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Entrapment as a Due Process Defense: Developments After Hampton v. United States

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NOTES

Entrapment as a Due Process Defense: Developments After *Hampton v. United States*

In *United States v. Jannotti*,[1] George Schwartz, president of the Philadelphia City Council, and councilman Harry Jannotti were found guilty by a jury of accepting bribes in violation of federal law.[2] The transactions were part of a complex and occasionally bizarre undercover operation known as ABSCAM.[3] Despite overwhelming proof that the defendants received payments,[4] and evidence permitting the inference that the payments constituted bribes in exchange for favors to be rendered by the defendants in their official capacity,[5] the district court acquitted the

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[1] 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, 30 CRIM. L. REP. (BNA) 2405 (3d Cir. Feb. 11, (1982) (full opinion available Apr. 16, 1982, on LEXIS, Genfed library, Newer file), *petition for cert. filed*, Apr. 12, 1982 (No. 81-1899) (phone conversation with Clerk's Office, United States Supreme Court, on Apr. 19, 1982). The reversal by the court of appeals became available after this note had been set in print. The reversal is based, however, primarily on the district court's erroneous findings of fact, leaving open the question whether the district court's entrapment analysis would have been sustained had the court of appeals accepted the facts underlying that analysis. This note continues to support the entrapment analysis of the district court. For a discussion of the court of appeals' decision, see note 151 *infra*.

[2] Schwartz was found guilty of "conspiring, in violation of 18 U.S.C. § 1962(d) [1976], to violate provisions of the Racketeer Influenced and Corrupt Organizations Statute, 18 U.S.C. § 1962(c) [1976] ('RICO' conspiracy), and, together with co-defendant Harry P. Jannotti, of conspiring to obstruct commerce in violation of the Hobbs Act, 18 U.S.C. § 1951(a) [1976]." 501 F. Supp. at 1183-84. Seeking dismissal of the indictment, both defendants alleged prosecutorial misconduct violative of due process, but decision was deferred pending development of the record at trial. *Id.* at 1184. At the conclusion of all the evidence, the defendants moved for acquittal pursuant to FED. R. CRIM. P. 29, and renewed their motions after the jury's adverse verdict. *Id.*

[3] ABSCAM stands for " 'Abdul scam,' after Abdul Enterprises Ltd., the bogus import-export firm that the agents used as their front." TIME, Sept. 1, 1980, at 14. For a discussion of the operation, see notes 136-37 & accompanying text *infra*. *Jannotti* is to date the only ABSCAM case in which the defendants have even momentarily been acquitted on grounds related to entrapment. Recently, district court Judge George Pratt sustained the ABSCAM convictions of Congressmen Myers, Lederer, Thompson, and Murphy from attacks based on due process and entrapment. United States v. Myers, No. CR 80-00249, No. CR 80-00253, No. CR 80-00291 (E.D.N.Y. July 24, 1981).

[4] The transactions were videotaped; Schwartz received $30,000 and Jannotti received $10,000. 501 F. Supp. at 1198-99.

[5] The defendants were to exercise their influence in the city council to pave the way for a fictitious hotel construction project. *Id.* at 1184. Although arguably consistent with what was revealed in the videotapes, Schwartz' claim that he had been paid as a consultant in local government matters was disbelieved by the jury. *Id.* at 1198.

defendants on three separate grounds,[6] including a novel due process defense related to entrapment. Although the court decided that the defendants had been "entrapped" in the legally orthodox sense of the term,[7] it also found[8] that the government's participation in the alleged bribery scheme violated the due process clause of the fifth amendment.[9]

The district court's decision in *Jannotti* is one of only three federal decisions[10] that have upheld entrapment as a due process defense[11] since

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[6] Apart from entrapment-related grounds, the court based Jannotti's acquittal on the government's failure to establish the actual or potential impact of the bribes on interstate commerce necessary for the court's jurisdiction under the Hobbs Act. *Id.* at 1184-85, 1199. Both defendants also were acquitted on the ground that "federal jurisdiction over the offenses charged [was] artificially created by the government in an attempt to exceed the proper scope of federal law enforcement." *Id.* at 1205. Federal entrapment cases not infrequently involve the concern that government agents have artificially created jurisdiction. *See, e.g.*, United States v. Archer, 486 F.2d 670 (2d Cir. 1973) (jurisdiction under the Travel Act, 18 U.S.C. § 1952 (1976), not established in probe concerning corruption within the New York criminal justice system).

[7] 501 F. Supp. at 1200. The orthodox "subjective theory" of entrapment bars prosecution only of those persons not "predisposed" or "ready and willing" to commit the offense. *See* notes 22-31 & accompanying text *infra*.

[8] 501 F. Supp. at 1203-05. For a discussion of the court's analysis, see notes 135-51 & accompanying text *infra*. The due process defense is technically distinct from the orthodox defense of entrapment because the latter is based on congressional intent and rules of statutory construction, *see* notes 34-36 & accompanying text *infra*, and is "not of a constitutional dimension." United States v. Russell, 411 U.S. 423, 433 (1973). Nevertheless, the due process defense is related to entrapment because both defenses arise from the government's participation in crimes committed by the defendant. Hence, the former defense may be termed an entrapment-due process defense. *See* note 11 *infra*. A successful claim of due process violations stemming from the government's participation in crime is rare, and such a defense is of comparatively recent origin. *See* note 10 & accompanying text *infra*.

[9] "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law;" U.S. CONST. amend. V. The fifth amendment's due process clause is made applicable to the states through the language of the fourteenth amendment. "[N]or shall any State deprive any person of life, liberty, or property without due process of law;" U.S. CONST. amend. XIV, § 1.

[10] The only other federal decisions sustaining an entrapment-due process defense in the wake of Hampton v. United States, 425 U.S. 484 (1976), are United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), and, most recently, United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981). For discussion of these cases, see notes 128-60 & accompanying text *infra*. Prior to *Hampton*, an entrapment-due process defense had been upheld in a number of specific contexts. *See, e.g.*, Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (pervasive government participation in illegal liquor manufacturing scheme); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971) (supplying of narcotics to defendant and repurchase by government); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970) (supply of counterfeit bills by government). *Chisum* has been overruled by implication, *see* Hampton v. United States, 425 U.S. 484 (1976) (government supplying of contraband to one later prosecuted for trafficking in such contraband not per se violative of due process), and the Fifth Circuit has viewed *Bueno* as effectively overruled by *Hampton*. *See* United States v. Benavidez, 558 F.2d 308, 309 (5th Cir. 1977).

In light of such developments, *Twigg*, *Jannotti*, and *Batres-Santolino* together mark an exception to the general demise of the entrapment doctrine, whether statutory, or rooted in due process, in the post-*Hampton* era.

[11] A due process deprivation is "more properly described as a grounds for dismissal [than a defense]," United States v. Batres-Santolino, 521 F. Supp. 744, 750 n.3 (N.D. Cal. 1981), but the term "defense" has been widely adopted. *Id.* Nevertheless, the due process

the decision of the United Sates Supreme Court in *Hampton v. United States.*[12] *Hampton* has been widely viewed as diminishing the scope of the orthodox entrapment defense[13] while continuing to acknowledge the possibility of a related defense rooted in due process principles.[14] The lower federal courts have similarly recognized an entrapment-due process defense,[15] but in the view of this note are nonetheless confused about its precise application. A survey of recent cases reveals numerous questionable decisions, conflicting judicial pronouncements, and a largely affective mode of analysis that bars prosecution only if the government's involvement in or solicitation of crimes is perceived as "outrageous."[16] This note argues that a due process analysis based solely on the outrageousness of the government's conduct provides no meaningful or definite standards for limiting governmental undercover activities conducted in the name of combatting crime. The note advocates a more reasoned mode of analysis that has begun to emerge in recent decisions such as the district court's in *Jannotti* upholding an entrapment-due process defense.

The evolution of the entrapment doctrine explains the significance of the post-*Hampton* development of entrapment as a due process defense. The first section of this note reviews the traditional formulation of the entrapment defense in the context of the classic debate over the subjective and objective "theories" of entrapment. This section argues that neither of these competing formulations adequately protects the constitutional rights of the accused, and that an entrapment defense rooted in due process principles is required. The historical survey is followed by a summary of recent federal decisions considering an entrapment-due process defense. Two recent cases, *Jannotti,* and a decision by the Third Circuit Court of Appeals, are then examined to formulate an entrapment-due process defense that is more workable than that currently prevail-

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defense raised in *Jannotti* has no agreed-upon name. *See, e.g.,* United States v. Brown, 635 F.2d 1207, 1212 (6th Cir. 1980) ("*Russell* defense"); United States v. Wylie, 625 F.2d 1371, 1377 (9th Cir. 1980) ("outrageous involvement defense"); United States v. Twigg, 588 F.2d 373, 377 (3d Cir. 1978) ("fundamental fairness defense"). The term "entrapment-due process defense" seems appropriate because the defense is based on the recognition that the violation of due process arising from the government's solicitation of and participation in the charged offenses requires displacement of the usual entrapment defense, and acquittal on constitutional grounds, regardless of what the orthodox test for entrapment might dictate. This nomenclature has been suggested by the title of Note, *Entrapment—A Due Process Defense—What Process is Due?,* 11 SW. U. L. REV. 663 (1979) (surveying cases prior to *Twigg*).

[12] 425 U.S. 484 (1976).

[13] *See, e.g.,* C. WHITEBREAD, CRIMINAL PROCEDURE 571 (1980) ("[I]t appears that the entrapment defense has moved in recent years from a very limited defense to a virtually nonexistent defense."). *See also* Comment, Hampton v. United States: *Last Rites for the "Objective" Theory of Entrapment?,* 9 COLUM. HUMAN RIGHTS L. REV. 223 (1977).

[14] *See* 425 U.S. at 491-95 (Powell, J., concurring); *id.* at 495-500 (Brennan, J., dissenting).

[15] *See* note 86 & accompanying text *infra.*

[16] *See* notes 86-127 & accompanying text *infra.*

ing. The final section presents a theoretical justification, based on principles of constitutional and criminal law, for the emerging mode of entrapment-due process analysis.

A CRITIQUE OF THE SUBJECTIVE AND OBJECTIVE THEORIES OF ENTRAPMENT

The Subjective Theory

The defense of entrapment arises whenever a person accused of a crime introduces evidence of the government's involvement through solicitation or active participation.[17] Although the federal courts first upheld the entrapment defense near the turn of this century,[18] it was not until 1932, in *Sorrells v. United States*,[19] that the Supreme Court first confronted its merits.[20] The *Sorrells* Court conceded that mere solicitation or tempta-

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[17] *See* Comment, *Elevation of Entrapment to a Constitutional Defense*, 7 U. MICH. J.L. REF. 361, 361 (1974); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 369 (1972).

[18] Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). For *Woo Wai*'s claim to priority as well as an excellent discussion of the early evolution of the entrapment doctrine, see Murchison, *The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine*, 47 MISS. L.J. 211, 213 (1976). Murchison notes that recognition of the entrapment defense in state courts preceded federal recognition, the Michigan Supreme Court claiming priority in this area. *See* People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973) (citing Saunders v. People, 38 Mich. 218 (1878)). The doctrine of entrapment has been described as a "purely American" invention unknown under English common law. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 245-46 (1942). For a discussion of efforts to adopt the defense in England and the Commonwealth, see Heydon, *The Problems of Entrapment*, 32 CAMBRIDGE L.J. 268, 278 (1973).

[19] 287 U.S. 435 (1932). *Sorrells* involved a conviction for the possession and sale of one-half gallon of whisky in violation of the National Prohibition Act, 41 Stat. 305 (1919) (repealed 1933). *Id.* at 438. A government agent posed as a tourist and met the defendant at his home. In the course of conversation, the two men discovered that they had both served in the 30th Division A.E.F. during the First World War. While reminiscing about their war experiences, the agent repeatedly asked Sorrells over the course of an hour to an hour and a half to obtain some liquor for him, and was twice refused. Only after the third request did Sorrells accede, leaving briefly, and returning to sell the agent half a gallon of liquor for five dollars. *Id.* at 439-40. The government failed to introduce any evidence that Sorrells had ever sold or possessed liquor prior to the transaction with the agent, although both the prosecution and defense introduced conflicting testimony regarding Sorrells' reputation as a "rum runner." *Id.* at 440-41. The district court ruled as a matter of law that there was no entrapment and refused to give the jury an entrapment instruction. *Id.* at 438. Sorrells was found guilty by the jury and sentenced to imprisonment for 18 months. *Id.* at 438-39. The judgment was affirmed by the court of appeals. Sorrells v. United States, 57 F.2d 973 (4th Cir.), *rev'd*, 287 U.S. 435 (1932).

[20] Murchison, *supra* note 18, at 225. The 17-year gap between *Woo Wai* and *Sorrells* is difficult to explain, since the Supreme Court's delay in definitively passing on the entrapment defense was not due to any lack of opportunity to review the matter: the Court itself denied certiori to 12 separate cases dealing with the defense from 1919 to 1932. *Id.* at 224. A plausible explanation may lie in the proximity of *Sorrells* to the repeal in 1933 of the 18th amendment, on which the National Prohibition Act was based. The Court, in Murchison's view, chose to recognize the defense in the limited context of a prohibitory

tion by government agents would not defeat prosecution.[21] However, the Court sharply distinguished such permissible law enforcement tactics from entrapment, which occurs whenever "the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute."[22]

This definition initiated what has come to be called the subjective theory of entrapment.[23] Under this theory, the result turns largely on whether

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statute which was itself universally unpopular and on the verge of extinction. *Id.* at 235-36. Indeed, the early history of the entrapment defense is so closely tied to the Prohibition Era that 10 years after *Sorrells* it was possible for the leading law review article on entrapment to suggest that the defense was in fact limited to the National Prohibition Act and hence should have disappeared with the passage of the 21st amendment. *See id.* at 233-34 (citing Mikell, *supra* note 18, at 255). While such a view has proven untenable, the historical origins of the defense nevertheless remain felt to this day. It is arguable that the Supreme Court's delay in formulating a coherent theory of entrapment resulted in a theory closely patterned after the lower federal decisions which had arisen in response to the peculiar enforcement techniques under the National Prohibition Act, rather than generally applicable to the problems of enforcing criminal laws. *See* Murchison, *supra* note 18, at 234-35. The unpopularity of the Act was such that detection methods more intensive than a relatively low degree of solicitation were not required because violation was widespread. Hence, the "predisposition" test for entrapment established by the subjective theory of *Sorrells* is peculiarly well suited to an evaluation of government conduct limited to solicitation, as occurred during the Prohibition Era. Moreover, such a test, by making evidence of past misconduct admissible in determining "predisposition," may be interpreted as a pragmatic judicial concession to the unpopularity of the Act, since persons who lacked a prior criminal record but violated the Prohibition Act could be deemed "otherwise innocent" by a jury reflecting the views of many Americans that the use of liquor was not really a crime in the first place. *See id.* at 235. The impetus given to the growth of the entrapment defense by an unenforceable and unpopular statute may even help to explain the insistence in *Sorrells* that the defense is statutory in nature.

[21] 287 U.S. at 441.

[22] *Id.* at 442 (emphasis added). In light of such a definition of entrapment focusing on the predisposition of the defendant, the Supreme Court in *Sorrells* reversed the holding of both the district court and the court of appeals that the issue of entrapment was not required to be submitted to the jury. *Id.* at 452. The Supreme Court found that "the evidence was sufficient to warrant a finding" that Sorrells "had no previous disposition to commit [the crime]" but rather was induced to sell whisky by the "repeated and persistent solicitation" of the government agent and the exploitation "of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War." *Id.* at 441. On remand to the district court to determine the issue of Sorrells' predisposition, the district judge, in response to the motion of the United States attorney, "*nol prossed* the case, and the charges against Sorrells were dropped." Murchison, *supra* note 18, at 233.

[23] The *Sorrells* theory is referred to as "subjective" because it focuses upon the subjective motives of the accused. *See* Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 165 (1976). Because the "subjective" theory remains the prevailing formulation of the entrapment defense, it may be described as the "orthodox" version of the defense, and the terms "orthodox" and "subjective" are used interchangeably in this note. Commentators have also referred to the subjective theory as the "predisposition test," *see* C. WHITEBREAD, *supra* note 13, at 566, or the "origin of intent" test for entrapment. *See* Note, *California Adopts the Unproven Federal Minority View of Entrapment*, 7 PEPPERDINE L. REV. 401, 401 (1980).

the defendant was predisposed to commit the crime?[24] If the defendant was predisposed,[25] the defense fails because the government has not induced an "otherwise innocent person" to commit an offense; it has merely furnished an opportunity for the crime in order to apprehend a would-be violator of the law.[26] If the defendant is not predisposed, however, prosecution is barred because the government has impermissibly induced an "otherwise innocent person" to commit crime.[27]

The Supreme Court reaffirmed the subjective theory of entrapment announced in *Sorrells* in its next decision dealing with entrapment, *Sherman v. United States*.[28] In *Sherman* Chief Justice Warren stated the central issue of entrapment as whether the government "had convinced an otherwise unwilling person to commit a criminal act or whether [the defendant] was already predisposed to commit the act . . . ."[29] Because the evidence did not support the jury's finding that the defendant was predisposed to sell narcotics, the conviction was reversed and the indictment dismissed.[30]

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[24] This is not to say that the "predisposition" of the defendant is the only issue involved in the orthodox entrapment defense, for in its initial stage the defense is affirmative in nature: the defendant must come forward with some evidence, however slight, that the actions of government officials induced the crime. *See* Tanford, *Entrapment: Guidelines for Counsel and the Courts*, 13 CRIM. L. BULL. 5, 18-21 (1977). The precise burden which the defendant bears is somewhat uncertain and varies among the circuits. While some courts have held that merely showing solicitation of the offense by the government satisfies the burden, *see, e.g.*, United States v. Sherman, 200 F.2d 880, 883 (2d Cir. 1952) (L. Hand, J.), others have "supplemented the defendant's burden of production on the inducement issue with the requirement that he produce some evidence negating his propensity to commit the crime," Park, *supra* note 23, at 181 (citing United States v. Watson, 489 F.2d 504 (3d Cir. 1973); Kadis v. United States, 373 F.2d 370 (1st Cir. 1967)). For an exhaustive review of the case law, see Park, *supra* note 23, at 179-84. Professor Park concluded that however the burden is formulated, the defense "is easy to raise." *Id.* at 178. And once the defense is raised successfully, the issue becomes primarily one of the defendant's predisposition, *see* Tanford, *supra*, at 27, with the government bearing the burden of proving beyond a reasonable doubt that either no government inducement occurred or that the defendant was predisposed to commit the offense. *Id. See also* Park, *supra* note 23, at 176 n.39.

[25] Predisposition is equivalent to a readiness and willingness to commit the crime existing prior to the government's involvement through solicitation or aid. *See* Sherman v. United States, 356 U.S. 369, 375 (1958) (Warren, C.J.).

[26] Sorrells v. United States, 287 U.S. at 441-42.

[27] *Id.* at 451.

[28] 356 U.S. 369 (1958). The defendant Sherman, while undergoing treatment to be cured of narcotics addiction, was approached by the government informant Kalchinian, also undergoing such treatment. After several chance meetings, Kalchinian asked Sherman to supply him with narcotics, the request being "predicated on Kalchinian's presumed suffering," and his "not responding to treatment." *Id.* at 371. Only after several such requests did Sherman succumb, eventually purchasing narcotics and sharing them with Kalchinian. *Id.* After three sales of narcotics to Kalchinian, each observed by government agents, Sherman was arrested and subsequently convicted and sentenced to 10 years in prison. *Id.* at 371-72. The court of appeals affirmed. Sherman v. United States, 240 F.2d 949 (2d Cir. 1957), *rev'd*, 356 U.S. 369 (1958).

[29] 356 U.S. at 371.

[30] *Id.* at 373, 378. The Court noted that a finding of lack of predisposition was required

The subjective theory of entrapment presented in *Sorrells* and *Sherman* is still the orthodox view of the entrapment defense.[31] Evidence of the defendant's prior convictions and reputation is well established as admissible to prove predisposition,[32] an issue itself ordinarily determined by the jury.[33] Conceptually, the entrapment defense under the subjective theory is statutory.[34] As announced in *Sorrells*, an entrapped defendant, while seemingly having committed a crime, is technically innocent because of the legal fiction[35] that Congress did not intend federal criminal statutes to apply to nonpredisposed defendants.[36] The defense is "not of a constitutional dimension"[37] nor binding upon the states,[38] and, as the Supreme Court has indicated, may be redefined and limited as Congress sees fit.[39]

The Objective Theory

A competing formulation of the entrapment defense most forcefully presented in the concurring opinions in *Sorrells*[40] and *Sherman*[41] has accompanied the development of the subjective theory of entrapment. Beginning with Justice Roberts in *Sorrells*, critics of the subjective theory of entrapment have called for a test in which inquiry is confined to the nature of the government's conduct.[42] Under an "objective theory" of

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as a matter of law. The government failed to show that Sherman was dealing in narcotics when he was approached by Kalchinian, and there was little proof that the sales resulted in profit to Sherman, nor any evidence that Sherman possessed narcotics other than the amounts sold. *Id.* at 375. Most obviously, the Court noted that at the time Sherman became the target of the government's investigation, he was attempting to refrain from the use of drugs and acceded to the informant's request only after repeated solicitation involving appeals to human sympathy. *Id.* at 373. The Court particularly condemned the senselessness of the government's conduct resulting in the defendant's return to the narcotics habit which he had been attempting to have cured. *Id.* at 376.

[31] Hampton v. United States, 425 U.S. 484, 488-89 (1976); United States v. Russell, 411 U.S. 423, 433 (1973).

[32] *E.g.*, Sherman v. United States, 356 U.S. at 382 (Frankfurter, J., concurring); W. LAFAVE & A. SCOTT, *supra* note 17, at 373.

[33] *See* Sorrells v. United States, 287 U.S. at 452; W. LAFAVE & A. SCOTT, *supra* note 17, at 373.

[34] *See* Hampton v. United States, 425 U.S. at 488 (referring to the "statutory defense of entrapment"); C. WHITEBREAD, *supra* note 13, at 565.

[35] *See* Sherman v. United States, 356 U.S. at 379 (Frankfurter, J., concurring).

[36] Sorrells v. United States, 287 U.S. at 448, 450-51. *See also* Sherman v. United States, 356 U.S. at 372.

[37] United States v. Russell, 411 U.S. 423, 433 (1973).

[38] All the states, however, have recognized some form of the entrapment defense, with the exception of Tennessee. *See* Comment, *Entrapment in Tennessee*, 45 TENN. L. REV. 57 (1977).

[39] United States v. Russell, 411 U.S. 423, 433 (1973).

[40] 287 U.S. at 453-59 (Roberts, J., concurring).

[41] 356 U.S. at 378-85 (Frankfurter, J., concurring).

[42] Sorrells v. United States, 287 U.S. at 459 (Roberts, J., concurring) ("[C]ourts must be closed to the trial of a crime instigated by the government's own agents. No other

entrapment[43] the issue, as articulated by Justice Frankfurter in *Sherman*, is the "conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime."[44] If it is found that the government's solicitation or other conduct would have ensnared only those "ready and willing" to commit the crime, entrapment has not occurred. A contrary finding, however, compels acquittal regardless of the disposition of the defendant.[45] Draftsmen have phrased the objective theory for proposed legislation in terms of a hypothetical average citizen not predisposed to commit crime.[46] In such a form, determination of entrapment would be at least as "objective" as determination of negligence under the law of torts. Objectively measuring the government's conduct by its probable effect upon a hypothetical average person obviates the need to refer to the subjective character of the particular defendant.[47]

In contrast to the subjective theory, with its statutory foundation, the objective theory rests on that "public policy" which requires the Court to protect "the purity of Government and its processes,"[48] and the corollary supervisory power of the Court to formulate and apply "proper standards for the enforcement of the federal criminal law in the federal courts."[49] Accordingly, under the objective theory of entrapment, the

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issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle . . . .").

[43] For the propriety of such terminology, see note 47 & accompanying text *infra*.

[44] Sherman v. United States, 356 U.S. at 384 (Frankfurter, J., concurring).

[45] *Id.*

[46] *See* the proposed Federal Criminal Code's section on entrapment:

§ 702 Entrapment

(1) Affirmative Defense. It is an affirmative defense that the defendant was entrapped into committing the offense.

(2) Entrapment Defined. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause *normally law-abiding* persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE 58 (1971) (emphasis added).

[47] *See* Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927), which describes as "objective" standards of tort liability which measure the defendant's conduct by comparing it to that of a reasonable person. The entrapment defense presented in the concurring opinions in *Sorrells* and *Sherman* is likewise "objective," since one must inquire what a normally law-abiding citizen would have done when confronted by the solicitation or other conduct revealed in the case. Because the Roberts-Frankfurter approach does away with any inquiry into the defendant's subjective state of mind, the approach has traditionally been referred to as the "objective" theory of entrapment. *See* Park, *supra* note 23, at 165. Professor Park, however, prefers to refer to the objective theory as the "hypothetical person" defense, *id.* at 171, which has also been termed the "conduct of authorities" test for entrapment. C. WHITEBREAD, *supra* note 13, at 566. In this note, the term "objective theory of entrapment" is used throughout in referring to the Roberts-Frankfurter formulation of the defense.

[48] Sorrells v. United States, 287 U.S. at 455 (Roberts, J., concurring).

[49] Sherman v. United States, 356 U.S. at 380 (Frankfurter, J., concurring). To the extent that the objective theory is based on the supervisory power of the Court over the ad-

defense is to be evaluated by the court, and not by the jury.[50] Moreover, an entrapped defendant is deemed guilty because no statutory exception for the nonpredisposed may legitimately be inferred from the language of criminal statutes.[51] Prosecution is barred because "the methods employed on behalf of the government to bring about conviction cannot be countenanced."[52]

The Questionable Adequacy of the Subjective and Objective Theories

The conflict between the two theories of entrapment has generated a classic debate that has admirably revealed the weaknesses of both approaches.[53] Against the subjective theory, it has cogently been argued

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ministration of criminal justice, the objective approach would be a federal doctrine not applicable to the states, *see* Hampton v. United States, 425 U.S. at 500 n.4 (Brennan, J., dissenting), and hence the objective theory is as constitutionally limited as the subjective theory. *See* notes 37-39 & accompanying text *supra*.

[50] *See* Sherman v. United States, 356 U.S. at 385 (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. at 457 (Roberts, J., concurring).

[51] Sherman v. United States, 356 U.S. at 379-80 (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. at 456 (Roberts, J., concurring).

[52] Sherman v. United States, 356 U.S. at 380 (Frankfurter, J., concurring).

[53] An impressive array of scholarly commentary in favor of the objective theory is collected in Park, *supra* note 23, at 167 n.13. For commentary in favor of the subjective theory, see the sources in Note, *supra* note 23, at 416 n.65. Academic support, however, has been heavily in favor of the objective theory, which has been endorsed by such groups as the American Law Institute and the National Commission on Reform of Federal Laws. *See* Park, *supra* note 23, at 166-67. Despite this preponderance of commentary in support of the objective theory, the subjective approach remains controlling under federal law, *see* text accompanying note 31 *supra*, and is the rule in the majority of state jurisdictions, *see* Park, *supra* note 23, at 167-68. At least eight states have adopted the objective theory of entrapment, either judicially or through statutory enactment. *See* Grossman v. State, 457 P.2d 226 (Alaska 1969); People v. Barraza, 23 Cal. 3d 675, 591 P.2d 947, 153 Cal. Rptr. 459 (1979); State v. Mullen, 216 N.W.2d 375 (Iowa 1974); People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973); Lynn v. State, 505 P.2d 1337 (Okla. Crim. App. 1973); HAWAII REV. STAT. § 702-237 (1976); N.H. REV. STAT. ANN. § 626:5 (1974); N.J. STAT. ANN. § 2C:2-12(a)(2) (West Supp. 1981). *See also* State v. Bacon, 114 N.H. 306, 319 A.2d 636 (1974); State v. Talbot, 71 N.J. 160, 364 A.2d 9 (1976). At least three other states seemingly have adopted the objective theory legislatively, with subsequent judicial decisions adhering to the subjective theory. *Compare* N.Y. PENAL LAW § 40.05 (McKinney 1975) *and* PA. STAT. ANN. tit. 18, § 313 (Purdon 1973) *and* UTAH CODE ANN. § 76-2-303 (1978) *with* People v. Mann, 31 N.Y.2d 253, 288 N.E.2d 595, 336 N.Y.S.2d 633 (1972) *and* People v. Calvano, 30 N.Y.2d 430, 282 N.E.2d 322, 331 N.Y.S.2d 344 (1972) *and* Commonwealth v. Mott, 234 Pa. Super. Ct. 52, 334 A.2d 771 (1975) *and* State v. Curtis, 542 P.2d 744 (Utah 1975). For a fuller discussion of this last situation, including information regarding the sources for the various statutory enactments, *see* Park, *supra* note 23, at 168 n.16.

Indiana remains with the majority of jurisdictions following a subjective theory of entrapment. *See* IND. CODE § 35-41-3-9 (Supp. 1981). *See also* Note, Hardin *and* Medvid: *A Change in Indiana's Entrapment Law*, 53 IND. L.J. 549 (1978) (discussing Indiana's entrapment law generally and movement away from requirement of probable cause to entrap first established in now moribund Walker v. State, 255 Ind. 65, 262 N.E.2d 641 (1970)).

that the statutory basis for the defense is transparently fictitious,[54] and that entrapment should be based solely on the nature of the government's conduct, not the character of the accused.[55] It has also been suggested

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[54] *See* Sherman v. United States, 356 U.S. at 379 (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. at 456 (Roberts, J., concurring) ("It is not merely broad construction, but addition of an element not contained in the legislation.") Justice Frankfurter stated:

> It is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers or informers because "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." . . . [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.

356 U.S. at 379.

[55] If the defense is indeed statutory, there is arguably no cogent explanation for the well-established rule that entrapment applies only to governmental conduct, there being no such thing as entrapment by "a private person, unconnected with law enforcement." W. LAFAVE & A. SCOTT, *supra* note 17, at 370; *see* United States v. Twigg, 588 F.2d 373, 376 (3d Cir. 1978); United States v. Garcia, 546 F.2d 613, 615 (5th Cir.), *cert. denied*, 430 U.S. 958 (1977); Holloway v. United States, 432 F.2d 775, 776 (10th Cir. 1970). Since the law does not recognize entrapment by private parties, it is the *identity* of the entrapper which is crucial to the defense. Under the subjective theory of legislative intent, the actual rule of law is not well explained. *See* Sherman v. United States, 356 U.S. at 380 (Frankfurter, J., concurring); Grossman v. State, 457 P.2d 226, 229 (Alaska 1969); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1109 (1951) ("If the genesis of intent formula is to be taken seriously, why limit entrapment to instigation by government agents?"). *See also* W. LAFAVE & A. SCOTT, *supra* note 17, at 372 ("It is something of a strain to read an implied exception into the statute (excepting persons induced by law enforcement officials and their agents, but not those induced by other persons)." (footnote omitted)).

The underlying rationale for the objective theory, however, namely that certain methods employed by the government to bring about a conviction cannot be countenanced, is at least consistent with the rule that entrapment by private parties is not a defense. *See* Sherman v. United States, 356 U.S. at 379-80 (Frankfurter, J., concurring); W. LAFAVE & A. SCOTT, *supra* note 17, at 372 ("It seems that public policy is the proper explanation of the entrapment defense."). This being the case, the subjective theory is arguably unsound, for a test which "looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense," 356 U.S. at 382 (Frankfurter, J., concurring).

For an opposing view arguing that the statutory basis of the subjective theory is neither fictitious, nor inconsistent with the rule for entrapment by private parties, see Park, *supra* note 23, at 240-43, 246-47. Park argues that it is not wrong to assume that Congress intends its enactments to be subject to common law defenses, such as insanity or duress, which like entrapment are extrinsic to the language of criminal statutes, and that the exception for private parties under the entrapment doctrine is analogous to the exceptions under the defense of mistake of law limiting the latter defense to reliance upon interpretations of the law by officials, where the possibility of collusion is minimal. *Id.* The analogies which Park draws, however, are questionable, since the defenses of insanity and mistake of law, while extrinsic to the language of criminal statutes, are arguably not wholly statutory defenses. Insanity may negate *mens rea*, W. LAFAVE & A. SCOTT, *supra* note 17, at 270, and the latter may be required as a matter of due process of law in the case of crimes traditionally requiring a mental state and imposing a serious penalty carrying a moral stigma. *See id.* at 144-46, 218-23; Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978); *cf.* Lambert v. California, 355 U.S. 225 (1957) (municipal ordinance imposing criminal liability for failure to register as a convicted felon held violative of due process where no showing was made

that the subjective theory is inherently prejudicial to defendants,[56] fosters unequal treatment under the law,[57] and fails to guide law enforcement

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that defendant should have known of the duty to register); Morissette v. United States, 342 U.S. 246 (1942) (*mens rea* is to be assumed in statutory formulations of common law crimes, despite silence of statute). *But cf.* Powell v. Texas, 392 U.S. 514, 535 (1968) (noting that the "Court has never articulated a general constitutional doctrine of *mens rea*"). More generally, it may be argued that the McNaughton Rule excusing criminal conduct where the defendant is unable to distinguish right from wrong is required as a matter of due process. *See* Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1531 (1975) (citing Leland v. Oregon, 343 U.S. 790 (1952)). *See also* Robinson v. California, 370 U.S. 660 (1962) (suggesting that eighth amendment forbids the state from making illness a crime) (heroin addiction).

As to mistake of law, the Supreme Court has held that the defense is founded upon due process principles when reliance upon the interpretations of public officials is involved. *See* Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959). Duress, on the other hand, does not emphasize the identity of the party whose conduct gives rise to the defense, as does entrapment. *See* W. LAFAVE & A. SCOTT, *supra* note 17, at 376 (any person who forces the defendant to commit a crime by implanting a reasonable belief in the imminence of death or serious bodily harm creates a defense of duress assertable by the defendant). The Supreme Court's insistence that entrapment is a statutory defense is therefore questionable, *contra*, Park, *supra* note 23, at 240-43, 246-47, because the defense is not evident from the face of criminal statutes, while other common law defenses which are also extrinsic to the literal language of criminal statutes are arguably based on due process grounds or not limited to the conduct of the government.

[56] The prejudice stems from the inherent unreliability of character and reputation evidence which are admissible to prove predisposition, and the danger that such evidence, together with proof of past criminal conduct, will be weighed by the jury not simply to determine predisposition, but also to determine guilt because the defendant is a bad person. *E.g.*, United States v. Russell, 411 U.S. 423, 443 (1973) (Stewart, J., dissenting); Sherman v. United States, 356 U.S. at 382 (Frankfurter, J., dissenting); W. LAFAVE & A. SCOTT, *supra* note 17, at 373.

[57] Because a finding of predisposition defeats the defense under the subjective theory, intensive and potentially coercive solicitation by the government is excused when evidence independent of the degree of solicitation required to induce the commission of the crime establishes predisposition. *See* United States v. Johnson, 565 F.2d 179 (1st Cir. 1977) (curses and threats made to defendant after sending undercover agent on a wild-goose chase from Massachusetts to Florida for drugs innocuous in light of defendant's predisposition); United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (actual threat made to defendant that his delay in supplying narcotics would call for violent retaliation, if continued, held insignificant given independent evidence of his predisposition). Hence the propriety of government conduct varies with the defendant, depending on predisposition, and arguably penalizes those with prior convictions:

> [Surely] if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. . . . A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes. . . . Past crimes do not forever outlaw the criminal and open him to police practices aimed at securing his repeated conviction, from which the ordinary citizen is protected.

Sherman v. United States, 356 U.S. at 383 (Frankfurter, J., concurring). The objective theory, in contrast, measures the propriety of government conduct by a single unvarying standard, namely by the likelihood that such conduct might induce a person not criminally disposed, to commit crime that he would otherwise not have committed. For criticisms of the objective theory, and a defense of the variable standard imposed by the subjective theory, see notes 59 & 63 & accompanying text *infra*.

officials regarding the outer limits of permissible conduct.[58] Equally cogent criticism of the objective theory of entrapment may be based on the pragmatic fear that objective limits to governmental undercover activities will result in per se rules enabling cautious criminals to escape detection.[59]

A more serious criticism of both theories of entrapment, however, is that they propose inadequate tests, given the problem both theories claim to address. Despite the differences between the two theories, their central concern is common. Subjective and objective theorists agree that although undercover police activity to *detect* crime is permissible,[60] the function of law enforcement "does not include the manufacturing of crime."[61] Once it is recognized that the entrapment defense should seek

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[58] *See* Sherman v. United States, 356 U.S. at 385 (Frankfurter, J., concurring) ("[A] jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court . . . can do this with the degree of certainty that the wise administration of criminal justice demands."). Acquittal under the subjective theory indicates the police conduct was wrong only with respect to the particular defendant involved. Identical conduct may be committed again by the government, in the hope that the next defendant will be believed by the jury to have been predisposed to commit the offense. *See* United States v. Russell, 411 U.S. 423, 444 (1973) (Stewart, J., dissenting). Moreover, under the subjective theory, the existence of congressional intent to exempt nonpredisposed defendants from criminal statutes is to be determined on a statute-by-statute basis, but the Court has never clearly indicated which criminal statutes embody an entrapment defense. *See* Sorrells v. United States, 287 U.S. at 459 (Roberts, J., concurring). However, the last criticism may also be made about the objective theory, which would seem to apply to all crimes, *see* notes 40-52 & accompanying text *supra*, but has been formulated as *not* applicable to crimes of violence. *See* W. LAFAVE & A. SCOTT, *supra* note 17, at 371. Under either theory, the defense is limited to so-called victimless crimes, where undercover government activity is most prevalent, but the reason for this is unclear. *See id.* A due process analysis would arguably extend the scope of an entrapment defense. *See* note 157 & accompanying text *infra*.

[59] In support of the variable treatment afforded by the subjective theory, it has been argued that "no fair assessment of the decency of an agent's conduct can be made without considering . . . the defendant's propensity for crime." Park, *supra* note 23, at 203. Such an argument gains cogency from the pragmatic realization that establishing objective limits to police conduct applicable in *every case* (as under the "hypothetical person" approach of the objective theory of entrapment) would permit criminals to escape detection by simply requiring those with whom they deal to transgress those limits. *See id.* at 228. *See also* J. SKOLNICK, JUSTICE WITHOUT TRIAL 103 (1966) (police policy prohibiting officers to be touched by prostitute or to suggest price led prostitutes to kiss potential customers and request price from them as device to screen out police agents). The tendency of an objective theory to establish per se rules governing police conduct while not protecting those persons who are abnormally gullible or susceptible to temptation, see note 63 *infra*, has prompted the criticism that the objective theory is likely to "acquit the wolves and convict the lambs." Park, *supra* note 23, at 271.

[60] *E.g.*, Sherman v. United States, 356 U.S. at 383 (Frankfurter, J., concurring) ("This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes . . . .") (objective theory); Sorrells v. United States, 287 U.S. at 441 ("[A]uthority [is] given for the purpose of detecting and punishing crime, and not for the making of criminals . . . .") (Hughes, C.J.) (subjective theory).

[61] Sherman v. United States, 356 U.S. at 372 (Warren, C.J.) (subjective theory); *see id.* at 384 (Frankfurter, J., concurring) ("The power of government is abused . . . when employed to promote rather than detect crime . . . .") (objective theory).

to distinguish the detection of crime from the senseless promotion of crime merely for the sake of obtaining a conviction,[62] it becomes apparent that both theories present too narrow an inquiry.

Under the objective theory, a person who succumbs to government solicitation to commit a crime is not entrapped if the solicitation would not have induced an average citizen to commit the crime. Nevertheless, a person with below-normal capacity to resist temptation might well have remained a law-abiding citizen, absent the government's activity.[63] Similarly, the subjective theory incorrectly assumes that predisposition is a sufficient criterion for determining whether the government's conduct has simply detected, and not manufactured, crime. A person may be ready and willing, *but unable* to commit the crime, lacking the necessary expertise and resources. Or a person may be predisposed to commit a crime, but unlikely to do so because of its difficulty, the risks involved, or its conflict with other motives and desires. In such cases, the reliability of "predisposition" to determine whether, if left alone, the accused would have committed the crime is dubious.[64] To remove every obstacle that might have kept even a predisposed person law abiding is not to detect crime, but to manufacture it—a possibility insufficiently acknowledged by the subjective theory of entrapment.[65]

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[62] For fuller discussion and justification for this view, see notes 166-72 & accompanying text *infra*.

[63] *See* Rossum, *The Entrapment Defense and the Supreme Court: On Defining the Limits of Political Responsibility*, 7 MEM. ST. U.L. REV. 367, 395 (1977). In contrast, the flexible standard imposed by the subjective theory might furnish a measure of protection for such individuals since lack of predisposition bars prosecution even in cases where solicitation is very slight. *See* Note, *supra* note 23, at 424-25. In People v. Goree, 240 Cal. App. 2d 304, 49 Cal. Rptr. 392 (1966), an agent playing pool with the defendant asked the defendant to obtain a marijuana cigarette for him. With no profit to himself, the defendant obtained a cigarette as requested. Despite this low degree of solicitation and ready compliance, the court of appeals reversed the conviction, holding that because lack of predisposition might still be found where the degree of solicitation is minimal, an entrapment instruction should have been given to the jury. *Id.* Ready compliance *is* circumstantial evidence establishing predisposition, but its weight is naturally dependent on the circumstances. *Compare Goree with* United States v. Navar, 611 F.2d 1156 (5th Cir. 1980) (ready sale of large quantitites of narcotics to agents requesting such contraband belied lack of predisposition). *See also* United States v. Jannotti, 501 F. Supp. 1182, 1200 (E.D. Pa. 1980) ("[T]he government cannot establish predisposition merely by showing that the defendant did commit the crime. If that were sufficient . . . there would be no such thing as an entrapment defense."). In a case such as *Goree*, it is difficult to see how acquittal could be possible under the objective theory, while the subjective theory has been praised for its flexibility to encompass such a possibility. *See* Note, *supra* note 23, at 424-25.

[64] The unreliability of the predisposition concept is suggested by Professor Donnelly's distinction between chronic and situational offenders. The latter may be "predisposed," and yet their criminal disposition may be prompted into action only under special circumstances. Where those circumstances are provided by the government, it remains questionable that a crime would have been committed absent the government's involvement. *See* Donnelly, *supra* note 55, at 1113.

[65] For illustration of the circumstances under which a defendant, though predisposed, still may be induced to commit a crime he would not otherwise have been likely to commit,

Toward a Due Process Defense

The inadequacy of both the subjective and objective theories is graphically demonstrated by the doctrinal tensions evident in the two most recent Supreme Court decisions dealing with entrapment, *United States v. Russell*[66] and *Hampton v. United States*.[67] In *Russell* the defendant was convicted for the illegal manufacture and sale of methamphetamine. Although the defendant admitted he was predisposed, the record disclosed that the government had provided the defendant with phenyl-2-propanone, an ingredient essential for the manufacture of methamphetamine and difficult to obtain.[68] Because of this essential aid by the government, the Ninth Circuit Court of Appeals acquitted, finding entrapment as a matter of law.[69]

Relying heavily on the analysis of the court of appeals, Russell urged the Supreme Court to "preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent 'supplied an indispensable means to the commission of the crime that could not have been obtained otherwise through legal or illegal

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see notes 128-60 & accompanying text *infra* (discussing United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981); United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980) *rev'd*, 30 CRIM. L. REP. (BNA) 2405 (3d Cir. Feb. 11, 1982); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1980)).

[66] 411 U.S. 423 (1973).

[67] 425 U.S. 484 (1976).

[68] *See* 411 U.S. at 425-26; *id.* at 447 (Stewart, J., dissenting).

[69] Russell v. United States, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973). The Ninth Circuit compared the case to its own earlier decision in Greene v. United States, 454 F.2d 783 (9th Cir. 1971), in which an undercover agent had engaged for more than two and a half years in aiding and abetting the defendants in the illegal manufacture and sale of distilled liquor by offering to provide a still, a still site, still equipment, and an operator, and furnishing the defendants with two thousand pounds of sugar at wholesale prices. The defendants were acquitted despite their predisposition to commit the offense. 454 F.2d at 786-87.

The court also relied on two other decisions, United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), and United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970), in which predisposed defendants were acquitted because the government had supplied them with narcotics and counterfeit bills, respectively, which served as the basis for the criminal charges. The court reasoned that although the government had not supplied Russell with contraband, it nevertheless enabled him to manufacture and sell it by furnishing an ingredient essential for its manufacture, thereby placing the case within the *Bueno* and *Chisum* holdings. 459 F.2d at 673.

All three of the precedents relied on by the court of appeals in *Russell* implicitly or explicitly resorted to due process principles in ordering acquittal, despite a finding of predisposition fatal to an entrapment defense under the subjective theory. *See* Greene v. United States, 454 F.2d at 787 (conduct found "repugnant to American criminal justice"); United States v. Bueno, 447 F.2d at 905 (government tactics "exceed[ed] the bounds of reason"); United States v. Chisum, 312 F. Supp. at 1312 (government activity "indistinguishable from other law enforcement practices . . . held to violate due process"). The Ninth Circuit, while refusing to attach a "label" to its result, also acknowledged the due process foundation of its decision. 459 F.2d at 674.

channels.' "[70] Rather than confront the merits of such an argument, the *Russell* majority reinterpreted the factual record. It concluded, against the court of appeals' earlier finding, that the defendant had not been "powerless" to commit the offense. The record revealed that the defendant not only could have but actually did obtain the ingredients for methamphetamine from sources other than the government during the period in which the charged offenses were committed.[71] Hence, finding that the respondent "cannot fit within the terms of the very rule he proposes,"[72] the majority declined to evaluate its merits. In dictum, however, the Court acknowledged that the predisposition test for entrapment might not be exclusively controlling, and hinted that had Russell fallen within the scope of his proposed defense, the due process clause might bar prosecution:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, *cf.* Rochin v. California, 342 U.S. 165 (1952), the instant case is distinctly not of that breed. . . . While the Government may have been seeking to make it more difficult for drug rings, such as that of which respondent was a member, to obtain the chemical the evidence described above shows that it nonetheless was obtainable.[73]

The split among the circuit courts in applying the *Russell* dictum[74] prompted the latest Supreme Court decision on entrapment, *Hampton v. United States*.[75] In *Hampton* the defendant claimed that a government agent had supplied him with the heroin he was later convicted of selling. The defendant accordingly requested a special instruction embodying the holding of *United States v. Bueno*,[76] that when the government buys contraband from itself through an intermediary, and then seeks to prosecute the intermediary, entrapment has been committed as a matter of law.[77] The trial court refused the instruction, and the court of appeals affirmed.[78]

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[70] 411 U.S. at 431.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 431-32.
[74] Cases such as United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), and United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970), acquitting predisposed defendants, involved the government's supplying of contraband, while the phenyl-2-propanone supplied in *Russell* was by "itself a harmless substance," and its possession "legal." 411 U.S. at 432. In the wake of *Russell*, the circuits were split as to whether the contraband cases such as *Bueno* and *Chisum* had survived. *Compare* United States v. West, 511 F.2d 1083 (3d Cir. 1975) (concluding that the contraband cases had survived) *and* United States v. Mosley, 496 F.2d 1012 (5th Cir. 1974) (same), *with* United States v. McGrath, 494 F.2d 562 (7th Cir. 1974) (concluding that they had not) *and* United States v. Jett, 491 F.2d 1078 (1st Cir. 1974) (same).
[75] 425 U.S. 484 (1976).
[76] 447 F.2d 903, 906 (5th Cir. 1971).
[77] 425 U.S. at 487-88.
[78] 507 F.2d 832 (8th Cir. 1974).

Before the Supreme Court, Hampton argued that the alleged supplying of contraband by the government constituted more than a mere opportunity to commit an offense, for without the government's aid he could not have committed the charged crime. Unlike *Russell,* there was no evidence that the defendant had the money or the contacts to permit the sale, absent the government's extraordinary conduct in supplying him with heroin.[79]

A sharply divided Supreme Court upheld Hampton's conviction, but failed to produce a majority opinion.[80] Justice Rehnquist's plurality opinion retreated from his own majority opinion in *Russell* to adopt a rigid rule that a predisposed defendant could never claim a bar to prosecution based on the government's involvement in the crime.[81] The concurring and dissenting opinions refused to go so far, acknowledging that due process in the context of entrapment might still bar prosecution of even a predisposed defendant.[82] The concurring opinion in *Hampton* nevertheless declined to confront the full merits of Hampton's argument. In the eyes of the concurring Justices, the precise constitutional question submitted for review was whether the supplying of contraband by the government was itself a per se violation of due process. Because essential material aid had been supplied in *Russell* without triggering a due process violation, the concurring opinion refused to acquit Hampton simply because the government supplied contraband.[83] The dissenting Justices agreed with the concurrence that due process principles or the Court's supervisory power might bar conviction of a predisposed defendant. They adhered to an "objective" theory, however, that in their opinion should have barred

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[79] Hampton v. United States, 425 U.S. at 496 n.1, 498 (Brennan, J., dissenting). *See also* Brief for Petitioner at 7, 18, Hampton v. United States, 425 U.S. 484 (1976).

[80] 425 U.S. at 484-91 (Rehnquist, J., joined by Burger, C.J. and White, J.) (plurality opinion); *id.* at 491-95 (Powell, J., concurring in the result, joined by Blackmun, J.); *id.* at 495-500 (Brennan, J., dissenting, joined by Stewart, J., and Marshall, J.). Mr. Justice Stevens did not participate.

[81] *Id.* at 488-90 (plurality opinion); *see id.* at 492 (Powell, J., concurring) ("The plurality thus says that . . . due process would never prevent the conviction of a predisposed defendant . . . .").

[82] *Id.* at 492-96 (Powell, J., concurring); *id.* at 497, 499 (Brennan, J., dissenting).

[83] *Id.* at 491-92 (Powell, J., concurring). That the supply of contraband is not per se violative of due process, then, is all that *Hampton* really decided. The more fundamental question—whether the supplying of contraband to one who had neither the contacts nor money to obtain it on his own, for the sole purpose of permitting a sale in order to convict, violates due process—was never confronted by the concurring opinion. The question *was* fully confronted in *Russell,* but never answered, since the defendant could not fall within the terms of such a defense. *See* text accompanying notes 71-73 *supra.* Accordingly, at least one commentator has argued that the full merit of the "conduit" theory of entrapment presented in United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), was not definitively decided by the Supreme Court, *see* Tanford, *supra* note 24, at 16-17, and in light of the concurring Justices' extremely narrow holding, this would seem correct. Neither the plurality nor the concurring opinion ever mentioned the *Bueno* decision. *But see* United States v. Benavidez, 558 F.2d 308 (5th Cir. 1977) (viewing *Bueno* as overruled).

Hampton's prosecution.[84] A majority of the justices therefore agreed that the predisposition test for entrapment should not be dispositive in every case in which the government has solicited or become involved in crime, and that due process notions should supplement the orthodox entrapment defense.[85] Nonetheless, the Court failed to achieve unanimity on the application of an entrapment-due process defense, foreshadowing subsequent confusion in the circuit courts.

ENTRAPMENT AS A DUE PROCESS DEFENSE AFTER *HAMPTON V. UNITED STATES*

The federal courts after *Hampton* have largely agreed that a due process defense remains available to bar prosecution even when a defendant is found to have been predisposed to commit the crime.[86] Nevertheless,

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[84] 425 U.S. at 497 (Brennan, J., dissenting) ("[I] agree with Mr. Justice Powell that *Russell* does not foreclose imposition of a bar to conviction—based upon our supervisory power or due process principles—where the conduct of law enforcement authorities is sufficiently offensive. . . . [T]he police activity in this case was beyond permissible limits."). Justice Brennan, while acknowledging a due process defense, was content to engraft the holding of United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), onto the objective theory of entrapment by resorting to the supervisory power of the Court, leaving "to another day whether it ought to be made applicable to the States under the Due Process Clause." 425 U.S. at 500 n.4. The dissent's reliance on the objective theory of entrapment seems strained, however, because the furnishing of narcotics would not seem to pose any danger that an average law-abiding citizen would be induced therby to engage in the crime of selling narcotics. *See* notes 44-47 & accompanying text *supra*.

[85] *See* 425 U.S. at 491-95 (Powell, J., concurring, joined by Blackmun, J.); *id.* at 495-500 (Brennan, J., dissenting, joined by Stewart, J., and Marshall, J.). Justice Stevens would also most likely support the possibility of an entrapment-due process defense which would supplant the subjective theory in certain instances, since as a circuit judge he had joined in the unanimous holding of United States v. McGrath, 468 F.2d 1027 (7th Cir. 1972), which barred prosecution of a predisposed defendant where the government had supplied counterfeit currency. *See* Comment, *supra* note 13, at 261 n.243. *McGrath* was subsequently vacated and remanded by the Supreme Court "for further consideration in light of United States v. Russell," 412 U.S. 936 (1973), and on remand the Seventh Circuit upheld McGrath's conviction. 494 F.2d 562 (7th Cir. 1974).

[86] United States v. Brown, 635 F.2d 1207 (6th Cir. 1980); United States v. Carreon, 626 F.2d 528 (7th Cir. 1980); United States v. Meacham, 626 F.2d 503 (5th Cir. 1980); United States v. Gray, 626 F.2d 494 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 887 (1981); United States v. Wylie, 625 F.2d 1371 (9th Cir.), *cert. denied*, 101 S. Ct. 863 (1980); United States v. Lentz, 624 F.2d 1280 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1696 (1981); United States v. Bocra, 623 F.2d 281 (3d Cir.), *cert. denied*, 101 S. Ct. 217 (1980); United States v. Caron, 615 F.2d 920 (1st Cir. 1980); United States v. Williams, 613 F.2d 560 (5th Cir. 1980); United States v. McQuin, 612 F.2d 1193 (9th Cir.), *cert. denied*, 445 U.S. 954 (1980); United States v. Noll, 600 F.2d 1123 (5th Cir. 1979); United States v. Hammond, 598 F.2d 1008 (5th Cir. 1979); United States v. Hodge, 594 F.2d 1163 (7th Cir. 1979); United States v. Burkley, 591 F.2d 903 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979); United States v. Szycher, 585 F.2d 443 (10th Cir. 1978); United States v. Prairie, 572 F.2d 1316 (9th Cir. 1978); United States v. Hansen, 569 F.2d 406 (5th Cir. 1978); United States v. Thomas, 567 F.2d 638 (5th Cir. 1978), *cert. denied*, 439 U.S. 822 (1979); United States v. Johnson, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); United States v. Leja, 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); United States v. Graves, 556 F.2d 1319 (5th Cir. 1977),

despite the large number of cases presenting an entrapment-due process defense, the courts have sustained the defendants' claims in only three cases.[87] The decisions suggest that successful claims are rare because of judicial failure to articulate any standards specifying what might violate due process within the entrapment context. Decisions currently rejecting the defense depend more on the subjective feelings of individual judges than upon any reasoned due process analysis.[88]

Part of the problem stems from the elusive and broad notion of due process itself. In the words of one scholar, "Due process has always been considered a residual concept, a catch-all protection limiting the entire government in favor of private rights."[89] It is therefore natural that due process defies precise definition.[90] However, much of the current weakness of due process analysis in the context of entrapment can be traced more particularly to dictum in *United States v. Russell*, where Justice Rehnquist pointedly cited *Rochin v. California*[91] to illustrate the possibility of an entrapment-due process defense.[92] The citation sheds remarkably little light on what due process might require in the context of entrapment, for *Rochin* dealt not with entrapment but with the power of the state to search and to seize evidence.[93] Moreover, the conduct of the police

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cert. denied, 435 U.S. 923 (1978); United States v. Steinberg, 551 F.2d 510 (2d Cir. 1977); United States v. Gonzales, 539 F.2d 1238 (9th Cir. 1976); United States v. Reifsteck, 535 F.2d 1030 (8th Cir. 1976). *See also* United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

The due process claims raised in the above decisions, while not sustained, at least merited scrutiny by the courts involved. For further cases, see Abramson & Lindeman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. L. 139 (1980) (surveying trend of decisions in each circuit); Cohn, *The Need for an Objective Approach to Prosecutorial Misconduct*, 46 BROOKLYN L. REV. 249, 254 n.27 (1980) (exhaustive collection of decisions up to 594 F.2d).

[87] *See* United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981); United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980) (sustaining defense), *rev'd*, 30 CRIM. L. REP. (BNA) 2405 (3d Cir. Feb. 11, 1982) (holding defense inapplicable in light of jury's findings of fact).

[88] *See* note 105 & accompanying text *infra*.

[89] R. MOTT, DUE PROCESS OF LAW 593 (1926).

[90] *See* Rochin v. California, 342 U.S. 165, 173 (1952) (Frankfurter, J.) ("Due process of law, as a historic and generative principle, precludes defining . . . ."). Some attempts at definition include Supreme Court statements to the effect that due process encompasses "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Palko v. Connecticut, 302 U.S. 319, 328 (1937), "minimum standards of fairness," Green v. United States, 355 U.S. 184, 215 (1957), and "fair play and substantial justice," International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). For a useful discussion, see Note, *supra* note 11, at 677-80, the author ultimately agreeing with the statement in Jones v. Franklin County Comm'rs, 130 N.C. 451, 465, 42 S.E. 144, 149 (1902), that " 'it is difficult to define with precision the exact meaning and scope of the phrase "due process" of law. Any definition which could be given would probably fail to comprehend all the cases to which it would apply.' " Note, *supra* note 11, at 678 n.103.

[91] 342 U.S. 165 (1952).

[92] *See* United States v. Russell, 411 U.S. at 431-32; text accompanying note 73 *supra*.

[93] Although not originally "regarded as a search and seizure [case] at all," *Rochin* may most easily be viewed as "an extreme instance of an illegal search and seizure." Reynard, *The Right of Privacy*, in FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 85, 113-14 (A. Hard-

in *Rochin*[94] was arguably so uniquely offensive that the decision provides no real guidance for evaluating due process claims.[95]

More fundamentally, the citation of *Rochin* must be criticized as invoking the questionable methodology of the Supreme Court's search and seizure cases prior to *Mapp v. Ohio*.[96] Although properly relying upon the generality of "fundamental fairness" to determine the meaning of due process,[97] the Supreme Court in those decisions notably failed to articulate

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ing ed. 1959). In this light, commentators have noted that *Rochin* is confusing at best as a guide for entrapment cases: "Justice Rehnquist's citation of *Rochin v. California* is enigmatic . . . . If *Rochin* indicates how outrageous police conduct must be before due process is denied, then the due process defense will offer negligible protection beyond that already afforded by the exclusionary rule." *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 251-52 (1973). In *Rochin* Justice Frankfurter's majority opinion found the conviction to violate the due process clause of the fourteenth amendment because the methods employed to obtain the incriminating evidence involved "conduct that shocks the conscience." 342 U.S. at 172. Justices Black and Douglas concurred, finding a violation of the fifth amendment's prohibition against self-incrimination. *Id.* at 174-77 (Black, J., concurring); *id.* at 177-79 (Douglas, J., concurring).

[94] Officers who had broken into the defendant's bedroom observed the defendant swallowing two capsules. 342 U.S. at 166. The officers, suspecting the capsules to be contraband, assaulted the defendant and unsuccessfully attempted to extract the capsules. *Id.* The defendant was taken to a hospital where an emetic solution was forced through a tube into his stomach, causing vomiting and leading to the discovery of two capsules containing morphine. *Id.*

[95] *See* Abramson & Lindeman, *supra* note 86, at 148 & n.35.

[96] These cases include Irvine v. California, 347 U.S. 128 (1954) (repeated and illegal breaking and entering of defendant's home and installation of listening devices, including one within defendant's bedroom, held not violative of due process); Rochin v. California, 342 U.S. 165 (1952) (stomach pumping to obtain incriminating evidence held violative of due process); Wolf v. Colorado, 338 U.S. 25 (1949) (failure to exclude doctor's records seized without warrant held not violative of due process). Mapp v. Ohio, 367 U.S. 643 (1961), overruled *Wolf* and incorporated the fourth and fifth amendments and the exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914), into the fourteenth amendment's due process clause, thereby making the guarantees of the fourth and fifth amendments meaningfully applicable to the states. For an illuminating discussion and implicit critique of the *Wolf-Rochin-Irvine* sequence of cases and their methodology, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 518-31 (9th ed. 1975).

[97] *See, e.g.*, Rochin v. California, 342 U.S. at 169 (Due process requires "an exercise of judgment . . . in order to ascertain whether [the state's conduct] offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ."). *See also* note 90 & accompanying text *supra*. Despite the gradual de facto acceptance of much of Justice Black's incorporationist views, the Supreme Court continues to adhere to a flexible "fundamental fairness" analysis. *See* Duncan v. Louisiana, 391 U.S. 145, 148, 149 n.14 (1968) ("[T]he Court has looked increasingly to the Bill of Rights for guidance," yet the inquiry remains whether "a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."). *See also* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 413 (1978) ("[T]he [Constitution] itself, the interpretivist's Bible, contains several provisions whose invitation to look beyond the four corners of the document . . . cannot be construed away."); Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at 'Substantive Due Process,'* 44 S. CAL. L. REV. 490, 493-94 ("The 'incorporation' doctrine has proven to be inadequate, as Griswold v. Connecticut shows.").

Rochin is therefore not problematic because the incorporationist view is somehow to be preferred. Granted, however, the desirability of a flexible and open-ended approach

what fundamental fairness might require. Rather, the Court adopted an ad hoc approach to the recurrent problem of searches and seizures, and decided each case by the subjective application of ambiguous labels.[98] In *Rochin*, Justice Frankfurter found stomach pumping to violate due process simply because it was conduct "that shocks the conscience."[99] To deem conduct shocking to the conscience is to state a conclusion, not a rational criterion. Because the *Rochin* standard is in essence a species of affective response, reasonable persons will differ in applying it, as was revealed when Justice Frankfurter later failed to convince his fellow Justices in *Irvine v. California*[100] that breaking and entering a suspect's home and installing electronic surveillance devices violated due process in light of *Rochin*. The incorporation of the exclusionary rule as part of the due process clause in *Mapp v. Ohio*[101] signaled an end to the *Rochin* approach in search and seizure cases. Justice Black observed in *Mapp*: "As I understand the Court's opinion in this case, we again reject the confusing 'shock-the-conscience' standard of the *Wolf* and *Rochin* cases, and instead set aside this state conviction in reliance upon the precise, intelligible and more predictable constitutional doctrine [under the fourth and fifth amendments]."[102] The inherently subjective analysis called for by a "shocks-the-conscience" test evades any principled articulation of the proper constitutional limits to police undercover activity and, by so doing, provides dubious assurance that due process will be observed.[103]

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to due process (as is made possible by the generality of "fundamental fairness"), it is still necessary to specify what one deems due process to require, and this *Rochin* fails to do. The vindication of Justice Black's view in Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (Black, J., concurring), may therefore be approved not because of its incorporationist underpinnings, but because of its greater specificity. See text accompanying note 102 *infra*.

[98] *See* Reynard, *supra* note 93, at 114 ("The great difficulty with the Court's ad hoc approach to [search and seizure typified by *Rochin*] is, of course, the lack of predictability of result—the seeming subjectivity with which cases are decided . . . .").

[99] 342 U.S. at 172. *See also* note 102 *infra*.

[100] 347 U.S. 128, 142-49 (1954) (Frankfurter, J., dissenting).

[101] 367 U.S. 643, 654-55 (1961).

[102] *Id.* at 666 (Black, J., concurring). Professor Tribe has also criticized the *Rochin* approach:

> Justice Frankfurter could explain only that the stomach pumping he deemed violative of due process in *Rochin v. California* was "conduct that shocks the conscience." References to history, tradition, evolving community standards, and civilized consensus, can provide suggestive parallels and occasional insights, but it is illusion to suppose that they can yield answers, much less absolve judges of responsibility for developing and defending a theory of what rights are "preferred" or "fundamental" and why.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-4, at 572-73 (1978) (foonotes omitted).

[103] *See* Abramson & Lindeman, *supra* note 86, at 174 n.145 ("Because no standard was specifically defined in *Rochin*, a court may always decline to find government behavior so shocking as to warrant reversal on due process grounds."); Comment, *supra* note 17, at 385 ("[The *Rochin*] standard in the context of the entrapment situation, if an objective test, represents a subjective judgment.").

The Failure of the Rochin *Standard in the Federal Courts*

Despite the Court's abandonment of a "shocks-the-conscience" standard in search and seizure cases, *Russell* has spawned a similarly nebulous test among the lower federal courts to determine whether government involvement in crime violates due process.[104] Because *Russell* invoked *Rochin*, many of the subsequent opinions contain little analysis beyond the conclusory statement that the government's conduct in the case is not "outrageous" in the sense of *Rochin*,[105] or that predisposition remains the controlling factor in any entrapment defense.[106] Caught between the affective rhetoric of *Rochin* and the inadequacy of the orthodox entrapment defense, the lower federal courts have not been able to implement an entrapment defense which fully incorporates the cardinal principle that the legitimate scope of law enforcement does not include the manufacturing of crime.

In *United States v. Wylie*,[107] the defendants were convicted for offenses arising from an LSD manufacturing ring. The enterprise began when Bachrach, a "sometime college teacher" interested in manufacturing and selling LSD, was betrayed by a friend to federal agents who supplied

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[104] *See* note 105 & accompanying text *infra*. Although Justice Rehnquist later denied the possibility of an entrapment-due process defense, *see* text accompanying note 81 *supra*, his invocation of *Rochin* as a guide for entrapment cases survives in Hampton v. United States, 425 U.S. 484, 491-95 (Powell, J., concurring); *id.* at 495-500 (Brennan, J., dissenting). See especially Justice Powell's concurrence, *id.* at 495 nn.6 & 7 (referring to *Rochin* and stating that a "demonstrable level of outrageousness" might bar conviction where the subjective theory of entrapment would not).

[105] *See, e.g.*, United States v. Wylie, 625 F.2d 1371, 1371 n.7 (9th Cir.), *cert. denied*, 101 S. Ct. 1696 (1980); United States v. Leja, 563 F.2d 244, 246 n.4 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); United States v. Steinberg, 551 F.2d 510, 515 (2d Cir. 1977); United States v. Gonzales, 539 F.2d 1238, 1239 (9th Cir. 1976). In each of the above cases, the courts simply found the police conduct to fall short of "outrageousness" despite the circumstances pointing to the danger of the manufacturing of crimes which would otherwise not have occurred. *See* notes 107-27 & accompanying text *infra*. *See also* United States v. Hansen, 569 F.2d 406, 411 (5th Cir. 1978) (informant alleged to have posted bail to release leader of ring being held on other charges, and to have supplied $10,000 "front money" for the purchase of narcotics; court found no "case of entrapment or outrageous police conduct"); United States v. Johnson, 565 F.2d 179, 182 (1st Cir. 1977) (threats made to defendant for failure to complete drug sale, leading to subsequent sale used to convict defendant; court found no "existence of such shocking police conduct as to preclude a conviction"); United States v. Graves, 556 F.2d 1319, 1325 (7th Cir. 1977) (acquiescence and implicit encouragement by Federal Housing Administration regarding submission of misleading mortgage insurance applications deemed not outrageous because not specifically undertaken to prosecute defendant); United States v. Quinn, 543 F.2d 640, 646, 648 (8th Cir. 1976) (informant instructed by "agents to pursue and threaten [defendant] with an adverse vote . . . if he did not pay [juror] to vote for [defendant's] acquittal . . . ."; court observed: "[I]t may safely be said that [police] may go a long way . . . without being deemed to have acted so outrageously as to violate due process . . . .").

[106] For a collection of cases which seemingly ignore the possibility that predisposition is not necessarily dispositive of an entrapment defense, see Note, *supra* note 111, at 681-82.

[107] 625 F.2d 1371 (9th Cir.), *cert. denied*, 101 S. Ct. 1696 (1980).

Bachrach with the ergotamine tartrate (ET) needed to manufacture the drug. Bachrach then embarked upon the activities that led to his conviction. The Ninth Circuit viewed the case as similar to *Russell*. Unlike the *Russell* Court, however, the Ninth Circuit failed to consider the scarcity of ET or the likelihood that the defendant could have obtained ET from a source other than the government. Although Bachrach claimed that the impetus given to the enterprise by the government violated due process, the court interpreted *Russell* as mandating a wholly affective "shocks-the-conscience" standard: "The defendants refer to this as 'governmental creative activity' which is a mischaracterization of the defense upon which they rely. The decisions which established this defense focus on the outrageousness of the governmental agents' involvement in the criminal activity."[108] Finding the government's conduct was not outrageous in light of *Russell*, but eschewing the factual analysis upon which such a judgment had been based, the court rejected Bachrach's entrapment-due process defense.

To the *Wylie* court's remark that "any consideration of the creativity exercised by the government agents is secondary to the consideration of the outrageousness of their involvement,"[109] one can only reply that "outrageousness" cannot be determined in a vacuum. Only by reference to the government's role in the crime, captured by such a notion as "creativity," can conduct be said to be outrageous in more than a purely affective sense. A better view of due process would prohibit the manufacturing of crime merely for the sake of securing a conviction.[110]

The affective analysis of *Wylie* emerges more starkly in cases involving even more questionable participation by government in crime. In *United States v. Gonzales*,[111] the defendants were convicted of crimes relating to the counterfeiting of United States currency. Although the decision describes the counterfeiting operation as "under way" prior to infiltration by government agents, the defendants possessed only a defective printing press and had not counterfeited any currency. The government agents, to "detect" crime, purchased ink and other supplies, furnished a working press, prepared the photostatic negatives for the counterfeits, and actively "participated in the operation of the press which produced the similitudes."[112] The court refused to consider whether a party other than the government realistically could have provided such aid and encouragement, and hence refused to examine whether the government's conduct created crimes that otherwise would not have occurred. In a

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[108] *Id.* at 1377 n.7.
[109] *Id.*
[110] *See* notes 166-72 & accompanying text *infra*.
[111] 539 F.2d 1238 (9th Cir. 1976).
[112] *Id.* at 1239.

wholly conclusory and subjective manner, the court found that "the law enforcement actions [were] well within the bounds of propriety" and held that "no due process violation occurred."[113]

Even more questionable than the agents' behavior in *Gonzales* is the government's role in crime in *United States v. Leja*.[114] Although the defendants initially approached a government informant with a proposal to set up a laboratory to manufacture phencyclidine (PCP), the government agents who joined the enterprise taught the defendants the "technical knowledge without which the phencyclidine could not have been produced"[115] and supplied the necessary chemicals and a lab site. Such activity was found constitutionally permissible on two grounds. First, the court assumed that the "defendants could have obtained sources of supply and information without the assistance of the government"[116] because of their predisposition to commit the crime. Second, the court reasoned that because the predisposition test for entrapment under the subjective theory is not of constitutional magnitude, the government's instruction in crime could not possibly be so outrageous as to violate due process.[117]

In vigorous dissent, Judge Rubin argued that it was undisputed that the government had taught the defendants how to manufacture PCP and had supplied them with the chemicals and the necessary lab site. Without such government involvement, it was doubtful that the defendants could have committed the offenses charged. In Judge Rubin's judgment, "Whatever else egregious conduct may be, it is at least the instruction by law enforcement officers in the technical expertise necessary for the commission of a crime."[118]

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[113] *Id.* at 1240. The court's largely affective mode of analysis is disclosed by its peculiar means of deciding the relative outrageousness of various forms of governmental participation in crime. The court concluded that because government agents in *Hampton* had engaged in action *malum in se*, while no such action was involved in the case before it, it was clear that no outrageous conduct could be found. *Id.* at 1239-40. Yet *Hampton* dealt only with the narrow question of whether the government's supplying of contraband might automatically bar prosecution for crimes relating to the contraband so supplied. *See* note 83 & accompanying text *supra*. *Hampton*'s holding that such conduct does not per se violate due process plainly implies little, if anything, about the acceptability of governmental actions not *malum in se*. The distinction drawn by *Gonzales* between actions *malum in se* and those not so is also dubious as an indicator of "outrageousness" in either a legal or moral sense, for the government's aiding and abetting of crime would itself be criminal when committed by a third party. *See* W. LAFAVE & A. SCOTT, *supra* note 17, at 495-512. *Gonzales* also failed to follow the Supreme Court's analysis in *Russell*, which examined the likelihood that a party other than the government would have been available to the defendant to play the government's role as aider and abettor in the crime. *See* note 71-73 & accompanying text *supra*.

[114] 563 F.2d 244 (6th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 1074 (1978).

[115] *Id.* at 247 (Rubin, J., dissenting).

[116] *Id.* (majority opinion).

[117] *Id.* Under this view, it is difficult to see what conduct the court would consider outrageous, no matter how clear it was that the conduct involved tended to manufacture crime.

[118] *Id.* at 247 (Rubin, J., dissenting).

Wylie, *Gonzales*, and *Leja* show that predisposition is a doubtful test for whether crime has been manufactured, because a person predisposed to a crime may lack the resources or expertise required to commit it. Moreover, a due process defense is needed even where the government extends no aid, because a predisposition or inclination to commit a crime will not necessarily be acted upon. In *United States v. Steinberg*,[119] the defendant Riese was convicted of offering monetary bribes to thwart an investigation by the Immigration and Naturalization Service (INS) into the employment of undocumented workers by the restaurant chain for which Riese worked. Riese's inclination to offer illegal inducements was arguably established by his hinted offers to the agents of free meals and tickets to athletic contests. However, Riese balked at the agents' suggestion that he pay them, stating that that would be "the worst thing," and that he was "very, very, very reluctant" and would not "come through."[120] Only continued pressure by the INS and the subsequent agreement to pay the agents by Riese's colleague Steinberg[121] led Riese to acquiesce in the scheme. The circumstances indicated that Riese "may have been motivated by friendship with Steinberg or sympathy for the [workers] involved."[122] The court of appeals, however, refused to consider seriously whether Riese had been led into criminal conduct which he otherwise would not have engaged in. In the court's view, because the agents merely "pursued and expanded on" Riese's initial corrupt suggestions,[123] the government's conduct was "certainly not improper," and the court accord-

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[119] 551 F.2d 510 (2d Cir. 1977).

[120] *Id.* at 512, 517. Riese even informed his supervisor in writing about the INS agents' demands and stated that he and his colleague Steinberg would meet a second time with the agents to refuse their request for a bribe, despite Riese's fear that there would be "reprisals" for such refusal. *Id.* at 518 (Van Graafeiland, J., dissenting). See also United States v. Quinn, 543 F.2d 640, 646 (8th Cir. 1976), where the government's effort to have the defendant bribe a juror was accompanied by the threat of an adverse vote. At least one commentator has suggested that because any demand by a government official for illegal payments carries with it a threat of a reprisal for failure to pay, such tactics should automatically be barred by entrapment. Donnelly, *supra* note 55, at 1115. The rationale is clear: if the defendant really would bribe an official, it is enough for the undercover agent to wait until he does so, thereby eliminating the element of coercion involved in the suggestion that payment be made, as well as the attendant risk that the jury will not appreciate the importance of the implied threat.

[121] The arrangement was initially unknown to Riese, who upon discovering it exclaimed in dismay, "I don't know anything about this. I don't know what you're talking about money, shit, Fred [Steinberg], you must know what [the agent's] talking about." 551 F.2d at 513.

[122] *Id.* at 514. One of the undocumented workers arrested along with Riese and Steinberg testified that "Riese told him he didn't want to do it but would do it to help him," and that the entire scheme was "not a right thing to do." *Id.* at 520 (Van Graafeiland, J., dissenting). Another worker testified "that Riese told her he did not want to get involved." *Id.* The majority concluded, however, that the jury's finding of predisposition was sufficiently supported by Riese's earlier conduct toward the agents, including his willingness to offer them free meals and sports tickets. *Id.* at 514.

[123] *Id.* at 515.

ingly declined to decide whether "truly outrageous overreaching by government agents" might bar prosecution of a predisposed defendant.[124]

The court's analysis fails to recognize that an individual may be predisposed to commit an act, yet refrain from doing so. As the court noted, but did not truly see, Riese's reluctance to engage in monetary bribes despite his corrupt inclination may have stemmed from his fear of the greater seriousness of such bribes and the increased risk of punishment.[125] Yet the deterrent effect of the criminal sanction is admirably shown when fear of punishment limits one's inclination to commit a crime. In such a case government activity to transform a predisposition into an overt act does not so much *detect* crime as senselessly promote it.[126] The court, however, assumed that the finding of a predisposition excused the government's egregious tactics. Such analysis, by focusing on the ambiguous talisman of "predisposition" rather than the total circumstances of the case, ignores the larger question of whether the government's conduct has manufactured a crime which otherwise would not have occurred.[127]

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[124] *Id.*

[125] *Id.* at 514.

[126] *Id.* at 520 (Van Graafeiland, J., dissenting) ("The very reasons which the majority derides, predispose many of our citizens to walk the straight and narrow path.").

[127] Because juries may not acquit under the subjective theory upon finding a predisposition to commit the crime, juries are asked to resolve the issue of predisposition alone and not whether any crime would have been committed absent the government's conduct. Accordingly, evidence of predisposition independent of the degree of solicitation required to produce the crime frequently results in convictions where potentially coercive tactics are employed, the most extreme example being that of actual threats made by government agents or informants to defendants who have failed to keep their promise of supplying narcotics. *See* United States v. Johnson, 565 F.2d 179 (1st Cir. 1977); United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). While it is arguable that no per se rule banning threats ought to be adopted because a government agent, in order to escape detection, must remain consistent with his adopted role as a professional narcotics dealer who would naturally be angered by the defendant's failure to perform, *see* United States v. Johnson, 565 F.2d at 182, the danger remains that the government's conduct, rather than the defendant's predisposition, causes the crime. The jury is invited to pass only on predisposition, and not on whether the defendant's predisposition is a sufficient explanation for his commission of the crime.

Moreover, as *Steinberg* illustrates, it is arguable that once some evidence of predisposition is secured, government agents go to great lengths to translate such an inclination into acts which otherwise might not have occurred. *See* United States v. Ordner, 554 F.2d 24 (2d Cir. 1977). In *Ordner* the defendant, a commercial blaster with no prior criminal record, was found to be predisposed and was convicted of selling pen guns to government agents, but was acquitted of additional charges arising from the sale of hand grenades. In an elaborate ruse, Ordner was introduced by an informant to agents masquerading as members of the Mafia who desired to purchase illegal weapons. Following the unexpected death of the informant, Ordner was warned by the agents not to contact the authorities, questioned about his family, and told that it was the informant's dying wish that Ordner succeed him as a member of the Mafia. Only after parties unknown to Ordner (but apparently not acting in concert with the government) attempted to abduct his daughter did he agree to sell hand grenades to the agents, and the jury acquitted Ordner on those charges following the attempted abduction. The jury's refusal to acquit regarding the sale

TWIGG AND *JANNOTTI:* TOWARD A MORE REASONED DUE PROCESS DEFENSE

The Third Circuit Court of Appeals' decision in *United States v. Twigg*,[128] and the recent ABSCAM decision of a Third Circuit district court in *United States v. Jannotti*[129] suggest a more workable and reasoned approach to an entrapment-due process defense than a "shocks-the-conscience" standard. In *Twigg* the defendants Twigg and Neville were convicted on charges stemming from the illegal manufacture of methamphetamine. On appeal, the defendants raised an entrapment-due process defense, characterizing the government's conduct as "so overreaching as to bar prosecution . . . as a matter of due process of law."[130] In sustaining the defense and reversing the judgment of the trial court, the court of appeals rejected the ambiguous "shocks-the-conscience" standard announced in *Russell*. In its place, the court adopted the more definite inquiry whether the government's conduct facilitated the detection and suppression of crime or impermissibly created new crime merely to obtain a conviction. Laudably, the court rejected the one-sided approaches of the subjective and objective theories of entrapment and examined both the objective effect of the government's tactics and the defendants' subjective intent.

Beginning with the government's conduct, the court noted that the extensive and essential aid furnished the defendants rendered doubtful whether they could have independently committed the crime of manufacturing methamphetamine. Only the government informant had the expertise to set up and run the illegal laboratory; it was also unclear whether the defendants had "the means or the money" to obtain the essential ingredient, phenyl-2-propanone, gratuitously provided by the government.[131]

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of the pen guns may be viewed as correct, but the government's tacit use of the aura of mystery and fear surrounding the Mafia, and the efforts made to have the defendant commit the additional crime of selling hand grenades, suggest the questionable extent to which agents are driven to encourage the transformation of an indefinite predisposition into criminal acts despite the unlikelihood that such acts would be committed freely. Such circumstances led Judge Oakes, although concurring in the judgment, to warn that the case disclosed "unquestionably borderline conduct on the part of a government that has a duty not to 'create crime for the sole purpose of . . . punishing it.' " *Id.* at 31 (quoting Butts v. United States, 273 F. 35, 38 (8th Cir. 1921)).

[128] 588 F.2d 373 (3d Cir. 1978).

[129] 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, 30 CRIM. L. REP. (BNA) 2405 (3d Cir. Feb. 11, 1982).

[130] 588 F.2d at 377. Neither defendant was entitled to acquittal on the basis of the subjective theory of entrapment. Neville was properly found to be predisposed, in light of the informant's testimony regarding Neville's ready acquiescence to the plan, and his involvement in a similar criminal ring some four years previously. Twigg could not claim the orthodox entrapment defense because he was drawn into the plan by Neville, a private party not acting in concert with the government. *Id.* at 376.

[131] *Id.* at 380-81. Through the informant Kubica, the government gratuitously supplied

The propriety of such tactics, the court declared, could only be evaluated in light of the facts known about the criminal defendants. Neville was predisposed, since he had participated in a similar venture with the informant Kubica some four years earlier and had readily acquiesced to the plan. Nevertheless, when the probe began, Neville "was not engaged in any illicit drug activity" and, as far as the record showed, "was lawfully and peacefully minding his own business."[132] Moreover, when contact between Kubica and Neville was reestablished, it was Kubica who suggested forming the criminal enterprise. Twigg, meanwhile, became involved fortuitously and only to repay a debt to Neville. Unaware of the criminal nature of the operation, Twigg began by running errands. Even after Twigg discovered its criminal purpose, he contributed nothing in terms of "expertise, money, supplies, or ideas" and "would not even have shared in the proceeds from the sale of the drug."[133] In light of such facts, the government's tactics could not be justified as a means of detecting crime. Rather, the "egregious conduct on the part of the government agents generated new crimes . . . merely for the sake of pressing criminal charges," and the court held such "overreaching" conduct to violate due process.[134]

In *United States v. Jannotti*, a district court for the Third Circuit cor-

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20% of the glassware, and the phenyl-2-propanone. *Id.* at 380. The government further made arrangements with chemical supply houses to facilitate Kubica's purchase of the remaining required materials. *Id.* When difficulties arose concerning an adequate location for the proposed illegal laboratory, the government freely provided a farmhouse suited for the purpose. *Id.* Once the laboratory was set up, Kubica "was completely in charge," *id.*, and did the manufacturing because only he possessed the expertise required to do so. *Id.* at 380-81. Any production assistance provided by the defendants was minimal and undertaken only at the specific direction of Kubica. Neville's contribution was financial; he provided Kubica with $1500 and otherwise spent much of his time away from the farmhouse. Twigg ran errands for Kubica, shopping for groceries and coffee. *Id.* at 376.

[132] *Id.* at 381. As even the dissent conceded, "why the government was willing to use Kubica . . . in order to reach Neville is unclear." *Id.* at 388 (Adams, J., dissenting). The majority remarked: "We . . . find it baffling that the Government would urge the reduction of the jail sentence for a man who may have run as many as 50 or 100 speed laboratories . . . in exchange for the convictions of two men with no apparent criminal designs and without the expertise required to set up a single laboratory." *Id.* at 381 n.9.

[133] *Id.* at 382. The court accordingly held that "Twigg's conviction is also tainted by the conduct of the DEA agents," so that conviction was barred by the due process clause. *Id.*

[134] *Id.* at 381. The majority relied heavily on United States v. West, 511 F.2d 1083 (3d Cir. 1975), and quoted that decision's statement that "creating new crime for the sake of bringing criminal charges," *id.* at 1085, serves "no justifying social objective," *id.* In eschewing the "shocks-the-conscience" test of *Rochin*, the majority noted that "the type of conduct that would be considered outrageous by Justice Powell or the Supreme Court is unclear." 588 F.2d at 379. In contrast, Judge Adams in dissent adhered to the *Rochin* test and voted to affirm the lower court's judgment: "I cannot say that [the government's conduct] shocks *my* conscience or that it reaches a demonstrable level of outrageousness beyond *my* toleration." *Id.* at 389 (emphasis supplied). The sentence reveals the inevitably subjective nature of the *Rochin* test and its reliance on the personal predilections of judges. *See* Abramson & Lindeman, *supra* note 86, at 179.

rectly interpreted *Twigg* as dealing with the "central theme . . . that, though predisposed, the defendants had in fact been induced to commit a crime they would not otherwise have been likely to commit."[135] Avoiding the "shocks-the-conscience" test, the court overturned the convictions of city councilmen Schwartz and Jannotti notwithstanding the jury's determination that the defendants had taken bribes and had been predisposed to do so. As part of the ABSCAM operation, Jannotti and Schwartz had been contacted by a government undercover agent named Wald, who disguised himself as the agent of a wealthy Arab sheik interested in investing large sums of money in hotel construction in Philadelphia.[136] Wald offered bribes to the councilmen in exchange for assurances that they would work to get the project approved by the city council, and the councilmen succumbed.[137]

Initially, however, the councilmen told Wald that the bribes were not necessary. They insisted that they would vote for the hotel project regardless of payments because it was legitimate and would stimulate the local economy. Wald resorted to what Judge Fullam characterized as "perhaps the crucial aspect of the undercover operation" in overreaching the bounds of legitimate law enforcement.[138] Wald stressed to

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[135] 501 F. Supp. at 1203.

[136] ABSCAM was originated by FBI agents operating out of Hauphaug, Long Island. *Id.* at 1193. FBI agents masqueraded as the representatives of one or more fictitious Arab sheiks purportedly interested in making large cash investments in the United States. *Id.* The Chase Manhattan Bank agreed to provide verification to anyone who might inquire that the sheiks indeed had more than $400 million on deposit with the bank. *Id.* A career swindler named Melvin Weinberg, facing a serious prison sentence for mail fraud, was recruited to use his extensive contacts among the underworld and other shady operators to spread news of the Arabs' desire to invest. *Id.* It was hoped that illegal schemes requiring the investment of large sums would be uncovered. *Id.*

The Philadelphia segment of ABSCAM began with the desire of two Philadelphia attorneys, Howard Criden and Louis Johanson, to obtain financing for a client to develop real estate believed suitable as a site for a casino. *Id.* at 1195. The casino project turned out to be legitimate, however. *Id.* Freely improvising, the government agents somewhat changed the focus of the operation by informing the two lawyers not only of the sheik's interest in financing the casino, but also of his interest in meeting Philadelphia politicians and his desire to become a permanent resident of the United States should unfavorable political developments occur in his country. *See id.* at 1195-96. In the months which followed, Criden and Johanson introduced the representatives of the sheik to various local politicians, including Philadelphia Congressman Michael Myers. *Id.* at 1196. Finally, in response to inquiries made by the sheik's representatives concerning the possibility of investing money in a hotel construction project in Philadelphia, Criden and Johanson introduced the defendants Schwartz and Jannotti to the undercover agent Wald for the ostensible purpose of discussing whether any opposition to the contemplated project was likely to arise. *Id.* at 1196-97.

[137] *Id.* at 1198-99.

[138] *Id.* at 1194.

the councilmen that they had to respond to "the Arab mind," "the Arab way of doing business."[139]

> A constant theme of the agents' representations was that their principals would not undertake any project unless first assured of the "friendship" of the persons with whom they were dealing. They were impressed with titles, with persons in official positions of power and influence. Their concept of "making friends" was that money had to be paid.[140]

The councilmen were warned that unless the Arab was assured of their "friendship" he would move the contemplated hotel project to another city. Such conduct, Judge Fullam concluded, "was calculated to overwhelm," in light of the "fiscal crises which beset all large cities these days," and the problems of "urban blight and decay."[141] Because the defendants had made it clear that payments were not necessary,[142] the government's implicit "appeal to civic duty" could only be viewed as an attempt to secure the commission of the crime at any cost, sheerly for the sake of obtaining a conviction.[143] To prosecute under such circumstances would violate due process for it is not "within the legitimate province of federal agents to embark upon a program of corrupting municipal officials merely to demonstrate that it is possible."[144]

In one respect, *Jannotti* marks an important extension of *Twigg*, since the condemned government conduct was limited to an oppressive degree of solicitation. The essential aid and expertise furnished in *Twigg* were noticeably absent. Nevertheless, the court correctly upheld the councilmen's due process defense. The peculiar circumstances in *Jannotti* illustrate that an individual predisposed to commit a crime nevertheless may choose to remain law abiding. The councilmen were arguably predisposed

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[139] *Id.*

[140] *Id.*

[141] *Id.* at 1200.

[142] *Id.* Schwartz assured the FBI agent that "the project appeared to be entirely legitimate and beneficial for the city, and that it would have his support." *Id.* at 1198. Even after being pressed into taking money, Schwartz continued to state that he was primarily interested "in the benefits the project would have for the people of Philadelphia." *Id.* Jannotti stated to the government agents: "[W]e'll be there trying to do everything we can for you . . . because it's as I say before a legitimate project, when you are coming in, I would go to bat with, without . . . ." *Id.* at 1199.

[143] *Id.* at 1204 ("[I]t is neither necessary nor appropriate to the task of ferreting out crime for the undercover agents to . . . add further incentives virtually amounting to an appeal to civic duty.").

[144] *Id.* at 1205.

to take the bribes,[145] but insisted that payments were not necessary.[146] In so responding, the councilmen evidently chose to forgo the bribes in order to be certain that nothing would impede the construction project from coming to Philadelphia.[147] By insisting that the bribes were necessary for the city to be awarded the project, the government agents proposed a wholly artificial crime[148] and interfered with a decision the councilmen had already implicitly made.[149] The government's conduct thereby promoted rather than detected crime.[150] Accordingly, in Judge Fullman's judgment, the circumstances argued "more strongly for dismissal on due process grounds" than even the *Twigg* case.[151]

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[145] Neither defendant expressed opposition to the bribery scheme, refused the bribes outright, or reported the offer to law enforcement officials. At most they indicated that payments were unnecessary. *See id.* at 1200. It is therefore possible to view the defendants as neither unwilling nor unready to accept the bribes, and therefore as predisposed. The defendants' response that the payments were merely unnecessary *is* disturbing, and as Judge Fullam noted, the jury's verdict "represents a natural human response" to the specter of officials not outraged by an offer of a bribe. *Id.* at 1205. The vagueness of the predisposition concept, however, makes it difficult to decide whether such defendants are predisposed because, on the one hand, they are not clearly inclined to accept the bribe, but on the other hand, they are not disinclined either. The jury found both defendants predisposed beyond a reasonable doubt, while Judge Fullam ruled that even under the subjective theory the defendants had been entrapped as a matter of law. *Id.* at 1204. Such divergence suggests that the orthodox entrapment test is ambiguous and therefore unworkable. In contrast, a due process defense would ask whether the government's conduct had detected or had promoted crime. While it is difficult to determine whether an individual who states that a bribe is unnecessary nevertheless is predisposed to accept it, it is unlikely that a crime would naturally occur under such circumstances. *See* note 148 *infra.*

[146] *See* note 142 & accompanying text *supra.*

[147] The primary importance in the councilmen's eyes of bringing the project to the city was disclosed by the videotapes of the transactions. *See* 501 F. Supp. at 1198-99. As part of their effort to assure the sheik that the project would encounter no problems, the councilmen insisted that bribes were unnecessary. *See id.* Such conduct suggests that an individual may desire the fruit of an illicit as well as a licit act when to choose one course of action threatens the choice of the other. Under such circumstances, an individual, capable of being viewed as predisposed because *not unready and unwilling* to commit the illicit act, may *nevertheless choose to remain law abiding* because of the greater desirability of the legal course of conduct.

[148] A party offering a public official a bribe would have no reason to insist that it be accepted once learning that it is unnecessary to secure the official's cooperation. Moreover, it is inconceivable that any actual party would threaten to move a construction project in order to induce the acceptance of bribes by a public official, because no actual party would desire the acceptance of bribes as an end in itself.

[149] *See* notes 145-47 & accompanying text *supra.*

[150] *See* 501 F. Supp. at 1200 ("[T]he Philadelphia aspect of the ABSCAM investigation was plainly not designed to expose municipal corruption . . . but merely to ascertain whether . . . city officials could be corrupted.").

[151] *Id.* at 1204. On appeal, however, the Court of Appeals for the Third Circuit en banc reversed the judgment of the district court and reinstated the jury's verdict. United States v. Jannotti, 30 CRIM. L. REP. (BNA) 2405 (3d Cir. Feb. 11, 1982) (full opinion available Apr. 15, 1982, on LEXIS, Genfed library, Newer File) (7-2 decision), *petition for cert. filed,* Apr. 12, 1982 (No. 81-1899) (phone conversation with Clerk's Office, United States Supreme Court). The jurisdictional defects noted by the district court, *see* note 6 *supra,* were deemed erroneous by the court of appeals. *Id.* at 2405, 2406. On the entrapment issues, the court

The entrapment-due process defense which emerges from *Twigg* and *Jannotti* combines elements of both the objective and subjective theories of entrapment. The decisions weighed numerous factors, including first, the nature of the defendants' predisposition and its reliability as an indicator of whether the crime would have been committed absent the government's involvement;[152] second, the defendants' prior criminal conduct and whether the defendants had been engaged in an ongoing pattern of criminal activity;[153] third, the initiation of the crime by the government or defendants;[154] fourth, the government's provision of essential materials

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based its reversal on the district court's error in substituting its own findings of fact for those of the jury. The majority concluded that the evidence was sufficient to sustain the jury's findings both that the defendants were predisposed to take the bribes and that despite references to the "Arab mind," no representations were made to the defendants that the hotel construction project was contingent upon the acceptance of illegal bribes. *Id.* at 2406-07. If the court's view of the sufficiency of the evidence is correct, reversal would seem proper, as the district court's finding that threats were made to move the project unless the bribes were accepted was crucial to its decision. *See* notes 138-44 & accompanying text *supra*.

Other features of the court of appeals' decision are questionable, however. Three of the judges comprising the majority would have directly overruled United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). *See* United States v. Jannotti, No. 81-1020, No. 81-1021, majority opinion at n.17 (3d Cir. Feb. 11, 1982) (available Apr. 15, 1982, on LEXIS, Genfed library, Newer file). The remaining four judges distinguished *Jannotti* from *Twigg* on the ground that the former did not involve the government's provision of essential material aid or expertise. By narrowly confining *Twigg* to its facts, the majority suggested that the degree of the government's solicitation or inducement (as distinct from the provision of aid or expertise) can never support a due process violation when predisposition has properly been found by the jury. *See* United States v. Jannotti, 30 CRIM. L. REP. at 2407. This is to ignore the possibility that the predisposed may choose to refrain from crime, and that regardless of the defendant's predisposition, a criminal transaction which is totally artificial, in the sense that no real party would have acted as the government did to encourage the crime, can only produce a conviction which amounts to "little more than a statistic." People v. Isaacson, 44 N.Y.2d 511, 523, 378 N.E.2d 78, 84, 406 N.Y.S.2d 714, 720 (1980); *see* notes 147-48 & accompanying text *supra*; note 160 & accompanying text *infra*. Furthermore, deference to the jury's factual finding regarding predisposition should not as a matter of law preclude courts from considering the due process implications of the government's solicitation or inducement, because it is well established that the due process defense is to be decided by the court and not the jury. *See* cases cited note 86 *supra*. Hence, to the extent that the court of appeals' reversal is based on deference to the jury's finding that the hotel construction project was not represented as contingent upon the acceptance of the bribes, it may be viewed as correct, but as a decision regarding the sufficiency of evidence needed to sustain a jury's verdict, it should have little impact on entrapment analysis. The decision is quite questionable, however, if it is read to mean that even had such a contingent arrangement been proposed, the jury was competent to decide that such a tactic did not violate due process because the defendants were predisposed. Such an interpretation would suggest that whenever the subjective theory of entrapment overlaps with the due process defense, the jury's evaluation of the former will be controlling. *See* United States v. Jannotti, No. 81-1020, No. 81-1021, text of dissenting opinion at n.8 (3d Cir. Feb. 11, 1982) (available Apr. 15, 1982, on LEXIS, Genfed library, Newer file) ("[The majority] permit[s] the jury to perform a responsibility which by law and by formal commission belongs to the judges of the Third Article." (footnote omitted)).

[152] *See* United States v. Twigg, 588 F.2d at 381-82; United States v. Jannotti, 501 F. Supp. at 1203-04.

[153] *See* 588 F.2d at 380-81; 501 F. Supp. at 1200, 1204.

[154] 588 F.2d at 380-81; 501 F. Supp. at 1200.

or services and the likelihood that the defendants could independently have obtained them from another source;[155] fifth, the relative importance of the roles played by the government and the defendants in the offense;[156] sixth, the difficulty of detecting the crime and the need for the tactics disclosed by the case;[157] seventh, whether, objectively considered, the tactics adopted were calculated to overwhelm;[158] and eighth, whether the record revealed caution on the part of law enforcement officials to avoid the manufacturing of crime or disclosed simply a desire to obtain a conviction.[159]

No one of the above factors[160] was determinative; each was weighed

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[155] 588 F.2d at 380-81.

[156] *See* 588 F.2d at 375-76, 380-82 (defendants either contributed money or ran errands for ring largely financed and wholly run by the government); 501 F. Supp. at 1200 (agents offered bribes without solicitation by defendants and insisted that bribes be accepted, while defendants made it clear that payments were not necessary).

[157] 588 F.2d at 378, 380-81; 501 F. Supp. at 1204. Solicitation and encouragement of so-called victimless crimes, including bribery and narcotics transactions, have been justified due to the extreme difficulty of detecting such crimes where the participants (including the "willing" victim) are unlikely to inform the police. *See* W. LAFAVE & A. SCOTT, *supra* note 17, at 371. Because the consensual factor rendering detection so difficult is not present in the case of nonvictimless crimes, it is arguable that a due process analysis would prohibit any expansion of undercover activities beyond the area of victimless crimes. *See* United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973) (Friendly, J.) (dictum) ("[T]here is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums."). In disturbing contrast, it is doubtful whether either the subjective or objective theory of entrapment would bar prosecution where, for example, "a policeman induces another person to beat up a third person." W. LAFAVE & A. SCOTT, *supra* note 17, at 371. *See also* note 58 *supra*.

[158] 501 F. Supp. at 1200.

[159] 588 F.2d at 381 ("[The] government agents generated new crimes . . . merely for the sake of pressing criminal charges . . . ."); 501 F. Supp. at 1200 ("[T]he Philadelphia aspect of the ABSCAM investigation was plainly not designed to expose municipal corruption . . . but merely to ascertain whether . . . city officials could be corrupted.").

[160] The *Twigg-Jannotti* analyses were recently followed in United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981), and are further supported by the similar reasoning of the New York Court of Appeals in People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1980). The defendants in *Batres-Santolino* were indicted for their participation in a conspiracy to import cocaine into the United States. 521 F. Supp. at 745. Although "not without some culpability [of their own]," *id.* at 752, the defendants had no prior experience in large-scale drug smuggling, nor any foreign source to supply cocaine, and lacked the organization and ability to smuggle drugs into the United States. *Id.* at 751-52. Although the court did not explicitly note the case's similarity with *Jannotti*, *see* note 148 & accompanying text *supra*, it placed heavy reliance on the artificiality of the government's conduct: "As obvious novices, it is inconceivable that [the defendants] could have entered the secretive world of international drug smuggling on their own. Established drug exporters would have spotted them instantly as amateurs and dismissed their efforts as ludicrous . . . ." 521 F. Supp. at 751. The case was therefore one "in which government agents 'manufactured' a crime that . . . could not and would not have been committed [absent their participation]." *Id.* In direct reliance on *Twigg*, the court held that the government's aid which made up for the defendants' lack of expertise and resources violated due process. *Id.* at 752.

In People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1980), the court

in conjunction with the rest, the central inquiry remaining whether under the total circumstances the government's conduct was justified as limited to the detection of crime, rather than its promotion. The *Twigg-Jannotti* analysis possesses sufficient flexibility to safeguard the defendant's right to be free from government-created criminality, while respecting the real needs of law enforcement agents to resort to subterfuge to combat crime.[161]

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of appeals reversed the defendant's conviction under the due process clause of the state's constitution notwithstanding the defendant's predisposition to commit the crime (New York follows the federal subjective theory of entrapment). The informant who led Isaacson into crime had earlier been beaten and threatened by the police for refusing to answer questions regarding his possession of what was thought to be a controlled substance, but which turned out to be legal. *Id.* at 515, 378 N.E.2d at 79, 406 N.Y.S.2d at 715. Knowing the charges to be groundless, the police used them to secure the informant's cooperation. *Id.* at 515-16, 378 N.E.2d at 79-80, 406 N.Y.S.2d at 715-16. The informant contacted Isaacson and related his problems including his prior beating at the hands of the police. *Id.* at 516, 378 N.E.2d at 80, 406 N.Y.S.2d at 716. Isaacson agreed to help by supplying the informant with cocaine so that he could make a sale and hire an attorney. *Id.* A site in Pennsylvania was chosen at Isaacson's insistence, due to the severity of New York's drug laws, but in accordance with police instructions, the informant tricked Isaacson into crossing the border where he was arrested. *Id.* at 517, 378 N.E.2d at 80-81, 406 N.Y.S.2d at 716-17.

In barring prosecution as violative of due process, the court explicitly weighed the following factors: first, whether the police manufactured a crime which otherwise would not likely have occurred; second, whether the record revealed a desire to obtain a conviction as an end in itself, with no indication that the police motive was to suppress crime or protect the populace; third, the nature of the solicitation to which the defendant was subjected; and fourth, the unlawfulness of the police conduct. *Id.* at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719. Although predisposed, the defendant had previously engaged in only "small and rather casual" sales of drugs, *id.* at 522, 378 N.E.2d at 83, 406 N.Y.S.2d at 720, and had no prior criminal record, *id.* at 514, 378 N.E.2d at 79, 406 N.Y.S.2d at 715. He was a graduate student and teacher at Pennsylvania State University on the verge of receiving his doctoral degree. *Id.* Such factors suggested the unlikelihood that a crime of the magnitude committed would normally have occurred, since the quantity of cocaine sold (two ounces valued at $3,800) was set by the police and partly induced by the informant's plea for help to defend the unfounded charges against him. The court reasoned that the only sensible target was the defendant's supplier and that because "[t]here was no indication of any desire to prevent crime by cutting off the source," the actual "conviction obtained became little more than a statistic." *Id.* at 523, 378 N.E.2d at 84, 406 N.Y.S.2d at 720. The beating of the informant, the deception practiced on him, and the "incredible geographical shell game," *id.*, used to lure the defendant into New York revealed only "the overriding police desire for a conviction of any individual," *id.*, even "of a resident of another State possessed of no intention to enter our confines." *Id.* at 522-23, 378 N.E.2d at 84, 406 N.Y.S.2d at 720. Accordingly, the due process clause required a bar to prosecution.

[161] The analysis in *Twigg* and *Jannotti* eschews per se tests that would operate against either the defendant or the police. A finding of predisposition is a factor to be weighed, but is not the sole and sufficient criterion by which to determine whether a crime has been manufactured. Conversely, because the propriety of police tactics as limited to the detection of crime is to be evaluated by a multiplicity of factors, it is difficult to see how criminals might avoid detection by forcing police to transgress specific lines: in a given case, for example, the supplying of essential material aid might be deemed permissible because of evidence that such aid would normally have been available, even absent the government's participation. *See* United States v. Russell, 411 U.S. at 431. Similarly, evidence that an official stated that a bribe was not necessary, merely as a device to screen out police agents, would permit police to escalate their tactics accordingly. It seems very unlikely, however, that many such cases would arise, since such a degree of caution would prove

THE THEORETICAL BASIS FOR AN ENTRAPMENT-DUE PROCESS DEFENSE

Although reasoned arguments have been advanced to support the notion that the entrapment defense may be based on the fifth amendment's privilege against self-incrimination[162] or on the fourth amendment's prohibition of unreasonable searches and seizures,[163] the majority in *United States v. Russell* rejected such possibilities.[164] Accordingly, it would appear that entrapment, even when envisioned as implicating the requirement of due process, violates no explicit constitutional right.[165] The lack of any clear constitutional basis for the defense, however, is not insurmountable, as the defense is clearly and most logically required as a matter of substantive due process: the criminalization of acts which would not have occurred absent the government's solicitation and aid can serve no legitimate purpose.[166]

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self-defeating for a criminal. An official desiring bribes, but routinely stating that such were not needed, might be taken at his word and never receive an offer of payment. The party applying for favors therefore would have to be apprised that the response was intended to screen out police, and evidence of such a practice would allow the police to intensify their solicitation.

[162] *See* Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63, 72-73 (1967) [hereinafter cited as Note, *Constitutional Standards*]; Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942, 951 (1965) [hereinafter cited as Note, *The Serpent Beguiled Me*] ("It is unreasonable to suppose that the Constitution protects a person against confession of an actual crime and not against commission of a staged offense, as if tempting a man to be honest were more reprehensible than tempting him to be wicked.").

[163] *See* Note, *Constitutional Standards*, *supra* note 162, at 73-76.

[164] 411 U.S. at 430 ("Unlike the situations giving rise to the holdings in *Mapp* and *Miranda*, the Government's conduct here violated no independent constitutional right of the respondent.").

[165] *See id.* at 430-31.

[166] To determine whether a legitimate purpose exists, substantive due process requires a searching "inquiry into whether legislation has a rational basis." Packer, *supra* note 97, at 492. Concededly, it labels a mode of constitutional analysis that has been discredited ever since Lochner v. New York, 198 U.S. 45 (1905). *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (Black, J.) ("[W]e refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." (footnotes omitted)). *See also* J. ELY, DEMOCRACY AND DISTRUST 251 n.69 (1980) ("[T]o arm the judiciary with a universal warrant to review for 'rationality,' a term whose meaning is obviously elastic, is unavoidably to tempt judges to exercise a general and illegitimate substantive review authority."); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 404-10 (1978).

Commentators have long advanced compelling arguments, however, to support the use of substantive due process analysis in the field of criminal law. *See, e.g.*, Angel, *Substantive Due Process and the Criminal Law*, 9 LOY. CHI. L.J. 61 (1977); Packer, *supra* note 97; Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 [hereinafter cited as Packer, *Mens Rea*]; Saltzman, *supra* note 55. *See also* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958). First, the Supreme Court "has [in fact] been applying substantive due process analysis in criminal cases," Angel, *supra*, at 74, albeit under the "rubrics of procedural due process, equal protection, right to privacy and eighth amendment." *Id.*; *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (criminal statute prohibiting use of

The due process clause requires the state's deprivation of liberty to

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contraceptives held unconstitutional infringement of fundamental right of privacy); Angel, *supra*, at 72 ("It is questionable whether Justice Douglas's approach [in *Griswold*] achieved anything that a pure substantive due process approach, the approach used by Justice Harlan in his concurring opinion, could not achieve." (footnote omitted)); Robinson v. California, 370 U.S. 660 (1962) (imposition of criminal sanction absent an act held violative of eighth amendment); Packer, *Mens Rea, supra*, at 148 n.144 ("[T]he constitutional peg on which the result is hung, the ban against cruel and unusual punishments, hardly seems apposite and is probably to be explained . . . as reflecting the Court's 'allergy to "substantive due process." ' ") (quoting Robinson v. California, 370 U.S. at 689 (White, J., dissenting)). Such precedents suggest that the legacy of the judicial reaction against *Lochner* is not dispositive or controlling, and as Professor Packer has argued, "we should be free enough of the shibboleths of the 1930's to be encouraged by the Supreme Court's [recent] willingness to inquire into the rationality of criminal statutes." Packer, *Means Rea, supra*, at 152 n.154. Candid acknowledgment that substantive due process *is* valid as a method of analyzing the constitutionality of criminal laws can only clarify the confusion created by attempts to avoid the application of the doctrine. *See id.* at 121 ("The decadence of substantive criminal law is never more starkly revealed than in the fact that a unanimous Supreme Court [in Morissette v. United States, 342 U.S. 246 (1942)] found it necessary to buttress by an opinion running to thirty pages the conclusion that claim of right is a defense to a charge of theft.").

Second, the demise of *Lochner* is not persuasive as a justification for rejecting substantive due process in the area of criminal law. Substantive due process is not literally synonymous with the evils of *Lochner*, *see* L. TRIBE, *supra* note 102, § 11-1, at 564 n.5, for *Lochner*'s error "lay not in judicial intervention to protect 'liberty,' " *id.* at 564, but "in giving that value a perverse content," *id.* at 566. The Court's rejection of *Lochner* signaled an end to substantive due process only as it might check "general economic or social welfare legislation." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 413. Even in the heyday of reaction against *Lochner*, the "Court was soon to point out that it would not hesitate to return to a strict form of review for acts that touched upon fundamental constitutional values," *id.* (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)), and it is clear that the Court continues to engage in substantive due process under the guise of discovering fundamental rights. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973). Viewed in this context, it cannot be asserted that criminal laws must be reviewed by the same standard of minimum rationality as is applied to state enactments regulating economic conduct. "The combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets the [criminal] sanction apart from anything else the law imposes," Packer, *Mens Rea, supra*, at 150, and "the protection of physical liberty is the oldest and most widely recognized part of [that "liberty" guaranteed by the due process clauses]." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 483. In comparison with the rights which the Court has already found to be fundamental, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel), the right to be free from criminal sanctions that serve no legitimate purpose would seem clearly to be entitled to an equal degree of protection. Substantive due process analysis requiring a showing of a legitimate societal purpose that outweighs the importance of the fundamental right affected, rather than a test demanding a minimum of rationality, should therefore be applied in the area of criminal law. *See* Saltzman, *supra* note 55, at 1626 ("Under the developing substantive due process doctrine labeled 'privacy,' the Court has recognized a large group of rights which have less connection to the Constitution than substantive limits on criminal law.").

Third, and related to the point just made, substantive review of the criminal law may also legitimately be inferred from the fundamental importance of the procedural safeguards of the fifth and sixth amendments. Procedural safeguards are related to substantive goals since they constitute a "means-ends approach to determine whether the legislative purpose is being fulfilled in a specific case." Angel, *supra*, at 65. The greater the procedural safeguard required, the greater the interest to be affected must be, since the procedure is intended to insure the legitimacy of applying the law in the individual case, that is, to insure a close fit between means and ends. *Id.* Hence, "although the court has never

further a legitimate social objective.[167] Imposition of the criminal sanction traditionally has been justified by theories of deterrence, restraint, rehabilitation, or retribution.[168] The first three theories implement the broad aim of the criminal law to prevent specific acts as injurious to the health, safety, and welfare of society.[169] The last, somewhat uneasily, embodies the judgment that a social mechanism for the expression of revenge is justifiable.[170]

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specifically stated that the right to be free from unjust criminal incarceration and criminal stigmatization is a fundamental right calling for the strictest constitutional scrutiny, such a holding is implicit in its decisions regarding the procedural protections surrounding a criminal trial." *Id.* at 69. More broadly, as Professor Hart observed: "What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?" Hart, *supra*, at 431. The fundamental importance of the procedural safeguards required for criminal trials thus logically implies the legitimacy of substantive due process analysis in criminal law.

Despite the demise of substantive due process after *Lochner*, it is strongly arguable therefore that the doctrine has a legitimate role to play in the field of criminal law. The unique severity of the criminal sanction, the fundamental importance of the "liberty" interest which its imposition infringes, as well as the stringent procedural safeguards required by the Constitution in criminal trials, all support the notion that criminal laws may properly be reviewed substantively to ascertain whether they serve a legitimate purpose. This is not to deny, however, the continuing reluctance of the Court to apply such analysis openly, or indeed to apply it at all. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (affirming without opinion lower court decision upholding constitutionality of state statute criminalizing sodomy).

[167] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 636 (1943). *See also* Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1071 (1968) ("The connotations of 'life, liberty, or property' as the totality of human activity and of 'law' as policy formulated and enforced by government to promote the general welfare convey the idea that government may interfere with human activity only for a socially useful purpose."); W. LAFAVE & A. SCOTT, *supra* note 17, at 137 (due process may invalidate a criminal statute "on the basis that the statute prohibits conduct that bears no substantial relationship to injury to the public" (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897) (state criminal statute prohibiting taking out insurance in an out-of-state insurance company on property within state held unconstitutional))).

[168] *E.g.*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35-61 (1968). *See also* G. FLETCHER, RETHINKING CRIMINAL LAW 414-15 (1978); W. LAFAVE & A. SCOTT, *supra* note 17, at 22-24. The theory of deterrence itself is frequently divided into general and specific deterrence, the former referring to the notion that punishment of one individual will deter others from committing the same crime, and the latter referring to deterrence of the individual who is punished from repeating his crime. *See* G. FLETCHER, *supra*, at 414.

[169] *See* W. LAFAVE & A. SCOTT, *supra* note 17, at 9, 22-24. Deterrence, rehabilitation, and restraint have been described as "consequentialist rationalia" for punishment, since it is the crime preventive consequence of punishment which serves as its justification. G. FLETCHER, *supra* note 168, at 414-15. The criminal is deterred from future wrongful acts, rehabilitated of his need or desire to commit such acts, or at the minimum restrained from committing criminal acts during the period of incarceration. In contrast, "the principle of retribution holds that punishment is just regardless of its consequences." *Id.* at 415.

[170] *E.g.*, W. LAFAVE & A. SCOTT, *supra* note 17, at 24. In the famous remark of Sir James Stephen, the criminal law may be viewed as standing in the same relation to the passion for revenge as marriage does to the sexual passion. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 82 (Burt Franklin ed. 1964). The unease, of course, stems from the observation that the institutionalization of the instinct for revenge remains "a form of retaliation, and as such, is morally indefensible." Wood, *Responsibility and Punishment*,

Under all four theories, however, the criminal sanction is not justified when the state manufactures crimes that would otherwise not occur.[171] Punishing a defendant who commits a crime under such circumstances is not needed to deter misconduct; absent the government's involvement, no crime would have been committed. Similarly, a defendant need not be incarcerated to protect society if he is unlikely to commit a crime without governmental interference. Nor does the state need to rehabilitate persons who, absent government misconduct, would not engage in crime. The state can "cure" them by regulating its own conduct.

The retributive theory of punishment places paramount importance on the need to avenge the harm produced by wrongful acts. To the extent that the police control and manufacture a victimless crime, however, it is difficult to see how anyone is actually harmed. More importantly, it is inconsistent to encourage harms that would otherwise not occur, and then to claim a compelling need to avenge them. Punishment ceases to be a response, but becomes an end in itself. There is then no justification or rationale for the imposition of the criminal sanction when the government's own conduct promotes the commission of crimes which otherwise

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28 J. CRIM. L. & CRIMINOLOGY 630, 636 (1938). Other theorists have rejected vengeance as the basis of a retributive theory of justice, *see* G. FLETCHER, *supra* note 168, at 417 ("It is obviously not to be identified with vengeance or revenge any more than love is to be identified with lust."), in favor of the less emotional view that the offender is simply obligated to suffer punishment. *Id.* The latter formulation amounts to a principle of expiation or atonement as underlying the retributive rationale, *see* H. PACKER, *supra* note 168, at 38, but the neutrality of one's terminology does not much matter. Ultimately, under the retributive theory "the criminal is to be punished simply because he has committed a crime. It makes little difference whether we do this because we think we owe it to him or because we think he owes it to us." *Id.*

[171] *See, e.g.*, United States v. West, 511 F.2d 1083, 1085 (3d Cir. 1975) ("[C]reating new crime for the sake of bringing criminal charges" serves "no justifying social objective."); United States v. Butts, 273 F.2d 35, 38 (8th Cir. 1921) ("The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."), *quoted in* Sorrells v. United States, 287 U.S. at 444; United States v. Chisum, 312 F. Supp. 1307, 1312 (C.D. Cal. 1970) (To "transform the law designed to promote the general welfare into a technique aimed at manufacturing disobedience in order to punish [is] a concept thoroughly repugnant to constitutional principles."). These cases suggest that courts were formerly aware that the relevant inquiry for a due process defense in the area of entrapment is whether crime has been detected, or senselessly manufactured for its own sake. The Supreme Court, however, has refused so to frame the defense, referring instead to the ambiguous "shocks-the-conscience" standard of *Rochin*, *see* notes 91-105 & accompanying text *supra*, while implicitly overruling cases such as *West* and *Chisum* on the narrow ground that the government's supplying of contraband does not per se violate due process, *see* notes 74-85 & accompanying text *supra*. To interpret *West* and *Chisum* as establishing a per se rule and to overrule them on that ground, however, does not address whether due process requires acquittal when the government has manufactured criminal conduct. *See* note 83 *supra*. Nevertheless, the Supreme Court's refusal to articulate standards, or even a relevant inquiry beyond the "shocks-the-conscience" test of *Rochin*, has led the lower federal courts to ignore the continued relevance of their own earlier pronouncements that the promotion of crime serves no justifiable social purpose.

would not occur merely to obtain a conviction. Under such circumstances, the criminal justice system's infringement upon personal liberty serves no legitimate social purpose and therefore violates due process.[172]

Accordingly, due process limits on the power of law enforcement agents to engage in the solicitation or facilitation of crime must be enforced whenever the government has manufactured a crime that otherwise would not likely have occurred. The objective and subjective theories of entrapment fail to recognize that a prohibition against the manufacturing of crime is of a constitutional magnitude;[173] both theories fail to protect adequately the defendant's right to be free from prosecution which serves no legitimate social interest.

The objective theory is simultaneously over- and under-inclusive in the degree of protection it affords. By prohibiting only conduct which would lead an average citizen into crime, it allows prosecution of persons who have a lower-than-normal capacity to resist temptation, but who would remain law abiding in the absence of government interference.[174] Furthermore, extensive aiding and abetting of crime as in *Twigg* would seem unlikely to lure an average citizen into crime, but may promote artificial and improbable crimes which would not ordinarily have been committed.[175] Conversely, the per se limits on police undercover conduct called for by the objective theory may permit sophisticated criminals to escape detection.[176]

The subjective theory, in turn, questionably relies on predisposition to determine whether the government has manufactured crime.[177] The inadequacy of the subjective theory of entrapment is well demonstrated by *Twigg* and *Jannotti*, in which the senseless promotion of crime was found despite the predisposition of the accused.[178] The presence of a subjective state of mind is an inadequate safeguard against the manufacturing of crime. One may be predisposed to commit a crime, without ever being likely to act on that predisposition.

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[172] Courts and commentators have noted that substantive due process should bar such a perverse transformation of means into ends. *See, e.g.*, note 171 *supra*. *See also* Note, *Constitutional Standards, supra* note 162, at 68-71; Note, *The Serpent Beguiled Me, supra* note 162, at 942-46. *Twigg, Jannotti,* and *Batres-Santolino*, however, remain unique among the federal decisions in the post-*Hampton* era in applying an entrapment-due process defense which avoids evaluation of "outrageousness" by focusing on whether the government has detected crime or impermissibly manufactured it. *See* notes 128-60 & accompanying text *supra*.

[173] *See* notes 37-39 & 49 & accompanying text *supra*.

[174] *See* note 63 & accompanying text *supra*.

[175] *See* notes 130-34 & accompanying text *supra*. *See also* United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981); note 160 *supra*.

[176] *See* note 59 & accompanying text *supra*.

[177] *See* notes 22-31 & accompanying text *supra*.

[178] *See* notes 128-51 & accompanying text *supra*. *See also* United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1980); note 160 *supra*.

The constitutionally suspect character of predisposition as a test for entrapment is revealed by examining the act requirement of the criminal law.[179] The act requirement allows the state to punish only those whose criminal potential has expressed itself in overt acts.[180] To abolish the act requirement is to allow the state to punish a mere status, which the Supreme Court in *Robinson v. California*[181] held to be a cruel and unusual punishment violative of due process. In *Robinson* the Court held unconstitutional a state statute criminalizing the *status* of being a narcotics addict, although the *act* of using narcotics could be a crime. Hence, the Court held that a presumption grounded in empirical fact—that addicts use drugs—was insufficient to abolish the requirement of an act. It follows that the state should not be allowed to punish a bare predisposition to commit a crime,[182] on the mere presumption that it will ripen into an overt act.[183] Of course, subjective theorists may argue that the predisposition test for entrapment requires not only predisposition but also an act, albeit government aided or abetted. The argument is circular, however; the government cannot justify punishment on the basis of an act that would not have occurred had it left the defendant alone. Under the subjective theory, the government punishes the defendant for being predisposed, and not for the act itself—which, effectively, the government provides.[184]

The requirement of an act as a prerequisite to punishment under Anglo-American criminal law is well established.[185] It reflects the inherent

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[179] *See* Note, *Constitutional Standards*, *supra* note 162, at 71.

[180] *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 17, at 178 ("[A] basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone."); 2 J. STEPHEN, *supra* note 170, at 78 ("Criminal law, then, must be confined within narrow limits, and can be applied only to definite overt acts, or omissions capable of being distinctly proved . . . .").

[181] 370 U.S. 660 (1962).

[182] It is also arguable that predisposition is a status in the sense of being a psychological endowment. *See* S. FREUD, *Criminals From a Sense of Guilt*, in 14 COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 332-33 (1957).

[183] As Justice Harlan noted in *Robinson*, addiction "cannot reasonably be thought to amount to more than a compelling propensity to use narcotics," and hence to punish addiction, as opposed to the actual use of narcotics, amounts to "punishment for a bare desire to commit a criminal act." 370 U.S. at 678-79 (Harlan, J., concurring). Predisposition also cannot be viewed as more than a "propensity" to commit a crime. Consequently, the justification of the government's conduct as merely detecting crime, solely on the basis of predisposition, violates the act requirement. The impermissible leap taken by the subjective theory is especially clear in those cases in which the essential nature of the government's role as aider and abettor in the crime renders highly doubtful whether a crime would otherwise have occurred. For an example of such an impermissible inference, see United States v. Leja, 563 F.2d at 247 ("[It] seems certain that the defendants could have obtained sources of supply and information without the assistance of the government agents, given their established predisposition to go into the drug making business.").

[184] *See* United States v. Hampton, 425 U.S. at 499 (Brennan, J., dissenting) ("No one would suggest that the police could round up and jail all 'predisposed' individuals, yet that is precisely what set-ups like the instant one are intended to accomplish.").

[185] *See* note 180 & accompanying text *supra*.

unreliability of predicting human behavior, and the danger of permitting the state to punish persons presumed dangerous or undesirable unless they have actually committed crimes.[186] Most fundamentally, however, the act requirement stems from the ethical and political postulate that the state "is bound to respect the autonomy and capacity for self-actuation of its citizens"[187]—the recognition, in other words, that its citizens are free beings and not automatons predestined to behave in predictable ways. Accordingly, to view predisposition as a sufficient test for the government's manufacture of crime denies the full possibility of human freedom.

The subjective theory of entrapment is based on the reductive and simplistic view that criminal conduct invariably results from a wrongful predisposition, whereas obedience to the law results from an imagined state of innocence free from illicit inclinations. Human conduct and choice are rarely so simple. A predisposition to commit crime is not incompatible with a decision to obey the law; considerations not wholly laudable may influence behavior, including fear of punishment, pragmatic appreciation of the benefits of a legal course of conduct, or realistic assessment of the difficulty of successfully committing a crime.[188] Regardless of the moral imperfections of one's motives, however, if they restrain one from committing crime, they protect society. Artificially removing obstacles to criminal activity transforms a law designed to punish and thereby supplement other disincentives for the commission of harmful acts into a rule governing the acceptability of subjective states of mind which by themselves are rarely determinative of human conduct.

Acknowledging the act requirement of the criminal law defers punishment to a later stage, and consequently poses the risk that contemplated crimes will actually be committed and produce harm or even escape detection. Nonetheless, respect for the autonomy and freedom of persons requires society to take such a risk. The criminal law must balance the interest of society in preventing harmful acts with the equally important goal of preserving respect for the integrity of human freedom and choice:

> Criminal punishment as an attempt to secure desired behavior differs from the manipulative techniques of the Brave New World (conditioning, propaganda, etc.) or the simple incapacitation of those with anti-social tendencies, by *taking a risk.* It defers action till harm has been done; its primary operation consists simply in announcing cer-

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[186] *E.g.*, Williamson v. United States, 184 F.2d 280, 283 (2d Cir. 1950) (Jackson, J.) ("Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented and fraught with danger of excesses and injustice that I am loath to resort to it . . . ."). *See also* 2 J. STEPHEN, *supra* note 170, at 78 ("If [the criminal law] were not so restricted it would be utterly intolerable; all mankind would be criminals and most of their lives would be passed in trying and punishing each other for offenses which could never be proved.").

[187] G. FLETCHER, *supra* note 168, at 431.

[188] *See* notes 107-60 & accompanying text *supra.*

> tain standards of behavior and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose. This is a method of social control which maximizes individual freedom within the coercive framework of law.[189]

The foregoing does not deny that some undercover solicitation or encouragement is justified to detect crime. Yet such conduct inevitably reaches a point where a contrived criminal act supplants what would have been done spontaneously. To view the government's conduct in such a case as equivalent to the detection of crime by resorting to a theory of "predisposition" is to deny the possibility of freedom, and to justify punishment on the basis of traits presumed to be predictive of human conduct.

CONCLUSION

The extensive government aiding and solicitation of crimes disclosed in recent cases demonstrate the inadequacy of existing theories of entrapment. Although insisting that the defense of entrapment is narrowly based upon a statutory exception for the nonpredisposed, the Supreme Court has repeatedly acknowledged in dicta that due process may also set limits to government involvement in crime. The lower federal courts in turn have recognized a due process defense which would supplement the otherwise statutory defense of entrapment. The result, however, has been far from satisfactory. The federal courts have failed to formulate the constitutional basis for their insight that the avowedly statutory test for entrapment should not be exclusively controlling. The Supreme Court's reference to conduct that "shocks the conscience" has been deficient as a basis on which to develop standards for safeguarding due process in the entrapment context: subjective assessments of "outrageousness" have largely been the order of the day. Moreover, the resulting mixture—a statutory defense which must be supplemented, due to its own shortcomings, by a vague constitutional mandate prohibiting "outrageous" government undercover activity—is unwieldy and internally inconsistent. It is left unexplained why part of the entrapment defense is of constitutional dimension, while another part is not, as if successfully inducing criminal conduct on the part of those not originally ready and willing to commit crime were somehow not outrageous.

A more unitary theory of entrapment governed by a more objective inquiry is needed. Entrapment should be squarely founded on the principle that the manufacturing of crime serves no legitimate purpose, and that where crime is manufactured, prosecution must be barred as a matter of due process. The inquiry relevant for the defense should simply

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[189] H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 23 (1968) (emphasis added).

be whether the government's conduct has led the defendant to commit a crime which he otherwise would not have committed. Predisposition *is* relevant: a person not already disposed to commit a crime is not likely to do so independently, and there can be no legitimate reason to overcome such an individual's reluctance to engage in crime. The presence of predisposition should not be dispositive, however. A bare predisposition to commit an act does not establish that the defendant would have acted in the real world as he did under the artificial circumstances provided by the government's actions. Predisposition, if established, should be only one of several factors to determine whether a crime has been manufactured, the artificiality of the government's aid and encouragement, and the likelihood that a third party would have played the role acted by the government being at least equally relevant. Such an approach avoids the inadequacies of the predisposition test for entrapment, as well as the subjectivity inherent in appraisals of "outrageousness." An entrapment defense must ask the right question in order to safeguard adequately the right to be free from government conduct which creates, rather than detects, crime.

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