having the effect of impeding the search for truth, is at cross-purposes with the very system of which it is a part and to which it owes allegiance.278 Thus, it has been argued that the "most obvious evil resulting from the denial-of-crime/no-entrapment rule is prevention of truth determination by the jury."279 It is important to understand that the inconsistency rule subverts the truth-seeking function of the trial by unreasonably requiring a defendant to present to the jury only what he believes to be the most credible set of facts available. In large part, the jury is thereby deprived of the benefit of viewing the bases for the accused's indictment in their entirety. The defendant

274. United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc).
275. See supra notes 127-52 and accompanying text.
276. For a discussion of the use of inconsistent pleadings in civil actions, see supra notes 85-93 and accompanying text.
277. Henderson v. United States, 237 F.2d 169, 172 (5th Cir. 1956) (emphasis added); accord United States v. Greenfield, 554 F.2d 179, 182 (5th Cir. 1977) ("the common goal of all trials of issues of fact is to arrive at the truth"); Sears v. United States, 343 F.2d 139, 143-44 (5th Cir. 1965) ("ultimate goal" of criminal trial is ascertainment of truth); see also Orfield, supra note 17, at 68.
may indeed be guilty; he indeed may not have been entrapped. Yet, these are both questions rightfully within the province of the jury. It may in fact be suggested that to the extent the issue of entrapment is committed to jury determination, “as part of [the jury’s] function of determining the guilt or innocence of the accused,” it may not, consistent with the Supreme Court’s decision in Sherman, be artfully rerouted via a defendant’s forced choice.

The concern is twofold. On the one hand, we are tempted to discount the value of allowing inconsistent defenses where their assertion is superfluous, that is, where a defendant would be found both guilty and not entrapped, or conversely, both innocent and entrapped. Retrospectively, in these cases, we are of course correct in reasoning that, as it turned out, it really didn’t matter. Although true, this misses the point altogether. If a defense is to be of any value, it cannot be premised or its use conditioned on how it will fare in any given case. Precisely because we don’t, indeed cannot, know the results beforehand, the defense must be submitted to the trier of fact. The second concern poses an even more serious problem. More often than not, the cases will not be as clear-cut as those outlined above. A defendant may be both genuinely guilty and yet unquestionably entrapped. Or, one may be wholly innocent, choose unsuccessfully to argue entrapment, and be found guilty. At the very least, on an individual level, it would be inequitable to deprive either one of these two hypothetical defendants as complete an opportunity as possible to defend themselves. Though in terms of substantive legal rules, each would be deemed innocent, procedural myopia obscures any such result. Classically, the inconsistency rule ignores the forest for the trees. Ostensibly concerned with eliciting truth, the rule is seemingly oblivious to its counterproductivity. Not only does it automatically and arbitrarily preclude important issues of fact from ever seeing the light of judicial day, and thereby inhibit informed decisionmaking, but it also engenders defendant dishonesty. By requiring a defendant to choose the most probably successful horn of an intractable dilemma, the rule instructs him both to remain silent as to possibly exculpatory testimony and to “create” that

280. Contrary to the suggestion of Justice Roberts in Sorrells v. United States, 287 U.S. 435, 457 (1932) (Roberts, J., concurring), quoted supra in text accompanying note 32, it has been conclusively established that “unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.” Sherman v. United States, 356 U.S. 369, 377 (1958) (footnote omitted). Of course, the jury must receive proper instructions from the trial judge who himself is entitled to “comment fairly upon the entrapment evidence.” Orfield, supra note 17, at 67.


282. Cf. United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc), quoted supra in text accompanying note 274.
testimony which will not be inconsistent with his chosen defense.\footnote{283}{Professor Groot has observed that "[i]n fact, the inconsistency rule may even force a defendant into perjury. An accused who is not factually guilty of crime may admit guilt because of a tactical decision that entrapment is his better defense." Groot, \textit{supra} note 31, at 269.}

Admittedly, condoning a Janus-like posture may in some cases reward the defendant who is now entitled to present at least two sets of incongruent facts. That is to say, allowing inconsistent defenses effectively sanctions a mendacious defendant's utterance of what he well knows to be an untruth, at least in those instances where a defendant claims entrapment despite acknowledging to himself his own guilt.\footnote{284}{This may not always be the case, however. Certainly a situation may arise where a defendant is both factually innocent and also entrapped.}

Still, this is a gratuitous concern. First, it is important to realize that despite the possibility of a defendant's less than honest recital, a defendant must always be entitled to present his case to a jury. Certainly none would advocate selectively preempting the jury's opportunity to evaluate testimony perceived by the judge or prosecution to be \textit{a priori} unbelievable, yet this is precisely what supporters of the inconsistency rule seem to have in mind. When reduced to its essentials, a trial itself represents little more than a forum in which competing claimants vie for the favor of the jurors. Of necessity, each side is impelled to allegations and responses in direct conflict with one another. Seldom is the case where absolute truth may be found in both parties' positions. The trial, therefore, pits these opposing forces one against the other for no other purpose than to discover the truth. Indeed, the inherent polarity which is engendered is reasonably viewed more as a tool of the truth discovery process than as an evil to be eschewed. To the extent inconsistency remains an inherent, indeed integral, part of the trial process, our concerns inevitably prove to be unwarranted.

Yet another reason exists which serves to dispel any irrational fears of inconsistency and leaves the basis for these concerns all but evaporated. It is not to be forgotten that an essential safeguard built into the criminal trial is the court's perjury sanction. Although the effectiveness of such a safeguard may be called into question, it arguably remains as effective a deterrent to the defendant who seeks to argue inconsistent defenses as it does to any criminal defendant.\footnote{285}{\textit{Cf.} Harris v. New York, 401 U.S. 222, 224-25 (1971) (illegally obtained confession, not admissible in case-in-chief, is admissible to impeach defendant's testimony; privilege to testify does not include right to commit perjury); Walder v. United States, 347 U.S. 62, 65 (1954) (use of illegally obtained evidence is admissible to impeach defendant's testimony; a defendant may not resort to perjurious testimony).} In any event, it seems the more reasonable approach to permit the jury to hear all the evidence available on any and all defenses and to make their own determination as to the ultimate truth. To arbitrarily with-
hold evidence from the jury the defense on the grounds that a priori it logically cannot be true is to ignore the fact that any defense, even when offered singly, may also be false. To the extent we have chosen to deal with this situation through the court-imposed perjury sanction, we are committed to a like resort in the case of inconsistent defenses in the interest of letting the jury decide. Any other course will effectively impede the ability of the jury to properly resolve a given case.

A related issue, advanced by proponents of the rule, is that permitting inconsistent defenses will inevitably tend to confuse a jury. While in its most general sense this may well be true, the more important question is whether such confusion will unduly interfere with the jury's ultimate findings. Doubtless, jurors will be somewhat baffled by a defendant who speaks simultaneously from both sides of his mouth, and this certainly poses a calculated risk to any defendant who avails himself of such a strategy. Yet, clear instructions from the bench might well minimize the degree of any such confusion and preserve the right of the defendant to make such a choice.

V. CONCLUSION

On balance, it appears that the law of entrapment is far less settled than observers might have surmised. Despite repeated pronouncements of the Supreme Court as to the substantive components of the defense, much remains to be spoken on the subtleties surrounding the procedures by which the defense may be invoked. Ironically, inconsistency has bred inconsistency; the divisive split among the circuits concerning the defense's availability to a non-admitting defendant has fostered both confusion and less than equal justice. Most troubling, perhaps, is the failure of a number of the circuits to provide any more than cursory analysis in their haste to reject the inconsistent entrapment defense. Such abdication of judicial responsibility has served only to perpetuate a logically unfounded and precedentially unsupportable rule. In light of what appears to be the growing importance the entrapment defense has come to assume, a thorough reevaluation of the rule may well be in order. To the extent the rule retains staunch support in some jurisdictions, and has been thoroughly discredited in others, the time seems ripe for the Supreme Court to delve further into

286. See Note, supra note 259, at 923; see also United States v. Daniels, 572 F.2d 535, 542 (5th Cir. 1978); Eastman v. United States, 212 F.2d 320, 322 (9th Cir. 1954). But see People v. De Rosa, 378 Ill. 557, 563, 39 N.E.2d 1, 4 (1941); People v. Jersky, 377 Ill. 261, 267, 36 N.E.2d 347, 350 (1941) (defendant entitled to inconsistent defenses even if offered for "express purpose of confusing the jury").

287. See supra note 247 and accompanying text.

288. See supra text accompanying notes 8-12.
the entrapment controversy and delineate more fully the parameters of its use.

In the absence of any articulable persuasive support for the retention of the inconsistency rule, it is submitted that the most reasonable course calls for the rule's abandonment. As little more than a jurisprudentially antiquated doctrine whose pernicious effects find no countervailing benefits, the rule proves an ill-fitting, incompatible partner with the very functioning of the criminal trial. As unpalatable a morsel contradictory defense positions may seem at first blush, there is comfort to be found in the words of Emerson, who recognized that "[a] foolish consistency is the hobgoblin of little minds. . . ." 289

Michael H. Roffer