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EDWARD G. MASCOLO*

I. INTRODUCTION

An impartial observer of the American criminal justice system must be fascinated by the intense interplay between the strivings for freedom and the demands of order. Certain truisms come readily to mind: There can be no liberty without order; neither, however, can there be permanent order without meaningful freedom for the individual. Similarly, one is reminded that an enlightened and democratic society, which casts its lot with the primacy of individual security and integrity (in short, a society dedicated to the supremacy of the rule of law under which the ultimate power rests with the people), demands that government be the servant rather than the master of the people and, in its dealings with individual members of society, that it act fairly and within a code of civilized decency.

Tensions still exist. While decency and the spiritual nature of man cannot long endure in a closed society controlled by the rule of force, neither can freedom itself long endure in an atmosphere of fear and anarchy, dominated by the rule of criminal violence. When a

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democratic "[s]ociety is at war with the criminal classes,"[1] it has, in effect, put itself on trial. It must confront the issue as to how far it is prepared to defend cherished notions of fair play and a sense of justice without simultaneously abdicating its responsibility of self-preservation. This issue implicates the moral caliber of such a society, and will help to define the standards of decency that will govern its relations with its members.[2]

It is not surprising, therefore, that methods employed in the administration of the criminal law have generated (and inspired) intense debate concerning the scope of permissible or acceptable behavior by government in its efforts to combat the destabilizing influences of antisocial behavior within a system of justice commited to standards of civilized conduct by government and its agents. In short, a free society about to do battle with its criminal elements must be prepared to say how far it will permit its government to go in "fighting the good fight" against crime. Will that society insist upon standards of conduct that, while potentially offensive to "some fastidious squeamishness or private sentimentalism about combatting crime too energetically,"[3] do not "shock[] the conscience,"[4] or will it sanction methods of law enforcement that make the government virtually indistinguishable from the criminal?

It is the thesis of this article that a society which tolerates criminal behavior and methods by its government in combatting crime is a society that has fatally blurred the fundamental distinction between the rule of law and the lawless enforcement of the criminal law, and by so doing, cannot long endure.[5] Specifically, this article will step beyond the Supreme Court's suggestion[6] and will propose a due process[7]

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1. Sorrells v. United States, 287 U.S. 435, 453 (1932)(Roberts, J., separate opinion).

2. *Cf.* Coppedge v. United States, 369 U.S. 438, 449 (1962)(the quality of a civilization may properly be judged by the methods employed in the enforcement of its criminal laws).

3. Rochin v. California, 342 U.S. 165, 172 (1952).

4. *Id.*

5. *Cf.* McNabb v. United States, 318 U.S. 332, 343 (1943)("[a] democratic society, in which respect for the dignity of all men is central, [must] guard[ ] against the misuse of the law enforcement process," and must provide "safeguards . . . against the dangers of the overzealous as well as the despotic").

6. *See* Hampton v. United States, 425 U.S. 484, 497 (1976)(Brennan, Stewart, & Marshall, JJ., dissenting), and *id.* at 492-93, 494-95 & nn. 6-7 (Powell & Blackmun, JJ., concurring in the judgment); United States v. Russell, 411 U.S. 423, 431-32 (1973)(dictum).

7. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

"[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

defense, supplemented by principles of judicial integrity and public policy, against outrageous practices of government agents in the enforcement of the criminal laws that shock the conscience and offend civilized standards of conduct.[8] Further, this defense will be an absolute bar to the government invoking judicial processes to secure a conviction of an individual against whom such methods have been employed. It will require the courts to close their doors to "such prostitution of the criminal law"[9] so as "not to be made the instrument of wrong."[10]

This article will first review the related doctrine of entrapment and analyze both the subjective and objective tests for its application. It will demonstrate that the subjective test endorsed by a majority of the Supreme Court,[11] with its analysis focused upon the criminal predisposition of an accused, is simply inadequate to protect the predisposed defendant against outrageous police behavior. This article will next explore the feasibility of a due process defense of outrageous government conduct and find doctrinal support for such a defense in both the objective test for entrapment and the equitable "clean hands" defense developed by Justice Brandeis in his memorable dissent in *Olmstead v. United States*.[12] Finally, it will argue for the adoption of a due process defense and will show not only that the need for such a defense is critical for the predisposed defendant, but also that it must be recognized by the courts as a moral imperative to protect government from the vices of its own agents and to preserve judicial integrity. In sum, this article will advocate the existence of an intimate relationship between the defense, on the one hand, and public policy and judicial integrity, on the other hand.

II. THE DOCTRINE OF ENTRAPMENT

The term "entrapment" signifies "instigation of crime by officers

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8. This defense of due process, while related to entrapment, is independent of the principles applicable to the latter doctrine. *See* United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983), *cert. denied sub nom.* Margolis v. United States, 104 S. Ct. 720 (1984); *see also* United States v. Lue, 498 F.2d 531, 534 (9th Cir.), *cert. denied*, 419 U.S. 1031 (1974).

9. Sorrells v. United States, 287 U.S. 435, 457 (1932) (Roberts, J., separate opinion).

10. *Id.* at 456.

11. *See* Hampton v. United States, 425 U.S. 484, 488-90 (1976)(plurality opinion of Rehnquist, Burger, & White, JJ.); *id.* at 492 n.2 (Powell & Blackmun, JJ., concurring in the judgment); United States v. Russell, 411 U.S. 423, 433-36 (1973)(5-4 decision); Sherman v. United States, 356 U.S. 369, 372-73 (1958)(5-4 decision on appropriate relation test to be applied); Sorrells v. United States, 287 U.S. 435, 441-42, 448, 451-52 (1932)(5-3 decision on issue of appropriate test).

12. 277 U.S. 438, 471, 483-85 (1928)(Brandeis, J., dissenting).

of government."[13] It has been defined as "the conception and planning of an offense by an officer [of the law], and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."[14] Thus, entrapment "occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials."[15]

Because entrapment implicates government and its agents in criminal activity, it is a concept which lends itself to controversy[16] and is appealing to defendants as a defense to criminal prosecution. The "Abscam" cases[17] and the celebrated trial of John DeLorean are recent examples of the intense litigation generated by entrapment.

In addition, the Supreme Court has "sharply divided" over "the meaning, purpose, and application of entrapment in criminal cases. . . ."[18] Much of this division has centered on whether the controlling standard for the defense of entrapment focuses on the conduct of law enforcement officers (the objective test) or the predisposition of the defendant to commit the offense of which he stands charged (the subjective test).[19]

The subjective test for entrapment, espoused by a majority of the Supreme Court,[20] requires a two-pronged inquiry. First, a court must determine whether the government agents induced the defendant to commit the crime in question. If the court so finds,[21] it must then

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13. Sorrells v. United States, 287 U.S. 435, 453 (1932)(Roberts, J., separate opinion).

14. *Id.* at 454; *see* Sherman v. United States, 356 U.S. 369, 372 (1958); United States v. Tavelman, 650 F.2d 1133, 1139 (9th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982); State v. Marquardt, 139 Conn. 1, 4, 89 A.2d 219, 221 (1952)("entrapment" constitutes the inducement, by government, of an individual to commit a criminal offense, not contemplated by him, for the purpose of prosecution).

15. Sherman v. United States, 356 U.S. 369, 372 (1958)(emphasis in the original)(quoting Sorrells v. United States, 287 U.S. 435, 451 (1932)).

16. *See, e.g.*, 35 CRIM. L. REP. (BNA) 2367, 2367-69 (Aug. 22, 1984).

17. United States v. Kelly, 707 F.2d 1460 (D.C. Cir.)(per curiam), *cert. denied*, 104 S. Ct. 264 (1983); United States v. Williams, 705 F.2d 603 (2d Cir.), *cert. denied*, 104 S. Ct. 524 (1983); United States v. Myers, 692 F.2d 823 (2d Cir. 1982)(*Myers II*), *cert. denied*, 103 S. Ct. 2438 (1983); United States v. Alexandro, 675 F.2d 34 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982); United States v. Jannotti, 673 F.2d 578 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982).

18. United States v. Jannotti, 673 F.2d 578, 596 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982).

19. *Id.*; *see* Hampton v. United States, 425 U.S. 484, 488-89 (1976)(plurality opinion); United States v. Russell, 411 U.S. 423, 428-30 (1973); Sherman v. United States, 356 U.S. 369, 372-73, 376-78 (1958); *id.* at 382-84 (Frankfurter, J., concurring in the result); Sorrells v. United States, 287 U.S. 435, 441-42, 451 (1932); *id.* at 458-59 (Roberts, J., separate opinion); *see also Russell*, 411 U.S. at 433-36.

20. *See* cases cited *supra* note 11.

21. The defendant carries the burden of persuasion on this issue, United States v.

make a subjective inquiry into the defendant's predisposition to commit the offense.[22] This latter inquiry is crucial under the subjective test. If a finding of predisposition is made,[23] the defense will fail[24] regardless of the degree and kind of misconduct perpetrated by the government agents.[25]

Mayo, 705 F.2d 62, 67 (2d Cir. 1983)(burden satisfied by defendant showing "that government initiated the crime"); United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952), by a fair perponderance of the evidence. United States v. Steinberg, 551 F.2d 510, 513 (2d Cir. 1977); United States v. Braver, 450 F.2d 799, 801-03 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); *see* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 48, at 373 n.28 (1972)(it is generally required that the defendant has the burden of establishing the facts constituting entrapment by a preponderance of the evidence). Although the subjective analysis focuses on the defendant's propensity for crime, rather than on the conduct of the police, both factors have been assessed in determining whether entrapment appears from the evidence. *See, e.g.*, United States v. Garcia, 546 F.2d 613, 615 (5th Cir.), *cert. denied*, 430 U.S. 958 (1977); *see also* Sorrells v. United States, 287 U.S. 435, 451 (1932).

22. *See* Hampton v. United States, 425 U.S. 484, 489-90 (1976)(plurality opinion); United States v. Russell, 411 U.S. 423, 435-36 (1973); Sorrells v. United States, 287 U.S. 435, 451-52 (1932); United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952); Note, *Due Process Defense when Government Agents Instigate and Abet Crime*, 67 GEO. L.J. 1455, 1457 (1979).

23. Here, the government has the burden of proof, United States v. Mayo, 705 F.2d 62, 67 (2d Cir. 1983); United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952), beyond a reasonable doubt. United States v. Jones, 575 F.2d 81, 83 (6th Cir. 1978); United States v. Steinberg, 551 F.2d 510, 514 (2d Cir. 1977); United States v. Braver, 450 F.2d 799, 801-03 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); Commonwealth v. Shuman, 391 Mass. 345, 351, 462 N.E.2d 80, 84 (1984); *see* United States v. Jannotti, 673 F.2d 578, 597 (3d Cir.)(en banc)(the government must disprove the entrapment defense beyond a reasonable doubt), *cert. denied*, 457 U.S. 1106 (1982); *see also* Kadis v. United States, 373 F.2d 370, 373 (1st Cir. 1967)(appearing to endorse standard for predisposition).

Once entrapment has been properly raised, it may be rebutted only by proof of actual predisposition, and not by reasonable cause to suspect criminal involvement on the part of the accused. The reasonable suspicion doctrine poses the threat of convicting an otherwise innocent person who has been harassed into crime, thereby deflecting the *Sorrells*-endorsed inquiry, *see* Sorrells v. United States, 287 U.S. 435, 451 (1932), into the culpability of the defendant. Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 197-98 (1976).

24. Hampton v. United States, 425 U.S. 484, 488-90 (1976)(plurality opinion); United States v. Russell, 411 U.S. 423, 436 (1973); United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983), *cert. denied sub nom.* Margolis v. United States, 104 S. Ct. 720 (1984); United States v. Twigg, 588 F.2d 373, 376 (3d Cir. 1978); People v. Peppars, 140 Cal. App. 3d 677, 685, 189 Cal.Rptr. 879, 884 (1st Dist. 1983); Note, *supra* note 22, at 1457; *see* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1102 (1951).

25. *See* Donnelly, *supra* note 24, at 1102. The First Circuit has rejected the bifurcated analysis of inducement and predisposition as separate issues, and has adopted a more comprehensive and singular approach involving an examination of the ultimate issue of entrapment. *See* United States v. Annese, 631 F.2d 1041, 1047 (1st Cir. 1980); United States v. Rodrigues, 433 F.2d 760, 761 (1st Cir. 1970), *cert. denied sub nom.* Rodriguez [sic] v. United States, 401 U.S. 943 (1971); Kadis v. United States, 373 F.2d 370, 373-74 (1st Cir. 1967); *see also* United States v. Parisi, 674 F.2d 126, 127-28 (1st Cir. 1982). Under the First Circuit approach, as developed in *Kadis*, inducement is not treated as a separate issue. The First Circuit argued, in *Kadis*, that consideration of inducement as a separate issue

It is therefore apparent that under the subjective analysis, as developed in *Sorrells v. United States*,[26] and reaffirmed in *Sherman v. United States*,[27] entrapment arises when law enforcement officers induce or lure otherwise innocent persons to the commission of crime.[28] As so framed, the defense prohibits conviction for an offense "which is the product of the creative activity of [government] officials."[29] Thus, for a court to determine whether entrapment has been established, it must distinguish between the seduction of the innocent and the ensnarement of the guilty.[30] Accordingly, since the genesis of the defense and the rationale of the subjective analysis are rooted in the legislative intent underlying the particular statute alleged to have been violated (namely, that it could not have been the intent of the legislature to enforce the statute against "persons otherwise innocent" who were induced by government agents to violating it),[31] the focus of inquiry will be on the character of the defendant and his predisposition to commit the crime in question, and not on the offensive governmental conduct.[32]

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tended to emphasize the need "to police the police" regardless of the degree of corruptibility of the defendant. 373 F.2d at 373. Such an approach, implicitly argued the court, would be out of step with the subjective analysis of entrapment espoused by a majority of the Supreme Court. As the First Circuit noted, the subjective test does not distinguish "between the issues of inducement and predisposition," nor does it condemn "the act of inducement apart from its effect on an *innocent* man." *Id.* at 374 (footnote omitted)(emphasis added).

With all due respect to the First Circuit, bifurcating the analysis of entrapment does not minimize the significance of predisposition. If a defendant cannot establish inducement, there is simply no need for the court to consider predisposition. The inquiry will end here, and the defense of entrapment will fail. Hence, it is both prudent and practical for a court to bifurcate the analysis of inducement and predisposition under the subjective approach to entrapment and to require a defendant who raises the issue of entrapment to satisfy the threshold inquiry of inducement. *See* Sherman v. United States, 356 U.S. 369, 372-73 (1958); Sorrells v. United States, 287 U.S. 435, 451 (1932).

26. 287 U.S. 435 (1932).

27. 356 U.S. 369 (1958).

28. United States v. Russell, 411 U.S. 423, 435-36 (1973); *Sorrells*, 287 U.S. at 448, 451-52.

29. *Sorrells*, 287 U.S. at 451.

30. *See Sherman*, 356 U.S. at 372.

31. *Sorrells*, 287 U.S. at 448-49, 452; *accord*, United States v. Russell, 411 U.S. 423, 435 (1973); *Sherman*, 356 U.S. at 372; United States v. Jannotti, 673 F.2d 578, 607 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982); *see* Comment, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655, 655-56 (1974).

32. *See* Hampton v. United States, 425 U.S. 484, 488-89 (1976)(plurality opinion); *Sherman*, 356 U.S. at 372-73; *Sorrells*, 287 U.S. at 441-42, 451; *see also* Note, *supra* note 22, at 1467-68 (since predisposition is a crucial issue in entrapment cases, and fatal, upon proof, to the defense, the prosecution can defeat a claim of entrapment without establishing the reasonableness of the governmental conduct). The Supreme Court remains committed to this approach. *See Hampton*, 425 U.S. at 488-90 (plurality opinion); United States v.

The objective test for entrapment, as articulated by Justice Roberts in *Sorrells v. United States*,[33] and by Justice Frankfurter in *Sherman v. United States*,[34] rejects the legislative-intent rationale of the subjective analysis with emphasis placed upon the defendant's criminal predisposition. They target the extent of governmental misconduct as the focal point of its inquiry.[35] As Justice Frankfurter critically observed in *Sherman*, a criminal statute is concerned exclusively with the definition and prohibition of certain conduct, not with legislative concepts of standards of decency for police conduct in the detection of criminal activity.[36] Moreover, Justice Frankfurter indicated that seeking statutory guidance in the application of a fictitious legislative intent would "distort analysis" and would result in the abdication of judicial responsibility, in the face of legislative silence, "to accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals."[37]

Justice Frankfurter also feared that emphasizing criminal predisposition would unnecessarily expose the defendant to juror prejudice. He noted that the government, in order to prove that it had not entrapped the accused, would be compelled to demonstrate a general predisposition on his part "to commit, whenever the opportunity should arise, crimes of the kind solicited . . . ."[38] Such proof, Justice Frankfurter observed, will frequently involve evidence of reputation, prior disposition, and other criminal conduct.[39] He argued, however, that this situation was pregnant with danger if the issue of entrapment were submitted to a jury, for then the defendant would run "the substantial risk that, in spite of instructions," the jury would be influenced by "a criminal record or bad reputation" in assessing the ultimate issue of guilt or innocence.[40]

Justice Roberts, in his separate opinion in *Sorrells*, also objected to the method of statutory interpretation employed by the *Sorrells* ma-

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Russell, 411 U.S. 423, 428-30, 433-36 (1973)(5-4 decision)(reaffirming the subjective test and declining to overrule *Sorrells* and *Sherman).*

33. 287 U.S. 435, 453 (1932)(Roberts, J., separate opinion).

34. 356 U.S. 369, 378 (1958)(Frankfurter, J., concurring in the result).

35. Hampton v. United States, 425 U.S. 484, 488-89 (1976)(plurality opinion); *see* United States v. Russell, 411 U.S. 423, 428-30 (1973); *Sherman* 356 U.S. at 382-84 (Frankfurter, J., concurring in the result); *Sorrells*, 287 U.S. at 458-59 (Roberts, J., separate opinion); *see also Russell*, 411 U.S. at 433-36.

36. *Sherman*, 356 U.S. at 381 (Frankfurter, J., concurring in the result).

37. *Id.*

38. *Id.* at 382.

39. *Id.*

40. *Id.*

jority, in that the behavior of the accused fell within the terms of the applicable statute.[41] In addition, he accused the majority of establishing no criteria for determining when a statute should be read as excluding cases of entrapment.[42]

More fundamentally, however, the difference between the subjective and objective tests for entrapment is one of theory. To endow the doctrine of entrapment with a statutory premise is to lose sight of its underlying function, which is to deny punishment for one who, while not in any legal sense innocent, has been enticed or induced to crime by law enforcement methods that fall below acceptable standards of conduct. It is for this reason that the proponents of the objective test have argued that it is the duty of the courts to close their doors to prosecutions founded on government-manufactured crimes.[43]

Although the legislative-intent rationale of the subjective approach to entrapment has deprived the doctrine of a constitutional footing[44] and has tended to limit its scope,[45] the doctrine, even in shrunken form, retains its vitality as a means of deterring improper law enforcement practices.[46] It involves the unjust procurement of crime by government agents,[47] and preserves the integrity of the courts and of the criminal justice system.[48] The doctrine articulates a philosophy of law that rejects punishment for one who has been induced by government agents to engage in criminal activity.[49] The defense that it affords is available, not as a vehicle for freeing the guilty, but as a means of prohibiting the prosecution and conviction of individuals for criminal conduct instigated and procured by government agents.[50] Strictly speaking, entrapment is, therefore, neither a defense

41. *Sorrells*, 287 U.S. at 456 (Roberts, J., separate opinion).

42. *Id.* at 456-57.

43. *Sherman*, 356 U.S. at 380-84 (Frankfurter, J., concurring in the result); *Sorrells*, 287 U.S. at 455-59 (Roberts, J., separate opinion).

44. *See* United States v. Russell, 411 U.S. 423, 433 (1973)(since the defense of entrapment "is not of a constitutional dimension," Congress may properly "adopt any substantive definition of the defense that it may find desirable" (footnote omited)).

45. *See id.* at 435.

46. For a discussion of the deterrence rationale of entrapment, see MODEL PENAL CODE § 2.10 commentary at 14 (Tent. Draft No. 9, 1959); W. LAFAVE & A. SCOTT, *supra* note 21, § 48, at 372; Park, *supra* note 23, at 242.

47. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 256, at 785 (2d ed. 1961).

48. Park, *supra* note 23, at 242; *see* United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975)(en banc); Donnelly, *supra* note 24, at 1112; Note, *supra* note 22, at 1456-57.

49. *See* United States v. Russell, 411 U.S. 423, 435 (1973); *Sorrells*, 287 U.S. at 452.

50. *See Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring in the result); *Sorrells*, 287 U.S. at 452; MODEL PENAL CODE, *supra* note 46, § 2.10 commentary at 14-15.

nor an excuse for crime in any conventional legal sense.[51] This has prompted one court to observe that rather than being perceived as a defense, entrapment should be "treated as a fact inconsistent with guilt."[52] While law enforcement conduct is not in any strictly technical sense a legal defense under the principles of entrapment, and cannot excuse a criminal offense, "it does not follow that the court must suffer a detective-made criminal to be punished."[53] Such a result would be beyond any conceivable legislative intent in enacting the statute or statutes alleged to have been violated by the defendant.[54] The issue of entrapment, as framed, is not concerned with the judicial power over the admission and exclusion of evidence.[55] The doctrine implicates the power to release an accused who has committed a criminal offense.[56] The power of clemency, however, may be exercised only by the executive branch of government.[57] Thus, the doctrine appears to be rooted in an ethical and social judgement. When society, through its law enforcement officers, has instigated and caused an individual's action or behavior, it is unjust for that society to insist upon punishment for such conduct.[58]

It follows, therefore, that the crucial issue raised by the doctrine of entrapment "is not whether the particular offense was brought about by the government agent, but rather whether the government agent brought about the defendant's *predisposition* to crime."[59] It is precisely because of the limiting scope of this inquiry, with its focus upon "the defendant's predisposition to crime," however, that the predisposed defendant is particularly vulnerable to outrageous acts of misconduct by the police in their zeal to ferret out criminals. But, as the subjective rationale teaches, he may not invoke the aid of the principles of entrapment. A finding of predisposition is fatal to a claim of

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51. *See Sorrells*, 287 U.S. at 456 (Roberts. J., separate opinion); Casey v. United States, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting).

52. State v. Whitney, 157 Conn. 133, 135, 249 A.2d 238, 239 (1968); *see* McCarroll v. State, 294 Ala. 87, 88, 312 So. 2d 382, 383 (1975) (defense of entrapment "rests on the defendant's admitting the deed but disclaiming the thought"); *see also* United States v. Licursi, 525 F.2d 1164, 1169 n.5 (2d Cir. 1975) (the court, in dictum, appeared to recognize that invoking the doctrine of entrapment concedes the commission of the offense charged).

53. Casey v. United States, 276 U.S. 413, 423 (1928)(Brandeis, J., dissenting).

54. *See* United States v. Russell, 411 U.S. 423, 435 (1973); *Sherman*, 356 U.S. at 372; *Sorrells*, 287 U.S. at 448-49, 452.

55. Note, *Entrapment*, 73 HARV. L. REV. 1333, 1334 (1960).

56. *Id.*

57. *See Sorrells*, 287 U.S. at 449; *Ex parte* United States, 242 U.S. 27, 42 (1916)(the "right to relieve" from punishment rests with the executive).

58. *See* Note, *supra* note 55, at 1335.

59. Commonwealth v. Shuman, 391 Mass. 345, 351, 462 N.E.2d 80, 83 (1984)(emphasis added).

entrapment.[60] It is here that the need for a new and more broadly-perceived concept of deterrence is particularly pressing. That need is twofold: to protect all citizens, including predisposed individuals and those only suspected of criminal predisposition, from unscrupulous law enforcement officials; and to devise a national standard proscribing police practices that shock the conscience and offend one's sense of justice. Hence, it is necessary for a due process defense based upon outrageous governmental conduct to fully satisfy the above criteria.[61]

III. THE RIGHT TO A DUE PROCESS DEFENSE

A. *Introductory Comments*

The argument concerning the feasibility, or desirability, of placing a due process limitation upon the degree and scope of police involvement in crime, is not truly an argument about law enforcement. Rather, it is an argument about government, and more specifically, the role and quality of government in a free society. If we have learned anything about the relationship between government and its citizens since the founding of this nation, it is that the options available to any society are limited, either to a community in which government is the servant of the people or to a state in which the interests of the individual are subordinated to the will and power of arbitrary government. The choice is stark, but clear-cut. It will tell us much about the quality of such a civilization.

Nowhere is this choice more sharply defined than in the administration of the criminal law, "that most awesome aspect of government. . . ."[62] It is to this subject that the thrust of this article is directed. This article attempts to demonstrate that the quality of a

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60. *See* authorities cited *supra* note 24.

61. Although the defense of entrapment is not availvable to a predisposed defendant, a separate due process defense, based solely upon governmental misconduct, may be invoked by any person accused of crime. *See* United States v. Kaminski, 703 F.2d 1004, 1007 (7th Cir. 1983); United States v. Twigg, 588 F.2d 373, 378-79 (3d Cir. 1978); Greene v. United States, 454 F.2d 783, 786-87 (9th Cir. 1971); People v. Isaacson, 44 N.Y.2d 511, 518-19, 523-24, 378 N.E.2d 78, 81, 84-85, 406 N.Y.S.2d 714, 717, 721 (1978); *see also* United States v. Wylie, 625 F.2d 1371, 1377-79 (9th Cir. 1980), *cert. denied sub nom.* Perluss v. United States, 449 U.S. 1080 (1981)(entertaining, but rejecting, a claim of due process deprivation from predisposed defendants, without specifically endorsing criteria for standing); *Greene*, 454 F.2d at 786-87 (entertaining, and sustaining, a claim of due process deprivation from predisposed defendants, without specifically endorsing criteria for standing); State v. Hohensee, 650 S.W.2d 268, 270-74 (Mo. Ct. App. 1982)(same). This latter defense has been accorded constitutional status. United States v. Beverly, 723 F.2d 11, 12 (3d Cir. 1983)(per curiam); *see* United States v. Jannotti, 673 F.2d 578, 608 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982).

62. Pennekamp v. Florida, 328 U.S. 331, 356 (1946)(Frankfurter, J., concurring).

civilization is properly judged by the methods employed in the enforcement of its criminal laws,[63] and that the quality of such methods must be measured against the standards of fundamental fairness under the rubric of due process. Although the concept of due process does not lend itself to rigid analysis, its ability to adapt to changing circumstances and to incorporate the accumulated wisdom of experience,[64] makes it ideally suited to the task of defining, in terms of concrete examples, the permissible limits of law enforcement involvement in the detection of crime and the apprehension of criminals. The experience may not always lend itself to easy and simple resolution, but a free society dare not shirk its responsibility to make the necessary commitment to controlling the awesome police power of the state.

B. *The Concept of Due Process*

The American system of criminal justice, with its emphasis upon accusatorial proceedings governed by the presumption of innocence,[65] the privilege against compulsory self-incrimination,[66] and the requirement of guilt beyond a reasonable doubt,[67] has sought "to balance the scales in the contest between government and citizen."[68] One of the key elements in this endeavor is the concept of substantive due process, with its emphasis upon fundamental fairness[69] and civilized decency[70] by government in its dealings with the individual.

Due process is not cast in a rigid mold. It embodies a concept that has evolved historically. It is neither fixed nor final.[71] In short, due process "is not a technical conception with a fixed content unre-

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63. *See* Coppedge v. United States, 369 U.S. 438, 449 (1962).

64. *See* Rochin v. California, 342 U.S. 165, 169-72 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63, 174 (1951)(Frankfurter, J., concurring).

65. *See* Taylor v. Kentucky, 436 U.S. 478, 483-86 (1978).

66. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966); Tehan v. United States *ex. rel.* Shott, 382 U.S. 406, 414-15 & n.12 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Malloy v. Hogan, 378 U.S. 1, 7 (1964); Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

67. Addington v. Texas, 441 U.S. 418, 423-24 (1979); Patterson v. New York, 432 U.S. 197, 210 (1977); *In re* Winship, 397 U.S. 358, 364 (1970).

68. Mascolo, *Procedural Due Process and the Right to Appointed Counsel in Civil Contempt Proceedings*, 5 W. NEW ENG. L. REV. 601, 628 (1983)(footnote omitted); *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)(one of the "fundamental values" that the privilege against compulsory self-incrimination implements is "our sense of fair play which dictates" a fair balance in the contest between the state and the individual); 8 J. WIGMORE, EVIDENCE § 2251, at 317-18 (J. McNaughton rev. 1961).

69. *See* Hampton v. United States, 425 U.S. 484, 494 n.6 (1976)(Powell, J., concurring in the judgment); Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978).

70. *See* Rochin v. California, 342 U.S. 165, 173 (1952).

71. *Id.* at 168-72; *see* Lassiter v. Department of Social Servs., 452 U.S. 18, 24-25

lated to time, place and circumstances."[72] Rather, it represents "a summarized constitutional guarantee of respect for those personal immunities" which are "fundamental" and "implicit in the concept of ordered liberty."[73]

Justice Frankfurter has described due process as a legal concept in these terms: "Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past *in assuring fundamental justice*, it is also a *living* principle not confined to past instances."[74] Many attempts have been made to precisely define this "most majestic concept." The attempts have proved to be somewhat unsuccessful,[75] primarily because of the "vague contours"[76] and comprehensive scope of due process.[77] What can be distilled from these efforts, however, is that the essence of due process is "an abiding sense of fundamental fairness in the relations between government and citizen,"[78] and "the sense of fair play. . . ."[79]

The meaning of "fundamental fairness," which extends to the individual the "most comprehensive protection of liberties,"[80] and embraces a noble ideal, "can be as opaque as its importance is lofty."[81] Applying due process "is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation"[82] by scrutinizing all of the circumstances[83] in light of relevant

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(1981); Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63, 174 (1951)(Frankfurter, J., concurring).

72. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951)(Frankfurter, J., concurring); *accord*, Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981); Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

73. Rochin v. California, 342 U.S. 165, 169 (1952)(quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), and Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

74. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (1951)(Frankfurter, J., concurring)(emphasis added).

75. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981).

76. Rochin v. California, 342 U.S. 165, 170 (1952).

77. *See id.*

78. Mascolo, *supra* note 68, at 612; *see* Landon v. Plasencia, 459 U.S. 21, 34-35 (1982); Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981); Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978); Hampton v. United States, 425 U.S. 484, 494 n.6 (1976) (Powell, J., concurring in the judgment); Spencer v. Texas, 385 U.S. 554, 563-64 (1967); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951)(Frankfurter, J., concurring); Lisenba v. California, 314 U.S. 219, 236 (1941).

79. Galvan v. Press, 347 U.S. 522, 530 (1954).

80. Rochin v. California, 342 U.S. 165, 170 (1952).

81. Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981).

82. *Id.* at 24-25.

83. *See* Hampton v. United States, 425 U.S. 484, 494-95 n.6 (1976)(Powell, J., con-

precedents, and assessing the competing interests at stake.[84]

Two perceptions emerge from this summarized review of the guiding principles of due process. First, is the trenchant commitment to fair play and civilized decency in the relations between the state and the individual. The picture is clear that due process "is not a fair-weather or timid assurance"[85] to the individual in his insistence upon freedom from arbitrary behavior and unscrupulous practices by government and its agents. Second, and as a follow-up to this profound commitment to the integrity and dignity of the individual, is the insistence upon fundamentally just standards of conduct by the state in the event that the citizen becomes a target of a criminal investigation. Due process intercedes here on behalf of the individual, not to tilt the scales in his favor, but simply to balance the scales in any ensuing contest with government.[86] And, it is precisely because of this comprehensive guarantee that due process is a particularly attractive vehicle for checking government abuses in the administration of the criminal justice system and the enforcement of the nation's penal codes. Moreover, it is a concept that brings a sense of justice to criminal proceedings and a message of civilized decency and fairness to all, including those predisposed to crime, who deal with government. Thus, it provides a protection that extends beyond the subjective principles of entrapment, with emphasis upon criminal predisposition and denial of security to those with such propensity.[87] Ultimately, and most importantly, due process makes no attempt to weigh the equities of the respective parties. It imposes *solely* upon government "respect [for] certain decencies of civilized conduct"[88] in its relations with citizens, irrespective of their guilt or innocence, or criminal propensity.

C. *Analysis and Discussion*

In his memorable dissent in *Olmstead v. United States*,[89] Justice Brandeis articulated an equitable "clean hands" defense to the admissibility of evidence obtained by government as the result of the com-

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curring in the judgment); *Sherman*, 356 U.S. at 384-85 (Frankfurter, J., concurring in the result).

84. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 24-25 (1981).

85. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951)(Frankfurter, J., concurring).

86. *See* Mascolo, *supra* note 68, at 612-13.

87. *See supra* notes 22-32 and accompanying text.

88. Rochin v. California, 342 U.S. 165, 173 (1952).

89. 277 U.S. 438, 471 (1928)(Brandeis, J., dissenting). *Olmstead* was overruled by Katz v. United States, 389 U.S. 347 (1967), on grounds unrelated to the context in which it is used in this article.

mission of criminal acts. Arguing that "a court will not redress a wrong when he who invokes its aid has unclean hands,"[90] a maxim that, although derived from principles of equity,[91] "prevails also in courts of law,"[92] Justice Brandeis reasoned that where government is the offending actor and seeks the remedies of the criminal law, the reasons for applying the operating principle underlying the maxim "are *compelling*."[93]

The "clean hands" maxim signifies that a litigant invoking the aid of equity has himself been guilty of unscrupulous and deceitful conduct violative of the fundamental concepts of equity jurisprudence. He therefore is refused all recognition and affirmative relief with respect to the controversy at issue.[94] Thus, the maxim dictates that whenever a plaintiff turns to equity for relief, but has been guilty of inequitable conduct relative to the particular controversy, the court will shut its doors to him *in limine*, and will refuse to interfere on his behalf by denying to him any affirmative relief.[95]

Applying the maxim to the criminal law, Justice Brandeis opined that the *ratio decidendi* of "unclean hands" dictated that legal remedies would be denied to a prosecuting litigant who "has violated the law in connection with the very transaction as to which he seeks legal redress."[96] The reasons for this, Justice Brandeis instructed, were "to maintain respect for law[,]. . . to promote confidence in the administration of justice[,]. . . [and] to preserve the judicial process from contamination," regardless of any wrong committed by the defendant.[97] Accordingly, the doctrine of "unclean hands" in the criminal law is a rule "not of action, but of *inaction*."[98]

In addition, the rule speaks to both substantive law and matters of procedure.[99] Hence, Justice Brandeis observed that objection to the government as one which "comes with unclean hands will be taken by

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90. 277 U.S. at 483 (footnote omitted).

91. *See* Manufacturers' Finance Co. v. McKey, 294 U.S. 442, 451 (1935); *Olmstead*, 277 U.S. at 483-84 (Brandeis, J., dissenting); 2 J. POMEROY, EQUITY JURISPRUDENCE § 397, at 91, § 398, at 92-94 (S. Symons 5th ed. 1941); 27 AM. JUR. 2d *Equity* § 136, at 666-67 (1966).

92. *Olmstead*, 277 U.S. at 484 (Brandeis, J., dissenting).

93. *Id.* (footnote omitted)(emphasis added).

94. 2 J. POMEROY, *supra* note 91, § 397, at 91; 27 AM. JUR.2d, *supra* note 91 § 136, at 667; *see* Manufacturers' Finance Co. v. McKey, 294 U.S. 442, 451 (1935).

95. 2 J. POMEROY, *supra* note 91, § 397, at 91-92; 27 AM. JUR. 2d, *supra* note 91, § 136, at 667; *see* Manufacturers' Finance Co. v. McKey, 294 U.S. 442, 451 (1935).

96. *Olmstead*, 277 U.S. at 484 (Brandeis, J., dissenting)(footnote omitted).

97. *Id.*

98. *Id.* (emphasis added).

99. *Id.* at 484-85.

the court itself," in order that "[t]he court [might] protect[] itself."[100]

For these reasons, concluded Justice Brandeis, "[d]ecency, security[,] and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen."[101] If the rule were otherwise, argued Justice Brandeis, the very existence of government would be "imperilled" by its failure "to observe the law scrupulously."[102] Furthermore, by its example as "the potent, the omnipresent teacher," the government, as lawbreaker, will breed "*contempt* for law" and invite anarchy.[103] To Justice Brandeis, therefore, any attempt by government to introduce, into "the administration of the criminal law," the doctrine that "the end justifies the means — to declare that the [g]overnment may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution." Against that "*pernicious* doctrine," he admonished, "[c]ourt[s] should *resolutely* set [their] face[s]."[104]

It is submitted that the doctrine of the equitable "clean hands" defense, as enunciated by Justice Brandeis in his *Olmstead* dissent, bears particular relevance to the due process defense of outrageous governmental conduct. It is consistent with the objective test for entrapment[105] articulated by Justice Roberts in *Sorrells v. United States*,[106] and by Justice Frankfurter in *Sherman v. United States*.[107] Those dissents focus on the extent of governmental misconduct rather than the defendant's criminal predisposition.[108] Under this test, it is the duty of the courts to close their doors to prosecutions founded upon governmental misconduct involving the inducement to or the creation of crime.[109]

Justice Roberts argued in *Sorrells* that the doctrine of entrapment

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100. *Id.* at 485.

101. *Id.*

102. *Id.*

103. *Id.* (emphasis added).

104. *Id.* (emphasis added); *see* United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973)(dictum)("[T]here is certainly a limit to allowing governmental involvement in crime . . . . Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction." (footnote omitted)); *see also* McNabb v. United States, 318 U.S. 332, 343-47 (1943)(courts, as custodians of liberty, should not sanction convictions obtained by methods offensive to a progressive society).

105. *See supra* text accompanying notes 33-43.

106. 287 U.S. 435, 453 (1932)(Roberts, J., separate opinion).

107. 356 U.S. 369, 378 (1958)(Frankfurter, J., concurring in the result).

108. *See supra* note 35 and accompanying text.

109. *Sorrells*, 287 U.S. at 457, 459 (Roberts, J., separate opinion); *see Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring in the result); *Sorrells*, 287 U.S. at 455 (Roberts, J., separate opinion); Donnelly, *supra* note 24, at 1102, 1112.

must be rooted "in the public policy which protects the purity of government and its processes"[110] from "the consummation of a wrong"[111] perpetrated "by foul means,"[112] and which closes the courts "to the trial of a crime instigated by the government's own agents."[113] In addition, Justice Roberts reasoned that courts themselves possess "the inherent right . . . not to be made the instrument of wrong."[114] Hence, it is the moral imperative of a court to preserve "the purity of its own temple" and "to protect itself and the government from such prostitution of the criminal law."[115]

Under this view of entrapment, there is no need for a distinction based upon the nature of the offense.[116] Similarly, for Justice Roberts, the issue of entrapment is not concerned with guilt or innocence, but only with "the public policy which protects the purity of government"[117] and the moral integrity of the judiciary.[118] It may be brought to the attention of the court "at any stage of the case," and, if established, requires the court to quash the indictment and to discharge the defendant.[119] It follows, according to Justice Roberts, that the defendant's reputation and prior criminal activities are not legitimate subjects of the inquiry.[120] The inquiry is concerned only with the preservation of judicial and governmental integrity.[121] Finally, according to Justice Roberts, there is no place for balancing equities between the accused and the government, because entrapment is not to be condoned because of a defendant's reputation or prior transgressions without disregarding "the reason for refusing the processes of the court to consummate an abhorrent transaction."[122]

Justice Frankfurter, in *Sherman*, was similarly persuaded. For him, an approach that focuses on the predisposition and character of

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110. *Sorrells*, 287 U.S. at 455 (Roberts, J., separate opinion).

111. *Id.* at 458.

112. *Id.* at 459.

113. *Id.*

114. *Id.* at 456.

115. *Id.* at 457. This analysis is but a reaffirmation of the position adopted by Justice Holmes in his dissenting opinion in *Olmstead*, 277 U.S. 438, 469 (1928), where he confessed to little, if any, distinction between government rewarding "its officers for having got evidence by crime" and government "pay[ing] them for getting it in the same way. . . ." *Id.* at 470. In either case, government would be playing "an ignoble part." *Id.*

116. *See Sorrells*, 287 U.S. at 455 (Roberts, J., separate opinion).

117. *Id.*

118. *Id.* at 457; *see* Casey v. United States, 276 U.S. 413, 425 (1928)(Brandeis, J., dissenting); Donnelly, *supra* note 24, at 1112.

119. *Sorrells*, 287 U.S. at 457 (Roberts, J., separate opinion).

120. *Id.* at 458-59.

121. *Id.* at 455, 457, 458-59.

122. *Id.* at 459; Donnelly, *supra* note 24, at 1102.

the accused "loses sight of the underlying reason for the defense of entrapment."[123] The rationale of the doctrine from Justice Frankfurter's perspective is that regardless of the defendant's reputation or past record for antisocial behavior and "present inclinations to criminality, . . . certain police conduct to *ensnare* him into *further* crime is *not to be tolerated* by an advanced society."[124] Therefore, the police should not be granted a blank check, including "inordinate inducements" in combatting the criminal elements of society,[125] and should not be accorded a roving commission to induce to crime persons who are endeavoring to resist the temptation of such conduct.[126]

Justice Frankfurter further argued that to ensure the objective regulation of law enforcement conduct in apprehending "only those ready and willing to commit crime,"[127] which would be lacking if the reasonableness of police conduct were evaluated in terms of the criminal predisposition of the accused, the proper focus of inquiry must be on the conduct of government agents.[128] For Justice Frankfurter, it simply was not the function of government "to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law."[129] In sum, Justice Frankfurter concluded that "[h]uman nature is weak enough and sufficiently beset by temptation *without government* adding to them and *generating crime*."[130]

Crucial to the objective test for entrapment, developed by Justice Roberts and Justice Frankfurter, is the recognition that the threat posed to the integrity of both the criminal law and the judicial processes lies not in the activity of the defendant, but rather in the conduct of the government. Hence, the proper focus of a court's inquiry will be on the government's activity and not on the behavior of the accused.[131] Moreover, the thrust of this inquiry is dictated by the doctrine that the judicial power should not be employed as an instru-

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123. *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring in the result).

124. *Id.* at 383 (emphasis added).

125. *Id.*

126. *See id.* at 383-84. It should be pointed out, however, that this position partially overlaps the subjective test for entrapment, in that it appears to emphasize the lack of criminal predisposition. *See* Hampton v. United States, 425 U.S. 484, 488-90 (1976)(plurality opinion); United States v. Russell, 411 U.S. 423, 433-36 (1973)(majority opinion); *Sherman*, 356 U.S. at 372-73 (majority opinion); *Sorrells*, 287 U.S. at 441-42, 451 (majority opinion).

127. *Sherman*, 356 U.S. at 384 (Frankfurter, J., concurring in the result).

128. *Id.*

129. *Id.*

130. *Id.* (emphasis added).

131. *See* United States v. Russell, 411 U.S. 423, 429 (1973); *Sherman*, 356 U.S. at

ment for the enforcement of the criminal law by means that are unjust. This is "a fundamental rule of public policy,"[132] and is grounded in the power of the judiciary "to protect itself and the government from such prostitution of the criminal law."[133] The genesis of this position is rooted in the policy of judicial integrity.[134]

Justice Brandeis, in his dissenting opinion in *Casey v. United States*,[135] adopted a similar approach. He reasoned that a prosecution based upon entrapment should be terminated in order to protect the government from the illegal conduct of its agents, and to "preserve the purity of its courts."[136] This decision to terminate, Justice Brandeis believed, had nothing to do with the denial of any rights of the defendant.[137] Thus, he did not place entrapment on a constitutional footing.

As Justice Brandeis perceived the situation, the conduct of the government and its officers was not a defense to the defendant. For him, governmental misconduct could not excuse the violation of criminal statutes.[138] But it did not follow, reasoned Justice Brandeis, that a "court must suffer a detective-made criminal to be punished."[139] To do so in his view would be tantamount to ratification by government of the misconduct of its officers.[140] This Justice Brandeis could not sanction. In order to protect government from the "illegal conduct of its officers,"[141] and to "preserve the purity of its courts,"[142] he would dismiss indictments and deny to government the use of the judicial process to seek convictions in cases involving official misconduct in the apprehension and prosecution of criminals.[143] It is apparent, therefore, that Justice Brandeis based his analysis of entrapment upon considerations of both public policy and judicial integrity, and implicitly invoked the supervisory powers of courts as a means of preserving the

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382-84 (Frankfurter, J., concurring in the result); *Sorrells*, 287 U.S. at 456-59 (Roberts, J., separate opinion).

132. *Sorrells*, 287 U.S. at 457 (Roberts, J., separate opinion).

133. *Id.*

134. *See* United States v. Russell, 411 U.S. 423, 445 (1973)(Stewart, J., dissenting); *Sherman*, 356 U.S. at 380, 385 (Frankfurter, J., concurring in the result); *Olmstead*, 277 U.S. at 483-85 (Brandeis, J., dissenting); *id.* at 470 (Holmes, J., dissenting); Donnelly, *supra* note 24, at 1112.

135. 276 U.S. 413, 421 (1928)(Brandeis, J., dissenting).

136. *Id.* at 425.

137. *Id.*

138. *Id.* at 423.

139. *Id.*

140. *Id.* at 423-24, 425.

141. *Id.* at 425.

142. *Id.*

143. *See id.* at 423-25.

integrity of courts and deterring illegal conduct by government or improper practices by the police.[144]

When government engages in the "dirty business"[145] of inducing or manufacturing crime, it comes into court with more than unclean hands: it comes into court with unclean hands that have sullied and violated the very law that government is charged with obeying and protecting. The courts are similarly charged with upholding and respecting the law. They are also under a duty to protect their functions and preserve "the purity of [their] own temple[s]. . . ."[146] Against such pernicious conduct, courts "should resolutely set [their] face[s],"[147] and firmly shut their doors.

If the result is to free a criminal, we as a people will have the satisfaction of knowing that the Constitution is being vindicated,[148] for "it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, *or worse, its disregard of the charter of its own existence.*"[149] We should not forget that the rule of law[150] in this country was designed to protect all of us — the innocent and the guilty — from rule by tyranny.[151] The choice may not be easy, but it is one that must be made. We live under "a government of laws, and not of men,"[152] and it is the duty of all officers of government, "from the highest to the lowest," to obey the

144. *See* United States v. Hasting, 461 U.S. 499, 505 (1983)(purpose of supervisory power of courts includes preserving judicial integrity and deterring illegal conduct); United States v. Payner, 447 U.S. 727, 736 n.8 (1980)("we agree that the supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity"); United States v. Ramirez, 710 F.2d 535, 541 (9th Cir. 1983)(following *Hasting*).

145. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting)(condemning the seizure of evidence by illegal means).

146. *Sorrells*, 287 U.S. at 457 (Roberts, J., separate opinion).

147. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

148. *Cf.* United States v. Beverly, 723 F.2d 11, 13 (3d Cir. 1983)(per curiam)(while the police conduct in question did not reach the requisite level of outrageousness to offend principles of due process, the court implicitly recognized that if it had, an acquittal would have been compelled "so as to protect the Constitution").

149. Mapp v. Ohio, 367 U.S. 643, 659 (1961)(emphasis added)(defending the exclusion of illegally obtained evidence).

150. *Cf.* United States v. Lee, 106 U.S. 196, 220 (1882)(no man is above the law, and all officers of government "are bound to obey it"); *see generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)(the United States is "a government of laws, and not of men").

151. *Cf.* Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)(the fourth amendment's prohibition of unreasonable searches and seizures "protects all, those suspected or known to be offenders as well as the innocent"); THE FEDERALIST No. 78, at 388-90 (A. Hamilton)(1831)(constitutional requirement of lifetime tenure for judicial officers will secure the independence of the judiciary against legislative encroachments, and protect the rights of the individual from majoritarian, as well as from tyrannical, excesses).

152. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

law.[153] In a free and democratic society, it is a "less[er] evil that some criminals should escape than that the government should play an *ignoble* part."[154] To hold otherwise would "breed[] contempt for [the] law,"[155] and would reduce the Constitution to a "form of words,"[156] or worse, to a dead letter. It is not a proper office of the judiciary to sanction, however indirectly, the lawless enforcement of the criminal law, or to have any hand "in such dirty business. . . ."[157] Nor should the prosecutor forget that, as a representative "of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,"[158] his interest is to see that "justice shall be done"[159] within a legal framework of proper and legitimate methods employed by law enforcement officials in ferreting out crime. Although it is understandable that prosecutors and their agents will tend to attach great significance to the societal interest in uncovering crime and convicting criminals, "the danger is that they will assign too little [weight] to the rights of citizens to be free from government-induced criminality."[160]

We live in a society "of ordered liberty. . . ."[161] Clearly, however, as this very concept implies, there can be no liberty without order.[162] Furthermore, there can be no order when the peace and security of society are threatened by "escalating crime in our cities,"[163] and when "[s]ociety [itself] is at war with the criminal classes. . . ."[164] Crime is a cancer that strikes at the social fabric of the community, and it is a rash society indeed that is so foolhardy as to think that it can endure with impunity the ravages wrought by unchecked and destructive criminal behavior.

Our concern about the evils of crime are real and legitimate. They are worthy of a self-respecting people. Our concerns for the decencies of life and for the integrity of civilized standards governing the conduct of law enforcement officers combatting the criminal elements of society are also worthy. Justice Frankfurter has described the admin-

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153. United States v. Lee, 106 U.S. 196, 220 (1882).

154. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting)(emphasis added).

155. *Id.* at 485 (Brandeis, J., dissenting).

156. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

157. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting); *see* Donnelly, *supra* note 24, at 1112.

158. Berger v. United States, 295 U.S. 78, 88 (1935).

159. *Id.*

160. United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973)(dictum).

161. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

162. *See* Cox v. New Hampshire, 312 U.S. 569, 574-75 (1941).

163. Hampton v. United States, 425 U.S. 484, 496 n.7 (1976)(Powell, J., concurring in the judgment).

164. *Sorrells*, 287 U.S. at 453 (Roberts, J., separate opinion).

istration of the criminal law as "that most awesome aspect of government. . . ."[165] Consistent with Justice Frankfurter's assessment, a major theme[166] of this article has been that the quality of a civilization may properly be judged by the methods employed in the enforcement of its criminal laws.[167] Thus, in our zeal to eradicate hoodlums and Mafia chieftans, we should take care not to forget our heritage and sense of fair play. Above all, we should not become criminals in our desire, however reasonable and praiseworthy, to fight crime.[168] This is a price that no enlightened society can afford to pay. It would be an awesome loss to gain security at the cost of offending our sense of justice and discrediting our commitment to the integrity of the rule of law. "Decency, security and liberty alike"[169] dictate against such a tragic result. Ultimately, it would be liberty itself that would be lost in the excesses of unrestrained police practices that are repugnant to a criminal justice system that is constructed upon a moral foundation of fundamental fairness in the relations between government and its citizens. Therefore, it is both the legal and the moral duty of government in a progressive society to enforce its criminal laws pursuant to a sense of justice and fairness, and within the limits of civilized standards of conduct.

It is true that crime has been a serious social problem in the urban centers of this nation.[170] In addition, criminal endeavors have become increasingly sophisticated and ingenious, as well as clandestine. This, in turn, has dramatically increased the burdens placed upon law enforcement authorities, especially in countering effectively the expanding drug practices in our cities.[171] It is not suprising, therefore, that the police have turned with increasing frequency to the services of informants and undercover agents as useful tools in combatting crime

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165. Pennekamp v. Florida, 328 U.S. 331, 356 (1946)(Frankfurter, J., concurring).

166. *See supra* text accompanying notes 2-5, 62-64.

167. Coppedge v. United States, 369 U.S. 438, 449 (1962); *see* Watts v. Indiana, 338 U.S. 49, 54-55 (1949)(plurality opinion); McNabb v. United States, 318 U.S. 332, 343-47 (1943); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 25-26 (1956).

168. *Cf. Sherman*, 356 U.S. at 372 (majority opinion) (although it is the function of law enforcement to prevent crime and apprehend criminals, "[m]anifestly, that function does not include the manufacturing of crime."); *see id.* at 384 (Frankfurter, J., concurring in the result)(it is not the function of government "to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law").

169. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

170. *See* Hampton v. United States, 425 U.S. 484, 496 n.7 (1976)(Powell, J., concurring in the judgment).

171. *See id.* at 495-96 n.7.

and penetrating criminal enterprises and conspiracies.[172]

Justice Roberts has described the conflict and resultant tension between society and the criminal elements in colorful terms:

> Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime. Resort to such means does not render an indictment thereafter found a nullity nor call for the exclusion of evidence so procured.[173]

Thus, a criminal prosecution will not be aborted simply because the government resorted to deceit[174] or obtained "evidence [of guilt] by artifice or deception."[175] Neither may the doctrine of entrapment be invoked where government agents have only provided the opportunity, or furnished the facilities, for the commission of crime.[176] Similarly, mere evidence of solicitation is not sufficient to raise the issue of entrapment.[177] And a feigned friendship, or one offered under false pretenses, is not, as a matter of law, entrapment.[178]

Nowhere is this need for "stealth and strategy"[179] more pronounced than in the efforts of government to stamp out the drug trade. Simply stated, informants and undercover agents are crucial to combatting drug-related and other contraband offenses.[180] In fact, they have even been permitted to supply drugs and other things of value to

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172. *See Sherman*, 356 U.S. at 372 (majority opinion), and *id.* at 381 (Frankfurter, J., concurring in the result); *Sorrells*, 287 U.S. at 453-54 (Roberts, J., separate opinion); United States v. Kaminski, 703 F.2d 1004, 1009-10 (7th Cir. 1983); United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1980); *see also* United States v. Lomas, 706 F.2d 886, 890 (9th Cir. 1983), *cert. denied sub nom.* Margolis v. United States, 104 S. Ct. 720 (1984)(defense conceded the propriety of such services); People v. Isaacson, 44 N.Y.2d 511, 524, 378 N.E.2d 78, 85, 406 N.Y.S.2d 714, 721 (1978).

173. *Sorrells*, 287 U.S. at 453-54 (Roberts, J., separate opinion)(footnote omitted); *see* United States v. Russell, 411 U.S. 423, 435-36 (1973).

174. United States v. Russell, 411 U.S. 423, 435-36 (1973).

175. *Sorrells*, 287 U.S. at 441 (majority opinion), and *id.* at 454 (Roberts, J., separate opinion); *see* Commonwealth v. Shuman, 391 Mass. 345, 351, 462 N.E.2d 80, 83 (1984); W. LAFAVE & A. SCOTT, *supra* note 21, § 48, at 369.

176. United States v. Russell, 411 U.S. 423, 435 (1973); *Sherman*, 356 U.S. at 372 (majority opinion), and *id.* at 382 (Frankfurter, J., concurring in the result); *Sorrells*, 287 U.S. at 441; *see* Casey v. United States, 276 U.S. 413, 424 (1928)(Brandeis, J., dissenting).

177. *See* United States v. Luce, 726 F.2d 47, 49 (1st Cir. 1984); Kadis v. United States, 373 F.2d 370, 374 (1st Cir. 1967); Commonwealth v. Shuman, 391 Mass. 345, 351, 462 N.E.2d 80, 83-84 (1984); Donnelly, *supra* note 24, at 1102.

178. United States v. Jones, 487 F.2d 676, 678 (9th Cir. 1973); United States v. Quevedo, 399 F.2d 307, 308 (9th Cir. 1968)(per curiam). *Cf.* United States v. Ladley, 517 F.2d 1190, 1193 (9th Cir. 1975)(discussing tactics found not to constitute entrapment).

179. *Sherman*, 356 U.S. at 372.

180. *See* Hampton v. United States, 425 U.S. 484, 495 n.7 (1976)(Powell, J., concur-

criminal enterprises in order to gain the confidence of those involved in illicit activities.[181]

But after conceding the practical everyday difficulties of combatting modern criminal enterprises, and acknowledging the useful role of informers and undercover operations in exposing and solving crime,[182] the fact remains that "there are *limits* to what either an informant or an undercover agent may do."[183] The courts may not "shirk the responsibility that is necessarily in [their] keeping . . . to accomodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals."[184] Therefore, the courts must be prepared to confront those situations involving law enforcement techniques employed against the criminal elements of society where, as a result of government participation in, or creation of, crime, "there comes a time when enough is more than enough — *it is just too much*. When that occurs, the law must condemn it as offensive [to due process] whether the method used is refined or crude, subtle or spectacular."[185] It may ultimately be only "a question of degree,"[186] but, by the exercise of sound judicial judgment, "[a] standard must be set somewhere and the line should be drawn"[187] where government induces and effectively controls criminal activities in a manner that can only encourage lawlessness.[188] At that level of official misconduct, due process must step in and call a halt to any "prosecution conceived in or nurtured by such [outrageous] conduct . . . ."[189]

Such conduct can be neither sanctioned nor tolerated, for it is

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ring in the judgment); United States v. Russell, 411 U.S. 423, 432 (1973); United States v. Twigg, 588 F.2d 373, 380 (3d Cir. 1978).

181. *See* United States v. Russell, 411 U.S. 423, 432 (1973); *see also* Hampton v. United States, 425 U.S. 484, 489-90 (1976)(plurality opinion)(practice implicitly endorsed), and *id.* at 491-92 (Powell, J., concurring in the judgment); United States v. Lomas, 706 F.2d 886, 890 (9th Cir. 1983), *cert. denied sub nom.* Margolis v. United States, 104 S. Ct. 720 (1984) (defense acknowledged permissibility of such practices).

182. *See* Williamson v. United States, 311 F.2d 441, 445 (5th Cir. 1962) (Brown, J., concurring specially).

183. United States v. McQuin, 612 F.2d 1193, 1196 (9th Cir.)(per curiam)(emphasis added), *cert. denied sub nom.* Johnson v. United States, 445 U.S. 954 (1980).

184. *Sherman*, 356 U.S. at 381 (Frankfurter, J., concurring in the result).

185. Williamson v. United States, 311 F.2d 441, 445 (5th Cir. 1962)(Brown, J., concurring specially)(emphasis added); *accord*, People v. Isaacson, 44 N.Y.2d 511, 523, 378 N.E.2d 78, 84, 406 N.Y.S.2d 714, 721 (1978); *see* Note, *supra* note 22, at 1471-72.

186. People v. Isaacson, 44 N.Y.2d 511, 523, 378 N.E.2d 78, 84, 406 N.Y.S.2d 714, 721 (1978).

187. *Id.* at 524, 378 N.E.2d at 85, 406 N.Y.S.2d at 721.

188. *See id.* at 521-24, 378 N.E.2d at 83-85, 406 N.Y.S. at 719-21; *see also* United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973)(dictum).

189. People v. Isaacson, 44 N.Y.2d 511, 522, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719-20 (1978).

simply not a legitimate function of government to engage in crime.[190] Justice Holmes, within the context of the illegal seizure of evidence, has admonished the courts, *as a branch of government*, that if "the existing code [of decency and fundamental fairness]" does not permit the prosecution "to have a hand in such dirty business [of securing evidence of crime by illegal acts]," it will "not permit the judge to allow such *iniquities* to succeed."[191] For Justice Holmes, there was "no distinction . . . between the government as prosecutor and the government as judge."[192] Further, it was but a deductive and logical conclusion that if evidence was inadmissible for having been obtained by unconstitutional means, it was also excludable for having been obtained by illegal acts of government agents.[193] Therefore, while the detection of criminals was a "desirable" end of effective law enforcement, for Justice Holmes it was more "desirable that the government should not itself *foster* and *pay* for other crimes" in securing evidence of guilt.[194] Accordingly, Justice Holmes was prepared to choose, as "a less[er] evil[,] that some criminals should escape than that the government should play an *ignoble* part."[195]

An argument might be made that defining the limits of law enforcement involvement in crime without focusing on a defendant's predisposition will raise doctrinal and practical difficulties for the courts.[196] Although such an argument raises legitimate issues, it should not be overlooked that the very essence of delineating these limits is to define fundamental fairness at particular times, in particular places, and within particular contexts. This is a task for which the courts are uniquely equipped to arrive at a just result by assessing and reasonably accommodating the competing interests at stake of the government, to detect and punish criminals, and of the individual, to be treated fairly within a framework of justice and decency. It is the purpose of constitutions "to preserve practical and substantial rights, not to maintain theories,"[197] and it is the penultimate responsibility of the courts to implement this goal. No other institution of government is so well-qualified to discharge this awesome duty, even when "there

190. *See Sherman*, 356 U.S. at 384 (Franfkfurter, J., concurring in the result); *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

191. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting)(emphasis added).

192. *Id.*

193. *Id.* at 471.

194. *Id.* at 470 (emphasis added).

195. *Id.* (emphasis added).

196. *See* Hampton v. United States, 425 U.S. 484, 494-95 & nn.5-6 (1976)(Powell, J., concurring in the judgment).

197. Davis v. Mills, 194 U.S. 451, 457 (1904).

is sometimes no sharply defined standard against which to make these judgments . . . ."[198]

Finally, the most appealing aspects of the due process defense are its constitutional basis and the scope of its protection. These factors are interrelated and demonstrate the clear and present need for the defense. First, the defense will place both the federal and state law enforcement authorities of this nation under a charge that they will be required to satisfy, at a *minimum*, certain standards of decency and fair play in their investigation and apprehension of criminals. Second, by reason of its constitutional footing, the defense will apply to all alike, the innocent, the guilty, and the criminally *predisposed*. Thus, the defense is national in scope. It fills the protective gaps, both doctrinal and factual, created by the subjective test for entrapment with its parochial preoccupation with criminal propensity.

D. *Dynamics of the Defense*

1. Distinguished from Entrapment

Although the due process defense is "a close relative of entrapment,"[199] it is independent.[200] It differs from entrapment in several important ways. In the first place, entrapment generally presents a question of fact, unless the defendant, as a matter of law, has established it beyond a reasonable doubt.[201] Due process involves governmental misconduct and, therefore, presents a question of law.[202]

This result would appear, upon initial impression, to be somewhat at odds with the legal perception of due process as a flexible concept

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198. Hampton v. United States, 425 U.S. 484, 495 n.6 (1976)(Powell, J., concurring in the judgment); *see* Rochin v. California, 342 U.S. 165, 169-73 (1952).

199. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983).

200. United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983), *cert. denied sub nom.* Margolis v. United States, 104 S. Ct. 720 (1984); *see* United States v. Hunt, 36 CRIM. L. REP. (BNA) 2203, 2203 (4th Cir. Nov. 28, 1984) ("entrapment and due process claims . . . are analytically distinct"); United States v. Lue, 498 F.2d 531, 534 (9th Cir.), *cert. denied*, 419 U.S. 1031 (1974).

201. United States v. Graves, 556 F.2d 1319, 1321 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); Goss v. United States, 376 F.2d 812, 813 (5th Cir. 1967)(per curiam); *see Sherman*, 356 U.S. at 377; United States v. McQuin, 612 F.2d 1193, 1196 (9th Cir.)(per curiam), *cert. denied sub nom.* Johnson v. United States, 445 U.S. 954 (1980); United States v. Twigg, 588 F.2d 373, 379 (3d Cir. 1978); People v. Peppars, 140 Cal. App. 3d 677, 685, 189 Cal. Rptr. 879, 884 (1st Dist. 1983).

202. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983); *see* United States v. Nunez-Rios, 622 F.2d 1093, 1098 (2d Cir. 1980); United States v. Johnson, 565 F.2d 179, 181-82 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); State v. Hohensee, 650 S.W.2d 268, 272 (Mo. Ct. App. 1982).

which derives its meaning from "time, place and circumstances."[203] Closer examination, however, dispels the confusion. The essential meaning of due process is fundamental fairness.[204] If a determination of a denial of fundamental fairness were simply an issue of fact to be "left to a jury's unguided discretion, . . . the [due process] defense as now understood would be transformed into an invitation to twelve jurors to consider in virtually any case whether [a] defendant was treated 'fairly.' "[205] This, a jury is not "equipped" to do. Therefore, it "should not be permitted to speculate on whether particular facts do or do not amount to fundamental fairness."[206] Moreover, since the due process defense strikes at "the legality of law enforcement methods," the determination of the lawfulness of governmental conduct is a legal issue which "must be made . . . by the trial judge, not the jury."[207]

Ultimately, however, the very nature of due process as an evolving concept with "vague contours" and a "continuing process of application" which defies meaning that is "final and fixed"[208] precludes, as a practical necessity, as well as a constitutional precept, the participation of jurors in the task of determining when misconduct by government has offended our sense of justice and shocked the conscience.[209] Therefore, if the issue of due process misconduct were a question of fact, a jury would be called upon to interpret a constitutional concept — a task that has been entrusted to the courts. As Justice Frankfurter has observed:

> Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of [judicial] decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those [judicial officers] *whom the Constitution entrusted*

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203. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

204. *See supra* text accompanying notes 69-70.

205. United States v. Johnson, 565 F.2d 179, 182 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978).

206. *Id.*; *see* United States v. Nunez-Rios, 622 F.2d 1093, 1098 (2d Cir. 1980)(since the due process defense is based upon defects in the institution of a prosecution, "this defense is properly decided by the court and not the jury.").

207. United States v. Russell, 411 U.S. 423, 441 (1973)(Stewart, J., dissenting).

208. Rochin v. California, 342 U.S. 165, 170 (1952).

209. *Cf. id.* at 169-73 (implicitly endorsing the constitutional duty of the judiciary to interpret and apply due process as an evolutionary concept).

with the unfolding of the process.[210]

The second major distinction between due process and entrapment lies in the availability of the due process defense to a predisposed defendant,[211] while proof of predisposition is fatal to a claim of entrapment,[212] even though the accused may not have given the police reasonable cause to suspect, prior to their investigation, that he was engaged in criminal activity.[213] In addition, the due process defense is one of constitutional dimension,[214] while the defense of entrapment is not.[215]

The respective scopes of the two defenses highlight the fourth and final major distinction between due process and entrapment. Although both doctrines provide relief from government misconduct in the enforcement of the criminal law, the scope of the due process protection extends beyond that of entrapment[216] and reaches "[p]olice overinvolvement in crime [which attains] a demonstrable level of outrageousness"[217] that is sufficient to shock the conscience and a sense of justice.

In spite of these differences, however, the due process defense does tend "to overlap with the entrapment defense."[218] This has contributed to a difficulty in delineating "the conduct circumscribed by the due process defense. . . ."[219] Moreover, as the Third Circuit has observed, "the lines between the objective test of entrapment favored by a minority of the [Supreme Court] [j]ustices and the due process defense accepted by a majority of the [j]ustices are indeed hazy. . . ."[220] This, in turn, has prompted some federal circuits to

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210. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring) (emphasis added); *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-80 (1803)(it is the duty of the judiciary to say what the law is and to interpret constitutions).

211. *See supra* note 61 and accompanying text.

212. *See supra* text accompanying note 60.

213. *See* United States v. Swets, 563 F.2d 989, 991 (10th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); United States v. Ordner, 554 F.2d 24, 27-28 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977); Note, *supra* note 22, at 1467-68.

214. *See supra* note 61 and accompanying text.

215. *See* United States v. Russell, 411 U.S. 423, 432-33 (1973).

216. *Cf.* United States v. Jannotti, 673 F.2d 578, 607 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982)("a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense").

217. Hampton v. United States, 425 U.S. 484, 495 n.7 (1976)(Powell, J., concurring in the judgment).

218. United States v. Jannotti, 673 F.2d 578, 606 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982).

219. *Id.*

220. *Id.* at 608.

adopt the postion that courts should be careful "not to undermine the [Supreme] Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense."[221]

2. Scope of the Defense

a. *Governing Principles*

Once a court is prepared to recognize the existence of a due process defense, it must then determine the limits of such a defense. It has been observed, concerning this issue, that while the scope of the due process defense is "potentially broad, [it] has in fact been severely restricted"[222] to a level of misconduct that shocks the conscience and a sense of justice.[223] This degree of outrageousness has been characterized as "go[ing] beyond that necessary to sustain an entrapment defense."[224] Moreover, the Supreme Court has yet to reverse a conviction because of pervasive involvment of government in crime;[225] and the federal circuits, to date, have done so in only two cases,[226] which involved the generation or manufacture of crimes solely for purposes of prosecution.[227] Still, as these examples imply, the perception of offensive behavior must be sufficiently broad to permit that degree of flexibility required for the "delicate [and ongoing] process of adjustment"[228] that permits due process to grow through experience and adapt to changing circumstances.[229] Closely related to this inquiry are the standards of fairness against which a court will objectively mea-

221. *Id.*; *accord*, United States v. Kelly, 707 F.2d 1460, 1475-76 (D.C. Cir.) (Ginsburg, J.,separate opinion)(lower federal courts "may not alter the contours of the entrapment defense under a due process cloak")(footnote omitted), *cert. denied*, 104 S. Ct. 264 (1983); United States v. Williams, 705 F.2d 603, 619 (2d Cir.), *cert. denied*, 104 S. Ct. 524 (1983).

222. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983).

223. *See id.*; United States v. Jannotti, 673 F.2d 578, 608 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982)("the majority of the [Supreme] Court has manifestly reserved for the constitutional defense [of due process] only the most intolerable government conduct"); *cf.* Rochin v. California, 342 U.S. 165, 172-74 (1952)(conduct that shocks the conscience and offends a sense of justice is conduct that violates the principles of due process).

224. United States v. Jannotti, 673 F.2d 578, 607 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982).

225. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983).

226. United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); Greene v. United States, 454 F.2d 783 (9th Cir. 1971).

227. United States v. Ramirez, 710 F.2d 535, 539-40 (9th Cir. 1983).

228. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

229. *See* Rochin v. California, 342 U.S. 165, 169-72 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63, 174 (1951)(Frankfurter, J., concurring).

sure police conduct. Here, the states are not limited to the minimum standards mandated by the United States Constitution as interpreted by the Supreme Court, and may "impose higher standards on law enforcement practices pursuant to their own constitutions."[230]

Invoking the principles of due process as a restraint upon the power of government to seek judicial procedures in obtaining criminal convictions is a doctrine of ancient origin, and is traceable to the Magna Charta.[231] A classic example of the doctrine is when government agents obtain evidence of crime by brutalizing a defendant. Such conduct goes beyond merely offending "some fastidious squeamishness or private sentimentalism about combatting crime too energetically."[232] Rather, "[t]his is conduct that shocks the conscience,"[233] and a conviction resulting from such methods offends our sense of justice and fair play and the standards of civilized conduct.[234]

The degree of misconduct, however, which will warrant the barring of prosecution, should not be restricted to situations involving police brutality that rivals "the rack and the screw"[235] in its assault upon human dignity.[236] To do so would drastically reduce the scope of protection provided by the due process defense.[237] Furthermore, it would unduly hamper the duty of courts "[t]o prevent improper and unwarranted police *solicitation* of crime . . . ."[238] It would simply be stretching credulity to equate brutality with "solicitation." Neither would "[p]olice overinvolvement in crime [that] . . . reach[ed] a de-

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230. Mascolo, *Probable Cause Revisited: Some Disturbing Implications Emanating from Illinois v. Gates*, 6 W. NEW ENG. L. REV. 331, 402 (1983); *accord*, People v. Isaacson, 44 N.Y.2d 511, 519, 378 N.E.2d 78, 82, 406 N.Y.S.2d 714, 718 (1978)(applying higher standards to due process defense); *see* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498-504 (1977); *cf.* Cooper v. California, 386 U.S. 58, 62 (1967)(dictum)(acknowledging the right of the states to impose, as a matter of state law, higher standards on searches and seizures than are required by the federal Constitution).

231. People v. Isaacson, 44 N.Y.2d 511, 520, 378 N.E.2d 78, 82, 406 N.Y.S.2d 714, 719 (1978).

232. Rochin v. California, 342 U.S. 165, 172 (1952).

233. *Id.*

234. *Id.* at 172-74; *see* Brown v. Mississippi, 297 U.S. 278, 285-86 (1936); *Lomas*, 706 F.2d at 891; United States v. Lue, 498 F.2d 531, 534 (9th Cir.), *cert. denied*, 419 U.S. 1031 (1974).

235. Rochin v. California, 342 U.S. 165, 172 (1952).

236. *See* People v. Isaacson, 44 N.Y.2d 511, 520, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 252 (1973)(hereinafter cited as *Supreme Court Term*); Comment, *supra* note 31, at 666-67, 669.

237. *See Supreme Court Term*, *supra* note 236, at 252.

238. People v. Isaacson, 44 N.Y.2d 511, 520-21, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978)(emphasis added).

monstrable level of outrageousness"[239] — the level of misconduct insisted upon by Justice Powell to trigger the due process defense — be confined to acts of brutality. Partners in crime, the situation envisioned by the due process defense, are not in the business of brutalizing, or physically coercing, one another into criminal activity. Moreover, government induces one to crime not merely by acts of intimidation but also by promises of profit or advantage. Similarly, government involvement in the planning, execution, and control of crime can become unconstitutionally pervasive without also attaining the level of *brutality* involving "physical or psychological coercion that 'shocks the conscience.' "[240]

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239. Hampton v. United States, 425 U.S. 484, 495 n.7 (1976)(Powell, J., concurring in the judgment).

240. United States v. Kelly, 707 F.2d 1460, 1476 n.13 (D.C. Cir.) (Ginsburg, J., separate opinion), *cert. denied*, 104 S. Ct. 264 (1983). Judge Ginsburg, in her separate opinion in *Kelly*, interpreted Supreme Court precedent as limiting the due process defense to acts of " 'coercion, violence[,] or brutality to the person.' " *Id.* (quoting Irvine v. California, 347 U.S. 128, 133 (1954)(plurality opinion)). In reaching this conclusion, Judge Ginsburg appears to have relied upon Irvine v. California, 347 U.S. 128 (1954)(plurality opinion), and Rochin v. California, 342 U.S. 165 (1952). However, the plurality in *Irvine* was quick to distinguish that case, as Judge Ginsburg herself acknowledged, from *Rochin*, relied upon by the defendant, which involved the forcible extraction of evidence from Rochin's body by means of a stomach pump. It was within this framework that Justice Jackson, writing for the *Irvine* plurality, observed that "[h]owever obnoxious are the facts in the case before us, they do not involve coercion, violence[,] or brutality to the person [as did *Rochin*]." *Irvine*, 347 U.S. at 133. Similarly, Justice Frankfurter's trenchant condemnation of the forcible extraction of the contents of the *Rochin* defendant's stomach as "conduct that shocks the conscience," *Rochin*, 342 U.S. at 172, did not imply a due process restriction to such offensive methods. To the contrary, his exhaustive analytical treatment of due process in *Rochin*, *id.* at 169-73, as a product of history and a flexible concept that provided the "most comprehensive protection of liberties," *id.* at 170, speaks to an opposite result. Thus, any reliance upon either *Irvine* or *Rochin* in support of restrictions upon the scope of the due process defense is simply misplaced. Even Judge Ginsburg conceded that such a limitation upon the reach of the defense would exclude from due process protection "*flagrant* misconduct on the part of the police. . . ." *Kelly*, 707 F.2d at 1476 (emphasis added). The Supreme Judicial Court of Massachusetts, however, appears to have accepted Judge Ginsburg's assessment of the Supreme Court precedents. *See* Commonwealth v. Shuman, 391 Mass. 345, 354-55, 462 N.E.2d 80, 85 (1984).

Judge Ginsburg's restrictive concept of the due process defense is particularly perplexing, in view of her reliance upon Justice Powell's standard of "[p]olice overinvolvement in crime [that]. . . reach[ed] a demonstrable level of outrageousness," Hampton v. United States, 425 U.S. 484, 495 n.7 (1976)(Powell, J., concurring in the judgment), as the "requisite level of outrageousness" to offend due process. *Kelly*, 707 F.2d at 1476 (Ginsburg, J., separate opinion). Clearly, however, Justice Powell's standard encompasses more than " 'coercion, violence[,] or brutality to the person,' " *id.*, or police *brutality* involving "physical or psychological coercion that 'shocks the conscience,' " *id.* at 1476 n.13 (interpreting lower federal precedents). *See* United States v. Twigg, 588 F.2d 373, 376-81 (3d Cir. 1978); Greene v. United States, 454 F.2d 783, 785-87 (9th Cir. 1971); State v. Glasson, 36 CRIM. L. REP. 2380, 2380-81, (Fla. Jan. 17, 1985) (applying defense to prosecutions based upon the testimony of vital state informants who stand to gain a fee conditioned upon their

Conduct that is repugnant to fundamental fairness and standards of civilized decency — conduct that shocks the conscience and offends a sense of justice — does not lend itself to rigid analysis or formal exactitude.[241] It can arise in a variety of situations depending upon time, place, and surrounding circumstances, as well as the nature of the crime in question and the manner in which the particular criminal activity is usually engaged in or carried on.[242] Moreover, encounters between government and citizen are too multifaceted and diverse to fit into a neat equation of what is acceptable and what is unacceptable conduct that will govern all situations, irrespective of time, place, and circumstance. Thus, the limits of conduct repugnant to a sense of justice, and, therefore, offensive to due process, defy the constrictions of precise formulation and rigid conceptualization.

The scope of the defense must extend as far as the remedy demanded by the peculiar government conduct in question. Regardless of the means employed, the ends remain the same: On one hand, the government's objective is the inducement of the citizen to crime, by whatever methods are effective, to secure a conviction. The court's remedy, on the other hand, is to protect the citizen from such conduct by denying to the government the aid of the judicial processes. Hence, the scope of the due process defense will be defined by the means employed by government to obtain impermissible ends: the apprehension and conviction of citizens for "government-induced criminality."[243] The key element in this mix of factors will be the degree of government involvement in the criminal enterprise. If the government has *manufactured* a crime to secure a conviction, then the defense will intercede to prevent a conviction, not for the benefit of the defendant, but "to protect the Constitution."[244] This test, which is rooted in notions of decency and fair play, applies an objective analysis to law enforcement conduct, and measures that conduct against due process standards of fundamental fairness, irrespective of the criminal predisposition of the defendant.[245]

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cooperation and testimony); State v. Hohensee, 650 S.W.2d 268, 268-70, 274 (Mo. Ct. App. 1982).

241. People v. Isaacson, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978). *See infra* text accompanying notes 421-24.

242. *Cf. Sherman*, 356 U.S. at 384-85 (Frankfurter, J., concurring in the result)(applying criteria to conduct condemned under the objective analysis of entrapment).

243. United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973)(dictum).

244. United States v. Beverly, 723 F.2d 11, 13 (3d Cir. 1983)(per curiam); *see* United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973)(dictum).

245. *See* Comment, *supra* note 31, at 669.

b. *The Direct Violation of a Protected Right of the Defendant*

A fundamental aspect of the scope of the due process defense addresses the issue of limiting its application to instances of police misconduct that directly infringes upon or violates some protected right of a defendant. This issue not only implicates the scope of the defense but also calls into question the very quality of the defense. To be more specific, does the due process defense against outrageous government conduct in the enforcement of the criminal law create a right on behalf of each individual to be protected from government-induced criminality, or does the defense apply only when the misconduct directly violates some protected right of the defendant that exists independently of the government's activity or behavior?

By way of dictum in *United States v. Russell*,[246] the Supreme Court suggested the existence of the due process defense: "[W]e 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 . . . ."[247] As support for this proposition, the Court cited[248] *Rochin v. California*.[249] *Rochin* involved the forcible extraction of evidence from the defendant's body by methods that "shock[ed] the conscience"[250] of the Court — a stomach pump. The Supreme Court condemned these procedures as going beyond merely offending "some fastidious squeamishness or private sentimentalism about combatting crime too energetically."[251] These were, in the Court's perception, "methods too close to the rack and the screw"[252] to pass constitutional muster, and clearly offended due process[253] by their brutal disregard of the "decencies of civilized conduct."[254] Thus, the Court, in *Rochin*, would not tolerate convitions secured "by methods that offend 'a sense of justice.' "[255]

In *United States v. Archer*,[256] the government argued that the Supreme Court's reference to *Rochin* in the *Russell* dictum confirmed that it perceived the due process defense as one limited to conduct

246. 411 U.S. 423 (1973).
247. *Id.* at 431-32 (dictum).
248. *Id.* at 432.
249. 342 U.S. 165 (1952).
250. *Id.* at 172.
251. *Id.*
252. *Id.*
253. *Id.* at 174.
254. *Id.* at 173.
255. *Id.*; *see* Brown v. Mississippi, 297 U.S. 278, 285-86 (1936).
256. 486 F.2d 670 (2d Cir. 1973).

which shocked the judicial conscience and directly infringed upon the rights of a defendant.[257] The Second Circuit, while finding it unnecessary to decide this issue because reversal was warranted on another ground,[258] appeared to endorse a broader application of the defense than that advocated by the government.[259] It incorporated the principles articulated by Justice Brandeis in his *Olmstead* dissent[260] and suggested the existence of a general due process right "of citizens to be free from government-induced criminality."[261] Judge Friendly states:

> [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*. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.[262]

As this passage clearly suggests, the *Archer* court was prepared, if the situation had arisen, to withhold the judicial processes from the prosecution of even "a gang of hoodlums" for government-instigated crime.

The only opportunity that the Supreme Court has had to indirectly address the limits of the due process defense was presented in *Hampton v. United States*.[263] In *Hampton*, a plurality[264] of the Court, speaking through Justice Rehnquist, appeared to have implicitly rejected the defense in the case of a predisposed defendant, and to have limited its scope to direct infringement of the rights of a defendant.[265] In the words of the plurality: "The limitations of . . . [d]ue [p]rocess. . . come into play only when the [g]overnment activity in question violates some protected right of the *defendant*."[266] But, for

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257. *Id.* at 676.
258. *Id.* at 677.
259. *Id.* at 676-77 & n.6 (dictum).
260. *See supra* text accompanying notes 89-104.
261. 486 F.2d at 677 (dictum).
262. *Id.* at 676-77 (dictum)(emphasis added).
263. 425 U.S. 484 (1976).
264. Consisting of Chief Justice Burger, Justice White, and Justice Rehnquist.
265. *See id.* at 490.
266. *Id.* (emphasis in the original); *accord*, United States v. Payner, 447 U.S. 727, 737 n.9 (1980)(quoting *Hampton* with approval). *Cf.* United States v. Kelly, 707 F.2d 1460, 1476 (D.C. Cir.)(Ginsburg, J., separate opinion)(lower federal courts "lack authority, where no *specific* constitutional right of the defendant has been violated, to dismiss indict-

the *Hampton* plurality, this could not be, for the defendant, the government agents, and their informant had all "acted in concert with one another."[267] Thus, an accused would not be able to invoke the protection of due process from police conduct clearly offensive to notions of fair play and decency and standards of fundamental fairness, if that conduct did not also directly infringe upon a protected right of the defendant.[268]

It is submitted that such a restrictive concept of the due process defense would deprive it of much of its vitality, and would result in the unseemly spectacle of government enforcing its criminal laws by methods that are offensive to "the charter of its own existence."[269] Furthermore, it would effectively deny protection to the predisposed defendant, a result clearly intended by the *Hampton* plurality, for it is difficult to conceive of police conduct that would directly infringe upon a *separate* protected right of one predisposed to the commission of the very offense of which he is charged. Since predisposition would also strip him of the entrapment defense,[270] the predisposed defendant would be without a remedy for unconstitutional practices employed against him in the enforcement of the criminal law.

More fundamentally, however, to perceive the concept of due process as a protection that is triggered only by government activity that violates some separate right of the defendant is to ignore reality. In *Rochin v. California*,[271] the leading federal case on the issue of governmental misconduct in the enforcement of the criminal law, Justice Frankfurter did not rest his decision reversing the defendant's conviction simply on any violation of a separate protected right to privacy or the right to be free from bodily assaults and batteries. To the contrary, he cried out against the very methods employed by the police to obtain evidence of the defendant's guilt — forcibly extracting, first manually and then by means of a stomach pump, two capsules of morphine from his body.[272] The rationale of the Court's decision was forcefully articulated by Justice Frankfurter:

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ments as an exercise of supervisory power over the conduct of federal law enforcement agents" (emphasis in the original)), *cert. denied* 104 S. Ct. 264 (1983).

267. 425 U.S. at 490.

268. *See* Comment, *supra* note 31, at 666. The majority of the *Hampton* Court did not comment on the scope of the due process defense, and, therefore, did not intimate a position on this issue.

269. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

270. *See supra* text accompanying notes 22-25.

271. 342 U.S. 165 (1952).

272. *Id.* at 166.

> Applying these general considerations [of the governing principles of due process] to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. *This is conduct that shocks the conscience.* Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibility. *They are methods too close to the rack and the screw to permit of constitutional differentiation.*[273]

Although the methods employed in *Rochin* did violate the privacy of the defendant's person, it is clear that Justice Frankfurter rested the Court's decision primarily on the means used and not simply on the issue of privacy. Thus, while the defendant's privacy concerns were implicated by the practices to which the government resorted, it was the conduct itself that "shock[ed] the conscience" of the Court and smacked of "methods too close to the rack and the screw to permit of constitutional differentiation."[274] The violation of privacy may have been effected, but it was the "brutal conduct" employed which offended notions of fair play and decency.[275] For Justice Frankfurter, to sanction such methods "would be to afford brutality the cloak of the law."[276] He concluded, therefore, that "*force* so brutal and so offensive to human dignity in securing evidence from a suspect" offended due process.[277]

It is clear that Justice Frankfurter measured the police conduct in *Rochin* against due process standards of fundamental fairness. He did not base the Court's decision exclusively on principles of privacy. Moreover, if it had been the intent of the *Rochin* Court to have protected only privacy interests, it could easily have done so. The opinion of the Court, however, is primarily devoid of such concerns. Although the protection afforded would secure privacy interests, *Rochin* sought also to place a constitutional limitation upon law enforcement conduct by measuring police practices against due process standards of fundamental fairness. Thus, the individual's privacy concerns would be addressed through the implementing restrictions im-

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273. *Id.* at 172 (emphasis added).
274. *Id.*
275. *Id.* at 173.
276. *Id.*
277. *Id.* at 174 (emphasis added).

posed by due process on governmental activities, while, simultaneously, the police would be held accountable for their behavior. The conclusion is inescapable, therefore, that *Rochin* endorsed a due process right of the individual to be free from outrageous governmental conduct in the enforcement of the criminal law.

This result makes good sense. To equate the due process defense with law enforcement conduct that directly infringes upon or violates some separate right of a defendant, as the *Hampton* plurality suggested and as the government urged in *Archer*, would effectively separate the defendant, for all practical purposes, from the protection of the defense except in *Rochin*-type situations. Further, it would degrade, by its limiting rationale, the very concept of due process as "a profound attitude of *fairness*. . . between the individual and *government*. . . ."[278] Ultimately, however, the most glaring flaw in the *Hampton* plurality's suggestion stems from its fundamental misconception of due process. Due process does not exist simply to vindicate other rights. It is a right intrinsic to itself. It secures for all persons the "most comprehensive protection of liberties. . . ."[279] For example, the more limiting rights to counsel and against compulsory self-incrimination, secured respectively by the sixth[280] and fifth[281] amendments to the United States Constitution, are but specific guarantees of this broad protection.[282] Therefore, it is submitted that the protection of due process, with its comprehensive guarantee of fairness in the relations between government and citizen, is not dependent upon any violation, by police misconduct, of a separate right of the defendant. It is further submitted that there exists for each individual a specific due process guarantee to be free from government-induced criminality, and that it is beyond the pale of legitimate conduct for government to prey upon its citizens in the hope of inducing them to crime.[283] This guarantee, while securing and implementing for the individual the more general right of privacy "to be let alone [by government],"[284]

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278. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)(emphasis added).

279. *Rochin*, 342 U.S. at 170.

280. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

281. U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

282. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963)(right to counsel in state prosecutions is fundamental and essential to a fair trial under fourteenth amendment principles of due process); *Rochin*, 342 U.S. at 172-73 (dictum)(coerced confessions in state criminal proceedings offend principles of fairness under due process).

283. *See Archer*, 486 F.2d at 676-77 (dictum).

284. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

will act independently to place law enforcement officials under constitutionally prescribed standards of decency and moral behavior. Similarly, the courts of this nation possess the inherent power, as a matter of public policy and in furtherance of judicial integrity and their supervisory powers,[285] to close their doors to such foul and dirty business.[286]

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285. Courts possess inherent supervisory powers over their proceedings "to preserve the integrity of the judicial process," United States v. Ramirez, 710 F.2d 535, 541 (9th Cir. 1983), and to ensure that neither justice is denied nor injustice is rewarded. In the federal system, the powers "first appeared as an independent basis of decision in *McNabb v. United States*, 318 U.S. 332 [1943]. . . ." *Ramirez*, 710 F.2d at 541. These powers are invoked to formulate and apply proper and civilized standards for the enforcement of the criminal law in judicial proceedings. *See Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring in the result); *McNabb*, 318 U.S. at 340-41. Thus, the courts, in crafting remedies pursuant to their supervisory powers, will be "guided by considerations of justice . . . ." *McNabb*, 318 U.S. at 341; *accord*, United States v. Hasting, 461 U.S. 499, 505 (1983).

The powers may be employed to implement remedies, not specficially required by either constitutional mandate or legislative command, for violations or denials of recognized rights, to preserve judicial integrity, and to deter illegal conduct or improper practices. *See Hasting*, 461 U.S. at 505; *Ramirez*, 710 F.2d at 541; *see also* United States v. Payner, 447 U.S. 727, 736 n.8 (1980) ("we agree that the supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity"), and *id.* at 734-37 & nn. 7-9. *Cf.* United States v. Kelly, 707 F.2d 1460, 1476 (D.C. Cir.)(Ginsburg, J., separate opinion)(lower federal courts "lack authority, where no *specific* constitutional right of the defendant has been violated, to dismiss indictments as an exercise of supervisory power over the conduct of federal law enforcement agents" (emphasis in the original)), cert. denied, 104 S. Ct. 264 (1983).

Not surprisingly, therefore, the aid of a court's supervisory powers has been endorsed, explicitly or implicitly, as a remedy for barring convictions, even of predisposed defendants, because of outrageous law enforcement practices. In fact, a majority of the Supreme Court justices in *Hampton* suggested their willingness to invoke the supervisory powers in cases of police misconduct in the enforcement ot the criminal law that is sufficiently offensive to violate principles of due process, irrespective of the predisposition of the defendants. *Hampton*, 425 U.S. at 493-97 (Powell & Blackmun, JJ., concurring in the judgment) (interpreting United States v. Russell, 411 U.S. 423 (1973), as not foreclosing such aid) (explicit); *id.* at 497 (Brennan, Stewart, & Marshall, JJ., dissenting)(explicit); *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring in the result) (entrapment cases) (explicit); *see Sorrells*, 287 U.S. at 455, 457, 459 (Roberts, J., separate opinion)(entrapment cases) (implicit); *Casey*, 276 U.S. at 423-24, 425 (Brandeis, J., dissenting) (entrapment cases) (implicit); *see also Sherman*, 356 U.S. at 385 (Frankfurter, J., concurring in the result). However, supervisory relief will not be forthcoming because of governmental misconduct, unless there exists "a clear basis in fact and law for doing so. . . ." *Ramirez*, 710 F.2d at 541 (where actions of law enforcement officers do not exceed "the bounds of permissible investigatory conduct," aid will be denied, and a court "need inquire no further").

286. *Cf. Sherman*, 356 U.S. at 380, 385 (Frankfurter, J., concurring in the result) (endorsing concept in entrapment cases); *Sorrells*, 287 U.S. at 455, 457, 459 (Roberts, J., separate opinion); *Casey*, 276 U.S. at 423-24, 425 (Brandeis, J., dissenting); *see Donnelly, supra* note 24, at 1112.

3. The Supreme Court and the Predisposed Defendant

In *Hampton v. United States*,[287] a prosecution for the sale of heroin to government undercover agents, the Supreme Court was afforded an opportunity to address the issue of the applicability of the due process defense to a criminally predisposed defendant. Although the court in *United States v. Russell*[288] had suggested, in dictum, the existence of such a defense,[289] and the necessary corollary that predisposition would not exclude a defendant from due process relief, a plurality of justices in *Hampton* backed off from this position.

Writing for the plurality, Justice Rehnquist argued that the only remedy available to a defendant who has encouraged the acts of government agents "lies *solely* in the defense of entrapment."[290] However, as Justice Rehnquist observed, predisposition is fatal to this defense.[291]

Justice Rehnquist then proceeded to reaffirm[292] the comment made by the court in *Russell* that the defense of entrapment "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve."[293] In addition, he quoted, with approval,[294] the further observation made in *Russell* that "[t]he execution of the federal laws under our Constitution is confided primarily to the [e]xecutive [b]ranch of the [g]overnment, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations."[295] But, to the *Hampton* plurality, as Justice Rehnquist explained, the "limitations" of due process are triggered only by governmental misconduct which "violates some protected right of the *defendant*."[296] In *Hampton*, however, the defendant, the government agents, and their informant had all acted in concert with one another.[297] Moreover, the defense of entrapment was available to the defendant only if he could establish that he had been

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287. 425 U.S. 484 (1976).

288. 411 U.S. 423 (1973).

289. *Id.* at 431-32 (dictum).

290. 425 U.S. at 490 (emphasis added).

291. *Id.*

292. *Id.*

293. 411 U.S. at 435.

294. 425 U.S. at 490 (plurality opinion).

295. 411 U.S. at 435.

296. 425 U.S. at 490 (plurality opinion) (emphasis in the original); *accord,* United States v. Payner, 447 U.S. 727, 737 n.9 (1980)(quoting *Hampton* with approval).

297. 425 U.S. at 490 (plurality opinion). In both *Hampton, id.* at 485-87 & n.3, 489-90, and *Russell*, 411 U.S. at 425-27, 433, 436, the facts revealed, and the defendants conceded, predisposition.

induced by government agents to engage in criminal activity.[298]

Finally, Justice Rehnquist touched upon illegal activity of police officers that exceeded "the scope of their duties" and was performed "in concert with a defendant. . . ."[299] Here, according to the plurality, the appropriate remedy lay, not in granting freedom to the equally culpable defendant, but in prosecuting the offending officers.[300] Therefore, it would seem that the *Hampton* plurality implicitly rejected the due process defense in the case of a predisposed defendant, no matter how outrageous the governmental misconduct.[301] In sum, it would appear that the *Hampton* plurality viewed predispostion as being as fatal to the due process defense as it is to the entrapment defense.[302]

This rigid position was too much for Justice Powell, who, joined by Justice Blackmun in an opinion concurring in the judgement, took exception to the plurality's attempt to deny due process relief to a predisposed defendant, "regardless of the outrageousness of police behavior in light of the surrounding circumstances."[303] He could find no support for such a result either in *Russell* or in the earlier cases which had delineated the defense of entrapment and its primary focus upon the defendant's predisposition.[304] Further, Justice Powell noted that the Supreme Court had "yet to confront [g]overnment overinvolvement in areas outside the realm of contraband offenses."[305] "In these circumstances," therefore, he was not prepared to conclude "that an analysis other than one limited to predisposition would never be appropriate under due process principles."[306]

Justice Powell took further exception to the plurality's "use of the 'chancellor's foot' passage from *Russell*" as a potential means of foreclosing reliance on the Court's supervisory power "to bar conviction of a predisposed defendant because of outrageous police conduct."[307] Again, he did not understand *Russell* "to have gone so far," for that case had indicated only that the Court "should be extremely reluctant to invoke the supervisory power in cases of this kind because that

298. 425 U.S. at 490 (plurality opinion); *Russell*, 411 U.S. at 435; *Sorrells*, 287 U.S. at 442, 452.

299. 425 U.S. at 490 (plurality opinion).

300. *Id.*

301. *See id.* at 492 (Powell, J., concurring in the judgment).

302. *See* United States v. Jannotti, 673 F.2d 578, 606-07 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982); United States v. Twigg, 588 F.2d 373, 377-79 (3d Cir. 1978).

303. 425 U.S. at 492 (Powell, J., concurring in the judgment).

304. *Id.* at 492-93 & n.2.

305. *Id.* at 493.

306. *Id.* (footnote omitted).

307. *Id.*

power does not give the 'federal judiciary a "chancellor's foot" veto over law enforcement practices of which it [does] not approve.' "[308]

Justice Powell was "not unmindful of the doctrinal and practical difficulties of delineating limits to police involvement in crime that do not focus on predisposition, as [g]overnment participation ordinarily will be fully justified in society's 'war with the criminal classes.' "[309] He recognized that this "undoubtedly" was the concern that prompted the plurality in *Hampton* "to embrace an absolute rule."[310] Justice Powell believed, however, that *Russell* had "left these questions open,"[311] and since this case was "controlled completely by *Russell*,"[312] he was unwilling to conclude that, "no matter what the circumstances," neither due process nor the Court's supervisory powers "could support a bar to conviction in any case where the [g]overnment is able to prove predisposition."[313]

Justice Powell was concerned that the "discussion of predisposition" might "overlook the fact that there may be *widely varying* degrees of criminal involvement."[314] More fundamentally, howerer, he believed that "[a] fair system of justice normally should eschew *unbending* rules that foreclose, in their application, all judicial discretion."[315]

Although Justice Powell recognized that it would be difficult to define proper limitations upon police involvement in criminal activities, he did not believe that "these difficulties. . . justify the plurality's absolute rule."[316] The essence of due process is "fundamental fairness,"[317] and the Supreme Court's cases were "replete with examples of judgments as to when such fairness has been denied an accused in light of all the circumstances."[318] Moreover, the fact that there is at times "no sharply defined standard against which to make these judgments"[319] was not "a sufficient reason," for Justice Powell, "to deny the federal judiciary's power to make them when warranted by the

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308. *Id.* at 493-94 (brackets in original).

309. *Id.* at 494-95 (footnotes omitted)(quoting *Sorrells*, 287 U.S. at 453 (Roberts, J., separate opinion)).

310. 425 U.S. at 495 (Powell, J., concurring in the judgment).

311. *Id.*

312. *Id.*

313. *Id.* (footnote omitted).

314. *Id.* at 494 n.5 (emphasis added).

315. *Id.* (emphasis added).

316. *Id.* at 494 n.6.

317. *Id.*

318. *Id.* at 494-95 n.6.

319. *Id.* at 495 n.6.

circumstances."[320] And, "[m]uch the same" was "true of analysis" under the Court's supervisory power.[321] Nor did Justice Powell "despair" of the Court's ability "in an appropriate case" to identify correct standards for law enforcement practices "without relying on the 'chancellor's' 'fastidious squeamishness or private sentimentalism.' "[322]

In conclusion, Justice Powell "emphasize[d] that the cases, if any, in which proof of predisposition is not dispositive will be rare."[323] He acknowledged that "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction."[324] Justice Powell believed that this would prove to be "especially difficult to show with respect to contraband offenses," which are particularly difficult to detect in the absence of undercover government operations.[325] Moreover, one could not "easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic,"[326] which represented "one of the major contributing causes of escalating crime in our cities."[327] Justice Powell felt, therefore, that law enforcement officials "must be allowed flexibility adequate to counter effectively such criminal activity."[328]

Justices Brennan, Stewart, and Marshall dissented in *Hampton*, and, in an opinion by Justice Brennan, espoused the objective test for entrapment.[329] In addition, Justice Brennan agreed with Justice Powell that *Russell* did not foreclose imposition of either a due process or a supervisory powers bar to conviction where police misconduct "is sufficiently offensive,"[330] even though a particular defendant "entitled to invoke such a defense might be [criminally] 'predisposed.' "[331] Justice Brennan concluded that conviction should be barred "as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by a [g]overnment agent."[332]

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320. *Id.*
321. *Id.*
322. *Id.* (quoting *Rochin*, 342 U.S. at 172).
323. 425 U.S. at 495 n.7 (Powell, J., concurring in the judgment).
324. *Id.*
325. *Id.*
326. *Id.* at 495-96 n.7.
327. *Id.* at 496 n.7.
328. *Id.*
329. *Id.* at 496-97 (Brennan, J., dissenting). For analysis of the objective test, *see supra* text accompanying notes 33-43, 105-34.
330. 425 U.S. at 497 (Brennan, J., dissenting).
331. *Id.*
332. *Id.* at 500 (footnote omitted).

Justice Stevens did not participate in the *Hampton* decision. This produced, therefore, a Court division consisting of a plurality of three justices, who appeared to have rejected a due process defense for the predisposed defendant, irrespective of the degree and kind of governmental misconduct, and a majority of five justices who would seemingly permit a predisposed defendant to invoke the aid of both due process and the supervisory powers if the government agents were guilty of "overinvolvement in crime [that had]. . . reach[ed] a demonstrable level of outrageousness. . . ."[333] Since *Hampton* was decided, however, Justice Stewart, one of the dissenters who endorsed due process and supervisory relief for predisposed defendants, has been replaced by Justice O'Connor. Neither Justice O'Connor's views nor those of Justice Stevens are known concerning the availability of due process and supervisory relief for predisposed defendants who have been victimized by governmental misconduct. Therefore, it is uncertain, at present, as to how the Supreme Court would rule if confronted with this issue, nor would it be profitable to speculate about or predict the outcome if such a case were to come before the Court. However, since Justice Stevens, based upon his record, appears to be more of a swing voter than Justice O'Connor, his vote might thus prove to be crucial to the outcome. Of course, additional changes in the membership of the Court could further complicate the picture and make the outcome even more unpredictable.

4. Applying the Defense

Although the issue of whether specific governmental conduct is violative of due process is one of law,[334] the outcome of such an inquiry will hinge upon an assessment of "the totality of the circumstances[,] with no single factor controlling."[335] This inquiry, because

333. *Id.* at 495 n.7 (Powell, J., concurring in the judgment); *see* United States v. Williams, 705 F.2d 623, 619 (2d Cir.), *cert. denied*, 104 S. Ct. 524 (1983); United States v. Jannotti, 673 F.2d 578, 607 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982); United States v. Nunez-Rios, 622 F.2d 1093, 1098 (2d Cir. 1980); United States v. Twigg, 588 F.2d 373, 378-79 (3d Cir. 1978); United States v. Johnson, 565 F.2d 179, 181 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); Commonwealth v. Shuman, 391 Mass. 345, 354, 462 N.E.2d 80, 85 (1984); State v. Hohensee, 650 S.W.2d 268, 271 (Mo. Ct. App. 1982); People v. Isaacson, 44 N.Y.2d 511, 519-20, 378 N.E.2d 78, 82, 406 N.Y.S.2d 714, 718 (1978); *see also* United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983), *cert. denied sub nom.* Margolis v. United States, 104 S. Ct. 720 (1984); United States v. Rodriguez-Ramos, 704 F.2d 17, 22 (1st Cir.), *cert. denied*, 103 S. Ct. 3542 (1983); United States v. Brown, 635 F.2d 1207, 1212 (6th Cir. 1980); United States v. Wylie, 625 F.2d 1371, 1377 (9th Cir. 1980), *cert denied sub nom.* Perluss v. United States, 449 U.S. 1080 (1981).

334. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983).

335. United States v. Tobias, 662 F.2d 381, 387 (5th Cir. 1981); State v. Hohensee,

of the flexible nature of due process,[336] will not lead to a "precise line of demarcation or calibrated measuring rod with a mathematical solution."[337] This is not surprising, for what is being sought is nothing less than police misconduct which has attained the "demonstrable level of outrageousness"[338] condemned by the "fundamental and necessarily general but pliant postulates"[339] of due process. As the Second Circuit has observed, "[t]he cases that have sustained due process claims concern [g]overnment conduct that was most egregious and reached the level of shocking the conscience."[340] In sum, therefore, a defendant who has been victimized by police misconduct "repugnant to the American system of criminal justice,"[341] and involving government participation in, or control of, criminal activity to an unconscionable degree,[342] may invoke the due process defense of outrageous police conduct.

Certain aspects of the conduct required to satisfy the due process criteria have been deemed by the courts to be indicative of law enforcement misconduct which violates fundamental fairness. Among the factors that may be considered as relevant to a denial of due process are (1) the manufacture, creation, and control of crime by government agents that substantially and unreasonably exceed the level of

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650 S.W.2d 268, 272 (Mo. Ct. App. 1982); *see Hampton*, 425 U.S. at 492, 494-95 nn.5-6 (Powell, J., concurring in the judgment); People v. Isaacson, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

336. *See supra* text accompanying notes 71-84.

337. People v. Isaacson, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

338. *Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring in the judgment); *accord,* United States v. Beverly, 723 F.2d 11, 13 (3d Cir. 1983)(per curiam); United States v. Rodriguez-Ramos, 704 F.2d 17, 22 (1st Cir.), *cert. denied*, 103 S. Ct. 3542 (1983); United States v. Brown, 635 F.2d 1207, 1212 (6th Cir. 1980).

339. People v. Isaacson, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

340. United States v. Alexandro, 675 F.2d 34, 40 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982); *see* United States v. Williams, 705 F.2d 603, 620 (2d Cir.), *cert. denied*, 104 S. Ct. 524 (1983); United States v. Jannotti, 673 F.2d 578, 608 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982)("only the most intolerable government conduct" will qualify for the due process defense).

341. United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983), *cert. denied sub nom.* Margolis v. United States, 104 S. Ct. 720 (1984); *see Russell*, 411 U.S. at 432 (law enforcement conduct violatve of "that 'fundamental fairness, shocking to the universal sense of justice,' mandated by . . . [d]ue [p]rocess")(quoting Kinsella v. United States *ex. rel.* Singleton, 361 U.S. 234, 246 (1960)); United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983)(conduct so outrageous as to shock a sense of justice).

342. *See* United States v. Twigg, 588 F.2d 373, 375-76, 380-81 (3d Cir. 1978); Greene v. United States, 454 F.2d 783, 784-87 (9th Cir. 1971); State v. Hohensee, 650 S.W.2d 268, 268-70, 274 (Mo. Ct. App. 1982); People v. Isaacson, 44 N.Y.2d 511, 515-18, 522-23, 378 N.W.2d 78, 79-81, 83-84, 406 N.Y.S.2d 714, 715-17, 720 (1978).

activity necessary to detect and apprehend criminals, or to gain their confidence;[343] (2) the strength and degree of the causal relationship between the governmental misconduct and the criminal activities of the defendant;[344] (3) persistent and repeated efforts by law enforcement officers to wear down and eventually overcome the defendant's reluctance to participate in the proposed criminal activity;[345] and (4) a predominant motive by the police to induce criminality solely to secure a conviction.[346] Similarly, the type of crime under investigation is relevant to the scope of permissible law enforcement conduct.[347] Here, the standard of reasonable involvement by government should be measured against the complexity and need for secrecy in preparing and executing the particular offense in question. This is because the intricacy of the enterprise and the difficulty in penetrating to its core will require a more intense police presence. Thus, the more complex and clandestine the criminal operation is, the greater will be the justification for the extent of government participation, provided that such activity does not attain the level of pervasive control and direction. Conversely, the less intricate and secretive the offense, the more restrictive will be the tolerable scope of law enforcement involvement. Ultimately, a court must assess the totality of the circumstances[348] to determine whether the government has exceeded the bounds of decency and has engaged in conduct that shocks the conscience and offends a sense of justice.[349]

Although instances of due process misconduct involving a predis-

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343. *See* United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983)(listed as an example of the defense by the court); United States v. Twigg, 588 F.2d 373, 380-81 (3d Cir. 1978); Greene v. United States, 454 F.2d 783, 786-87 (9th Cir. 1971); State v. Hohensee, 650 S.W.2d 268, 274 (Mo. Ct. App. 1982); People v. Isaacson, 44 N.Y.2d 511, 522, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 720 (1978); *see also* United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1980)(implicitly recognizing such overinvolvement as an example of the defense).

344. United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1980).

345. People v. Isaacson, 44 N.Y.2d 511, 521, 522, 378 N.E.2d 78, 83, 84, 406 N.Y.S.2d 714, 719, 720 (1978).

346. *See* United States v. Twigg, 588 F.2d 373, 381 (3d Cir. 1978); People v. Isaacson, 44 N.Y.2d 511, 522, 378 N.E.2d 78, 84, 406 N.Y.S.2d 714, 720 (1978); *see also* Greene v. United States, 454 F.2d 783, 786-87 (9th Cir. 1971). The government may rebut a claim of improper motive by evidence demonstrating that its investigation of the defendant was reasonable and free of improper motive, even though such evidence might amount to inadmissible hearsay if it were offered to prove the truth of the matters asserted. *See* United States v. Hunt, 36 CRIM. L. REP. (BNA) 2203, 2203 (4th Cir. Nov. 28, 1984).

347. United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1980).

348. *See* Greene v. United States, 454 F.2d 783, 786-87 (9th Cir. 1971).

349. *See Rochin*, 342 U.S. at 172-74; People v. Isaacson, 44 N.Y.2d 511, 522, 378 N.E.2d 78, 84, 406 N.Y.S.2d 714, 720 (1978).

posed defendant "will be rare,"[350] such cases do exist. Moreover, as a review of these cases will demonstrate, merely "prosecuting the police under the applicable provisions of state or federal law" for "engag[ing] in illegal activity in concert with a defendant beyond the scope of their duties,"[351] as Justice Rehnquist has urged, is simply not an adequate remedy; for what is at stake is not only the vindication of constitutional guarantees but also the very preservation of judicial integrity itself. To state the proposition in its starkest terms, the courts must close their doors to "such prostitution of the criminal law"[352] as an act of self-preservation. What is called for is a judicial pledge of allegiance to "the purity of [the court's] own temple"[353] and to the preservation of the Constitution.[354] "[P]rosecuting the police" will not fulfill these goals, and will be irrelevant to the preservation of judicial integrity.

In *Greene v. United States*,[355] a prosecution for the illegal manufacture of alcohol, the facts revealed that an undercover agent reestablished contact with the defendants after having been instrumental in causing their previous arrest on bootlegging charges.[356] The agent then pressured the defendants to establish a new liquor operation, and for over two years was deeply involved in the defendants' illicit activities.[357] These included offering to supply materials, an operator, and a location for the still, as well as actually supplying two thousand pounds of sugar at wholesale prices.[358] Throughout this extended period of operations, the government, through its undercover agent, was the sole purchaser of all the liquor that the defendants produced at the still.[359]

The Ninth Circuit, on appeal from the defendants' convictions, rejected the defense of entrapment, in that the defendants had been predisposed to sell bootleg whiskey from the time that the agent had first contacted them.[360] However, it reversed and ordered dismissal of charges, because the government had so enmeshed itself in criminal activity, "from beginning to end," that a conviction under these cir-

350. *Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring in the judgment).

351. *Id.* at 490 (plurality opinion).

352. *Sorrells*, 287 U.S. at 457 (Roberts, J., separate opinion).

353. *Id.*

354. *Cf.* United States v. Beverly, 723 F.2d 11, 13 (3d Cir. 1983)(per curiam)(due process misconduct "compel[s] acquittal so as to protect the Constitution").

355. 454 F.2d 783 (9th Cir. 1971).

356. *Id.* at 784.

357. *Id.* at 785.

358. *Id.* at 785-86.

359. *Id.* at 786.

360. *Id.*

cumstances was "repugnant to American criminal justice. . . ."[361] Therefore, although the Ninth Circuit, in *Greene*, did not explicitly invoke the principles of due process as the ground for reversal, the concept of fundamental fairness under due process was clearly the basis of the court's decision.

Similarly, in *United States v. Twigg*,[362] the Third Circuit found government involvement in the illegal manufacture of drugs so pervasive and outrageous as to offend due process.[363] Here, government agents, acting through an informant who was himself a convicted felon desirous of reducing the severity of his sentence, suggested to the defendants the establishment of a drug factory, provided all necessary equipment and expertise, as well as the location for the factory, and performed the lion's share of the manufacturing.[364] By contrast, the defendants' involvement in the illicit operation was minimal, and then only at the specific direction of the informant.[365]

Although entrapment was not available to the defendants because of their predisposition,[366] the court found the due process argument of the defendant, Nevill, "persuasive,"[367] for the government had engaged in the "egregious conduct" of "generat[ing] new crimes by the defendant [Neville] merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs."[368] As the court viewed the situation, "[f]undamental fairness [would] not permit [it] to countenance such actions by law enforcement officials. . . ."[369] Accordingly, "prosecution for a crime so fomented by [government agents would] be barred."[370]

In *State v. Hohensee*,[371] the defendant was convicted of a burglary which was "sponsored," manufactured, and directed by the Spring-

361. *Id.* at 787.
362. 588 F.2d 373 (3d Cir. 1978).
363. *Id.* at 380-81.
364. *Id.* at 375-76, 380-81.
365. *Id.* at 376, 381.
366. *Id.* at 376.
367. *Id.* at 377.
368. *Id.* at 381.
369. *Id.*
370. *Id.* (footnote omitted). The continued vitality of *Twigg* has been questioned. *See* United States v. Beverly, 723 F.2d 11, 12 (3d Cir. 1983)(per curiam); United States v. Jannotti, 673 F.2d 578, 610 n.17 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982)("In this day of heightened criminal activity, the federal judiciary must be cautious not to exercise a 'veto' — especially . . . a constitutional veto — 'over law enforcement practices of which it [does] not approve.' " (quoting *Russell*, 411 U.S. at 435)(brackets in the original)).
371. 650 S.W.2d 268 (Mo. Ct. App. 1982).

field, Missouri, Police Department.[372] To perpetrate the burglary, the police made a " 'deal' " with two convicted felons, who, in return for leniency on another burglary charge, agreed to supply information to the police concerning burglaries in Springfield.[373] For this, the informants were being paid weekly salaries by the police, who kept them under close supervision.[374]

One of the informants had been acquainted with the defendant for approximately seven years, during which burglary had been "their principal topic of conversation."[375] Contact was made with the defendant, and the two informants, Officer Roberts of the Springfield Police Department, who was acting in an undercover capacity, and the defendant met at a house that had been rented pursuant to an undercover operation known as " 'Operation Rosebud.' "[376] The purpose of this conference was to discuss the burglary of "the Brandhorst building."[377]

Since the defendant was familiar with the interior of the building, he was able to draw a floor plan which included the location of a particular safe that was the object of the break-in.[378] Using separate vehicles, the four individuals proceeded to the "target area. . . ."[379] The defendant drove his own vehicle, while the two informants and Officer Roberts traveled in a separate " 'Ford van.' "[380] The defendant drove into a parking lot, "approximately 150 yards from the Brandhorst building," and remained there as a lookout.[381] Meanwhile, the two informants broke into the building and removed the safe.[382] Officer Roberts, who had remained outside, helped the informants load the safe into the van.[383] The three of them "then drove past the lookout position of the defendant, who followed them to the undercover house."[384]

On appeal, the defendant claimed that his conviction of burglary

372. *See id.* at 268-70.
373. *Id.* at 269.
374. *Id.*
375. *Id.*
376. *Id.* at 269, 270.
377. *Id.* at 269. The subsequent break-in of this building, which formed the basis of the prosecution of the defendant, was accomplished without the prior consent or knowledge of the owner. *Id.* at 268-69.
378. *Id.* at 269.
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.*

should be invalidated on due process grounds, because he had been victimized by the misconduct of the police and their agents.[385] After thoroughly reviewing the relevant case authorities,[386] the Missouri Court of Appeals, in *Hohensee*, concluded that the overreaching involvement of the law enforcement officials in the burglary of the Brandhorst building was sufficiently outrageous to offend principles of due process.[387] The court therefore reversed the defendants' conviction.[388]

Characterizing the defendant's involvement, primarily as a lookout, in the criminal enterprise as "no more of a threat to society than that of a stargazer, similarly situated, contemplating Polaris,"[389] the court found it "difficult to conceive a situation where the government's involvement could be greater or the defendant's could be less, and the conduct of the latter still be a likely subject for prosecution."[390] Thus, the court reasoned that the break-in was accomplished by the government agents without benefit of the defendant's presence, and his conduct, standing alone, would not have been illegal if the agents had not engaged in their illegal acts.[391] In addition, the court noted that there was no evidence that the burglary "was part of ongoing criminal activities engaged in by defendant prior to his involvement with Officer Roberts and the two salaried felons."[392]

In a strong concurring opinion, Chief Judge Greene observed that what the government had concocted here was nothing less than a manufactured crime, "aided and abetted by two habitual criminals" hired by the police for such purpose, "in hopes of getting evidence to show that the defendant, by acting as a supposed lookout, was also guilty of

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385. *Id.* The defendant, because of his predisposition, made no claim of entrapment. *Id.* at 270 & n.2.

386. *Id.* at 270-74.

387. *Id.* at 274.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.* The defendant had also been convicted of conspiring to burglarize a specified residence. Here, however, the court upheld the conviction and rejected the defendant's argument that there could be no conspiracy where the alleged co-conspirators were either law enforcement officers or their agents who lacked the requisite criminal intent. Under the applicable statute, the prosecution was required to prove only that the defendant, with the purpose of promoting or facilitating that burglary, did agree with Officer Roberts and the two paid informants that they, or one or more of them, would burglarize the residence. *Id.* at 276. This was the gist of the defendant's agreement, and, to the court, the fact that the other three co-conspirators lacked the criminal intent to commit the burglary was "of no moment." *Id.*

the crime."[393] For Chief Judge Greene, if such conduct received the sanction of the courts, it was "difficult to imagine under what circumstances they would ever say to the police, 'You have gone too far.' "[394]

Moreover, Chief Judge Greene condemned the police misconduct in *Hohensee* for breeding disrespect for law enforcement officers, eroding public confidence in the criminal justice system, and, "if condoned," resulting in "*police excesses that cannot be tolerated in a democracy.*"[395] Although he acknowledged that most law enforcement excesses were undoubtedly "motivated by frustration over the inability of the police to completely satisfy the demands of the public to 'get the criminals off the streets,' "[396] Chief Judge Greene nevertheless concluded that this inability could not "justify breaking the law by those who are sworn to uphold it."[397]

Finally, in *People v. Isaacson*,[398] the New York Court of Appeals condemned police misconduct that originated with the arrest of a third person for possession of a controlled substance and who was subsequently physically abused during interrogation by police officers.[399] Later, when the officers learned that the substance was not a controlled one, they kept this information from him until after his services as an informant had ended.[400] Instead, he was kept under the delusion that he was facing a substantial period of incarceration if convicted. He thus agreed, upon advice of counsel, to be an informant for the police.[401]

The informant proceeded to contact various individuals, including the defendant, in order to set up drug deals for which the police could arrest the sellers.[402] The defendant, a resident of Pennsylvania with no prior record, initially refused the informant's pleas to help him "make money to hire a decent lawyer" in order to fight the criminal charges facing him.[403] After persistent entreaties by the informant, however, the defendant finally agreed to sell cocaine to the informant in a quantity suggested by the police so they could obtain a conviction

393. *Id.* (Green, C.J., concurring).
394. *Id.*
395. *Id.* (emphasis added).
396. *Id.*
397. *Id.*
398. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).
399. *Id.* at 515, 378 N.E.2d at 79, 406 N.Y.S.2d at 715.
400. *Id.*
401. *Id.* at 515, 378 N.E.2d at 79, 406 N.Y.S.2d at 715-16.
402. *Id.* at 516, 378 N.E.2d at 80, 406 N.Y.S.2d at 716.
403. *Id.*

under New York law for a higher grade of crime.[404] The police also used the informant to lure the defendant into New York for the sale, although the defendant feared New York's drug laws and did not want the sale to take place there.[405] Finally, the informant suceeded in getting the defendant to cross the state line into New York and to consummate the deal, even though the defendant thought that the place selected for the sale was in Pennsylvania.[406] At the meeting place, the defendant was arrested in the course of the transaction.[407]

The New York Court of Appeals reversed the defendant's conviction and ordered the dismissal of the indictment for conduct so egregious as to violate due process standards of fairness.[408] The court was compelled to this result by the cumulative effect of "the manufacture and creation of crime,"[409] the "deceptive, dishonest[,] and improper" practices employed by the police to intimidate and trick the informant, and thereby the defendant indirectly, into the commission of a criminal offense,[410] the persistent effort to overcome the defendant's reluctance to commit the offense,[411] and "the overriding police desire for a conviction of any individual."[412] What struck the court as particularly offensive was the "incredible geographical shell game — a deceit which effected defendant's unknowing and unintended passage across the border into this State."[413] In short, the police were not motivated by "any desire to prevent crime by cutting off the source" of illicit drugs,[414] and sought only a conviction that would become "little more than a statistic."[415]

Thus, the case revealed in its totality "the ugliness of police brutality,"[416] compounded by deceit and persistent inducement, "to satisfy the police thirst for a conviction" in brazen disregard of fundamental fairness and rights.[417] In conclusion, the court brushed aside the defendant's predisposition because the proper focus of inquiry was on whether the concept of fundamental fairness mandated

404. *Id.* at 516-17, 378 N.E.2d at 80, 406 N.Y.S.2d at 716.
405. *Id.* at 517, 378 N.E.2d at 80-81, 406 N.Y.S.2d at 716-17.
406. *Id.* at 517-18, 378 N.E.2d at 81, 406 N.Y.S.2d at 717.
407. *Id.* at 518, 378 N.E.2d at 81, 406 N.Y.S.2d at 717.
408. *Id.* at 518-20, 378 N.E.2d at 81-82, 406 N.Y.S.2d at 717-18.
409. *Id.* at 522, 378 N.E.2d at 83, 406 N.Y.S.2d at 720.
410. *Id.* at 522, 378 N.E.2d at 84, 406 N.Y.S.2d at 720.
411. *Id.*
412. *Id.*
413. *Id.* at 522-23, 378 N.E.2d at 84, 406 N.Y.S.2d at 720.
414. *Id.* at 523, 378 N.E.2d at 84, 406 N.Y.S.2d at 720.
415. *Id.*
416. *Id.*
417. *Id.*

dismissal[418] The court declared that the proper administration of justice required, as a matter of due process,[419] that "this prosecution should be barred."[420]

The *Isaacson* court emphasized, however, that it was not limiting its due process analysis to situations involving police brutality. While this type of conduct would justify the barring of prosecution, it did not define the limits of the inquiry or the scope of due process relief.[421] The court implicitly recognized that due process was too flexible a concept to fit neatly into a factual frame defined by "precise line[s] of demarcation or calibrated measuring rod[s] . . . ."[422] Therefore, in order "[t]o prevent improper and unwarranted police solicitation of crime,"[423] courts must apply the "fundamental and necessarily general but pliant postulates" of due process analysis to the peculiar factual circumstances of each instance "in which a deprivation is asserted. . . ."[424] Implicit in this position is the recognition that such an approach is most adaptable to providing the broad protection against outrageous police practices that only due process standards of fundamental fairness can guarantee.

The common thread running through these cases is the pervasive, overreaching involvement of government and its agents in the manufacture, direction, and control of crime for purposes of prosecution. Government has a duty to prevent crime, not create crime, to apprehend criminals, not become a criminal.[425] One has no quarrel with the proposition that government may employ "deceit,"[426] "[a]rtifice[,] and stratagem,"[427] set "traps,"[428] and use "decoys[] and deception"[429] to ensnare criminals. Criminal activity, by its very nature, will frequently take place in secret and prove difficult to detect. To effectively

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418. *Id.* at 524, 378 N.E.2d at 85, 406 N.Y.S.2d at 721.

419. *See id.* at 525, 378 N.E.2d at 85, 406 N.Y.S.2d at 721.

420. *Id.* at 525, 378 N.E.2d at 85, 406 N.Y.S.2d at 722.

421. *See id.* at 520-21, 378 N.E.2d at 83, 406 N.Y.S.2d at 719.

422. *Id.* at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719.

423. *Id.* at 520-21, 378 N.E.2d at 83, 406 N.Y.S.2d at 719.

424. *Id.* at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719.

425. *See Sherman*, 356 U.S. at 372 (majority opinion), and *id.* at 384 (Frankfurter, J., concurring in the result); *Olmstead*, 277 U.S. at 469-70 (Holmes, J., dissenting); *see also id.* at 483-85 (Brandeis, J., dissenting); *Casey*, 276 U.S. at 423 (Brandeis, J., dissenting); *Archer*, 486 F.2d at 676-77 (dictum).

426. *Russell*, 411 U.S. at 436.

427. *Sorrells*, 287 U.S. at 441; *accord, id.* at 453-54 (Roberts, J. separate opinion); *see* Commonwealth v. Shuman, 391 Mass. 345, 351, 462 N.E.2d 80, 83 (1984); W. LAFAVE & A. SCOTT, *supra* note 21, § 48, at 369.

428. *Sorrells*, 287 U.S. at 453 (Roberts, J., separate opinion).

429. *Id.* at 453-54.

counter it, law enforcement agencies must resort to "stealth and strategy" as "necessary weapons in [their] arsenal. . . ."[430] Thus, as we have seen,[431] it is proper for government agents, in particular those engaged in undercover operations, to provide the opportunity, or furnish the facilities, for the commission of crime. But, while facilitating the commission of criminal activity, or even partially assisting in its execution, may be permissible, manufacturing crime is not. Peripheral involvement in crime is one thing; creation, direction, and control are another.

When government goes beyond the mere facilitation of crime, when it exceeds the use of traps, decoys, deceit, and deception, when it instigates or induces citizens, whether predisposed to the commission of crime or not, when its involvement in crime becomes more than peripheral, when its activity reaches the level of creation, direction, and control, then "enough is more than enough — it is just too much."[432] At this point, crime has become "the product of the creative activity" of government,[433] and not of the criminal classes. It is then time for the courts to step in and bar their doors to the prosecution of citizens for such manufactured and orchestrated "crimes." And, it is here that the need for due process protection is compelling.

Both the subjective and objective tests for entrapment provide only partial, and inadequate, relief. First, the statutory premise of the subjective approach to entrapment deprives the doctrine of a constitutional footing and exposes it to modification by legislative fiat.[434] Second, under the subjective analysis, criminal predisposition is fatal to a claim of entrapment.[435] Similarly, the objective test for entrapment, while extending protection to the predisposed defendant,[436] lacks a constitutional basis.[437] Thus, it is simply doctrinally and normatively

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430. *Sherman*, 356 U.S. at 372.

431. *See supra* text accompanying notes 176-77.

432. Williamson v. United States, 311 F.2d 441, 445 (5th Cir. 1962)(Brown, J., concurring specially); *see* Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 620, 629-31 (1982).

433. *Sorrells*, 287 U.S. at 451; *accord, Sherman*, 356 U.S. at 372.

434. *See Russell*, 411 U.S. at 433.

435. *See supra* text accompanying notes 22-25.

436. *See supra* text accompanying notes 33-40, 105-34.

437. *See Russell*, 411 U.S. at 432-33; *supra* text accompanying notes 135-37; *see also Sorrells*, 287 U.S. at 456 (Roberts, J.,separate opinion)(the defendant "has no *rights* or equities by reason of his entrapment" (emphasis added)); Note, *supra* note 22, at 1456-57; *cf. Sherman*, 356 U.S. at 380, 385 (Frankfurter, J., concurring in the result)(placing the objective analysis on both a supervisory-power and judicial-integrity footing); *Sorrells*, 287 U.S. at 455, 457, 459 (Roberts, J., separate opinion)(same, except that implicitly as to supervisory-power basis).

inadequate to establish national standards of decency and fairness against which to measure the reasonableness of police practices in the enforcement of the criminal laws. The ultimate drawback, however, to invoking the protection of entrapment principles against outrageous "[p]olice overinvolvement in crime,"[438] arises from the limiting scope of the doctrine which does not extend to conduct that shocks the conscience and offends notions of decency and fair play.[439] Hence, the need for a due process defense.

IV. CONCLUSION

We return, then, to the central theme of this article. The issue of police misconduct in the enforcement of the criminal law is not an issue of law enforcement, it is an argument about government. As this article has endeavored to show, the manufacture of crime is not the legitimate business of government.[440] Neither is it the proper function of government to prey upon its citizens by instigating or inducing them to crime.[441] In our zeal to combat crime, we must not permit the government to become the ultimate lawbreaker. In the words of Justice Brandeis:

> Experience should teach us to be most on our guard to protect liberty when the [g]overnment's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of *zeal*, well-meaning but *without understanding*.[442]

While the apprehension and prosecution of criminals are desirable ends,[443] they do not justify "foul means. . . ."[444] It is, therefore, the inherent duty of courts to "preserve the purity"[445] of their "own temple[s]"[446] by refusing to have a hand in "such dirty business"[447] that is repugnant to due process standards of fundamental fairness. Thus, it is both the legal and moral duty of government in a democratic

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438. *Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring in the judgment).

439. *See supra* text accompanying notes 216-17.

440. *See Sherman*, 356 U.S. at 372 (majority opinion), and *id.* at 384 (Frankfurter, J., concurring in the result).

441. *See Archer*, 486 F.2d at 676-77 (dictum).

442. *Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting)(footnote omitted) (emphasis added).

443. *See id.* at 470 (Holmes, J., dissenting).

444. *Casey*, 276 U.S. at 423 (Brandeis, J., dissenting).

445. *Id.* at 425.

446. *Sorrells*, 287 U.S. at 457 (Roberts, J., separate opinion).

447. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting).

society to enforce its criminal laws pursuant to a sense of fair play and within the limits of civilized standards of decency.