

against the bill; Hunt knew that supporting it would cost him severely, but he felt he had no other morally acceptable course. One of Hunt's advisors is reported to have said to him at the time, "If the election is about race, if that's what you've got to do to win, we just won't win, and just be prepared to accept that."

Hunt's decision strikes me as defensible, for two reasons. First, it might be argued that his responsibility to his supporters was not only to win, but also to represent certain values about which they cared deeply. If the price of victory was the public abandonment of one of those values, then his victory could well be thought to lose much of its point. Second, race was not just any issue. A decent politician — and particularly a southerner — had ample reason to believe that compromise on race would be unconscionable.

Still, the result of Hunt's decision was the defeat of an intelligent and honorable man at the hands of one

of the most unreconstructed race-baiters in American politics today, someone beyond the pale on a wide range of issues. If trimming on the holiday bill could have secured Helms's defeat, I believe that a decision on Hunt's part to do so would have been morally permissible. In politics (and perhaps elsewhere as well), the morality of using intrinsically attractive means is circumscribed by the ability of the political system — and in a democracy that means the people — to respond affirmatively to them. For whatever else the endeavor to pursue and exercise power may be, it is surely not a suicide pact.

— William A. Galston

This article was adapted and condensed from "Do Political Candidates Have an Obligation to Play Hardball?" a talk given at the Institute for Philosophy and Public Policy's Workshop on Philosophy and Public Policy, held at Catholic University, June 21-23, 1989.

What's Wrong with Entrapment?

Police are often tempted to use deceptive tactics in investigative work — and indeed are sometimes justified in doing so. Many offenses could not be successfully prosecuted without the use of deceptive tactics — e.g., white collar crime, organized crime, and crimes, such as blackmail and extortion, where the victims are inhibited about reporting. In all these cases, the traditional reliance on testimony of the victims is likely to be inadequate, and evidence needs to be gained in other ways. Unless deceptive tactics are used to detect crimes like these, criminal charges are likely to be concentrated on crimes more commonly associated with the poor and minorities, giving the criminal justice system a class bias. And even for more commonplace crimes, the use of deceptive tactics may be an efficient means of collecting evidence and ensuring the conviction of wrongdoers, given opposition to the excessive use of coercion in law enforcement and constitutional constraints on the gathering of evidence by the police.

In the United States, entrapment constitutes a legal limit on the use of deception in investigation. It is a defense which, if established, will result in the acquittal of a person charged with a criminal offense. But it is not always clear what makes for entrapment or why it ought to function as a defense.

What is entrapment? Why does it constitute a defense against criminal accusations?

The Subjective Approach

Discussions of entrapment have generally taken the form of a comparison between "subjective" and "objective" approaches.

The subjective approach places the emphasis on the defendant's mental state — on whether or not, prior to the inducements offered by state officials, the defendant was disposed to commit a crime of the particular type with which he or she is charged. Thus, in *U.S. v. Russell*, Justice Rehnquist argued that the defense of entrapment can be made out "only when the Government's deception actually implants the criminal design in the mind of the defendant." What lies behind the "subjective" approach is a desire to protect innocent defendants. The purpose of the defense, according to Chief Justice Warren, is to draw a line "between the trap for the unwary innocent and the trap for the unwary criminal." Where the "disposition" to commit the alleged offense has been "implanted" in the mind of an "innocent" person, the line separating permissible deception and entrapment has been crossed. The defendant is no longer culpable.

But what is involved in "implanting," such that it should diminish culpability? Suppose Abel would be reluctant to commit a crime of a certain type, say, to embezzle funds; however, Agent Baker plays on Abel's sympathies and persuades him to undertake the embezzlement. On the subjective approach this counts

as entrapment, for Agent Baker “implants” the intention to embezzle in Abel’s mind. Now suppose Abel has a general inclination to embezzle, but has not formed any specific intention to do so; Agent Baker gives Abel the opportunity to embezzle, and Abel responds affirmatively. In the latter case, the subjective approach claims that Baker does no more than provide the water that will determine whether or not the fertile seeds of criminal conduct are already there.

However, if the issue is one of *culpability* for the crime, isn’t Abel just as culpable in both cases? Suppose in the first case Baker had been a private citizen rather than a government agent. Then Abel could not claim in his defense that Baker “implanted” the intention in his mind, rendering him non-culpable. At the very most what Baker did would be a mitigating factor. So the issue does not seem to be a simple one of culpability. Why should the fact that Baker is a government agent make all the difference? This the “subjective” approach fails to explain.

The Objective Approach

In contrast to the “subjective” approach, the “objective” one focuses on the character of the state’s involvement in the commission of the offense with which the defendant is charged. As the court in *Russell* put it, “The question is whether — regardless of the predisposition to crime of the particular defendant involved — the governmental agents have acted in such a way as is likely to instigate or create a criminal offense.” Or, again in the words of Justice Frankfurter, the question “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.”

This concern with the government’s conduct has manifested itself in a number of different ways. Sometimes the issue has been whether excessive persuasion was used to induce the defendant to commit the crime: not whether the persuasion was excessive in relation to the particular defendant, as in the subjective approach, but whether it was excessive in relation to some objective standard. As the California Supreme Court posed the question: “Was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?” Other times, what seems to have been at issue was the fact that the government had supplied something that was essential to the commission of that kind of crime. In all cases, there seems to have been a further, supervenient point of concern — that in acting as it did the government operated in an unseemly manner.

But if the subjective approach’s terminology of “implanting” was problematic, the objective approach’s talk of “creating” crime is no less so. For in what sense does the government create the crime in entrapment that it does not when it uses decoys or other methods of undercover detection? If the point is to charge the government with being the crime’s “precipitating cause” or *sine qua non*, then in any case where the

crime would not have occurred but for the government’s involvement, a defense of entrapment will be sustainable.

If the point is to charge the government with having made the crime “easier,” there does not seem to be any particular problem with the government’s action unless, in creating the opportunity, it has brought about the formation of a specific intent where none previously existed. And the objective approach eschews any concern with the defendant’s specific intent. If the point instead is to charge the government with having played “the major part” in the crime’s occurrence, then determining whether entrapment has occurred will again need to take account of the subjective factors that play a central role in the subjective approach. Otherwise, how could it be established that the government has played the major part? Since the objective approach explicitly excludes from consideration the mental state of the individual concerned, it is to be wondered whether it is seriously concerned with the issue of “creation” (i.e., causation).

An Alternative

The difficulties confronting both subjective and objective approaches should at least raise the possibility that they do not offer productive alternatives for characterizing entrapment. At the same time, the strong support that exists for each suggests that each captures something of importance.

To set up an alternative approach, it may be helpful to start with a major (though not exclusive) concern of the objective approach — a distinction between acceptable and unacceptable ways for governments to control crime. Proponents of both traditional approaches hold that it is unacceptable for governments to operate so as to induce defendants into committing crimes they would not otherwise have committed. It is only when the defendants are charged with offenses of a type that they would have committed without the government’s involvement that the government does not overreach itself. The point is not that the *particular* offense would have been committed had the government not been involved, but that an offense of *that kind* would have been committed had the government not been involved. (It would be much too demanding to insist, as a rule, that the particular offense would have occurred in the absence of government involvement — that would severely and unnecessarily handicap undercover work.) From this starting point, where the traditional approaches differ is over the means for determining when the government has behaved unacceptably. Subjectivists believe that if the person was predisposed to commit a crime of that particular type, the bounds of acceptability will not have been crossed. Objectivists believe that if the government has played too substantial a role in the crime’s creation the bounds of acceptability will have been crossed.

We may do better if we do not focus on whether this or that responsibility-establishing or responsibility-defeating factor is present, but on whether the situa-



Lukas Cranach, "Eva," 1531

*The serpent beguiled me,
and I did eat....*

tion has been such as to enable us to *tell* whether the defendant would have acted in some such way had the government not been involved in the way it was. Sometimes the government's involvement bulks so large that we may no longer be able to have any confidence that, absent its involvement, the individual

concerned would have committed an offense of the kind in question. When that is so, the defense of entrapment should be available to the defendant.

If, then, what makes for entrapment is the government's involvement in criminal activity in a manner which *either* draws into it those who would not otherwise have engaged in conduct of that kind *or* leaves it unclear whether those who engaged in it would otherwise have done so, we can resolve the stalemate between the subjective and objective approaches. The fact that a defendant was not — in some reasonably full-bodied sense — predisposed to criminal conduct of the kind charged will constitute a strong reason for believing that entrapment occurred. For it provides a fairly clear indication that without the government's involvement the defendant would not have engaged in that kind of criminal activity. This is the burden of the subjectivist approach. But even if the defendant is predisposed to engage in criminal conduct of the kind charged, a defense of entrapment may be available. For the government's involvement may bulk so large that it is no longer possible to tell, from the participant's behavior, whether he or she would otherwise have actually engaged in conduct of that kind. In recognizing this, we acknowledge a point emphasized by objectivists — the excessive involvement of government in the creation of crime.

What Is Wrong with Entrapment?

The position I have taken so far is that entrapment does not give us any reason for thinking that those entrapped are criminals. It is a structuring of circumstances such that the outcome possesses questionable evidential value. Justice Frankfurter, however, puts the point more positively and moralistically: "The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and bring about the downfall of those who, left to themselves, might well have obeyed the law."

I think this is right, but overstates the objection to entrapment. Sometimes the effect of entrapment will be that crimes are committed that would not otherwise have occurred. But that will not always be the case. Sometimes a crime of that type would have been committed anyway; the problem with entrapment is that it leaves us without sufficient reason for knowing whether that would have been the case.

Behind Frankfurter's moralism lies the further belief that the government, in conducting itself in a certain way, offends the standards of decent behavior. But this, I would suggest, is an issue distinct from that of entrapment. Certainly sometimes the police engage in undercover tactics which, however successful, are so egregious, outrageous, or abhorrent that they should be outlawed by the courts and their evidential yields not be allowed to count. However, I am not convinced that the entrapment defense is what is required to outlaw such tactics. The entrapment defense is probably best left as is — as a defense that challenges the

connection between the defendant's involvement in a particular crime and the claim that the defendant would anyway have committed a crime of that type. The claim that certain government activities are in themselves improper should, I believe, be addressed as a separate issue — perhaps as a violation of due process.

However it is addressed, the issue of abhorrent government conduct is problematic. At what point does government conduct go beyond the pale? Does it vary with the kind of offense? Some objectivists argue that it becomes unacceptable when it is of a kind that would be sufficient to induce the average, normally law-abiding citizen to commit a crime. But this may be to pitch the limits too low — especially if it can be argued that more can be demanded of those in positions of great trust and responsibility than can be expected of the average, law-abiding citizen. A reasonable flexibility may be needed, not only to take account of the differing expectations we have of people, but also to avoid a situation in which the only criminals caught are inexperienced.

Gerald Dworkin offers a plausible test for determining when the government has overreached itself. The criminal law, he argues, is not a pricing system, which is indifferent to the choices made by citizens — whether they obey or choose instead to disobey and pay the penalty. It is meant to be obeyed. Government goes too

far when its actions have the effect of saying not "Do not do X," but "Do x." When it does the latter, it not only violates the *telos* of the criminal law, but also deals unfairly with citizens. It becomes a tester of virtue rather than a detector of crime.

In any case, my point is not to deny that in entrapment the government may be left with the stain of crime on its hands, but to deny that this is what makes entrapment a proper defense. What makes it a proper defense is its evidential bankruptcy. Entrapment is an inappropriate investigative technique, not only or primarily because it traps the innocent or manifests substandard behavior on the part of governmental agents, but because it leaves us without adequate grounds for establishing the guilt of those whom it succeeds in ensnaring. Those who are held guilty of crimes ought to possess the relevant dispositions, and they ought to have been placed to give those dispositions effect. Entrapment removes our basis for knowing whether both these conditions obtained.

— John Kleinig

John Kleinig is a professor at the John Jay College of Criminal Justice. This article was condensed and adapted from his lecture materials on police ethics. His reflections on entrapment were greatly stimulated by Andrew Altman and Steven Lee, "Legal Entrapment," *Philosophy & Public Affairs*, vol. 12 (1983).

Fairness in Taxation

When Ben Franklin said that the only two certainties are death and taxes, he could not have been speaking of income taxes, which were all but unheard of in his day. A few city states in Italy had experimented with an income tax in medieval times, and Britain adopted a temporary income tax during the Napoleonic wars. But the income tax did not come into widespread use until the mid to late nineteenth century. Great Britain adopted an income tax in 1842, Japan in 1887, and Germany in 1891.

In 1894, the Congress established an income tax in the United States, only to have the Supreme Court overturn it a year later, on the grounds that Article I of the Constitution prohibits any taxation that is not linked directly to political representation. The Constitution states: "Representatives and direct taxes shall be apportioned among the several states according to their respective numbers." A "head" tax or a poll tax would be acceptable on this criterion; a tax levied on income would not. If people have an equal vote, they should

pay the same amount in taxes, or so the high court said.

The Sixteenth Amendment to the Constitution, ratified in 1913, cleared the way for the income tax. That Amendment reads: "The congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Debate about income tax policy usually centers on the question of fairness, that is, who ought to pay how much and why. Simple as this question may seem, attempts to translate fairness into practical policy raise a host of further questions. What should be taxed? earned income? total income? wealth? consumption? If we tax income, how much and what kinds of income should be exempt from taxation? We might want to exclude at least as much income as people require to meet their subsistence needs, or, perhaps, to maintain a "decent" standard of living. Present law also excludes from taxes income directed toward certain socially