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The Entrapment Defense: An Interview

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Interview

The Entrapment Defense

AN INTERVIEW WITH PAUL MARCUS*

Law Review: Professor Marcus, on behalf of the Ohio Northern University Law Review, I would like to thank you for agreeing to sit for an interview. Let me start by asking you to explain your background briefly. By what pathways did you become a scholar of criminal law and procedure?

Professor Marcus: The short answer is I loved law school. Some people do not, but I did. And I particularly loved the criminal law and criminal procedure areas. I clerked for a federal court in Washington, practiced for a few years in Los Angeles, and then went into teaching at the University of Illinois, principally in the criminal law/criminal procedure area. I began working in the entrapment area and undercover police surveillance probably fifteen to twenty years ago. It was an area that I found important to teach to students and difficult to teach, and not, in my judgment, a whole lot had been written in the area. So, I really became involved in the scholarly part of it. That led me to much more involvement in the practice area as well. Lawyers and judges would call and ask me either informally to participate or formally to handle a case or work on a case. It led me to do more comparative law work as well. When I would visit other countries, such as

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Brazil, Malaysia, or Australia, I would ask questions involving undercover police work and what they did. What they do overseas is quite different from what we do in terms of the legal issues here. I wrote a book called *The Entrapment Defense*.[1] The first edition came out fourteen years ago; it is now in its third edition. I recently re-did it so hopefully I am current on the law of entrapment and undercover surveillance.

Law Review: What were the motivating factors along your career pathway or was the pathway more experiential? Did you at some point know, O.K., I'm going to dedicate myself to this area, or did it just happen by serendipity?

Prof. Marcus: A little bit of a combination. Legal research, at least in my experience, often involves issues that do not look so complex, but once you start getting into them, they become far more complicated. They take you just much, much longer to get into and then other questions develop. But in addition, I really would get involved with particular matters on both the prosecution and defense sides and that really fueled me to know more about the area and to speak and write on it because I really did have a number of concerns.

Law Review: A prominent surveillance technique is the undercover law enforcement sting operation. When I hear that phrase, I think of movies such as *The Sting* or *The Untouchables*, which evokes a different era. Has the use of sting operations in the United States been more or *less* prominent during certain eras?

Prof. Marcus: Yes, there has been a little bit of an ebb and flow, clearly in connection with traditional criminal law prosecutions as opposed to espionage or terrorist activities. In terms of traditional criminal law activities when there is more of a push for enforcement of criminal laws that are frankly difficult to enforce—narcotics-trafficking is a prime example of that or in older days, alcohol restrictions—it is very difficult to prosecute unless you have an insider. It is very difficult to prosecute the people who are in charge of it.

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1. PAUL MARCUS, THE ENTRAPMENT DEFENSE (3d ed. 2002).

The follow up, and I will mention this although we can talk about it later, I have tried for a long time to quantify how many of these are going on out there because in my own experience I can say, informally, a lot are happening. It is a very, very common technique. But it is impossible to compile any empirical evidence and certainly I have not seen any. Let me explain why that is. There is no unified law enforcement agency responsible in this area. You see undercover police operations and stings at all different levels. In a small city, say one hundred thousand people, there may well be undercover police operations regarding prostitution rings—that is pretty common. At the county level, a little bit larger, with relatively minor drug offenses—not the national distributor— you may well have a sting operation with drug offenses at the county level.

Then we move up to the state level. Many states are involved in all kinds of undercover operations with respect to consumer fraud, securities transactions at the state level, certainly statewide drug prosecutions, investment scams . . . . So even before we talk about the federal undercover work in this area, there are enormous numbers in all fifty states plus the District of Columbia. Well, having said that, we then turn to the federal agencies. I have seen matters in which the DEA—the Drug Enforcement Administration—was involved, the FBI, postal inspectors, securities investigators, treasury department people, immigration officers—so you have all these agencies having little to do with one another and they are all engaged in this technique, which again can be effective or not but is viewed as an important part of the law enforcement arsenal.

Law Review: In terms of importance, you just mentioned the breadth of areas in which the sting operations can be used and you did anticipate the follow up as to measuring the frequency of sting operations, how important are they and what benefits do they provide to law enforcement officials?

Prof. Marcus: It is controversial. There are strong supporters and harsh detractors. I am somewhere between the two. The supporters argue that these undercover operations

are absolutely essential. There are some crimes run by organized crime—with small letters I do not mean it's necessarily *mafia* run, but multiple party crimes where you must penetrate the group. Their view is: If you want to find the person who is a distributor of narcotics or who has a nationwide consumer scam, the only way to do it is to get involved with the criminal endeavor. To do that, we must send in undercover agents to buy or to sell—to become part of the operation—and that is how you break the crime ring.

The detractors contend stings are very expensive. You have to have people specially trained and if you do not, you will have big problems. You have to have people who are specially trained. It becomes their life for a time and they have to be monitored very carefully. Even so, the success rate is not always wildly high. It is uneven. The critics would say on the rare occasion it makes sense but as a general rule, traditional law enforcement is better. It is cheaper and it is more effective.

I fall somewhere in between. I believe that the entrapment undercover operation creates a problem. Often law enforcement departments are ill-advised to pursue this, certainly as a first resort, because it is expensive and it is uneven. And often the legal questions are litigated. And they are difficult and expensive to litigate so I think the critics have a point. On the other hand, I have been personally involved with cases where it was clear to me that you could not eliminate at least a major part of the problem unless you had an undercover operation. It is just not something you can do with search warrants or even wire taps because [of] these criminal organizations—again not necessarily the biggest ones but even the sort of "mom and pop" organization where it is very hard to get anyone, except the smallest fish in the sea, without an insider.

Law Review: You mentioned some of the risks that are inherent in the use of sting operations. What legal restrictions exist to curtail some of those risks?

Prof. Marcus: The principal one is the entrapment defense. But let me at least mention a couple of the others. In the extreme situation—and this is very unusual, but it can

happen—in the extreme situation, there can be a due process violation. If the government agents are so involved in the criminal endeavor from beginning to end—they have organized it, they are intertwined in it—there are courts who will say that situation is shocking to the conscience. That test goes back to an old Fourth Amendment case *Rochin v. California*[2]—which most people have had in criminal procedure, the stomach pump case. There, Justice Frankfurter said the government action was shocking. We are not going to condone it no matter what else is present. And there are such cases. It does not happen very often happily. Now I will say there are some courts in the U.S., including one right here in this area, the Sixth Circuit, who do not believe that there *is* a due process defense. I think they are wrong. While the Supreme Court has never so held, there is certainly *strong* dicta that would indicate it. Moreover, it would be a sad day, indeed, if we would say behavior, which was otherwise shocking, could be allowed.

There are Fourth Amendment restrictions here as well under traditional search and seizure principles. That is, if you have an undercover agent involved, she can elicit information in terms of conversations, she can certainly testify to what she observes, [and] testify to what evidence is given to her, but she cannot engage in searches that are not otherwise permitted by the Fourth Amendment. I will give you an example. If she is at a meeting at someone's house, and she is the undercover agent, she can testify as to what people said, she can testify to her seeing money changing hands—that sort of thing. But, when they all go in the other room, she cannot rummage through the dresser drawers or the kitchen cabinets because clearly she is a government agent and she needs a warrant to search a house. That, too, is not going to happen terribly often. The evidence normally is given to her, to that agent, as part of the whole operation.

The real limitation here is the entrapment defense. The entrapment defense is used a lot. Here,

2. 342 U.S. 165 (1952).

there has been a real shift in how successful it has been. It is hard to gauge empirically. But from the reported cases, and the cases I have been involved with over the last dozen years, we have seen major changes in the way the defense gets raised and frankly how successful it is.

Law Review: You mentioned some recent developments. What is the historical genesis for the entrapment defense in the United States?

Prof. Marcus: The entrapment defense is unlike any other defense that we have. If one thinks back to first year criminal law, traditional defenses, such as self-defense, defense of others, necessity, and the insanity defense—that sort of claim in our system comes from the early English common law. They have been around for literally hundreds of years. Now we may view defenses a little bit differently than the English did two hundred to three hundred years ago, but the core of those defenses remains. That is not true with the entrapment defense.

The entrapment defense does not come from the English common law. The English do not have it even today. This defense developed about one hundred years ago in the United States in cases in which the courts began to be concerned with creation of crime by government agents. There was a big push during prohibition with regard to government agents becoming heavily involved in setting up alcohol operations essentially so that they could then bust those same alcohol operations. The defense has become an absolutely accepted and important part of our criminal justice system. Even though in most states it is not by statute, all states have it. And there is certainly a federal entrapment defense, even though it is not constitutionally based and even though it is not linked to the English common law.

Law Review: You mentioned some differences between the federal use of the entrapment defense and the states' use. Could you further explain some of the differences between jurisdictions' use of the entrapment defense?

Prof. Marcus: Because the entrapment defense is not constitutionally based, states are free to do whatever they want—much the way self-defense would not be viewed as constitu-

tionally based. But with something like self-defense, basically it is the same defense in all fifty states and the District of Columbia. There are some nuances with respect to evidence or jury instructions, but basically it is the same defense. With the insanity defense, there are some variations on the theme but the basic issues are similar in most states. That is not true with entrapment.

There are really two basic defenses of entrapment. And then, there is a third one, which blends the two. The earliest and still majority rule on entrapment is referred to as the subjective test. This test was developed by the United States Supreme Court. Again, it is not constitutionally based so the states do not have to follow the Supreme Court. But, of course, many states, including the State of Ohio, would just do so as a general course and because they believe it is the better way to go. The subjective defense focuses on the individual himself, and says basically the legislature could never have intended that someone who is free of culpability in terms of any kind of bad state of mind ought to be criminally punished. As a consequence, we will look at that suspect's personal, subjective state of mind and ask one key question: Prior to the time when the government tried to engage him, or when they solicited him, did he have a predisposition to commit the crime? Was he likely to do it on his own, wholly apart from the government? If the answer is yes, he was so disposed, we are not going to much care about what the government involvement was, so the line goes, because this person is culpable. If the answer is no, he was not so disposed, then he ought not to be prosecuted at all. The federal government uses this test. It was promoted heavily by an interesting collection of Justices, including Chief Justice Warren and Chief Justice Rehnquist—and those [two] are two who are not terribly alike in the criminal justice area generally. A majority of states would follow this, though some of our very largest states do not. California, Texas, Pennsylvania, and Michigan do not. So there are a number of important states who would not choose to follow the subjective standard.

The second test is called the objective standard. This was promoted most heavily by Justices Frankfurter, Stewart, Marshall, and Brennan—again not a group you normally think of together. Their view was that the basis stated for the subjective test—that the legislature could not have intended nonculpable people to be found responsible—is nonsense. They asserted that the reality was the legislature never thought of any of this. If they had, they would have created a statutory defense. All the legislators did in a drug offense, for instance, was define the crime, give the elements of the crime, and the punishment. So their view was essentially—let us be honest about it—the *real* reason to have an entrapment defense . . . it is as a judicial curb on extreme law enforcement behavior. And, because what we are trying to do is have the judiciary limit the executive here, we ought to be honest about what the test is. The test is not *who* is the defendant, or what did she believe, or whether she was disposed. But the real question ought to be what did the police *do*. Was that police behavior so extreme that we are willing to say [that] we toss out the conviction in order to alter behavior by the police? It is viewed as an objective test because what we say is: Look at a reasonable person standard, if the behavior of the police was such that it might have caused a reasonable person to violate the law—one who would otherwise not violate the law under these circumstances—that behavior is improper. Objectively, we say that is too extreme and we are going to strike down the conviction.

The last set of states—and there are some of these but not very many—essentially blend the two tests together. The norm here is to say Part One is a question of law for the judge: Was the government behavior too extreme? And if the answer to that is yes, then that ends the inquiry. Then it is a good defense. If the answer to that is no, or at least it is debatable, *then* give the matter to the jury, the question of whether this defendant was predisposed to commit the crime.

Law Review: In terms of the subjective/objective tests, it seems analogous to the nature/nurture debate as some juris-

dictions have answered the question somewhere in between the two poles. What do you see as the pros and cons of each test, and which one would you prefer?

Prof. Marcus: I prefer a blended test, but I am not sure I would have it as a sort of bifurcated analysis. I like where the Supreme Court has gone with its test as I will explain in a moment.

The subjective test has a tremendous benefit which is that we really look at the *individual* defendant. The central notion of our criminal justice system has always been individual culpability. So if she really was predisposed to commit the crime, then there is something to be said for prosecuting her and not allowing an affirmative defense. The problem with that, however, is that identical police conduct in two different cases can net two distinct results because we have two unique defendants. One must wonder whether that is a sensible criminal process where exactly the same behavior by the government yields two quite different results. The second part of the problem with the test is: How do you prove predisposition? Often the way to prove predisposition is to look at prior criminal activities. We know in our criminal justice system we typically do not allow [it]. There are some exceptions, but typically we do not allow prior crimes by this defendant to demonstrate propensity—likelihood that the charged crime has occurred. We do not do that for good reason—because the person is on trial for what he did *today*, not what he did *five years ago*. But with entrapment, we allow evidence of prior crimes because what better indicator is there of predisposition? If a person has done this four times over the past ten years, [by] the fifth time, he was probably disposed to commit it. So, it is very troubling. We wonder about prosecuting someone for prior times even though the jury is instructed that it is not for *propensity*—it is only to determine *predisposition*. That is a pretty fine line, I think, to instruct a lay jury on.

With the objective test, we are more honest that *what* we are trying to do here is: Determine appropriate police behavior. Certainly, mainstream

police activity is not really affected here. So the real benefit is we look at the government behavior and we ask the serious questions. There are two problems with this however. One is: How do you judge that? We are talking about a reasonable person who would be compelled to commit a crime, but the whole notion of the criminal justice system is that reasonable people are *not* compelled to commit crimes unless they are coerced—unless they are saving someone's life—and we already have defenses for that. And the second part . . . again, the flip side of the predisposition test: Do we really *want* to have a standard dealing with the reasonable person? Shouldn't we be measuring individual culpability? Now it seems to me the Supreme Court here has done a pretty good job because the Justices have retained the majority subjective test so predisposition is still the test. But what they have said is: We are going to look carefully at two things. First, what is predisposition? Just because a person has a predilection for this type of activity does not mean a predisposition. The *real* question is: Whether he would have engaged in the criminal behavior, which is different. And second, we are going to rely much more heavily on an analysis of the government's behavior. If the government engaged in extensive and intensive inducement, that is a good sign that the defendant was not predisposed because it took such extreme inducement in order to get him to commit the crime. So, in a way, even though the Court still retains the predisposition test, it looks more like a blend because we are putting more reliance on the government behavior than we ever did before.

Law Review: Do you think part of the blending you were referring to on the predisposition point stems from the notion, as the Seventh Circuit said in *Hollingsworth*,[3] that "predisposition" has both "positional" and "dispositional" elements?

Prof. Marcus: Yes, I think it is. Judge Posner wrote the opinion there. And I published an article soon afterward

3. Hollingsworth v. United States, 27 F.3d 1196 (7th Cir. 1994).

praising him because I thought he got the doctrine exactly right. We were both harshly criticized by some who said that is not what the Supreme Court said and that is not what it meant. But I think it is what the Court meant. It seems to me that the Court was saying in the important *Jacobson* case,[4] involving the farmer who was convicted of receiving dirty magazines through the mail, was to look quite carefully at *who* this defendant is. Is he likely to have committed the crime without the government involvement? And I believe that what Judge Posner said is: When we are told by the Court to look carefully at who this defendant is, we also want to look closely at what the government did. What the government did in *Hollingsworth*, for instance, was to set up a criminal enterprise—something that the defendants could not have done on their own.[5] They were enthusiastic. They were greedy. They wanted to make money. But it is no crime to be greedy and to want to make money. It is not even a crime to want to violate the law. You have got to *take steps* to violate the law. What the Seventh Circuit said was: The defendants had the disposition—perhaps, the enthusiasm—but they were not positioned to be able to commit the crime. That was a case involving financial transactions, offshore banking, and these defendants were two amateurs. And these amateurs did not know how to commit this crime. And because they were not likely to commit it *on their own*, as a matter of law—not even as a matter of fact but as a matter of law—the subjective test has not been satisfied. And because the government has the burden of proof beyond a reasonable doubt—if the entrapment defense is properly raised in a case like that—the court found [that] the government could not prove this crucial factor beyond a reasonable doubt.

Law Review: You mentioned "as a matter of law." And earlier you mentioned the effort of the judiciary to curtain the executive branch. It does seem that there are judge/jury decision maker issues that arise frequently in the

4. Jacobson v. United States, 503 U.S. 540 (1992).

5. *Hollingsworth*, 27 F.3d at 1201-02.

entrapment context. What are some of the differences you have seen between how judges and how juries interpret factual contexts involving potential use of the entrapment defense?

Prof. Marcus: I see some big differences. Let me step back and give just a bit of an overview as to what the law is supposed to be, or at least, what I believe the law is supposed to be. I think the law is that generally in the subjective test jurisdictions, the jury decides the key matters. These are fact-oriented questions about what the state of mind was at a particular time—whether the person was predisposed or not. In the objective jurisdictions, most commentators and judges traditionally thought that this ought to be a question generally for the judge as a matter of law—in order to develop standards and determine what the extreme reach is. Having said that, however, the two principles have gotten jumbled. In a number of cases involving the subjective standard, we have courts who will say this issue never should have gotten to the jury. That can happen one of two ways: there was not enough evidence to demonstrate entrapment, or there was so much evidence to demonstrate entrapment that it is not even a triable issue. The *Hollingsworth* case[6] is just such a case where the court finds entrapment is a matter of law. But the Supreme Court in *Jacobson*,[7] and also in the earlier *Sherman* case[8] involving a narcotics transaction, the Court said the evidence was so clear as to lack of predisposition—I think because of the heavy inducement of the government—that we decide as a matter of law.

On the other side of that coin, there are a number of jurisdictions that have objective standard tests, but give it to the jury to resolve as a question of fact. So, it is a bit of an oddity because I think the original proponents for each side believed in a pretty pure judge/jury split, and it's gotten much less pure in recent years. Now, having said that, it is most inter-

6. *Id.* at 1204.
7. *Jacobson*, 503 U.S. at 540.
8. Sherman v. United States, 356 U.S. 369 (1958).

esting for me having been involved in both federal and state cases, and seen a whole lot of them out there in reported decisions as well. I find judges often reluctant in the entrapment area. They frequently believe, correctly or not, and sometimes I think it is correct, that the undercover "tool" used was absolutely necessary, and the defendant was enthusiastic about committing the crime. So we have little sympathy for this person. The government inducement was pretty heavy, but that is what you have to do to solve this crime. There are certainly judges who would disagree with that, but my experience has been more judges take that dim view of entrapment.

Juries, I often find, react positively to the entrapment defense. I think there is a real concern over government overreaching—over the big brother/ big government . . . the George Orwell *1984*[9] sense that the government is in every part of our lives and they can get us started in a criminal behavior and then end up prosecuting us for that same criminal behavior. Juries, in addition, do something which I find judges do not often do. There are exceptions. But in numerous cases, juries put on trial the undercover agents *as much* as they put on trial the defendants. By that, I mean, the defense lawyer will go into *who* this undercover agent was—in trying to attack her credibility, in trying to demonstrate that she did a whole lot more to create the criminal enterprise than she should have, [and] in trying to demonstrate that she was the dominant figure, not the defendant, in promoting the criminal offense. There are many cases where the evidence was quite powerful and the jury acquitted. Indeed, consider the two most famous of these cases. John DeLorean, the car maker from years ago, was tape-recorded in San Diego, I think. He was tape-recorded giving the money or taking the money with drugs, but the jurors were so disgusted with the involvement of the government agent that they acquitted. In the Marion Barry case, in Washington D.C., they did not totally acquit, but he was found guilty of

9. GEORGE ORWELL, 1984 (New American Library 1961).

a *minor* misdemeanor and had been charged with a *serious* drug offense. And I think the later comments of the jurors made it clear that they were truly upset with how hard the government informant had pushed to get Barry to engage in criminal behavior. So, I think juries can often be more sympathetic than judges here. Frankly, with all due deference to my judge friends, I think jurors may understand this issue better than judges do with the concern that the government not become the lawbreaker.

Law Review: You seem to be enthusiastic in terms of the jurys' analysis of the entrapment issues, but you did mention earlier maybe there are some exceptions. What are some of those specifics?

Prof. Marcus: Oh yes, there certainly are exceptions. Understand that the entrapment defense is not going to work terribly well with a defendant who has been convicted of essentially the same crime before. I think juries in that situation understand quite well that while the government agent may be pretty sleazy, in order to get someone with prior offenses, you need someone like that and they are going to be very unsympathetic to the entrapment argument. That is on the side of the jury *not* reacting well. Let me give you something on the side with the *judge* reacting well. The criminal judges can be quite sophisticated folks who analyze what the operation was that the government put forth and how legitimate the argument was as to [the] necessity of it. But they can be critical as well. There is a federal case out of Oregon in which the agent was receiving large sums of money, not taxable sums of money, based upon arrests, [and] was given no direction and no definition in terms of what entrapment would be or how far he could go. And the court was absolutely fed up with the government explanation.[10] It found entrapment as a matter of law.[11] There, the federal judge clearly understood that the government did not have to do it this way and had done a lousy job in getting their

10. *See* United States v. Martinez, 924 F. Supp. 1025 (D. Or. 1996), *aff'd*, 122 F.3d 1161 (9th Cir. 1997).

11. *Id.* at 1030.

agent ready and available to participate.[12] So it can go both ways.

Law Review: You mentioned earlier the *Jacobson*[13] and the *Sherman*[14] cases. And certainly there has been a shift in the Supreme Court's rulings recently—and obviously the famous shift of Justice Brennan acquiescing to the changing times. Could you speak to such jurisprudential shifts and also the comparative aspects between the U.S. and other countries you mentioned earlier?

Prof. Marcus: Sure. Let me separate them. In terms of what had happened at the Supreme Court, for fifty to sixty years, there was a real split. It started off as 5-4, grouping the five led by Chief Justice Warren [and] now Chief Justice Rehnquist, who promoted heavily the subjective test for the reasons I mentioned before. There were always at least three or four dissenters, Justices Frankfurter, Brennan, Marshall, Stewart, who said: No, the objective test makes the most sense because we want to curtail government behavior. There is currently no one on the Supreme Court today who, at least openly, challenges the subjective test any longer. The last dissenter was Justice Brennan who wrote this rather poignant opinion in the *Mathews* case[15]—a relatively minor entrapment decision involving inconsistent defenses—saying, in essence, "If I were writing from a clean slate, I would not use this subjective test, but I am not. Enough is enough. *Stare decisis* says I am on board." That was really the last gasp and that was well over a decade ago. So, there really has not been any dissent at the Supreme Court from the subjective test. There certainly have been dissents from the *application* of the test but not the test itself.

Now on the comparative side of things, it is striking. I have not seen any country that has anything

12. *Id.*
13. *Jacobson*, 503 U.S. at 540.
14. *Sherman*, 356 U.S. at 369.
15. Mathews v. United States, 485 U.S. 58 (1988).

like what we have in terms of a true entrapment defense—even with nations that have *similar* criminal justice systems. The Australians and the English, for instance, would say only that entrapment can be considered by a judge to the extent of *limiting* evidence—sort of like a mini-exclusionary rule. If the government was way too involved in retrieving the gun, then we will exclude the gun but it is not an affirmative defense. As a practical matter, however, that gun almost *never* gets excluded as they also have discretionary exclusionary rules, which are not often used, especially with entrapment. So, in the countries closest to us, there is a possibility that entrapment evidence can be limited, but it is not a very real possibility or, at least, not a possibility seen often. Now in most other nations—certainly in civil law countries—you do not see anything like an entrapment defense or even a limitation. They may try to deal with problems in other ways, but the reality is that if the elements of the crime have been shown . . . she goes to jail.

Let me tell you that I have had several conversations, both in the United States and in other countries, with judges, practicing lawyers, and law professors about this very issue. I had one French judge speak to me a couple of years ago when I was talking about both the exclusionary rule and entrapment and the heavy price the government in the United States has to pay in order to obey the law essentially. I think his words were something like:

"You Americans are so cynical about your government and so distrustful of your law enforcement."

I agreed, noting that it is based upon our historical perspective. We are not willing to tolerate some government actions. But, I said to him, "Surely you must have problems with these undercover operations if you are trying to deal with narcotics, obscene materials, and fraud scams—those are areas where you generally see undercover operations."

He said, "Oh, certainly we have undercover operations and we have problems of agents going too far."

I then asked, "If you are not excluding evidence and you are not allowing an affirmative defense of entrapment, what do you do to monitor and limit the government? Do you have job sanctions against the police?"

And he said, "No, not very often."

"Do you limit the evidence even if you do not have a defense?"

"No. We do not do that."

"Do you have fines against the police involved?"

He said, "No. We generally do not do that."

And I asked, "Does that mean you generally do not do anything then in cases involving this kind of extreme behavior?"

And the answer was, "Yes. We generally do not do anything."

Law Review: Do you think an aspect of the "American" notion that you mentioned is fear of the government acting arbitrarily as applied to a specific individual or a class of persons? It does seem like even the *Jacobson* case,[16] for example, that a government official can say: Okay, you *are* looking at a certain *type* of magazine . . . . And have you seen such fear manifest into reality in particular cases?

Prof. Marcus: I think it is part fear. I actually have an article coming out soon where an Australian friend and I compare our two criminal justice systems.[17] One of the major differences certainly is we are willing to limit government behavior in investigations much more than the Australians are. And it is hard to explain why that is. There is this distrust in the U.S. of arbitrary or discriminatory law enforcement, but it is *more* than that. We are also fearful of big powerful government, which seems an oddity because, in the world, the United States is viewed as the most powerful government. But that is not really true. We may be the most powerful nation economically and militarily perhaps,

16. *Jacobson*, 503 U.S. at 540.

17. Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. INT'L & COMP. L. (forthcoming 2004).

but our government is fairly limited in its powers. We have checks and balances. And we have restrictions over law enforcement that most other countries do not have. Entrapment is one such restriction, the exclusionary rule being another, *Miranda*[18] being another, and also cases being dismissed under the right to a speedy trial, strict double jeopardy, and confrontation rights. And I think all of these are part and parcel of the notion that the government has a duty and right to investigate and prosecute but within fairly circumscribed bounds. We want this process quite transparent so we understand what is going on. And if there is a price to be paid, it may be controversial, but we are willing to pay that price of not having successful prosecutions here.

Law Review: I am shifting gears somewhat since we have a few minutes left. By looking to the future as lawyers are predictors, [but] not necessarily good ones, what does the future hold for the use of those surveillance techniques, such as undercover sting operations, and for the responses of the legal system?

Prof. Marcus: I think you have split it apart perfectly. In terms of what is going to happen, it is pretty clear we are going to see more of the undercover operations—*not less.* Increasingly, they are used in areas where we are seriously concerned and [are] putting [in] more resources—these tending to be areas where undercover police operations might work. Those operations do not work terribly well with violent crime. It is hard to break into the Hell's Angels or a terrorist cell. There actually have been few cases involving violent organized crime. But it is different if we are talking about narcotics, financial crimes, alien smuggling, and areas of increasing concern that may have both national and international components. Here, undercover agents may well be effective. I think there will be more of a push for this type of government activity, surely at the federal level, but also at the state and local levels.

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18. Miranda v. Arizona, 384 U.S. 436 (1966).

In terms of the legal response, I have seen over the last few decades more concerns with the government overreaching. In a way, the undercover operation is seductive. It looks like it is low cost. You plant someone in. You get the whole group, and wow! What a success! Well, it just does not work that way. It is expensive. You have to train people well, the success rate may not be great, sometimes you win, sometimes you lose, and it is hard to tell ahead of time. And I see, more and more, juries and judges in a way that I did not see [them] ten or twenty years ago, scrutinizing carefully what the government has done to determine if the government overreached. In the drug area, there have been cases where the government was really involved—if not in the manufacture of the drugs, certainly in the operation of the whole enterprise. I'm thinking of cases where courts have said: No, that's just too much government involvement. Yes, we will look at the predisposition. But the language in the opinions is clearly focusing on the government behavior much more than ever. The use of the entrapment defense in connection with Internet-related crimes is increasingly seen, cases involving obscenity or sexual offenses against minors. These are serious crimes. But it is an area where there are real concerns about freedom of speech—the government not being able to be limited in many traditional ways because you do not have *formal* meetings and you are plugging into the Internet. I can think of a case out of the Ninth Circuit recently in which the government was just ripped apart by the Court of Appeals, and I think *correctly*, for taking what was seemingly an innocent, though perhaps, *bizarre*, sexual encounter and making it into a very serious sexual offense in a way in which the defendant *never* would have intended.[19] The way the court reached that conclusion was not only focusing on the defendant's state of mind, but again *heavily* on what the government had done to promote that state of mind.

19. United States v. Poehlman, 217 F.3d. 692 (9th Cir. 2000).

Law Review: Do you think it is fair to say that we might be in for significant changes in the doctrines involved because, it seems from listening to you, that some things, maybe, are becoming obsolete? You mentioned government overreaching certainly as a pervasive theme and the idea of the fact that there is such labor intensiveness involved with entrapment-type sting operations. But yet with technological advances, it seems that the involvement of humans in law enforcement's monitoring activities is being superceded by the use of technology as an ongoing monitoring process to where it seems the line is becoming fuzzy —whether a shield from government monitoring exists. Similarly, you mentioned the Internet and the idea of space being collapsed, and before we talked about "predisposition" as having a "positional" element. What do you think of such notions of technological impact on the entrapment defense?

Prof. Marcus: Well, you are right, but only to a limited extent. I say you are right because I think there are crimes now where technology helps tremendously in solving the crimes and getting the culprits—Internet-related offenses, financial crimes that are done over the wires. Again, [there is] a real potential for serious problems because you cannot easily monitor. You cannot see when they went into that meeting or hear what was said because nothing was said unless there is an Internet or e-mail record. I do not think the doctrines are going to change, but there is going to be closer scrutiny—again, because of these concerns. But there is another part of it. I probably better address [it] with the law enforcement community. For a lot of these crimes, there is no substitute for the kind of good old-fashioned police work we all know about. If you really want to bust a large narcotics group, a major alien smuggling ring, [or a] serious financial fraud, you *need* to have face-to-face meetings. You have to *become* part of the operation. These people simply are not going to trust you with any serious information that could, in any way, incriminate the folks who are running the operations. And for that, I think, you need the traditional undercover operation—which is why I think it is going to remain pretty vibrant.

Law Review: Do you have any ideas of specific legal issues on the horizon line that you see as potentially providing the fodder for landmark or, at least, important court decisions?

Prof. Marcus: Again, I do not think the central doctrine as to entrapment is going to change that much. It appears that we, as a country, are reasonably comfortable with that and even the split between the states is not terribly far as each one has moved [closer to] the middle. I guess I would say there are two areas that are ripe for further consideration and application. The first involves technology much more than ever before, particularly the Internet, e-mail, and the like, where things are moving very quickly. It is hard to keep track of things. Yet we know it has tremendous impact and we have already begun to see this in terms of upsetting prosecutions involving sexual crimes and minors—as I mentioned before. So, we are going to see that much more. The other, and this is [of] most interest, deals with international issues because these are increasingly common. We are seeing cooperation, happily, between our government and other countries because so many of the drug and alien smuggling and financial crimes are not limited to one nation's boundaries. Here, we are going to have some difficult issues as to defenses that can be raised, as to jurisdictions where you can prosecute [and] who gets to raise the evidence. And we have just begun to see the tip of the iceberg there. There is much more to come.

Law Review: For example, maybe [with] the Foreign Corrupt Practices Act or something along those lines where issues of extra-territoriality are involved?

Prof. Marcus: Yes. I will put in a plug here. I have friends at the United States Department of Justice—criminal division . . . in the international section—and these are issues they are thinking about very seriously. They are extremely capable people and business is booming for them.

Law Review: As a final question, based on your vast experience working on both sides of entrapment cases, what are some of your favorite cases or favorite memories where the issues seemed to be so poignant to you?

Prof. Marcus: I will mention a few. The first two are reported cases. The third one, I'll change the facts around because it is not a reported case and I was not officially on record. One involves a case where the government, for some bizarre reason, believed that drug smuggling in the northeast corridor was occurring out of the State of Maine—not a terribly wise belief. There was a craggy coast for landing and they had a bunch of undercover agents, who were themselves not pure, offering $1 million dollars in cash with $100,000 dollars up front to a marina owner to essentially "close his eyes" while the drugs got delivered and shipped through there. The jury had little trouble, saying the marina owner was in bad financial trouble, but he never would have done this without [the] 1 million dollars cash. Another was a financial fraud case out of New York City in which one gets the sense the defendants were pretty greedy and would have loved to have made some more money, but did not have a *clue* on how to go forward. They did not know how to convert financial instruments and how to write up the deal. But there was a government agent involved who knew *exactly* how to do all this and showed them everything to do. And again the jury frowned upon that—entrapment found, acquittal of all charges. Then I worked on one several years ago where I helped a prosecutor in a case involving militia—some dangerous and violent crimes. This is an exception to the usual entrapment case where they planted someone inside the militia, and that is really how they found out about future crimes. That is one where the entrapment defense never really got raised. My involvement was early on—in trying to guide the undercover agents as to how far they could go. They had to participate enough to be viewed as an accepted part of the group, but if they flopped over the line and were too actively involved, the fear was that the entrapment defense could be successfully raised. That is very difficult to do because the agents [were] away for weeks or months at a time, and they [did] not exactly know where the criminal endeavor [was] going to be involved. My advice was to go along with the group, but not to be initiating new endeavors, encouraging

people into areas they would not have gone into before that, or coming up with solutions to problems that they could not solve.