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Criminal Law - The "No I Didn't, and Yes I Did But...." Defense: Is the Entrapment Defense Available to Criminal Defendants Who Deny Doing the Crime? - Mathews v. United States

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CRIMINAL LAW—THE "NO I DIDN'T, AND YES I DID BUT . . ." DEFENSE: IS THE ENTRAPMENT DEFENSE AVAILABLE TO CRIMINAL DEFENDANTS WHO DENY DOING THE CRIME?—Mathews v. United States

INTRODUCTION

"In these mean and cynical times when criminal defense work is not a lot of fun, this decision is like a fresh light of sunshine on a dark and cloudy day." These words from Franklin Gimbel, the defendant's attorney, obviously reflect his pleasure with the United States Supreme Court's decision in Mathews v. United States. He may, however, be in a small group of pleased individuals and institutions.

Before the Mathews decision, a vast majority of the federal courts of appeals had taken the view that a criminal defendant could not deny commission of the acts charged and still avail himself of the entrapment defense. The courts reasoned that an unacceptable inconsistency exists when a defendant attempts to deny the charged acts and simultaneously plead entrapment. Additionally, the courts reasoned that the truth-finding function of criminal trials compelled either the adoption or the continued existence of the majority rule. Presently, a majority of the state courts share this same view of the defense. Because of the Mathews decision, the federal courts must apply what was once the minority view at the federal level and what remains the minority rule in the state courts. Though state courts are free to choose either position, adoption of the Mathews rule leaves our federal courts undivided on the issue, thus affording criminal defendants in the federal system the "No I didn't, and yes I did but . . ." defense where the facts allow.

3. See infra notes 89-161 and accompanying text.
4. See United States v. Dorta, 783 F.2d 1179, 1181 (4th Cir. 1986); Munroe v. United States, 424 F.2d 243, 244 (10th Cir. 1970).
5. See Dorta, 783 F.2d at 1181-82; United States v. Smith, 757 F.2d 1161, 1168 (11th Cir. 1985).
6. See infra note 238.
7. Id.
This Note will explore the history of the entrapment defense. In addition, this Note will review previous federal court decisions regarding the inconsistency rule. The inconsistency rule refuses a criminal defendant the right to deny committing the charged acts and plead the entrapment defense. This Note will analyze both the majority and dissenting opinions of Mathews. The Note concludes by urging the North Carolina courts to follow the Mathews lead and change its stance with regard to the inconsistency rule.

THE CASE

In 1985, the Federal Bureau of Investigation (FBI) arrested Mathews, defendant-petitioner, and charged him with violating a federal statute that prohibits public officials from accepting bribes. At that time, Mathews worked for the Small Business Administration (SBA) in Milwaukee, Wisconsin, where he ran the SBA’s “8A Program.” The SBA established the program to assist small businesses by subcontracting government contracts to those who participated in the program.

Prior to October 1984, Mathews had requested loans of money from DeShayer, President of Midwest Knitting Mills, a participating company in the program. In October 1984, DeShayer believed that because he had not made the loans to Mathews, Midwest had not been provided with the program’s benefits. Because of DeShayer’s complaint, the FBI began an investigation of Mathews with DeShayer’s assistance. DeShayer, while under FBI surveillance, offered Mathews a loan which Mathews agreed to accept. Two months after that conversation, Mathews took money from DeShayer in a restaurant and was immediately arrested by the

8. Mathews, 108 S. Ct. at 885. Such conduct violates 18 U.S.C. § 201(g) (1986). The statute provided for a fine of not more than $10,000.00 or a prison term of not more than two years for:
   (g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or because of any official act performed or to be performed by him.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
FBI.\textsuperscript{15} Mathews filed a pre-trial motion \textit{in limine} in an attempt to defend his actions with the defense of entrapment.\textsuperscript{16} Because Mathews would not admit to all the elements of the charged offense, the district court denied the motion.\textsuperscript{17} With DeShayer as its key witness, the government contended that Mathews accepted money in return for which he agreed to perform officials acts for Midwest in his capacity as administrator at the SBA.\textsuperscript{18} The government introduced tape recordings of the loan discussions between the two men in support of its contention.\textsuperscript{19}

Mathews denied DeShayer's testimony and the FBI's arguments, claiming that he accepted personal loans unconnected to his position with the SBA.\textsuperscript{20} He backed his argument with testimony that he had previously taken personal loans from his friend DeShayer.\textsuperscript{21} He claimed that DeShayer fortuitously offered a loan to him just when he was in great need of monetary assistance.\textsuperscript{22} Mathews said the reasons DeShayer offered to make the loan were: first, because DeShayer had hidden the money from his wife; second, DeShayer did not want her to discover that fact; and third, because if DeShayer did not make the loan, DeShayer might squander the money.\textsuperscript{23}

At the end of the testimony, Mathews moved for a mistrial on the grounds that the district court erred in refusing to give the jury an instruction on the entrapment defense.\textsuperscript{24} Although noting a probable lack of evidence to support the defense, the court denied Mathews' motion based on the rule that a defendant may not argue entrapment without admitting commission of all charged acts.\textsuperscript{25}

The jury returned a guilty verdict from which Mathews appealed.\textsuperscript{26} The United States Seventh Circuit Court of Appeals af-
firmed the district court's decision\(^{27}\) commenting on the split between the federal courts with respect to this entrapment issue.\(^{28}\) The court held that the district court ruled correctly because of the "per se" inconsistency in denying the crime and pleading entrapment.\(^{29}\) From that decision, Mathews petitioned the United States Supreme Court for \textit{certiorari}. The Court granted \textit{certiorari}\(^{30}\) limited to the issue of "whether a defendant in a federal criminal prosecution who denies commission of the crime may nonetheless have the jury instructed, where the evidence warrants, on the affirmative defense of entrapment."

\textbf{BACKGROUND}

\textbf{A. In General}

Entrapment may generally be defined as an "act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him."\(^{34}\) Although the early common law did not recognize the entrapment defense,\(^{35}\) the United States courts gradually began to accept the doctrine in the late nineteenth and

\begin{footnotesize}
\begin{enumerate}
\item United States v. Mathews, 803 F.2d 325 (7th Cir. 1986), \textit{cert. granted}, 107 S. Ct. 1601 (1987). Mathews alleged three lower court errors. First, he argued that the court erred with regard to the entrapment issue. Second, he alleged error concerning the exclusion of veniremen. Last, he argued error where the lower court denied a motion for mistrial when the prosecution removed all blacks from the jury by use of its peremptory challenges. \textit{Id.} at 326. This Note will discuss only the alleged error regarding entrapment.
\item 803 F.2d at 327.
\item \textit{Id.} The court stated, "We see no reason to allow Mathews or any defendant to plead these defenses simultaneously." \textit{Id.}
\item \textit{Mathe\-ws}, 108 S. Ct. at 884-885.
\item Franklin Gimbel, Mathews' lawyer, found Chief Justice Rehnquist's majority vote pleasantly interesting given a "very hostile" moment between the two at oral argument. Stewart, \textit{supra} note 1, at 42.
\item \textit{Mathe\-ws}, 108 S. Ct. at 886.
\item BLACK'S LAW DICTIONARY 477 (5th ed. 1979).
\end{enumerate}
\end{footnotesize}
early twentieth centuries.36 Prior to gaining approval in the courts, the traditional view was that as long as the actor did the criminal acts, it was irrelevant that he was tricked into so doing.37 Also, the courts were not concerned with the degree of deception.38 Speaking by analogy to Genesis 3:31 illustrating Eve’s unsuccessful attempt to plead entrapment, the New York Supreme Court refused to give credence to the defense in the early and now famous case of Board of Commissioners v. Backus.39 The New York Court of Appeals reaffirmed this position on entrapment in People v. Mills.40

Eventually, the doctrine caught hold in the states41 and ultimately in the federal judiciary.42 In Woo Wai v. United States,43 the Ninth Circuit Court of Appeals adopted the doctrine, applied it, and reversed the defendant’s conviction of conspiracy to import illegal aliens into the United States.44 Grounded in a public policy rationale, the court held “that a sound public policy can be upheld

36. LAFAVE AND SCOTT, supra note 35, at 421; see also Marcus, supra note 35, at 9-11.
37. LAFAVE AND SCOTT, supra note 35, at 421.
38. Id.
39. 29 How. Pr. 33, 42 (1864). Here the court stated:
Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the pleas as ancient as the world, and first interposed in Paradise: ‘The serpent beguiled me and I did eat.’ That defense was overruled by the great Lawgiver, and whatever estimate we 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.
40. 178 N.Y. 274, 70 N.E. 786 (1904). The court stated, “We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it.” Id. at 289, 70 N.E. at 791.
42. See generally Mikell, The Doctrine of Entrapment in the Federal Courts, U. P A. L. REV. 245 (1942); DeFeo, supra note 35; MARCUS, supra note 35; Groot, supra note 39.
43. 223 F. 412 (9th Cir. 1915).
44. Id. at 414-416.
only by denying the criminality of those who are thus induced to
commit acts which infringe the letter of the criminal statutes." 45
After Woo Wai, all the lower federal courts began to recognize the
doctrine. 46

Much time passed in our nation's history before the United
States Supreme Court decided an entrapment case. However, in
Casey v. United States, 47 while Justice Holmes summarily dis-
missed the defendant's allegations of entrapment for the majority
of the Court, 48 Justice Brandeis forcefully argued in the dissent
that the doctrine applied. 49 Distinguishing the present case from
those where the defendant already intended to commit a crime,
Justice Brandeis argued:

The obstacle to the prosecution lies in the fact that the al-
leged crime was instigated by officers of the government; that the
act for which the government seeks to punish the defendant is the
fruit of their criminal conspiracy to induce its commission. The
government may set decoys to entrap criminals. But it may not
provoke or create a crime and then punish the criminal, its
creature. 50

The United States Supreme Court would wait until 1932 before
conclusively embracing the doctrine of entrapment.

1. The Subjective View

In Sorrels v. United States, 51 a majority of the United States
Supreme Court for the first time adopted the entrapment de-
fense. 52 The Court through Chief Justice Hughes recognized that
the government may give criminals the opportunity to commit

45. Id. at 415.
47. 276 U.S. 413 (1928) (attorney convicted of narcotics offenses).
48. Id. at 418.
49. Id. at 423.
50. Id. at 423. Justice Brandeis concluded, "[t]his prosecution should be
stopped, not because some right of Casey's has been denied, but in order to pro-
tect the government. To protect it from illegal conduct of its officers. To preserve
the purity of its courts." Id. The reader should note it appears that Justice Bran-
deis would be in favor of the objective view of entrapment. See infra note 60 and
accompanying text.
51. 287 U.S. 435 (1932) (where the evidence produced at trial sufficiently
warranted reversal of defendant's conviction for illegally possessing and selling
whiskey).
52. Id.
THE ENTRAPMENT DEFENSE

crimes and may prosecute those who carry out their own criminal intent.\textsuperscript{53} The Court continued that a different problem is posed when the government implants the criminal intent into a person who had not previously entertained such intent.\textsuperscript{54} Citing a lower federal appellate court case,\textsuperscript{55} the Court held as permissible, decoys used to catch criminals who already possess the intent, but specified that "decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime."\textsuperscript{56}

The Court's rationale for what has become known as the subjective view of entrapment, which is also the majority view, placed its focus on congressional intent. Chief Justice Hughes reasoned that Congress in no way intended convictions to be validly maintained where government officials instigated the crime in the minds of innocent persons.\textsuperscript{57} As a corollary to this view, the center of inquiry should be directed toward the "otherwise innocent" defendant and his predisposition to commit the crime.\textsuperscript{58} The Court explained, "[I]f the defendant seeks acquittal by reason of entrapment, he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue."\textsuperscript{59}

2. The Objective View

Justice Roberts writing for the minority concurred in the result but disagreed with the majority as to the reasons forming the basis of the doctrine.\textsuperscript{60} Espousing the objective view to entrapment,\textsuperscript{61} Justice Roberts argued that the congressional intent ra-

\begin{itemize}
\item \textsuperscript{53} Id. at 441.
\item \textsuperscript{54} Id. at 442.
\item \textsuperscript{55} Newman v. United States, 299 F. 128 (4th Cir. 1924).
\item \textsuperscript{56} Sorrells, 287 U.S. at 445.
\item \textsuperscript{57} Id. at 448. A succinct statement of the Court's rationale is found in the words of Chief Justice Warren in Sherman v. United States, 356 U.S. 369 (1958). "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." Id. at 372.
\item \textsuperscript{58} Sorrells, 287 U.S. at 451. As the Court stated in Sherman, "To 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." Sherman, 356 U.S. at 372.
\item \textsuperscript{59} Sorrells, 287 U.S. at 451.
\item \textsuperscript{60} Id. at 453. Justice Brandeis joined in the dissenting opinion.
\item \textsuperscript{61} The reader should note that the United States Supreme Court still adheres to the subjective view. The Court reaffirmed Sorrells in Sherman v. United States, 356 U.S. 369 (1959) (Frankfurter, J., concurring in the judgment); United
\end{itemize}
tionale could not be valid and in his view amounted to "judicial amendment" of Acts of Congress. The minority opinion also rejected the notion that the defendant's predisposition was at issue. The minority emphasized that the objective view rests on the public policy to protect defendants from unacceptable law enforcement practices. This approach concentrates not upon a defendant's predisposition, but upon whether the law enforcement practice at issue falls below satisfactory standards of police conduct. Under this approach, the trial judge would decide whether

States v. Russell, 411 U.S. 423 (1973) (Douglas, J., dissenting); Hampton v. United States, 425 U.S. 484 (1976) (Brennan, J., dissenting); and Mathews, 108 S.Ct. 883. While each occasion provided for the Court an opportunity to reaffirm Sorrells, each also allowed those who favored the objective view to reargue their position. Thus, forceful reasoning of the objective approach appears in the concurring opinion by Justice Frankfurter in Sherman, 356 U.S. at 378; by Justice Stewart in Russell, 411 U.S. at 439; and by Justice Brennan in Hampton, 425 U.S. at 495. The reader should note Justice Brennan's seeming acquiescence to the subjective view in Mathews, 108 S. Ct. at 888.

Although a minority approach, the objective view carries a substantial following. At least twelve states follow this view by statute or by case law. See, e.g., ALASKA STAT § 11.81.450 (1978); ARK. STAT. ANN § 5-2-209 (1975); HAW. REV. STAT. § 702-237 (1976); N.Y. PENAL LAW § 40.05 (McKinney 1968); N.D. CENT. CODE § 12.1-05-11 (1973); PA. STAT. ANN tit. 18, § 313 (1973); Tex. Penal Code Ann. § 8.06 (Vernon 1974); UTAH CODE ANN. tit. 76-2-303 (1973). See also People v. Barraza, 23 Cal. 3d 675, 153 Cal. Rptr. 459, 591 P.2d 947 (1979); State v. Mullen, 216 N.W.2d 375 (Iowa 1974); People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973); State v. Wilkins, 144 Vt. 22, 473 A.2d 295 (1983). Several observations are worth noting. The New Jersey statute provides for a combined approach. N.J. STAT. ANN. § 2C: 2-12 (West 1979). Tennessee was the latest state to officially recognize the entrapment defense. In a difficult decision, the state's high court adopted the subjective approach, but it appears that the ruling could easily be reversed. See State v. Jones, 498 S.W.2d 209, 218-220 (Tenn. 1980). Also note that the objective view is endorsed by a majority of the legal community and by the American Law Institute. See Mullock, The Logic of Entrapment, 46 U. PITR. L. REV. 739, 740-741 (1985); MODEL PENAL CODE § 2.13 (1962).

62. Sorrells, 287 U.S. at 456. See Justice Frankfurter's concurring opinion in Sherman where he explained, "[T]he only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged." Sherman, 356 U.S. at 379.

63. Sorrells, 287 U.S. at 458-459.

64. Id. at 457.

65. Sherman, 356 U.S. at 382. The critical factor is whether objectively such police conduct "would entrap only those ready and willing to commit crime." Id. at 384.
The entrapment defense is a defense that a defendant may use to argue that they were induced by law enforcement to commit a crime. If the defense is successful, the defendant is acquitted of the charges. The burden of proof falls on the defendant to prove that law enforcement induced them to commit the crime. The standard for proof is that the defendant was not ready and willing to commit the crime without the诱导 from law enforcement. If the defendant meets this burden, the prosecution is required to prove that the defendant was ready and willing to commit the crime.

As to the defendant's burden, most courts hold that "some evidence" showing governmental activity likely to cause an otherwise innocent person to commit a crime is sufficient. "Mere solicitation" is not adequate proof. If the defendant fails to meet this burden, the court will not put the issue to the jury. If the defendant meets his burden, the burden will shift to the government.

66. Sorrells, 287 U.S. at 457; see also Russell, 411 U.S. at 441.
67. LaFave and Israel, Criminal Procedure, § 5.3 at 425 (1984) [hereinafter LaFave and Israel].
69. 200 F.2d 880 (2d Cir. 1952).
70. Id. at 882-883.
71. See United States v. Bagnell, 679 F.2d 826, 834 (11th Cir. 1982); Kadis v. United States, 373 F.2d 370, 374 (1st Cir. 1967). Compare United States v. Tobias, 662 F.2d 381, 384 (5th Cir. 1981) (government conduct creating "substantial risk" that otherwise innocent would commit the crime). See also LaFave and Israel, supra note 67, at 425; Marcus, supra note 41, at 60.
74. United States v. Tate, 554 F.2d 1341, 1344 (5th Cir. 1977); United States v. Teeslink, 421 F.2d 768, 771 (9th Cir. 1970).
75. LaFave and Israel, supra note 67, at 425; Marcus, supra note 41, at 60.
must then prove the defendant's predisposition to commit the crime beyond a reasonable doubt.\textsuperscript{76}

4. Pleading Entrapment

The typical manner of raising the defense is to do so along with a not-guilty plea.\textsuperscript{77} However, the issue dealt with in Matheus concerned a different strategical approach: deny the acts and plead entrapment. Before Matheus, the United States Supreme Court had not discussed the issue of whether a criminal defendant could both deny committing the charged acts of the offense and avail himself of the defense. The lower federal courts' attempts to resolve the issue produced division among the circuits.\textsuperscript{78} Also, the state courts have ruled on the subject.\textsuperscript{79} In a majority of both the federal and state courts, this defense strategy was not allowed.\textsuperscript{80}

B. Development in the Circuit Courts

The early history of the inconsistency rule remains uncertain.\textsuperscript{81} The Fourth Circuit set forth the rule in Nutter v. United Turner, supra note 72, at 3.


\textsuperscript{78} \textit{See generally} Annotation, Availability in Federal Court of Defense of Entrapment Where Accused Denies Committing Acts Which Consti- tute Offense Charged, 54 A.L.R. FED. 644 (1981). The scope of this Note only covers the situation presented in Matheus, i.e., where the defendant seeks to deny acts and use the entrapment defense. There exist other variations for use of the defense such as where the defendant seeks to deny the intent element of the crime, not the acts, and to plead entrapment. For a thorough examination of the variations, see Note, Entrapment and Denial of the Crime: A Defense of the Inconsistency Rule, 1986 DUKE L.J. 866 \cite{note, Entrapment and Denial}.

\textsuperscript{79} \textit{See generally} Annotation, Availability in State Court of Defense of Entrapment Where Accused Denies Committing Acts Which Consti- tute Offense Charged, 5 A.L.R. 4TH 1128 (1981) \cite{hereinafter Annotation, Availability in State Court}. \textit{See also infra} note 238.

\textsuperscript{80} For federal cases, \textit{see infra} notes 82-141. For state cases, \textit{see infra} note 238.

\textsuperscript{81} Groot, supra note 39, at 260 n.31.
States.\textsuperscript{82} In \textit{Nutter}, the government indicted the defendant on charges of the illegal sale of morphine.\textsuperscript{83} The jury acquitted the defendant on all but the first of five counts in the indictment.\textsuperscript{84} He appealed alleging, \textit{inter alia}, that he had been entrapped into the sale.\textsuperscript{85} At trial, he had testified that no sale occurred.\textsuperscript{86} The court, citing no authority, ruled that in order to raise the entrapment defense, the defendant must admit to the acts.\textsuperscript{87} After \textit{Nutter}, federal courts adopting the inconsistency rule did so apparently without relying on legal authority.\textsuperscript{88} Although the precise origin of the rule remains cloudy, each of the federal circuits had chosen a position to follow. The inconsistency rule enjoyed a ten-to-two lead with the minority anchored by the Ninth and District of Columbia Circuits.

\textbf{1. Circuits Adhering to the Inconsistency Rule}

The First Circuit ruled in 1963 that a defendant could not utilize the entrapment defense unless he first admitted to the acts charged.\textsuperscript{89} In 1980, the First Circuit reaffirmed the inconsistency rule in \textit{United States v. Annese}.\textsuperscript{90} In \textit{Annese}, the defendants appealed a jury conviction of methamphetamine production.\textsuperscript{91} Noting that some inconsistency remains allowable as where a defendant does not testify yet pleads entrapment, the court ruled that too much inconsistency results when the defendant denies the charged acts and seeks to use the entrapment defense.\textsuperscript{92}

The Second Circuit's position on the inconsistency rule is confusing. In \textit{United States v. Pagaro},\textsuperscript{93} the defendant appealed his conviction of the illegal sale of heroin.\textsuperscript{94} On appeal, this court af-

\begin{itemize}
\item \textsuperscript{82} 289 F. 484 (4th Cir. 1923). \textit{See Groot, supra} note 39, at 260.
\item \textsuperscript{83} 289 F. at 484.
\item \textsuperscript{84} \textit{Id}.
\item \textsuperscript{85} \textit{Id.} at 485.
\item \textsuperscript{86} \textit{Id}.
\item \textsuperscript{87} \textit{Id}.
\item \textsuperscript{88} \textit{See United States v. Georgians, 333 F.2d 440 (7th Cir. 1964), cert. denied, 379 U.S. 901 (1964); Bakotich v. United States, 4 F.2d 386 (9th Cir. 1925). See also Groot, supra note 39, at 260 n.31.}
\item \textsuperscript{89} Sylvia v. United States, 312 F.2d 145, 147 (1st Cir. 1963) (defendant convicted of selling a small quantity of heroin).
\item \textsuperscript{90} 631 F.2d 1041 (1st Cir. 1980).
\item \textsuperscript{91} \textit{Id.} at 1042.
\item \textsuperscript{92} \textit{Id.} at 1047.
\item \textsuperscript{93} 207 F.2d 884 (2d Cir. 1953).
\item \textsuperscript{94} \textit{Id.} at 884-85.
\end{itemize}
firmed the trial court's refusal to instruct the jury on the entrapment defense because the defendant denied having made any sale. Thus, the Second Circuit appeared to have adopted the inconsistency rule. However, in a later decision, the Second Circuit ruled that it had not yet resolved the problem of inconsistent pleadings and that the issue remained open. Nevertheless, in United States v. Mayo, the court timely adopted the inconsistency rule.

The Third Circuit has been consistent through the years. In United States v. Hill, the defendant appealed a conviction of narcotics distribution. Relying on United States v. Watson, the court ruled that for the defendant to use the entrapment defense, he must first admit all the elements of the crime, including the mens rea.

One circuit has recently reevaluated its position as to this problem and has consequently adopted the inconsistency rule. Before 1986, the Fourth Circuit followed the rule in Crisp v. United States, which allowed a defendant to deny the acts and plead entrapment. The Fourth Circuit changed its stance in United States v. Dorta. Based upon an interest in conformity to the majority view and in protecting the truth-finding function of criminal trials, the court held, "[T]he better rule is that defendants are not entitled to a jury instruction on entrapment when they testify that they have not committed the crime charged."

The Fifth Circuit followed the inconsistency rule but fash-
ioned two exceptions to it in United States v. Henry.\(^{108}\) The first exception is that a defendant may plead entrapment and also deny the criminal intent. In Henry, a pharmacist was convicted of illegally dispensing controlled substances.\(^{109}\) The defendant testified that he had no criminal intent.\(^{110}\) The defendant also requested an instruction on the entrapment defense which the lower court denied.\(^{111}\) The circuit court reversed.\(^{112}\) While adhering to the inconsistency rule,\(^{113}\) the court held that a defendant may deny the criminal intent and plead an entrapment defense.\(^{114}\) Thus, the court reaffirmed the position taken by the Fifth Circuit in an earlier case, Henderson v. United States.\(^{115}\)

The Henry court embraced the second exception by ruling that United States v. Greenfield still applied in the Fifth Circuit.\(^{117}\) The Greenfield Court followed the inconsistency rule, but added that such a rule "is not unbending."\(^{118}\) With reliance placed upon Sears v. United States,\(^{119}\) the Greenfield Court held that where the government's evidence injects the issue of entrapment into the case a defendant may deny the charged acts and plead entrapment.\(^{120}\) The Henry Court adopted this holding as the second exception to the inconsistency rule.\(^{121}\)

The Sixth Circuit also adhered to the inconsistency rule in United States v. Bryant,\(^{122}\) where the defendant was convicted of the illegal purchase of fox pelts.\(^{123}\) Because the defendant denied commission of all elements of the crime, the lower court refused to

108. 749 F.2d 203 (5th Cir. 1984).
109. Id. at 206.
110. Id.
111. Id.
112. Id. at 214.
113. Id. at 205.
114. Id.
115. 237 F.2d 169 (5th Cir. 1956).
116. 554 F.2d 179 (5th Cir. 1978), cert. denied, 439 U.S. 860 (1979) (defendant convicted of making illegal prescriptions of controlled substances. The lower court refused to allow defendant the entrapment defense unless he admitted committing the criminal acts.).
117. Henry, 749 F.2d at 213.
118. Greenfield, 554 F.2d at 182.
119. 343 F.2d 139 (5th Cir. 1965).
120. Greenfield, 554 F.2d at 182.
121. Henry, 749 F.2d at 213.
123. Id. at 1093-94.
instruct on entrapment.\textsuperscript{124} The Sixth Circuit court agreed, stating that in order to use the defense, the defendant must admit "each and every element of the crime."\textsuperscript{125} Recent Sixth Circuit cases reaffirmed this position.\textsuperscript{126}

Both the Seventh and Eighth Circuits have adopted the inconsistency rule. In \textit{United States v. Liparota},\textsuperscript{127} a case concerning illegally obtaining and possessing food stamps, the Seventh Circuit Court of Appeals reaffirmed its position.\textsuperscript{128} Although earlier Eighth Circuit case law expressed a contrary view,\textsuperscript{129} the later cases supported the inconsistency rule.\textsuperscript{130}

The Tenth and Eleventh Circuits adopted the inconsistency rule. In \textit{Munroe v. United States},\textsuperscript{131} where the defendants were convicted of illegally selling amphetamines, the Tenth Circuit ruled that the lower court correctly denied defendants' use of the entrapment defense because they denied committing the charged crime.\textsuperscript{132} The Eleventh Circuit took an approach similar to that of the Fifth Circuit. In \textit{United States v. Smith},\textsuperscript{133} the jury convicted the defendant of distributing and conspiracy to distribute cocaine.\textsuperscript{134} The court followed the inconsistency rule.\textsuperscript{135} The court ruled that while a defendant may plead inconsistent defenses in other contexts, such defenses are not permissible in this setting.\textsuperscript{136} The court viewed its rule as facilitating the truth-finding function of a criminal trial\textsuperscript{137} and promoting economy of the prosecution's time spent in trial preparation.\textsuperscript{138} However, the Eleventh Circuit

\begin{flushleft}
\textsuperscript{124} Id. at 1094.
\textsuperscript{125} Id.
\textsuperscript{126} United States v. Whitley, 734 F.2d 1129 (6th Cir. 1984) "To rely on the defense of entrapment, the defendant must admit all elements of the offense." \textit{Id.} at 1139. \textit{Cf.} United States v. Prickett, 790 F.2d 35 (6th Cir. 1986) (defendant was not allowed to deny intent and plead entrapment).
\textsuperscript{127} 735 F.2d 1044 (7th Cir. 1984), \textit{rev'd on other grounds}, 471 U.S. 419 (1985).
\textsuperscript{128} Id. at 1048.
\textsuperscript{129} Robinson v. United States, 32 F.2d 505 (8th Cir. 1928).
\textsuperscript{130} Wore v. United States, 259 F.2d 442 (8th Cir. 1958).
\textsuperscript{131} 424 F.2d 243 (10th Cir. 1970).
\textsuperscript{132} Id. at 244.
\textsuperscript{133} 757 F.2d 1161 (11th Cir. 1985), \textit{reh'g. denied}, 763 F.2d 419 (11th Cir. 1985) (\textit{en banc}).
\textsuperscript{134} Id. at 1164.
\textsuperscript{135} Id. at 1167.
\textsuperscript{136} Id. at 1167-68.
\textsuperscript{137} Id. at 1168.
\textsuperscript{138} Id.
\end{flushleft}
did identify two exceptions to its rule. The first exception occurs when the government's own case raises the issue of entrapment.\textsuperscript{139} Second, as long as the defendant's defenses do not "necessarily disprove" one another, a defendant may argue apparently inconsistent defenses.\textsuperscript{140} In the court's words, "[A] defendant may assert entrapment along with another defense so long as a jury could consistently find that he or she is entitled to either defense without changing its view of the facts."\textsuperscript{141}

2. \textit{Circuits Allowing Denials and the Entrapment Defense}

One would perhaps think that with all the authority maintaining the inconsistency rule, there would be no court prepared to follow a different path. However, such was not the case. The United States Courts of Appeals for the Ninth Circuit and the District of Columbia Circuit allowed a defendant to deny the acts and plead entrapment. The Ninth Circuit had previously traveled on a different track. In \textit{Eastman v. United States},\textsuperscript{142} the defendants appealed convictions of unlawfully importing opium into the United States.\textsuperscript{143} The defendants alleged trial error in not instructing the jury on entrapment.\textsuperscript{144} The court affirmed the trial court's decision reasoning that it is logically inconsistent to deny the crime and plead entrapment.\textsuperscript{145} The court also seemed concerned that such a defense might confuse the jury.\textsuperscript{146} The \textit{Eastman} holding remained effective until being overruled by \textit{United States v. Demma}.\textsuperscript{147}

In the \textit{Demma} case, the defendants denied the requisite intent in their subsequent convictions for conspiracy to import and distribute heroin.\textsuperscript{148} They did not deny doing the actual physical acts, only the intent element.\textsuperscript{149} The defendants requested an instruc-

\begin{itemize}
\item \textsuperscript{139} \textit{Id.} See \textit{United States v. Haimowitz}, 725 F.2d 1561 (11th Cir. 1984).
\item \textsuperscript{140} \textit{Smith}, 757 F.2d at 1168. See \textit{Henderson v. United States}, 237 F.2d 169 (5th Cir. 1956).
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} 212 F.2d 320 (9th Cir. 1954).
\item \textsuperscript{143} \textit{Id.} at 321.
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Id.} at 322.
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} 523 F.2d 981 (9th Cir. 1975).
\item \textsuperscript{149} \textit{Id.} at 982.
\item \textsuperscript{150} \textit{Id.}
\end{itemize}
tion on entrapment which the district court denied because of the inconsistency rule. In reversing the district court's decision, the court set forth five reasons underlying its conclusion. First, the court believed that *Eastman* impermissibly relieved the government of its burden under *Sorrells* to "prove beyond a reasonable doubt that the acts charged were non-entrapment acts." Second, the court stressed that a defendant should be able to plead "garden-variety alternative contentions," as where the defendant remains silent and asserts the entrapment defense. Nevertheless, the court stated that because the inconsistency theory only applies to where the defendant denies the charged acts, not intent, the *Eastman* rule does not apply to this case. Third, the court observed that defendants in criminal prosecutions may assert inconsistent defenses because of the strong public policy in favor of affording defendants "every reasonable protection" in criminal prosecutions. Fourth, the court then held the *Eastman* rule an untenable exception to the general rule allowing inconsistent defenses. The court turned to address a practical aspect of the new rule when it pointed out that pleading inconsistent defenses may not be wise. "Inconsistent testimony by the defendant seriously impairs and potentially destroys his credibility." Finally, the court believed that the *Eastman* rule raises constitutional problems with self-incrimination and should therefore be avoided.

The District of Columbia Circuit also allowed the defendant to deny acts and plead entrapment. In *Hansford v. United States*, where the jury convicted the defendant of the illegal sale of heroin capsules, the court determined that the denial of the charged crime and a plea of entrapment were permissible and alternative, but were not inconsistent. The court reasoned that a defendant

151. *Id.*
152. *Id.* at 983.
153. *Id.* at 984.
154. *Id.*
155. *Id.* at 985.
156. *Id.* "It is an exception without any justification. There is no conceivable reason for permitting a defendant to assert inconsistent defenses in other context but denying him that right in the context of entrapment." *Id.*
157. *Id.*
158. *Id.* at 986. *See also* Groot, *supra* note 39, at 269-275.
159. 303 F.2d 219 (D.C. Cir. 1962).
160. *Id.* at 221.
could consistently assert that a certain act did not occur and simultaneously assert that should the jury believe the act occurred, the government induced the act through entrapment.\textsuperscript{161}

Although a majority of the federal courts had adopted the inconsistency rule, two circuits allowed the defendant the benefit of pleading entrapment and denying the criminal acts. The reason behind the United States Supreme Court's delay in waiting until Mathews to resolve the controversy remains unclear. Previous cases had presented the Supreme Court with ample opportunity to review the inconsistency theory.\textsuperscript{162} Congress empowered the Supreme Court through a federal statute the right to review by \textit{certiorari} decisions of the courts of appeals.\textsuperscript{163} "\textit{Certiorari} is granted . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal,"\textsuperscript{164} and where there is a "need for a uniform rule."\textsuperscript{165} Mathews presented the Court with an issue meeting these criteria, and the Court granted \textit{certiorari} to review the case.\textsuperscript{166}

\textbf{ANALYSIS}

\textbf{A. The Majority Approach}

In the Mathews decision, a strong majority of the Court spoke through the well-reasoned opinion drafted by Chief Justice Rehnquist.\textsuperscript{167} After a brief overview of the history and general rules of entrapment. Chief Justice Rehnquist began a structured analysis of the issue, setting forth the government's arguments only to then explain their inadequacies.\textsuperscript{168}

The government advanced four propositions for maintenance of the inconsistency theory. First, the government argued that a definitional inconsistency exists when the defendant desires to

\begin{itemize}
  \item \noindent 161. \textit{Id.}
  \item \noindent 162. \textit{See supra} notes 104, 122, and 127.
  \item \noindent 166. Mathews, 803 F.2d 325 (7th Cir. 1986), \textit{cert. granted}, 107 S. Ct. 1601 (1987).
  \item \noindent 167. The casting of votes left the Court split on the issue by a six-to-two decision. In the majority were Rehnquist, C.J., Brennan, Marshall, Stevens, and O'Connor, J.J. Brennan, J. filed a concurring opinion. Scalia, J. concurred in the judgment. White, J. wrote a dissenting opinion which was joined by Blackman, J. Kennedy, J. did not participate.
  \item \noindent 168. Mathews, 108 S. Ct. at 886-887.
\end{itemize}
deny the crime and plead entrapment because by the definition of entrapment the crime was necessarily committed. This argument has considerable merit. The argument, from a purely logical approach, is valid. The argument goes "No I did not, and yes I did but. . . ." The Court, however, dealt with the argument by articulating a two-part response.

First, the Court relying on Stevenson v. United States and Wharton's Criminal Procedure stated that a defendant is generally entitled to assert any recognized defense when sufficient evidence exists to support that defense. In Stevenson, the Court ruled that the evidence warranted instruction as to both self-defense and manslaughter for a defendant convicted of a murder resulting from a gunfight. By offering the general rule as a matter of fact, the Court left itself open to criticism by the minority. The Court could have gone further to support the contention by explaining the policy behind such a rule. The policy exists in our belief that in cases where significant liberty interests are in jeopardy, criminal defendants should be given "every reasonable protection" in their defense. Additionally, the Court should have considered the possibility that such a rationale provides the justification for the recognized exceptions to the inconsistency theory held previously by various federal appellate courts in cases where the government's own evidence raises the issue or where the defendant's defenses do not "necessarily disprove" each other. By following this course of action, the Court could have lessened the impact of the dissenter's subsequent retaliation against the initial premise.

169. Id. at 886-87.
170. Id. For the foundation of the definitional analysis, the government relied on Russell, 411 U.S. at 435.
171. Symbolically it would be represented by the statement form P \(\sim P\) (where "P" represents "proposition," \(\sim\) represents "and," and "P" represents "not proposition."). See also Groot, supra note 39, at 259.
172. 162 U.S. 313 (1896).
173. 4 C. Torcia, WHARTON'S CRIMINAL PROCEDURE § 538 (12th ed. 1976).
175. Stevenson, 162 U.S. at 323.
176. The reader should note the cases cited in footnote 1 of the dissenting opinion stand contrary to the majority's general rule. Mathews, 108 S. Ct. at 890, n.1.
177. Demma, 523 F.2d at 985.
178. See supra notes 108-120 and 139-141 and accompanying text.
Second, the Court responded with a "so-what" argument. The Court stated that the federal courts already allow inconsistent defenses in the criminal law arena. Examples offered in support of this proposition included only cases from the District of Columbia Circuit. Although the proposition may be valid, such scant authority hardly supports the view that federal appellate courts permit such defense. The Court nonetheless accurately assessed the status of the law. The Court should have substantiated its view of the law with added endorsements of scholars in the field who support this view. From a different angle, the Court legitimately could have argued that the defense is not so much inconsistent as it is alternative.

The second proposition offered by the government apparently argued that because the Federal Rules of Criminal Procedure do not contain a rule authorizing inconsistent pleadings, while the Federal Rules of Civil Procedure do, Congress must not have intended to allow such defenses in federal criminal trials. The Court sufficiently dealt with the argument by distinguishing the systems of pleadings in civil and criminal cases. The Court concluded that the reason Congress did not include a counterpart to the civil rules in the criminal rules was because criminal trials require a less elaborate system of pleadings. While this argument adequately disposes of the government's assertion, the Court might have gone further and formulated the argument that: first, the Federal Rules do not prohibit inconsistent pleadings; second, pol-

181. In the words of the dissenting opinion "[g]iven the rarity of reported federal cases on this question, drawing any conclusion about the prevailing practice in the federal courts is difficult." Mathews, 108 S. Ct. at 890 n.1.
183. LAFAVE AND ISRAEL, supra note 67, at 424.
184. Hansford, 303 F.2d at 221.
185. FED. R. CIV. P. 8(e)(2).
187. Id.
icy allows a defendant all possible defenses; and third, if a person may plead inconsistent defenses in the civil setting where the stakes are arguably lower than in the criminal context, then surely a defendant should be allowed to plead inconsistently in a criminal case.

For the third argument, the government contended that allowing the inconsistent pleading will foster perjury, confuse juries, and undermine the truth-finding function of the criminal trial.188 Such reasoning has been persuasively given in support of the inconsistency theory on the appellate level.189 Indeed, the government's concerns were admirable. All should agree that the truth-seeking function of the courts is an important policy deserving protection.

The Court reasoned that such concerns are misplaced in this setting.190 First, the Court pointed out that the same argument could apply to the civil context, but inconsistent pleadings are allowed there.191 Second, the Court refused to believe that perjury would necessarily be sanctioned and encouraged by the new rule.192 Speaking from a practical point of view, the Court realized that the risk of perjury will be slight because the strategy of denying the crime and pleading entrapment subjects the defendant's credibility to greater scrutiny.193 In essence, the Court meant that few defendants will choose this strategy; and those who do, will perhaps do more harm to themselves than good.194

The analysis given by the Court is persuasive but for one exception. It is perhaps specious to say that inconsistent defenses should be allowed in the criminal arena because the listed concerns exist in the civil arena and yet such defenses are still allowed. Such reasoning suggests that defendants in both contexts will be equally motivated to win their cases. Such a proposition proves questionable given the nature of criminal trials and the interests which are at stake. It may be fallacious to say that if a defendant in a civil case will not perjure himself, he also will not perjure himself in a

188. Id.
189. See Crisp, 783 F.2d at 1181-82; Smith, 757 F.2d at 1161; see also United States v. Rey, 706 F.2d 145, 147 (1983); see generally Note, Entrapment and Denial, supra note 78.
191. Id.
192. Id.
193. Id. at 888.
194. Id.
criminal case.

Additionally, the Court might have taken the analysis a bit further. In acknowledging that the purpose of the trial is to discover the truth, the Court could have suggested that by allowing inconsistent defenses, a jury will be better able to fulfill its function.\(^{195}\) Also, it could have been argued that through continued existence of the inconsistency rule, a defendant will be compelled to commit perjury.\(^{196}\) He may believe that his better means of defense rests with pleading entrapment and although he did not commit all of the charged acts, he would be forced into admitting to so doing in order to avail himself of the defense.

The Court quickly dismissed the government’s final argument. The government maintained that Congress did not intend to allow inconsistent defenses evidenced by the fact that Congress has not specifically allowed them.\(^{197}\) The Court responded by stating that the absence of any Congressional action does not compel the government’s conclusion but does leave the issue for the Court to decide.\(^{198}\) The majority decided the issue by holding that “even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment.”\(^{199}\)

In a concurring opinion, Justice Brennan expressed agreement with the majority as to resolution of the issue in the case. Justice Brennan also took the opportunity to acquiesce to the subjective view of entrapment held by a majority of the Court since Sorrells.\(^{200}\) Justice Brennan stated that while he personally preferred the objective view, “I bow to stare decisis, and today join the judgment and reasoning of the Court.”\(^{201}\)

Justice Scalia’s concurring opinion illustrated that in practical application of the new rule, the interests of justice will be protected through the “self-penalizing” nature of pleading inconsistent defenses.\(^{202}\) Justice Scalia further argued that any inconsistency present is merely a formal one, arising only when entrapment is defined as to require commission of the charged

\(^{195}\) Groot, supra note 39, at 268-269.

\(^{196}\) Id.

\(^{197}\) Id.

\(^{198}\) Id. at 888.

\(^{199}\) Id. at 886.

\(^{200}\) Id. at 888-889.

\(^{201}\) Id. at 889.

\(^{202}\) Id.
crime. Justice Scalia’s argument asserted that because the extra element is not a part of the definition of entrapment, one should be allowed to deny committing the crime. He went on to admit that the defense cannot be used unless a crime is shown, “but in that sense all affirmative defenses assume commission of the crime.” Nevertheless, even if the third element is a part of the definition, the “self-penalizing” aspect of the inconsistent pleadings insure the furtherance of justice and outweighs any “special prophylactic rule.”

B. The Dissenters’ Approach

The dissenting justices chose an analytical approach which began by determining the “only” possible rationale for the majority’s decision, followed by a three-part argument concerning why that rationale could not apply to the present situation. Justice White, joined by Justice Blackmun, began the analysis by agreeing with the majority’s assessment as to the lack of constitutional grounds for the decision and the absence of any Act of Congress or Federal Rule of Criminal Procedure on the subject. The dissenters then made reference to the fact that the civil rules do contain an authoritative provision on point. While not expressly saying so, the justices appear to be forwarding the argument made by the government that if there is an explicit rule in the civil context and not in the criminal, then Congress did not intend for there to be one. The dissenters criticized the majority for the lack of authority in support of the proposition that the law generally permits inconsistent defenses. Likewise, they continued the assault by expressing the fact that the majority approach did not conform to the majority rule on the federal appellate level. From the dissenter’s view, the only rationale left for the Court to base its decision rests with a general proposition which allows a defendant to put forth any recognized defense when sufficient evidence exists to support that de-

203. Id. Justice Scalia stated, “I see no reason why the third element is essential, unless it is for the very purpose of rendering the defense unavailable without admission of the crime.” Id. (The third element is actual commission of the crime.).
204. Id.
205. Id.
206. Id. at 890.
207. Id.
208. Id.
209. Id.
The entrapment defense. The dissenters argued, and later attempted to demonstrate, that the "general proposition" does not apply in this setting.

The dissenters correctly noted that the Constitution does not hold the answer to the problem, nor has Congress spoken. Yet, the congressional intent argument implied in the dissent fails for the reasons argued by the majority. The fact that Congress did not include the rule in the Federal Rules of Criminal Procedure cannot provide a concrete basis for a denial of its existence. The majority's support of the view that courts generally permit inconsistent defenses in criminal trials deserved the criticism it received in light of the lack of authority presented for such a vital ground in the majority's argument. The deficiency in case citations alone, however, may not be persuasively used in attack of the general rule. Likewise, the fact that a majority of lower courts applied one rule, while obviously of some concern, provides little substantial incentive for also choosing that rule in this case. When a majority of the federal appellate courts apply a rule which merits change, the Court should do so even if it means accepting the minority approach.

The first argument the dissenters offered to back their belief that the general proposition does not apply to entrapment finds its basis in some unique nature of the entrapment defense. The dissenters acknowledged that inconsistent defenses remain viable in civil proceedings for various policy reasons. They went as far as to agree that inconsistent defenses should be allowed in some criminal cases. Yet, when the focus turned to entrapment, "a relatively limited defense," the argument emerged that by definition when a defendant denies the acts and concurrently asserts entrapment, the defendant must by lying. Policy as well as authority denies the defendant any right to lie at trial.

210. Id.
211. Id.
212. See Mathews, 108 S. Ct. at 887.
213. See supra notes 180-183 and accompanying text.
216. Id. See Smith, 757 F.2d at 1167-1168.
218. Id. at 890-891.
The dissenters drafted a compelling argument based on the definition of entrapment, but still missed the point. First, the dissenter's definitional argument may be incorrect. Second, if any inconsistency exists, it is purely technical. Sound policy should disregard purely formal logic in determining the validity of a legal rule; rather, the realities of the situation under consideration must be viewed. Facts may produce evidence sufficient to support both defenses as they did in the present case. The majority understood this and limited the holding to such situations. Finally, the policy with which the dissenters concern themselves is the prevention of the defendant's alleged lies. If true, then the same concerns should be present in the civil context. Yet, the dissenters would permit a defendant in a tort action to deny a duty of care was owed, but if it was owed, it was met. Both assertions cannot be true. According to the dissenters, the defendant must therefore be lying. However, this is not an accurate conclusion. In both contexts, the defendant is not lying but is simply asserting alternative defenses to an action against him.

The dissenting justices argued as their second rationale the rise of perjury resulting from adherence to the new rule. They observed that the Court has always worked to combat perjury. They then attacked the majority's concession that since anything is possible, perjury may increase with the conclusory statement, "This is reason enough to reject the Court's result." They continued by stating that even if inconsistent defenses do not increase the risk of perjury in civil cases, the risk will increase in criminal cases because the stakes are greater and must therefore be minimized by disallowance of such defenses. They conclude with an assertion that by allowing the inconsistent defenses the Court sanctions perjury because the defendant is arguing two defenses, one of which is false.

First, the dissenters should not have made the argument that a mere possibility of perjury provides adequate support for rejecting the new rule. Absolutes are difficult to find in law. Second,

220. See supra notes 203-206 and accompanying text.
221. Matheus, 108 S. Ct. at 889.
222. Id. at 886.
223. Id. at 891.
224. Id.
225. Id.
226. Id. at 891.
227. Id.
the risk of perjury does exist in civil cases, but inconsistent defenses are allowed. An equally tenable counterargument may be made regarding the alleged increased stakes of the criminal trial. If the stakes are greater, a defendant more often than not will choose not to plead inconsistently because of the potential decrease in his credibility.\textsuperscript{228} This self-penalizing aspect of the defense diminishes any possible risk of perjury.\textsuperscript{229} Lastly, the argument made concerning the sanctioning of perjury, as we have seen, rests upon a faulty premise and is therefore not persuasive.

The final argument asserted by the dissenting justices stressed that even if the new rule does not increase perjury, juries will be confused by the defendant's pleading. This confusion requires a different rule because more defendants may gain acquittals due to the confusion.\textsuperscript{230} However, juries will be capable of understanding the realities of the facts and the defense. "I did not do it, but if you think I did, the government entrapped me into doing it," is not an incomprehensible idea. Moreover, the prosecutor who expects the defendant will plead inconsistently can take steps to select a jury less capable of being confused. Finally, the mere possibility that the confusion-producing "shell games"\textsuperscript{231} may foster unwarranted acquittals lacks persuasive impact as it is just that, a hypothetical chance, offered without supporting evidence.

Surprisingly, the dissenting justices failed to mention the few recognized exceptions to the inconsistency theory.\textsuperscript{232} Those exceptions could have been used to further an argument that the problem could be resolved with an exception rather than a new rule, especially given the overwhelming support of the inconsistency theory on the appellate level. Further, the majority did not include as a rationale for its decision the constitutional argument enunciated by at least one court and several commentators that when a defendant is forced to admit to the crime to plead entrapment, he is deprived of his fifth amendment guarantee against self-incrimination.\textsuperscript{233} Perhaps the majority considered the argument, disagreed with it, and hence did not include it or they possibly did not consider it at all. The ultimate cause of the omission nonetheless re-

\begin{itemize}
\item \textsuperscript{228} Id. at 888.
\item \textsuperscript{229} See supra note 205 and accompanying text.
\item \textsuperscript{230} Matews, 108 S. Ct. at 891-892.
\item \textsuperscript{231} Id. at 892.
\item \textsuperscript{232} See supra notes 108-120 and 139-141 and accompanying text.
\item \textsuperscript{233} See Demma, 523 F.2d at 986; Groot, supra note 39, at 269-275; Nagle, supra note 182, at 98; Note, Entrapment and Denial, supra note 78, at 883.
\end{itemize}
mains irrelevant as the majority adequately supported itself and correctly structured the new rule.

However, the Mathews rule only applies on the federal level. States are free to fashion their own approach, and indeed most have.\textsuperscript{234} Even though most states follow the inconsistency rule, including North Carolina, the North Carolina courts should change positions and adopt the Mathews rule.

**IMPACT ON NORTH CAROLINA**

Although violations of a defendant's federal or state due process rights may occur with outrageous police conduct,\textsuperscript{235} the en-

\textsuperscript{234} See generally Annotation, Availability in a State Court, supra note 79.
\textsuperscript{235} See, e.g., Russell, 411 U.S. at 431-32 (where a defendant was convicted of the unlawful manufacturing of methamphetamines, the Court ruled that it was not yet faced with the question of whether law enforcement agents might conduct themselves in such an outrageous manner as to violate the Due Process Clause of the Fifth Amendment). Cf. Hampton, 425 U.S. at 489-91 (where the Court again refused to find a due process violation, but also did not abandon the possibility that one might occur under the proper facts.)

The lower federal appellate courts have also grappled with the issue. In United States v. Smith, 538 F.2d 1359, 1361-1362 (9th Cir. 1976), the defendant was convicted of conspiracy to illegally manufacture and distribute methamphetamines. The court determined that no due process right violation occurred where the police informant was the defendant's longtime friend, where the friend helped to set up and operate the drug laboratory at defendant's direction, and where defendant provided the drug formula. But see United States v. Twigg, 588 F.2d 373, 380-381 (3d Cir. 1978), (holding a due process violation occurred where the government contacted the defendant who was not engaged in any illegal conduct, implanted the criminal intent in his mind, provided the essential supplies, and the government's agent controlled the laboratory as the laboratory expert.) Compare with United States v. Beverly, 723 F.2d 11, 12-13 (3d Cir. 1983) (holding that government involvement did not violate defendants due process rights where government agents were highly involved in inducing defendants to commit arson. The court questioned the continuing validity of Twiggs, yet maintained the present governmental conduct was subject to disapproval.) See also United States v. Simpson, 813 F.2d 1462, 1465 (9th Cir. 1987), cert. denied, 108 S. Ct. 232 (1987). The court stated that "the due process channel which Russell kept open is a most narrow one." Here, the court held, inter alia, that where the FBI continued to use an informant for five months after learning that the suspect-defendant and the informant were having sex on a regular basis, such conduct did not violate defendant's due process rights. \textit{Id.} "Although we do not necessarily condone this investigatory tactic, we hold that the governmental conduct was not so shocking as to violate the due process clause." \textit{Id.}

State courts are also willing to find due process violations. See State v. Pooler, 255 N.W.2d 328, 330-331 (Iowa 1977), (the court stating in dictum, that while a defendant may not have been entrapped, government conduct may violate
The entrapment defense is not of constitutional origin or scope. As a result, states are free to structure their own rules on the subject. States also may decide whether to follow the inconsistency theory or whether to adopt Mathews. A majority of states have chosen to follow the inconsistency rule first announced on the state level in People v. Murn and recently denounced in Mathews. While the trend in the state courts is toward Mathews, North Carolina clings to the inconsistency rule as explained in State v. Neville.

The North Carolina Supreme Court follows the majority view of entrapment which places the primary focus upon the defendant's predisposition to commit the crime. In State v. Luster, the court stated the defense of entrapment by definition requires two
elements:

(1) [A]cts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.²⁴²

In the absence of evidence sufficient to show both elements, the defendant will not be entitled to an entrapment defense instruction.²⁴³ North Carolina also follows the majority rule as to the typical manner of raising the entrapment defense which is through a not-guilty plea.²⁴⁴ In addition, according to Neville, a defendant is not entitled to raise the defense where he also denies committing the acts charged.²⁴⁵

In Neville, a jury had convicted the defendant of possessing with intent to sell and selling lysergic acid diethylamide (LSD).²⁴⁶ At trial, the defendant denied ever possessing the drug, contending to the contrary that all he did was to participate in a scheme fabricated with intent to make the buyer (an undercover police office) believe the drugs came from the defendant when in reality an informant bought them for resale.²⁴⁷ According to the State's evidence, the defendant bought and resold the LSD.²⁴⁸ At the close of the evidence, the trial judge refused to instruct the jury on entrapment.²⁴⁹ The defendant appealed, alleging the trial judge erred in his refusal.²⁵⁰ The North Carolina Court of Appeals affirmed the trial court.²⁵¹ The defendant then appealed to the North Carolina Supreme Court.

On appeal, the defendant conceded that the inconsistency rule applied in North Carolina,²⁵² but he argued that his defense was

²⁴³. Id. See State v. Hageman, 307 N.C. 1, 27, 296 S.E.2d 433, 448 (1982) (holding burden of proof rests with defendant to prove both elements.)
²⁴⁴. Luster, 306 N.C. at 581, 295 S.E.2d at 429 n.4. See supra note 77.
²⁴⁵. Neville, 302 N.C. at 626, 276 S.E.2d at 375
²⁴⁶. Id. at 624-25, 276 S.E.2d at 374
²⁴⁷. Id.
²⁴⁸. Id.
²⁴⁹. Id.
²⁵⁰. Id.
²⁵². The inconsistency rule has its roots in North Carolina case law in State v. Boles, 246 N.C. 83, 97 S.E.2d 476 (1957). Without supporting authority, the
consistent, relying on Henderson v. United States\textsuperscript{253} for authority.\textsuperscript{254} The court correctly distinguished the fact patterns and held the defendant's reliance misplaced. The defendant here denied the charged acts, whereas in Henderson, the defendant admitted his acts in operating an illegal distillery.\textsuperscript{255} Additionally, the court offered as the primary rationale for denying the defendant his requested instruction, the definitional reasoning offered by the government and dissenters in Mathews: "The defense of entrapment presupposes the existence of the acts constituting the offense."\textsuperscript{256} Before concluding the opinion, the court approved exceptions which will allow a defendant to deny the charged acts or mental state and plead entrapment. Where the government's case raises the issue of entrapment, the defendant may deny the acts and plead entrapment.\textsuperscript{257} Also, a defendant may deny the intent element in a charged offense but not the underlying acts.\textsuperscript{258} In conclusion, the court apparently stated that because its research could reveal no case which had allowed the requested defensive strategy, it would also not allow the defense.\textsuperscript{259}

The North Carolina Supreme Court's analysis parallels the analysis used by the dissenters in Mathews and federal appellate courts prior to Mathews with regard to the definitional argument. The argument being when a defendant pleads entrapment he must by definition have admitted to the charged acts underlying the offense.\textsuperscript{260} However, the definitional argument cannot provide an adequate basis for the inconsistency because: first, as a general rule courts allow inconsistent defenses; and second, any apparent inconsistency is technical in nature.\textsuperscript{261} In fact, North Carolina generally allows inconsistent defenses in criminal cases,\textsuperscript{262} while the court announced the rule. Id. at 85, 97 S.E.2d at 478. In a later case, the court relied on Boles for the same proposition. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

\textsuperscript{253} 237 F.2d 169 (5th Cir. 1956).

\textsuperscript{254} Neville, 302 N.C. at 625-626, 276 S.E.2d at 374-375.

\textsuperscript{255} Id.

\textsuperscript{256} Id. at 626, 276 S.E.2d at 375.

\textsuperscript{257} Id.

\textsuperscript{258} Id.

\textsuperscript{259} Id.

\textsuperscript{260} See supra notes 89-141 and 218 and accompanying text.

\textsuperscript{261} See supra notes 171-184 and 220-223 and accompanying text.

\textsuperscript{262} State v. Hayes, 88 N.C. App. 749, 364 S.E.2d 712 (1988) (where the court allowed the defendant to plead self-defense and accident to a charge of second-degree murder); see also State v. Walker, 34 N.C. App. 485, 238 S.E.2d 666
North Carolina Rules of Civil Procedure provide for them in the civil context. Additionally, the court in Neville was willing to permit a defendant to deny acts and plead entrapment when the government's case forces the issue. How is that any different than when the defendant's case raises the issue? If the evidence raises the issue, regardless of whose evidence it is, the North Carolina courts should allow the defendant to deny the acts and plead entrapment as did the Mathews case. Finally, the North Carolina Supreme Court's concluding remarks in Neville suggest that the court ruled the way it did because it could find no contrary supporting authority. If that is the case, the North Carolina Supreme Court may confidently cite Mathews as authority for a new North Carolina rule on the subject.

VI. CONCLUSION

This Note attempted to relay the history of entrapment and the inconsistency rule, explain the wisdom and flaws of the Mathews opinion, and suggest that North Carolina should adopt the Mathews rule. Before Mathews, the federal courts were divided on the issue of when a defendant could plead entrapment. By a ten-to-two count, the majority of courts would not allow the defendant an instruction on entrapment when he had denied the acts underlying the charged offense. The alleged inconsistency coupled with the policy reasons of preventing perjury and protecting the truth-finding function of the courts compelled the majority's position. Such reasoning also formed the basis of the state court decisions in support of the inconsistency rule which still the majority view on the state level. Mathews, however, has unified the federal courts with a rule, contrary to the inconsistency rule, which operates to allow the formally inconsistent pleadings where the evidence warrants. Though not compelled to follow the federal rule, North Carolina should adopt the Mathews holding. Indeed, the sound analysis of Justice Rehnquist's opinion, combined with the North Carolina Supreme Court's willingness in Neville to adopt a differ-


263. N.C. R. Civ. P. 8(e)(2).
264. Neville, 302 N.C. at 626, 276 S.E.2d at 375.
266. See supra note 258 and accompanying text.
ent rule, should at the very least prompt North Carolina to take another look towards revising its inconsistency rule.

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