UIC Law Review

Volume 18 | Issue 2 Article 4

Winter 1985

Entrapment, De Lorean and the Undercover Operation: A Constitutional Connection, 18 J. Marshall L. Rev. 365 (1985)

Kevin Hackett O'Neill

COMMENTS

ENTRAPMENT, DE LOREAN AND THE UNDERCOVER OPERATION: A CONSTITUTIONAL CONNECTION

In baiting a mousetrap with cheese,
always leave room for the mouse. *

On October 19, 1982, four men gathered secretly in a Los Angeles hotel room to conclude a multimillion dollar cocaine deal.[1] The group consisted of the familiar elements of a modern drug conspiracy: a financier, a dealer, a distributor, and a profiteer.[2] After inspecting several pounds of the cocaine and pronouncing it "better than gold,"[3] the participants joined in a champagne toast dedicated

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* Saki, *The Square Egg* (1924), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 904(b) (14th ed. 1968).

1. For a general discussion of the events preceding the arrest of John Z. De Lorean on October 19, 1982, see generally Hoover, *A Trial of Images: Do the Secret Tapes Show the Real John De Lorean*, NAT'L LAW J., July 2, 1984, at 1 [hereinafter cited as Hoover, *A Trial of Images*].

2. *See Prosecution's Trial Memorandum Re: Entrapment, Exhibits*, United States v. De Lorean, No. CR82-910(A)-RMT (C.D. Cal. 1982) (attached exhibits identifying individuals present at time of arrest) [hereinafter cited as *Prosecution's Entrapment Memorandum*].

There were several parties at the hotel room meeting. The "financier" or banker was Federal Bureau of Investigation Special Agent Benedict Tisa (whose cover name was "James Benedict"). The "dealer" or intermediary was a paid government undercover informant named James Timothy Hoffman. The "distributor" or individual who purportedly was to supply the contacts was Federal Bureau of Investigation Special Agent John Valestra (whose cover name was "Mr. Vicenza"). The "profiteer" was John Z. De Lorean, who was to receive a $60 million "investment" in the ailing De Lorean Motor Company. *See Notice of Motion and Motion to Dismiss for Outrageous Government Conduct, Memorandum of Points and Authorities, Request for Evidentiary Hearing, Declaration* at 3-5, United States v. De Lorean, No. CR82-910-RMT (C.D. Cal. 1982) [hereinafter cited as *Defendant's Outrageous Government Conduct Memorandum*]; *Government's Opposition to Defendant's Motion to Dismiss for Alleged Outrageous Government Conduct, Memorandum of Points and Authorities*, at 4-7, United States v. De Lorean, No. CR82-910(A)-RMT (C.D. Cal. 1982) [hereinafter cited as *Government's Outrageous Government Conduct Memorandum*].

3. *Prosecution's Entrapment Memorandum, supra* note 2, at "exhibits" (statement of Mr. John Z. De Lorean during recorded conversation of hotel meeting on October 19, 1982); Hoover, *A Trial of Images, supra* note 1, at 1 (hotel meeting and conversation depicted).

to "a lot of success for everybody."[4] Moments later, an agent of the Federal Bureau of Investigation entered the hotel room and arrested the stunned toastmaster for conspiracy to traffic 55 pounds of cocaine.[5] With the exception of the toastmaster, every participant in the hotel room gathering was a government undercover agent and was aware that the entire meeting had been recorded by a concealed videotape camera.[6] The sole exception was an internationally renowned, millionaire automaker, by the name of John Zachary De Lorean.[7]

News of the arrest sent shockwaves through the world media.[8] After several prior successful "sting" operations,[9] it appeared that the United States government, using a variety of undercover practices,[10] had once again produced a sensational arrest. Through the use of electronic surveillance, paid informants, and careful planning, the FBI had effectively foiled a drug trafficking scheme valued at over $50 million. Yet, two years later, after a long and

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4. *Prosecution's Entrapment Memorandum, supra* note 2, at "exhibits" (statement of Mr. John Z. De Lorean during recorded conversation of hotel meeting on October 19, 1982).

5. Marquis, *Lawyers Speculate on Defense Tactics in De Lorean Case*, L.A. Daily J., November 11, 1982, at 1, col. 2 (discussing charges and defense options of *De Lorean* case).

6. *See supra* note 2; Srodes & Fallon, *Can De Lorean Get A Fair Trial*, L.A. Times, *reprinted in* Chi. Sun Times, March 4, 1984, at 14 (discussion of *De Lorean* case and use of secret surveillance).

7. *See generally* I. FALLON, DREAMMAKER: THE RISE AND FALL OF JOHN DE LOREAN (1983) (life of automaker described); Berger, *Maverick Entrepreneur in Drug Case*, N.Y. Times, August 17, 1984, at B6, col. 3-5 (life of De Lorean depicted).

8. Wilson, *'Simple' Drug Case Ends Its Bizarre Run*, Chi. Tribune, August 17, 1984, at sec. 1, p. 5, col. 3 (*De Lorean* case "made headlines throughout the world."). As a result of the widespread publicity surrounding the *De Lorean* trial, the trial court issued a closure of all pre-trial documents whereby such documents would be initially filed *in camera* and under seal. United States v. De Lorean, 561 F. Supp. 797 (C.D. Cal. 1983).

9. *See, e.g.*, Hoffa v. United States, 385 U.S. 293 (1966) (labor leader convicted of jury tampering as a result of government undercover operation); United States v. Myers, 527 F. Supp. 1206 (E.D.N.Y. 1982) (various congressmen, a mayor, a state senator, city councilmen and others were successfully convicted under ABSCAM), *aff'd*, 710 F.2d 915 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 702 (1984); United States v. Williams, 705 F.2d 603 (2d Cir.) (United States Senator convicted for bribery as a result of successful ABSCAM undercover operations), *cert. denied*, 104 S. Ct. 524 (1983); United States v. Jannotti, 673 F.2d 578 (3d Cir.) (city councilmen successfully convicted under ABSCAM operation), *cert. denied*, 102 S. Ct. 2906 (1982). *See generally* Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567 (1982) (examples of sting operations discussed); Livermore, *The Abscam Entrapment*, 17 CRIM. L. BULL. 69 (1981) (a brief discussion of the facts and theories of ABSCAM case); Marx, *Creative Policing or Constitutional Threat?*, CIV. LIB. REV., July/August, 1977 at 34 (examples of successful and unsuccessful sting operations discussed).

10. *See* Wilson, *supra* note 8, at 5, col. 1 (*De Lorean* case had everything, including informers, stolen tapes and 'blind' ambition). *See, e.g.*, United States v. Carpentier, 689 F.2d 21 (2d Cir. 1982) (bribery case describing tactics used by government in ABSCAM investigations), *cert. denied*, 459 U.S. 1108 (1983).

highly-publicized trial, John De Lorean walked triumphantly from a federal courthouse, acquitted by a jury of all charges stemming from his arrest for drug trafficking.[11] In the aftermath of the *De Lorean* verdict, several issues remain unresolved concerning not only his acquittal but the status of the law regarding government undercover "sting" operations.

Some observers contend that the acquittal was the result of an aberrant, legal legerdemain, symptomatic of a corrupt legal system that responds favorably to the few who are wealthy enough to bankroll an elaborate legal defense.[12] Others argue that John De Lorean was a victim of overzealous law enforcement practices which portend an erosion of individual liberty and the emergence of an Orwellian police state.[13] This comment, however, proffers a different view. It examines the *De Lorean* case in relation to the troubled history of judicial reaction to government sponsored undercover operations, and demonstrates that the acquittal in this instance resulted from a confused confluence of two distinct legal defenses, entrapment[14] and due process,[15] in the collective mind of a modern jury. More importantly, the *De Lorean* verdict may serve

11. John De Lorean was acquitted on all eight counts of conspiring to smuggle $24 million worth of cocaine after 59 days of testimony on August 16, 1984. *See* Boston Globe, August 17, 1984, at 1, col. 5; Wall St. J., August 17, 1984, at 1, col. 3.

12. For example, one observer aptly expressed this sentiment by stating, "I imagine there's different ways of manipulating the law if you have the money. If it was me, I'd be on my way to jail by now." Boston Globe, August 17, 1984, p. 2, col. 5 (an article describing nationwide reaction to *De Lorean* verdict). *Contra* Editorial, Chi. Tribune, August 19, 1984, § 5, p. 2, col. 1 ("People who want to avoid facing up to the problem of the government's conduct will say that [De Lorean] got off the hook because he had expensive lawyers.").

13. For example, Geoffrey R. Stone, University of Chicago law professor, reacted to the De Lorean verdict by stating, "If this shows anything, it's that government undercover activities of a highly intrusive nature with respect to targets who are not themselves clearly appropriate targets of investigation, are not investigations that the American public approve of." Chi. Tribune, August 19, 1984, § 5, p. 1, col. 1 (*De Lorean* verdict analyzed). For a discussion of the prospects of an "Orwellian" society resulting from government undercover operations, see United States v. White, 401 U.S. 745, 770 (1971) (Harlan, J., dissenting) (developments in electronic surveillance make "technologically feasible the Orwellian Big Brother"); Ehrlich, *Sorrells-Entrapment or Due Process? A Redefinement of the Entrapment Defense*, N.Y. ST. B.J., July 1983, at 36 (warns of police state and Orwellian society); Hodges, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother*, 3 HASTINGS CONST. L.Q. 261, 297 (1976) (*1984* is a state of mind where the appearance of repression has impact of reality); Kirby, *Eight Years to 1984: Privacy and the Law*, 5 J. COMP. & L. 487 (1976) (urges reform of privacy laws to forestall Orwellian society); Note, *Due Process Privacy and the Path of Progress*, 2 LAW F. 469, 523 (1979) (references to *1984* pervade privacy literature). *But see* Keisling, *The Case Against Privacy*, STUDENT LAW., September 1984, at 25 (Orwellian prediction fundamentally wrong).

14. *See infra* notes 18-92 and accompanying text.

15. *See infra* notes 111-68 and accompanying text.

as a catalyst for the rise of yet a third defense to offensive government undercover operations: the right of privacy.[16]

Although entrapment, due process, and the right of privacy are often regarded as separate and unrelated legal theories by judges and legal scholars, they are actually different aspects of the same problem: lawless invasion of privacy by law enforcement agents.[17] In support of this contention, this comment begins by tracing the origins and limits of the traditional entrapment defense. It then shows how the limitations inherent in this defense have yielded a new due process defense in cases involving outrageous government conduct in planned, undercover operations. This comment then discusses how the due process defense ultimately will require courts to consider more carefully the defendant's privacy interests jeopardized by such operations. Finally, several recommendations are presented for clarifying and reforming this unsettled area of law.

ENTRAPMENT AND ITS PROGENY

The Origins of Entrapment Theory

The entrapment defense[18] was first recognized by the United States Supreme Court in 1932.[19] In *Sorrells v. United States*,[20] a federal prohibition agent, posing as a tourist, visited the defendant and engaged him in a conversation about their common war experiences.[21] After gaining the defendant's confidence, the agent asked for some liquor. After twice refusing the request, the defendant finally capitulated when he was asked a third time, and sold the agent a five dollar bottle of moonshine liquor. The defendant was subsequently prosecuted for violation of the National Prohibition

16. *See infra* notes 169-220 and accompanying text.

17. *See* Osborn v. United States, 385 U.S. 323, 343-44 (1966) (Douglas, J., dissenting) ("lawless invasion of privacy" constitutes essential problem in cases of government investigatory misconduct).

18. "Entrapment" is defined as the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., concurring). Moreover, entrapment is an affirmative defense. Averritt v. State, 246 Miss. 49, 149 So.2d 320, *cert. denied*, 375 U.S. 5 (1963). *See generally* Magness, *The Defense of Entrapment -Definition Bases and Procedure*, 3 TEX. TECH. L. REV. 117 (1971) (discusses bases of entrapment); De Feo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243 (1967) ("subjective" test for entrapment discussed and defended).

19. Sorrells v. United States, 287 U.S. 435 (1932). The defense of entrapment was first recognized in the federal courts in Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).

20. 287 U.S. 435 (1932). *See generally* Ehrlich, *supra* note 13, at 33 (*Sorrells* discussed).

21. *Sorrells*, 287 U.S. at 439-41.

Act.[22]

In reversing the conviction on entrapment grounds, the *Sorrells* Court held that government agents were prohibited from instigating a criminal act by persons "otherwise innocent in order to lure them to its commission and to punish them."[23] Thus, over the objection of four concurring justices,[24] the Supreme Court majority focused on the defendant's intent or predisposition to commit the crime. The Court relied on a theory of statutory construction and reasoned that Congress could not have intended that its statutes would be enforced by tempting otherwise innocent persons into violations of those statutes.[25]

In 1958,[26] the Supreme Court considered again the theory underlying entrapment and expressly re-affirmed the view adopted by the *Sorrells* Court. In *Sherman v. United States*,[27] a government agent posed as a drug user at a drug rehabilitation clinic in order to gain the confidence of the defendant. Although the defendant was initially reluctant, he ultimately acceded to the repeated requests of the government agent for a small quantity of drugs. In reversing the defendant's conviction for the illegal sale of narcotics, the *Sherman* majority focused on the defendant's intent or predisposition and his repeated reluctance to sell narcotics to the government agent. Thus, the Court observed that, in determining whether entrapment has been established, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary crimi-

22. *Id.* at 439.

23. *Id.* at 448.

24. *Id.* at 455 (Roberts, J., concurring) (basis of entrapment should be public policy concern for purity of courts).

25. *Id.* at 448. *See also* United States v. Russell, 411 U.S. 423, 428 (1973) (statutory construction theory re-affirmed).

Under the statutory construction theory, the Supreme Court ruled that Congress could not have intended that its statutes would be enforced by tempting innocent persons. *Sorrells*, 287 U.S. at 448. The Court stated that it is bound by public policy to construe federal statutes reasonably so as not "to do violence to the spirit and purpose of the statute." *Id.* Thus, the Court interpreted the criminal statutes as impliedly stating that entrapped defendants were to be excluded from their coverage.

The statutory construction basis of entrapment, however, is a baseless fiction. An entrapped defendant has committed the act made criminal by the statute. Moreover, the defendant has done so with the requisite *mens rea*, notwithstanding that the criminal disposition may have developed after the government's instigation of the criminal design. For a thoughtful criticism of the statutory construction basis of entrapment, see Abramson & Linderman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. LAW 139, 149-50 (1980). *Compare* De Feo, *supra* note 18, at 255 (1967) (legislative intent theory supported as absence of *actus reus* in entrapment cases) *with* Magness, *supra* note 18, at 128 (entrapment based on absence of *mens rea*).

26. Sherman v. United States, 356 U.S. 369 (1958) (second Supreme Court case dealing with entrapment defense).

27. *Id.*

nal."[28] While concurring in the result, four members of the *Sherman* Court disagreed with the majority's focus on predisposition and argued that the conduct of the government should be the centerpiece of entrapment analysis.[29]

The Supreme Court has remained deeply divided since *Sorrells* and *Sherman* concerning the basis and focus of the entrapment defense. Accordingly, the Court has had considerable difficulty articulating a consistent, meaningful standard for the defense.[30] This disagreement has led to two distinct views of entrapment. The majority view is based on a theory of statutory construction and focuses on the "subjective" predisposition of the particular defendant charged with the offense.[31] The minority view of entrapment, on the other hand, is based on the judiciary's supervisory jurisdiction over the administration of justice and focuses on the conduct of the police.[32] Both views command significant support among judges and legal scholars and often compel disparate results in cases involving a claim of entrapment.

The Majority View of Entrapment: A "Subjective" Test

The "subjective" view of entrapment continues to attract a bare majority of Supreme Court justices,[33] and most state courts.[34] It has been termed the "subjective"view because under this approach a subjectively predisposed defendant is barred from raising the entrapment defense when the criminal design originates with the defendant and not with the government.[35] Courts adopting this view reason that no entrapment can occur when the government merely provides the opportunity for an "unwary criminal" to commit a crime. In seeking to determine whether an individual is in fact an

28. *Id.* at 372.

29. *Id.* at 383 (Frankfurter, J., concurring). *Accord Sorrells*, 287 U.S. at 455 (Roberts, J., concurring).

30. *See generally* Comment, *Entrapment: Sixty Years of Frustration*, 10 NEW ENG. L. REV. 179 (1974) (confusion in federal courts discussed).

31. For a general discussion of the subjective theory of entrapment, see Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976).

32. For a general discussion of the objective theory of entrapment, see Note, *Entrapment: Time to Take an Objective Look*, 16 WASHBURN L.J. 324 (1977).

33. *See* Hampton v. United States, 425 U.S. 484, 488-90 (1976) (denying the defendant an entrapment defense due to defendant's predisposition); United States v. Russell, 411 U.S. 423, 433 (1973) (stating that the focus of the defense is on the predisposition of the defendant to commit the crime); Sorrells v. United States, 287 U.S. 435, 452 (1932) (majority adopts predisposition approach).

34. *See, e.g.*, State v. Keating, 551 S.W.2d 589 (Mo. 1977) (adopts subjective view of entrapment), *cert. denied*, 434 U.S. 1071 (1978); People v. Calvano, 30 N.Y.2d 199, 282 N.E.2d 322, 331 N.Y.S.2d 430 (1972) (subjective view of an entrapment applied). For a comprehensive review of state courts which have adopted the subjective view, see 62 A.L.R. 3d 110.

35. *See* Abramson & Linderman, *supra* note 25, at 144-45 (subjective entrapment explained).

unwary criminal with a prior disposition towards committing an offense, the subjective test focuses on two slim reeds—predisposition and inducement.[36] As central as these two concepts are to the subjective view, the Court has never defined or applied either term with any degree of certainty.[37]

Nevertheless, the Supreme Court continues to indicate that the defendant's predisposition constitutes the "principal element"[38] of the entrapment defense. In an attempt to formulate a workable definition of "predisposition," one lower court has stated that predisposition "connotes only a general intent or purpose to commit the crime when an opportunity or facility is afforded for the commission thereof."[39] Under this formulation, specific intent to commit the specific offense prior to the government inducement need not be shown by the prosecution. While there is considerable support for this general intent view,[40] such a view is difficult to reconcile with the cases in which the Supreme Court has upheld the defense of entrapment.[41] The Court's analysis is not framed in

36. Park, *supra* note 31, at 176. *See also* Magness, *supra* note 18, at 118 (predisposition and inducement provide basis of subjective view).

37. *See generally* Seidman, *The Supreme Court, Entrapment and Our Criminal Justice Dilemma*, 5 SUP. CT. REV. 111, 120-27 (1981) (uncertainty involved in predisposition and inducement discussed).

38. *Russell*, 411 U.S. at 433. *See generally* Comment, *Entrapment -Predisposition of Defendant Crucial Factor in Entrapment Defense*, 59 CORNELL L. REV. 546 (1974) (traces role of predisposition in entrapment cases).

39. State v. Houpt, 210 Kan. 778, 782, 504 P.2d 570, 574 (1972).

40. *See Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring).

41. The *Sorrells* Court reversed the defendant's conviction based upon the entrapment defense. *Sorrells*, 287 U.S. at 452. Interestingly, the Court never expressly concluded that the defendant did not have the general intent to deal in illicit liquor. In fact, several witnesses had testified that the defendant had a general reputation as a "rum runner" notwithstanding his otherwise good character and commendable employment record. *Id.* at 441. Instead, the Court merely found that the specific act for which the defendant was prosecuted, i.e., sale of one-half gallon of liquor to the agent, was instigated by the prohibition agent. Surely, an individual capable of procurring a half gallon of liquor during prohibition in a matter of minutes was not someone without at least some "general intent or purpose to commit the crime."

Similarly, in *Sherman*, the Court reversed a narcotics conviction based upon the *Sorrells* analysis. *Sherman*, 356 U.S. at 376. Even though the defendant had twice been convicted of narcotic offenses, the Court found entrapment as a matter of law. Arguably, a defendant who had a previous criminal record and who was convicted of selling narcotics on several occasions to a government agent possessed at least a "general intent" to commit the crime. The Court emphasized that Sherman was "innocent" apparently because he was seeking medical assistance for his addiction and not profiting from the narcotics sale. Both *Sorrells* and *Sherman* seem to emphasize the initial reluctance of the defendant to the inducement. Arguably, initial reluctance is as much indicative of a cautious criminal as it is an innocent predisposition and does not resolve the issue of prior general intent. *See, e.g.*, United States v. Glassel, 488 F.2d 143, 146 (9th Cir. 1973) (court noted that reluctance may simply indicate a cautious hardened criminal), *cert. denied*, 416 U.S. 941 (1974). Therefore, a defendant's general intent does not explain the result in either *Sorrells* or *Sherman*.

terms of the general intent of the accused to commit a crime. The analysis in both *Sorrells* and *Sherman* focused on whether the government instigated the specific act for which the defendant was prosecuted and whether such instigation was resisted by the defendant.[42] Thus, it is more likely that the Court is concerned with the general lifestyle and character of the defendant rather than his general intent.[43] Under either approach, the Court's nebulous inquiry into predisposition is vulnerable to two criticisms.

First, an inquiry into the defendant's personal predisposition or moral character is highly prejudicial.[44] Once a defendant has raised the defense of entrapment by showing some evidence of government inducement,[45] the prosecution is permitted to rebut defendant's evidence by proving his predisposition beyond a reasonable doubt.[46] In most criminal trials, evidence is deemed inadmissible if it is based upon rumor or suspicion concerning a defendant's temperament or criminal tendencies.[47] Such evidence tends to focus the jury on the character of the defendant rather than the acts allegedly committed in furtherance of a particular offense.[48] In cases involving a claim of entrapment under the subjective view, however, the prosecution is allowed to introduce evidence of past crimi-

42. *See, e.g., Sorrells*, 287 U.S. at 441. *Contra* United States v. Glaeser, 550 F.2d 483, 487 (9th Cir. 1977) (affirming refusal of entrapment instruction in fraud case because recorded conversation showed that defendant was predisposed notwithstanding feigned reluctance). *See supra* note 41.

43. Seidman, *supra* note 37, at 124. Professor Seidman presents a thoughtful and articulate explanation of the Supreme Court's interpretation of "predisposition" as unrelated to "criminal tendency".

44. *See Russell*, 411 U.S. at 443 (Douglas, J., dissenting) (prejudicial effect criticized); Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) (precursor of prejudice criticism); Comment, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655, 669 (1974) (defendant's tendencies an improper yardstick); Note, *The Defense of Entrapment and the Due Process Analysis*, 43 U. COLO. L. REV. 127, 132 (1971) (defendant's past record wrong focus).

45. *See* United States v. Wolffs, 594 F.2d 77, 80 (5th Cir. 1979) (some evidence of inducement must be shown); Note, *The Need for a Dual Approach to Entrapment*, 59 WASH. U.L.Q. 199, 201 (1981) ("some evidence" requirement supported).

46. *See* United States v. Glaeser, 550 F.2d 483 (9th Cir. 1977) (reasonable doubt standard discussed).

47. An emphasis on predisposition "permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor—all of which would be inadmissible in any other context—in order to prove the defendant's predisposition." *Russell*, 411 U.S. at 443 (Stevens, J., dissenting). *See* Seidman, *supra* note 37, at 127 (evidence of defendant's character usually inadmissible).

48. *See, e.g.*, Michelson v. United States, 335 U.S. 469, 475-76 (1948) (focus of jury discussed). *See generally* Comment, *Entrapment -A Due Process Defense—What Process Is Due?* 11 SW. U.L. REV. 663, 688 (1979) (defendant tried on basis of general moral character criticized).

nal convictions,[49] criminal reputation, and rumors concerning a defendant's criminal tendencies and associations,[50] as well as evidence that usually violates the hearsay rule,[51] in order to prove predisposition.[52] The types of evidence admissible by the government in cases of alleged entrapment then, are often prejudicial to the defendant and irrelevant to the specific crime for which a defendant is being prosecuted.

An appropriate inquiry into a defendant's predisposition, if allowed at all, should be confined to the relevant facts of the offense in order to avoid jury bias.[53] This approach would emphasize factors such as the ongoing nature of the criminal activity and initiation of the encounter by the defendant with the government. Otherwise, the accused is rendered defenseless against a broad inquest into his moral character, his reputation, and his associations with individuals of questionable integrity.

The second criticism of the Court's emphasis on predisposition is that such a focus is irrelevant to the essential purpose of the entrapment defense.[54] Courts permit the accused to claim entrapment in order to examine and prohibit objectionable police behavior.[55] Therefore, the permissibility of such police conduct

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49. *See, e.g.*, Demos v. United States, 205 F.2d 596 (5th Cir.) (prior federal conviction), *cert. denied*, 346 U.S. 873 (1953); Carlton v. United States, 198 F.2d 795 (9th Cir. 1952) (prior misdemeanor conviction).

50. Russell v. United States, 411 U.S. 442, 443 (1973) (Douglas, J., dissenting). *See, e.g.*, Rocha v. United States, 401 F.2d 529 (5th Cir. 1968) (evidence that defendant was engaged in narcotics activities held admissible where entrapment defense raised), *cert. denied*, 393 U.S. 1103 (1969). *See generally* Park, *supra* note 31, at 200-16, 247-62 (reputation evidence discussed).

51. *See, e.g.*, Washington v. United States, 275 F.2d 687, 690 (5th Cir. 1960) (hearsay admitted); United States v. Siegel, 16 F.2d 134, 137 (8th Cir. 1926) (hearsay evidence); *see supra* note 47.

52. If a defendant raises the entrapment defense, the Supreme Court has stated that the defendant "cannot complain of [a] . . . searching inquiry into his own conduct and predisposition . . . ." *Sorrells*, 287 U.S. at 451.

53. For a discussion of defense counsel's strategy in dealing with character evidence in entrapment cases, see Tanford, *Entrapment: Guidelines for Counsel and Courts*, 13 CRIM. L. BULL. 5, 20-26 (1977). *Cf.* Hardy, *The Traps of Entrapment*, 3 AM. J. CRIM. LAW 165, 202-04 (1974) (entrapment defense should be used as attorney's last resort).

54. In *Sorrells*, Justice Roberts stated that

> [t]he applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy.

Sorrells, 287 U.S. at 459 (Roberts, J., concurring). *See also Russell*, 411 U.S. at 446 (Stewart, J., dissenting) (predisposition inquiry irrelevant); Note, *Entrapment: A Source of Continuing Confusion in the Lower Courts*, 5 AM. J. TR. ADV. 293, 303 (1981) (predisposition irrelevant).

55. The purpose of the entrapment defense "must be to prohibit unlawful government activity in instigating crime." *Russell*, 411 U.S. at 442 (Powell, J., dissenting). *See also* Abramson & Linderman, *supra* note 25, at 149 (entrapment used to prevent improper conduct by government).

should not depend upon the prior record or propensities of the defendant.[56] This approach not only implies different law enforcement standards for different citizens but also creates a situation of potentially inconsistent verdicts from identical police practices.[57] A citizen's constitutional rights to equal protection[58] and due process[59] are jeopardized whenever offensive law enforcement practices are prohibited against one citizen but permitted against another because of police speculation or hunches concerning possible criminal tendencies.[60] More importantly, such an approach misleads law enforcement officials by suggesting that investigatory practices are governed by the criminal record or character of the targetted defendant and not the commands of the law.[61] If criminal

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56. In his concurring opinion in *Sherman*, Justice Frankfurter stated:

> Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities.

Sherman, 356 U.S. at 383 (Frankfurter, J., concurring).

57. *See* Note, *supra* note 44, at 133 (inconsistent results from identical practices criticized).

58. The U.S. Constitution states: "No State shall make or enforce any law which shall . . . *deny to any person within its jurisdiction the equal protection of the laws.*" U.S. CONST. amend XIV, § 1 (emphasis added). If courts are willing to convict one person based upon government conduct which would be wholly illegal if used to convict another person, then the former is not being treated equally. *See generally* Orfield, *The Defense of Entrapment in Federal Courts*, 1967 DUKE L.J. 39, 56 (equal protection view of entrapment discussed); Comment, *supra* note 44, at 669 (unequal protection in "subjective" entrapment criticized).

59. The U.S. Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, *without due process of law* . . . ." U.S. CONST. amend V. (emphasis added). In Rochin v. California, 342 U.S. 165 (1952), the Supreme Court stated: "It has long since ceased to be true that due process of law is heedless of the *means by which otherwise relevant and credible evidence is obtained.*" *Id.* at 172 (emphasis added). *See also* Comment, *supra* note 44, at 661 (due process-equal protection in entrapment urged).

60. In *Sorrells*, Mr. Justice Roberts first articulated this concern by stating:

> Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. . . .To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction.

Sorrells, 287 U.S. at 458-59 (Roberts, J., concurring). *See also* Abramson and Linderman, *supra* note 25, at 154-55 (criminal background should not render impermissible conduct legal).

61. Critics of the subjective view argue that "focusing on the defendant's innocence or predisposition has the direct effect of making what is permissible or impermissible police conduct depend upon the past record and propensities of the particular defendant involved." *Russell*, 411 U.S. at 443 (Stewart, J., dissenting). Moreover, the subjective test means that government agents are "permitted to entrap a person with a criminal record or bad reputation, and then to

reputation, suspicions, and associations are to play a meaningful role in shaping law enforcement practices, then they should be confined only to providing the evidentiary basis for a proper search or arrest warrant; they must not be used as justification for unrestricted, secret surveillance or for improper inducement of targetted defendants.[62]

The second element of the subjective view of entrapment concerns the level of inducement necessary to evoke criminal conduct by the defendant.[63] Under this second inquiry, an excessive or improper inducement may indicate that the government lured an otherwise innocent person into criminality.[64] The Supreme Court has remained silent regarding the type or level of inducement necessary to support the subjective view of entrapment.[65] Although physical abuse and coercion have been held to constitute impermissible inducements,[66] other less offensive forms of persuasion have caused the courts greater difficulty. Such inducements have included simple requests,[67] repeated requests,[68] and promises of exorbitant gain,[69] as well as appeals to sympathy,[70] past friendship,[71]

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prosecute him for the manufactured crime, confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway." *Id.* at 444 (Stewart, J., dissenting). *See also* Abramson and Linderman, *supra* note 25, at 154 ("subjective" approach misleads law enforcement officials).

62. *See infra* notes 191-213 and accompanying text.

63. *See generally* Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 584 (1982) (inducement element discussed); Park, *supra* note 31, at 200 (government inducement constitutes second element).

64. Entrapment defense prohibits law enforcement officials from instigating a criminal act by persons "otherwise innocent in order to lure them to its commission and to punish them." *Sorrells*, 287 U.S. at 448. For a discussion of cases involving an impermissible form of inducement, see 22 A.L.R. Fed. 731, 748-50.

65. *See* Seidman, *supra* note 37, at 121 (inducement issue not adequately addressed by courts).

66. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952) (conviction reversed due to physical abuse of defendant), *cited in Russell*, 411 U.S. at 431 (cited as an example of improper conduct by police). *See also* United States v. Archer, 486 F.2d 670, 676-77 (1973) (physical abuse of defendants condemned).

67. *See, e.g.*, Lopez v. United States, 373 U.S. 427 (1963).

68. *See, e.g., Sorrells*, 287 U.S. 435 (1932); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S. 2d 714 (1978).

69. *E.g.*, United States v. Reynoso—Ulloa, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). In *De Lorean*, government agents offered Mr. De Lorean approximately $60 million worth of "investments" in his financially depressed automobile company. Srodes and Fallon, *supra* note 6, at 14, col. 1. *See also* United States v. Jannotti, 673 F.2d 578, 598-99 (2d Cir.) (size of a bribe or inducement is a significant factor), *cert. denied*, 457 U.S. 1106 (1982).

70. *E.g., Sherman*, 356 U.S. 369 (1958); Kadis v. United States, 373 F.2d 370 (1st Cir. 1966); People v. Isaacson, 44 N.Y. 2d 511, 378 N.E.2d 78, 406 N.Y.S. 2d 714 (1978).

and past drug addiction.[72] The offensiveness of a particular inducement is primarily a function of its repetition, intensity, and setting.[73] Therefore, no clear standard for measuring the propriety of a government proferred inducement has emerged from the cases.

The difficulty in determining the permissibility of a particular inducement is exacerbated further by its logical nexus to the defendant's personal predisposition.[74] Proverbially, there is a little larceny in us all.[75] Thus, subjective predisposition becomes an essential element of any inducement inquiry. If the courts continue to equate predisposition with the defendant's willingness to commit an offense, then courts must be prepared to scrutinize the level of inducement necessary to produce such willingness on the part of the defendant. For example, the issue of whether a particular inducement is exorbitant depends on whether it was beyond that amount necessary to tempt a particular defendant. Under this view, a trivial inducement to one defendant may be exorbitant when offered to another defendant who is not possessed of equal moral endurance or strength of character. Such an approach is unpredictable and will rarely serve as an accurate barometer of criminal disposition. A prospective determination of a proper inducement becomes most difficult for law enforcement officials when it is measured by the subjective disposition of the targetted defendant and not by an objectively considered standard of reasonableness. In theory and practice, therefore, the "subjective" view of entrapment poses many difficulties to courts and law enforcement planners.

The Minority View of Entrapment: An "Objective" Test

The "objective" view of entrapment is favored by many legal

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71. *E.g., Sorrells*, 287 U.S. 435 (1932); People v. Isaacson, 44 N.Y. 2d 511, 378 N.E.2d 78, 406 N.Y.S. 2d 714 (1978).

72. *See, e.g., Sherman*, 356 U.S. 369 (1958) (the government informer and the entrapped defendant were both narcotics addicts).

73. *See* Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 260-61 (1975) (number and duration of opportunities is key factor in inducement inquiry); Gershman, *supra* note 63, at 591, 624-26 (inducement must be fairly significant).

74. *See* Seidman, *supra* note 37, at 120-27 (predisposition-inducement nexus discussed).

75. Human nature is frail enough at best, and requires no encouragement in wrongdoing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation.

People v. Saunders, 38 Mich. 218, 222 (1878). *See also* De Feo, *supra* note 18, at 270 (tendencies of average men should be considered); Seidman, *supra* note 37, at 118 (implies few people "have no price").

scholars,[76] the drafters of the Model Penal Code,[77] and a persistent minority of Supreme Court justices.[78] It is termed the objective view because under this approach the propriety of police conduct is determined "by the likelihood, objectively considered that it would entrap only those ready and willing to commit crime."[79] Under the objective test, courts only consider the nature of the police activity involved and not the predisposition of the particular defendant.[80]

The objective view redresses the problems of prejudice and irrelevance raised by the subjective approach. One of its more significant benefits is that under the objective view, courts focus primarily on evidence concerning the government's conduct; the efficacy of the defense is not controlled by evidence regarding a particular defendant's predisposition.[81] This approach relieves the finder of fact of the burden of determining the defendant's predisposition prior to any inducement offered by the government. It also allows the fact finder to measure the propriety of a given inducement by its natural and probable effect on an "average" individual, objectively considered.

The objective view, however, has problems of its own. Essentially, opponents maintain that some inquiry into the defendant's

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76. *E.g.*, Abramson and Linderman, *supra* note 25 ("objective" test preferred over "subjective" test); Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 MISS. L.J. 573 (1976) (objective approach endorsed); Comment, *Entrapment: Predisposition of Defendant Crucial Factor in Entrapment Defense*, 59 CORNELL L. REV. 546 (1974) (objective approach more appropriate).

77. The Model Penal Code has adopted the view that an inducement is illegal if it creates "a substantial risk that . . . an offense will be committed by persons other than those who are ready to commit it." MODEL PENAL CODE, § 2.13(1)(b) (Proposed Draft, 1962). For a critical discussion of the effect and basis of the Model Penal Code position, see Ranney, *The Entrapment Defense—What Hath the Model Penal Code Wrought?*, 16 DUQ. L. REV. 157 (1977-78).

The objective approach has also been adopted by the proposed new Federal Criminal Code. *U.S. National Commission on Reform of Federal Criminal Laws*, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (1971).

78. *See, e.g.*, Hampton v. United States, 425 U.S. 484, 491 (1976) (Powell, J., concurring); *Hampton*, 425 U.S. at 495 (Brennan, J., dissenting); *Russell*, 411 U.S. at 436 (Douglas, J., dissenting); *Sherman*, 356 U.S. at 378 (Frankfurter, J., concurring); *Sorrells*, 287 U.S. at 453 (Roberts, J., concurring).

79. *Sherman*, 356 U.S. at 384 (Frankfurter, J., concurring).

80. *E.g.*, Grossman v. State, 457 P.2d 226 (Alaska 1969) (courts should focus on the conduct of the government, not the defendant); State v. Mullen, 216 N.W.2d 375 (Iowa 1974) (court focuses on conduct of government in applying entrapment defense); People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973) (police misconduct should be real focus of entrapment defense).

81. *Russell*, 411 U.S. at 446 (Stevens, J., dissenting). Justice Frankfurter has stated:

> The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.

Sherman, 356 U.S. at 382 (Frankfurter, J., concurring).

prior intent is necessary to protect society against ready and willing criminals who plan and commit contraband offenses.[82] Absent such an inquiry, an "unwary criminal" could escape conviction merely because police practices employed in a particular instance were sufficient to induce crime in an ordinary citizen. This criticism of the objective view, however, misrepresents the purpose of law enforcement and the entrapment defense. As indicated by *Sorrells* and its progeny, the proper objective of law enforcement is to detect and prevent crime, not to create it.[83] The objective view serves this purpose because it allows courts to determine whether a crime has been instigated by government agents based on the natural and probable effect that a particular government-proffered inducement would have on an "average" citizen. It should seemingly require less effort by undercover agents to facilitate criminal activity by an unwary criminal than would be required to facilitate the commission of a crime by an ordinary law-abiding citizen. The objective view merely asserts that if police conduct exceeds the level necessary to induce criminal activity by the ordinary citizen, then the government has moved beyond merely facilitating crime and has entered the realm of creating crime.

The advocates of the objective view, therefore, maintain that the most reliable indicator of improper police conduct is not an inquiry into a defendant's nebulous predisposition, but rather an objective determination of the likely effect that a challenged police practice would have on an "average" citizen. This view tends to favor the accused because it focuses the attention of the court pri-

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82. The majority opinions in both *Sherman* and *Russell* relied on the observation of Judge Learned Hand:

> Indeed, it would seem probable, that, if there were no reply [to the defendant's claim of inducement], it would be impossible ever to secure convictions of any offenses which consist of transactions that are carried on in secret.

Sherman v. United States, 200 F.2d 880, 882 (2d Cir. 1957), *quoted in Russell*, 411 U.S. at 434, *and Sherman*, 356 U.S. at 377 n.7. *See also* Livermore, *ABSCAM Entrapment*, 17 CRIM. L. BULL. 69, 72 (1981) (a defendant's capacity to resist certain government-proferred temptations should be tested by government agents in certain crimes).

83. The Supreme Court has repeatedly stated:

> The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, '[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'

Russell, 411 U.S. at 434-35, *quoting Sherman*, 356 U.S. at 372 *and Sorrells*, 287 U.S. at 442. For an interesting discussion of the economic consequences of government instigated crime, see United States v. Kaminski, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring).

marily on the conduct of the police and does not scrutinize the criminal associations or tendencies of the accused.

Despite their differences, both the subjective and the objective tests of entrapment suffer from two shortcomings in coping with sophisticated, undercover operations. First, although the Supreme Court has never addressed the issue,[84] a majority of lower courts require that a defendant who claims entrapment must also admit to having committed the crime.[85] This poses significant problems to the trial lawyer.[86] Forcing the defendant to admit guilt at trial, notwithstanding concerns that his free-will was overborne by a government inducement, further increases the risk of prejudice to the defendant's case.[87] Second, and more fundamentally, the Supreme Court has stated that the entrapment defense is a product of judicial rulemaking and is not of a constitutional dimension.[88] Therefore, the entrapment defense can be limited or altered as desired by the courts.[89] This renders the entrapment defense subject to the same process of evisceration suffered by the exclusionary rule[90] and other defenses[91] to government misconduct. It will be shown, however, that defending against instances of offensive government undercover operations in an entrapment setting may rest on firmer grounds than judicial rulemaking. The defense can be viewed in

84. United States v. Valencia, 645 F.2d 1158, 1172 (2d Cir. 1980). *But see* Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 MISS. L.J. 573, 609-10 (1976) (author asserts that *Sorrells* Court expressly rejected nonavailability of entrapment defense on a not-guilty plea).

85. *See* Annot., 61 A.L.R. 2d 677. For a discussion of the trend in the federal courts against the "defendant must admit all" rule, see Note, *Denial of the Crime and the Availability of the Entrapment Defense in the Federal Courts*, 22 B.C.L. REV. 911, 916-29 (1981).

86. *See* Tanford, *supra* note 53, at 18-29 (litigation problems involved in "inconsistent defenses" discussed). *See also* Hardy, *supra* note 53, at 202-04 (recommendations for attorneys in entrapment cases).

87. *See supra* notes 44-53 and accompanying text.

88. United States v. Russell, 411 U.S. 423, 433-36 (1973).

89. *Cf.* Miranda v. Arizona, 384 U.S. 436, 491 (1966) ("where the rights secured by the Constitution are involved, there can be no [judicial] rule making . . . which would abrogate them").

90. *See* United States v. Leon, 104 S. Ct. 3405, 3430 (1984) (Brennan, J., dissenting) (Exclusionary Rule suffers from "gradual but determined strangulation" by the Court). *See, e.g.*, United States v. Leon, 104 S. Ct. 3405 (1984) (Court recognizes "good faith" exception to Exclusionary Rule); Nix v. Williams, 104 S. Ct. 2501 (1984) (Court adopts "inevitable discovery" exception to Exclusionary Rule); United States v. Havens, 446 U.S. 620 (1980) (Exclusionary Rule inapplicable concerning evidence suggested in direct examination and introduced for impeachment purposes during cross examination); United States v. Calandra, 414 U.S. 338 (1974) (Court declines to apply Exclusionary Rule to grand jury proceedings). *See also* Posner, *Rethinking the Fourth Amendment*, 1981 S. CT. REV. 49, 53-80 (economic analysis supports replacing Exclusionary Rule with tort remedies).

91. *See, e.g.*, New York v. Quarles, 104 S. Ct. 2626 (1984) (public safety exception to *Miranda* Rule). *See also infra* note 208 (exceptions to warrant requirement).

the context of a constitutional defense.[92] Such a constitutional connection between the entrapment defense and the interests affected by overzealous law enforcement practices may explain the *De Lorean* verdict and may form the basis for a defense to future cases of government misconduct.

De Lorean's Entrapment Defense: A Misguided Missile

While the objective view of entrapment has been adopted by several state jurisdictions,[93] the Supreme Court has expressly adopted the subjective approach in federal cases.[94] Thus, in evaluating a claim of entrapment, the trier of fact in federal cases must focus on the conduct of the defendant and not on the conduct of the government agents. Accordingly, the *De Lorean* jury was instructed to focus on Mr. De Lorean's predisposition or willingness to participate in a drug trafficking scheme when he was approached by government undercover agents.[95] In retrospect, however, it is likely that the jury either misunderstood or misapplied that in-

92. In *Sherman*, the Supreme Court alluded to the constitutional dimensions of entrapment practices by stating:

> When the criminal design originates with the officials of the government and they implant in the mind of the innocent person the disposition to commit the alleged offense . . . *stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search.*

Sherman, 356 U.S. at 372 (emphasis added). It has also been suggested that "[e]ntrapment is due process." Ehrlich, *Sorrells—Entrapment or Due Process? A Redefinement of the Entrapment Defense*, N.Y. ST. B.J., July 1983 at 36 (author re-examines *Sorrells* in light of due process defense). For a general discussion of the constitutional aspects of the entrapment defense, see Magness, *supra* note 18, at 127-28 (author discusses several possible constitutional bases for entrapment defense); Note, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655, 660-70 (1974) (fifth amendment applicable to entrapment cases). *See also infra* note 134 (additional articles listed supporting constitutional defense to extreme cases of government law enforcement misconduct).

93. *See supra* note 80.

94. *See* United States v. Myers, 527 F. Supp. 1206, 1220 (E.D.N.Y. 1981) ("objective" approach never accepted by Supreme Court majority).

The majority in *Russell* clearly stated: "We decline to overrule these cases [in which the Court adopted the subjective approach]. *Sorrells* is a precedent of long standing that has already been reexamined in *Sherman* and implicitly there reaffirmed." *Russell*, 411 U.S. at 433. *See also* Dunham, *Hampton v. United States: Last Rites for the 'Objective' Theory of Entrapment*, 8-9 COLUM. HUM. RTS. L. REV. 223 (1977) (Supreme Court has effectively precluded application of "objective" test).

95. In *De Lorean*, U.S. District Judge Robert Takasugi read the following jury instruction to the jurors which describes the subjective test for entrapment:

> First, the idea for committing the acts came from the creative activity of the government agents or informants and not from John De Lorean. Second, the government agents and informant then induced John De Lorean into committing the acts. Third, John Z. De Lorean was not ready and willing to commit the acts before the government agents and informant induced him into becoming involved with the charged activity.

struction in light of the evidence presented at trial concerning Mr. De Lorean's predisposition.

Beginning in March, 1982, John De Lorean faced a serious financial crisis.[96] His De Lorean Motor Company was in a desperate financial condition. The British government was threatening to permanently close the company's main plant in Northern Ireland unless De Lorean acquired $30 million in additional financing.[97] Investors were rare and the upscale De Lorean automobile market was weak. In short, Mr. De Lorean needed to attract financial investors with significant resources or face bankruptcy. It was against this backdrop that a shrewd, rather unsavory government informant,[98] and former neighbor, first telephoned Mr. De Lorean on June 29, 1982 for purportedly social reasons.

During the months following the initial conversation, a conspiracy emerged in which a substantial quantity of cocaine would be marketed in the United States.[99] Through an elaborate series of proposals and counter-proposals, Mr. De Lorean agreed to provide an ownership interest in his motor company to undercover agents posing as drug dealers in exchange for nearly $60 million in financial assistance for his ailing motor company.[100] The elaborate scheme ultimately collapsed, however, because Mr. De Lorean was in fact an unwitting participant in a bail out scheme which was conceived and organized by government undercover agents. The money, the drugs, the dealers, and the champagne were all props in a neatly staged sting operation.[101]

It is clear from the trial testimony of government agents that the government first mentioned cocaine to Mr. De Lorean during the initial unrecorded conversations[102] between De Lorean and the

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Wilson, *De Lorean's Acquittal Serves as Indictment of Federal Sting*, Chi. Tribune, August 19, 1984, § 1, at 3, col. 1. *See also* United States v. Williams, 529 F. Supp. 1085, 1095 (E.D.N.Y.) (entrapment jury instruction given by trial court in ABSCAM case), *aff'd*, 705 F.2d 603 (2d Cir. 1981), *cert. denied*, 104 S. Ct. 524 (1983).

96. *See* Srodes & Fallon, *supra* note 6, at 14, col. 2.

97. *See* Hoover, *A Trial of Images*, *supra* note 1, at 1.

98. The government informant, James Timothy Hoffman, has been described as an admitted perjurer and cocaine smuggler who turned informer after being granted immunity from drug smuggling charges. Moreover, Mr. Hoffman was reportedly paid over $111,643 between January, 1982 and May, 1984 by the government. Additionally, Mr. Hoffman had demanded 10% of any assets seized in the De Lorean investigation. The *De Lorean* trial judge termed Hoffman a "hired gun" for the government. N.Y. Times, August 17, 1984, at B6, col. 4-5.

99. *See* Hoover, *A Trial of Images*, *supra* note 1, at 1.

100. *Id.*

101. *See* Wilson, *'Simple' Drug Case Ends Its Bizarre Run*, Chi. Tribune, August 17, 1984, § 1, at 5, cols. 1-3.

102. *See* Tybor, *Government Conduct Gets Guilty Verdict*, Chi. Tribune, August 19, 1984, § 5, at 4, col. 2.

government informant. Additionally, an undercover agent testified that Mr. De Lorean had no prior background in drug trafficking.[103] In fact, the government undercover agents further stated that they proposed the details of financing the drug trafficking scheme to Mr. De Lorean, provided the source of the narcotics, and set the purchase price for the narcotics.[104] None of these factors, however, are determinative of the issue of predisposition.[105] When a person is shown to be ready and willing to violate the law, the fact that the opportunity to do so was provided by undercover agents is not entrapment.[106] Furthermore, merely because the government initiated the contact with the defendant or assisted in the commission of a crime does not, in itself, constitute entrapment.[107] As previously indicated, the traditional subjective view of entrapment focuses on the willingness of the defendant, not the conduct of the government. Despite opportunities to extricate himself from the drug conspiracy, De Lorean remained committed to the illegal scheme.[108] Yet, the jury acquitted him.

While the result in *De Lorean* may have been correct, it cannot be supported under the traditional entrapment test as presented in the jury instruction.[109] De Lorean's clear predisposition to commit

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103. N.Y. Times, August 17, 1984, p. B6, Col. 4 (F.B.I. Special Agent Benjamin Tisa admitted at trial the absence of evidence that De Lorean was involved previously in drug trafficking).

104. *Tybor, supra* note 102, § 5 at 4, col. 2.

105. *See* United States v. Fleischman, 684 F.2d 1329, 1343 (9th Cir.) (fact that government initiated the contact with defendant not dispositive of the issue of entrapment), *cert. denied*, 459 U.S. 1044 (1982); United States v. Swets, 563 F.2d 989, 990 (10th Cir. 1977) (first contact not dispositive), *cert. denied*, 434 U.S. 1022 (1978); United States v. Ratcliffe, 550 F.2d 431, 434 (9th Cir. 1976) (mere assistance of government agents in commission of crime does not constitute entrapment); United States v. Gonzalez-Benitez, 537 F.2d 1051 (9th Cir.) (government can supply contraband to gain confidence of defendant), *cert. denied*, 429 U.S. 923 (1976). For a general description of tactics employed by government in the ABSCAM investigation, see United States v. Carpentier, 689 F.2d 21 (2d Cir. 1982), *cert. denied*, 459 U.S. 1108 (1983).

106. The Supreme Court has repeatedly indicated that "the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Russell*, 411 U.S. 423, 435 (1973) (quoting *Sherman* and *Sorrells*).

107. *See* United States v. Fleischman, 684 F.2d 1329, 1343 (9th Cir. 1982); United States v. Christopher, 488 F.2d 849 (9th Cir. 1973).

108. On September 4, 1982, in a videotaped meeting concerning financing the narcotics deal, the following conversation transpired:

Mr. Hoffman [informant]: "I mean if you don't want to do it, if you want to stop, you're not compelled to, I won't be mad, I won't be hurt, I won't be anything. If you can get the money some where else and it's better circumstances, I'd say do it"

Mr. De Lorean: "Well, I want to proceed."

N.Y. Times, August 17, 1984, at B6, col. 6. *See also Prosecution's Entrapment Memorandum, supra* note 2, at "exhibits" (conversation transcript).

109. *See supra* note 95.

the illegal scheme would have precluded his prevailing on entrapment grounds. In order to understand the result of the *De Lorean* trial then, it is necessary to look beyond the entrapment defense and its inherent limitations.[110] Accordingly, it will be shown that the *De Lorean* verdict can only be justified and explained by reference to an emerging constitutional defense to offensive government undercover operations: the due process defense.

THE RISE AND FALL AND RESURRECTION OF THE DUE PROCESS DEFENSE

Due process has been characterized as involving "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[111] In essense, the fifth amendment due process clause guarantees a fair trial to every defendant.[112] This concept of "fundamental fairness"[113] necessarily embodies notions of a fair judge, a fair jury, and a fair accusatory procedure as well.[114] When truly outrageous government conduct is used against a defendant in the accusatory stage, the due process clause of the fifth amendment precludes conviction of a defendant without reference to any alleged predisposition.[115] The Supreme Court has indicated

110. Entrapment has certain identifiable limitations. First, it is not available to the predisposed defendant. *Russell*, 411 U.S. at 433-36. Second, the entrapment defense is not of a constitutional dimension. *Id.* It remains a matter of implied intent under statutory construction. *See supra* note 24. Third, entrapment remains a question of fact for the jury to decide in most cases. *Sorrells*, 287 U.S. at 452. Fourth, it is generally not available to a defendant who denies committing the offense. *See* Annot., 61 A.L.R. 2d 677. Fifth, a defendant who is induced by a third party not connected with the government cannot raise the defense. United States v. Twigg, 588 F.2d 373, 376 (3d Cir. 1978).

111. Palko v. Connecticut, 302 U.S. 319, 328 (1937), *overruled on other grounds*, Benton v. Maryland, 395 U.S. 784, 794 (1969). In effect, due process ensures "minimum standards of fairness." Green v. United States, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting) (due process prohibits trying a defendant twice for same crime); Lisenba v. California, 314 U.S. 219, 236 (1941) (due process ensures fairness at all stages of criminal procedure).

112. "A fair trial in a fair tribunal is a basic requirement of due process." *In re* Murchinson, 349 U.S. 133, 136 (1955). The protection provided by the fifth amendment "is as broad as the mischief against which it seeks to guard." Counselman v. Hitchcock, 142 U.S. 547, 562 (1891).

113. Kinsella v. United States *ex rel* Singleton, 361 U.S. 234, 246 (1960) (fundamental fairness in law enforcement mandated by fifth amendment); Lisenba v. California, 314 U.S. 219, 236 (1941) (due process prevents fundamental unfairness from infecting a trial).

114. *Lisenba*, 314 U.S. at 236-38. *See also* B. SCHWARTZ, CONSTITUTIONAL LAW 215 (1972) (right to a fair trial "presupposes" a defendant's right to a fair accusatory procedure as well).

115. United States v. Russell, 411 U.S. 423, 431-32 (1973) (due process principles may absolutely bar a conviction). *See, e.g.*, Cox v. State of Louisiana, 379 U.S. 559, 569-71 (1965) (due process barred conviction of defendant under statute punishing picketing near courthouses where defendant relied on assurances of government official); Raley v. State of Ohio, 360 U.S. 423, 437-39 (1959) (due process barred contempt conviction of witness who refused to answer questions

that law enforcement conduct that violates "fundamental fairness, shocking to the universal sense of justice"[116] would provide the necessary basis for dismissal of a conviction on due process grounds.[117] While this defense has been used effectively in several lower courts,[118] it has received a mixed reception from the Supreme Court in cases involving offensive government undercover law enforcement.

The "Rise" of the Due Process Defense

In 1973, the Supreme Court was presented with a case that involved an admittedly predisposed defendant.[119] In *Russell v. United States*,[120] the defendant was convicted of unlawfully manufacturing and selling an illicit drug.[121] The defendant raised two

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at hearing after being assured of right to rely on privilege against self-incrimination by government official); Rochin v. California, 342 U.S. 165 (1952) (due process barred conviction based upon evidence forcibly removed from defendant's stomach by government agents); Lisenba v. California, 314 U.S. 219, 239-41 (1941) (due process barred conviction based on unlawfully extracted confession). *See infra* notes 130-162 and accompanying text.

116. Kinsella v. United States, 361 U.S. 234, 246 (1960), *quoted in Russell*, 411 U.S. at 431-32.

117. *Russell*, 411 U.S. at 431-32.

118. *E.g.*, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (due process barred criminal conviction because government agent planned, set up, and ran manufacturing of illicit drugs); United States v. West, 511 F.2d 1083 (3d Cir. 1975) (due process barred criminal conviction because government agent provided the drugs); United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973) (due process defense recognized but conviction reversed on other grounds); Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (due process barred conviction where government provided the materials and labor to make bootleg liquor); United States v. Batres-Santolino, 521 F. Supp. 744, 752 (N.D. Cal. 1981) (due process barred conviction because government agent initiated defendant to drug-related enterprise); United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980) (due process principles applied), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1983); United States v. Hastings, 447 F. Supp. 534 (E.D. Ark. 1977) (dismissal simpliciter of indictments allowed where outrageous government conduct used in apprehending defendants); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978) (due process barred conviction where government's active and insistent encouragement led to crime). *But see* United States v. Ordner, 554 F.2d 24 (2d Cir.) (predisposition outweighed significant governmental involvement in crime); *cert. denied*, 434 U.S. 824 (1977); Note, *The Need For a Dual Approach to Entrapment*, 59 WASH. U.L.Q. 199, 207 n.58 (1981) (noting cases in which due process defense has failed). For a discussion of due process cases, see Abramson & Linderman, *supra* note 25.

119. United States v. Russell, 411 U.S. 423, 427-28 (1973). For a review of the history of entrapment and due process defenses in the Supreme Court, see Abramson & Linderman, *supra* note 25, at 140-58.

120. 411 U.S. 423 (1973). For a discussion of the scope and effect of the *Russell* case, see Note, *Recent Decisions*, 12 DUQ. L. REV. 340-48 (1973); Note, *Criminal Procedure: Supreme Court Attempts to Clarify Limits of Entrapment Defense*, 58 MINN. L. REV. 325 (1973).

121. *Russell*, 411 U.S. at 424-27 (manufacturer of Methamphetamine or "Speed").

defenses: entrapment and due process. During the course of the government investigation, an undercover narcotics agent had provided the defendant with an essential ingredient which was difficult to obtain, though legally obtainable.[122] The court of appeals reversed the defendant's conviction notwithstanding his predisposition because of "an intolerable degree of governmental participation in the criminal enterprise."[123] The *Russell* Court disagreed, however, and re-affirmed the traditional "subjective" view of entrapment against the "objective" view advanced by four dissenting justices.

More importantly, however, the Court held open the possibility that a predisposed defendant could claim a constitutional deprivation of due process in cases of government misconduct. In the widely cited dicta of Justice Rehnquist, the *Russell* Court stated:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is *so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed.*[124]

Thus, *Russell* caused widespread speculation that the Supreme Court was prepared to look beyond the traditional entrapment defense when outrageous government conduct produced a criminal conviction.[125] This view became less certain, however, as a result of

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122. The government agent supplied defendant with the chemical phenyl-2-propanone, an essential ingredient in the manufacture of methamphetamine. *Id.* at 425. The phenyl propanone was available only to licensed persons and, thus, was difficult but not impossible to obtain elsewhere. *Id.* at 449 (Douglas, J., dissenting).

123. *Russell*, 459 F.2d 671, 673 (1972), *rev'd*, 411 U.S. 423 (1973).

124. 411 U.S. at 431-32 (citations omitted) (emphasis added). Post-*Russell* cases often refer to this dictum as a basis for recognizing the existence of the due process defense. *See, e.g.*, United States v. Corcione, 592 F.2d 111, 114-15 (2d Cir.), *cert. denied*, 440 U.S. 975 (1979); United States v. Twigg, 588 F.2d 373, 377 (3d Cir. 1978); United States v. Ryan, 548 F.2d 782, 788 (9th Cir.), *cert. denied*, 429 U.S. 939 (1976); United States v. Register, 496 F.2d 1072, 1081 (5th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975); United States v. Archer, 486 F.2d 670, 676 (2d Cir. 1973).

The majority in *Russell* cited the example of Rochin v. California, 342 U.S. 165 (1952) as satisfying this due process standard. *Russell*, 411 U.S. at 431-32. In *Rochin*, law enforcement agents forcibly pumped the defendant's stomach at a hospital in order to retrieve two morphine capsules for evidence. *Rochin*, 342 U.S. at 166. This type of government misconduct was held violative of fifth amendment guarantees of fundamental fairness and barred conviction of the defendant. *Id.* at 172. The *Russell* Court's reliance on *Rochin* has been criticized, however, as an unnecessarily extreme example of the due process defense. Gershman, *supra* note 63, at 598-601.

125. *See, e.g.*, United States v. West, 511 F.2d 1083, 1086 (3rd Cir. 1975) (court reversed conviction based on *Russell* theory of intolerable government conduct and entrapment). *See also* Comment, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655, 664-70 (1974) (scope of *Russell's* due process defense explored); Note, *Entrapment*, 12 DUQ. L. REV. 340, 344-45, 347 (1973) (a "new" due process defense emerges from *Russell*); Note,

the Court's next and last case concerning the defense.

The "Fall" of the Due Process Defense

In 1976, the Supreme Court attempted once again to present a definitive statement concerning a government misconduct defense.[126] In *Hampton v. United States*,[127] a predisposed defendant raised entrapment and due process defenses to a criminal conviction. In *Hampton*, the defendant was convicted of selling heroin, supplied by a government informant, to government agents. The defendant argued that, although his predisposition rendered the entrapment defense unavailable, the government's outrageous conduct in supplying him with the contraband denied him his due process. A deeply divided Supreme Court affirmed Hampton's conviction.

Justice Rehnquist, in writing the plurality opinion, renounced the due process defense previously acknowledged in *Russell*[128] even though the Court had previously applied the defense in an entrapment setting.[129] The five justices comprising the concurring and dissenting opinions disagreed with Justice Rehnquist, however, and expressly recognized the viabilty of a due process defense in cases involving outrageous government conduct.[130] Since *Hampton*, the

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Criminal Procedure: Supreme Court Attempts to Clarify Limits of Entrapment Defense, 58 MINN. L. REV. 325, 329 (1973) (*Russell* acknowledges but does not delineate scope of due process defense).

126. Hampton v. United States, 425 U.S. 484 (1976).

127. *Id.* For a critical discussion of the scope and possible effect of the *Hampton* case, see Note, *Entrapment*, 5 N.D.L. REV. 284, 289-91 (1976).

128. In *Hampton*, Justice Rehnquist apparently reversed his position toward the due process defense announced in *Russell*. *See supra* note 124 and accompanying text. Writing for a plurality of the court in *Hampton*, Rehnquist stated that "[t]he remedy of the criminal defendant with respects to the acts of Government agents, which, far from being resisted, are encouraged by him, *lies solely in the defense of entrapment*. But . . . petitioner's conceded *predisposition rendered this defense unavailable to him*." 425 U.S. at 490 (emphasis added). Thus, it appears that the more conservative members of the Court had withdrawn their support for a due process defense in an entrapment setting. In *Hampton*, Justice Rehnquist was joined in his restrictive view of the due process defense by Chief Justice Burger and Mr. Justice White. *Id.* at 485.

129. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559, 571 (1965) (due process barred conviction to prevent "indefensible sort of entrapment by the State" (*quoting* Raley v. Ohio, 360 U.S. 423, 438 (1959)). *Accord* Lisenba v. California, 314 U.S. 219, 236-37 (1941) (due process barred conviction based on improper police conduct in obtaining a coerced confession from defendant).

130. In his concurring opinion, Justice Powell, joined by Justice Blackmun, was "unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the government is able to prove predisposition." *Hampton*, 425 U.S. at 495 (Powell, J., concurring). In his dissenting opinion, Justice Brennan, joined by Justices Stewart and Marshall would have reversed Hampton's conviction on due process grounds. *Id.* at 497 (Brennan, J., dissenting). The dissenting justices viewed the government's role

Supreme Court has refused to reconsider the issue of entrapment and due process in cases of alleged government misconduct.[131] As a result, the due process defense has been examined and debated in the lower courts[132] and in Congress[133] and has received considerable attention from legal scholars.[134]

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in instigating the crime and providing the contraband as violative of fundamental fairness guaranteed by the due process defense. *Id.* at 497-500 (Brennan, J., dissenting). For a discussion of post-*Hampton* cases that have reversed a conviction on due process grounds, see Abramson & Linderman, *Entrapment and Due Process*, *supra* note 107, at 158-82.

131. For cases concerning the entrapment or due process defense that have been denied *certiorari* by the Supreme Court, see United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982); United States v. Till, 609 F.2d 228 (5th Cir.) (due process defense unsuccessful where government merely purchased drugs from defendant), *cert. denied*, 445 U.S. 995 (1980); United States v. Corcione, 592 F.2d 111 (2d Cir.), *cert. denied*, 440 U.S. 985 (1979); United States v. Thomas, 567 F.2d 638 (5th Cir.), *cert. denied* 439 U.S. 822 (1978); United States v. Johnson, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); United States v. Leja, 563 F.2d 244 (5th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); United States v. Graves, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). *See also supra* note 9.

132. For lower court cases which have successfully applied the due process defense in an entrapment setting, see United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); United States v. West, 511 F.2d 1083 (3d Cir. 1975); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981); United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982); United States v. Hastings, 447 F. Supp. 534 (E.D. Ark. 1977); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978). *See also* Moloy, *ABSCAM: Time for the Supreme Court to Clarify the Due Process Defense*, 16 IND. L. REV. 581, 586-91 (1983) (lower courts attempt to clarify due process defense).

133. In *Russell*, the Court stated that "Congress may address itself to the question and adopt any substantive definition of the [entrapment] defense that it may find desirable." *Russell*, 411 U.S. at 433. Several attempts to enact a statutory entrapment defense have failed. *See, e.g.*, S.1, 93d Cong., 1st Sess., § 1-3B2 (1973) (entrapment statute); S.1, 94th Cong., 1st Sess. § 551 (1976) (entrapment statute).

134. *See, e.g.*, Abramson & Linderman, *supra* note 25 (due process explained and supported); Moloy, *supra* note 132 (due process defense supported); Murchison, *supra* note 76 (traces rise of due process defense); O'Connor, *Entrapment Versus Due Process: A Solution to the Problem of the Criminal Conviction Obtained by Law Enforcement Misconduct*, 7 FORDHAM URBAN L.J. 35 (1978) (due process supported); Comment, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655 (1974) (development of due process defense); Comment, *Entrapment—A Due Process Defense—What Process Is Due?*, 11 SW. U. L. REV. 663 (1979) (excellent discussion of due process defense); Note, *Entrapment: A Source of Continuing Confusion in the Lower Courts*, 5 AM. J. TR. ADV. 293, 302-08 (1983) (due process defense supported); Note, *The Need For a Dual Approach to Entrapment*, 59 Wash. U.L.Q. 199 (1982) (excellent article applying due process principles to entrapment).

The "Resurrection" of the Due Process Defense

The due process or "outrageous government conduct" defense that is emerging from the lower courts differs significantly from the traditional entrapment defense. First, the due process defense is based on the fundamental fairness requirement of the fifth amendment and raises a question of law for the judge to decide.[135] Second, it is generally available even to a defendant who was admittedly predisposed to commit the crime and, therefore, could not claim entrapment.[136] Third, a defendant who was induced by a third party not connected with the government is not barred from raising the due process defense.[137] Fourth, the defense remains available to a defendant who denies committing the offense.[138] Finally, the level of government overinvolvement that must be shown by the defendant claiming a due process violation is considerably higher than that required for the entrapment defense.[139] Therefore, the due process defense constitutes an effective limitation on the extent to which the government can become enmeshed in criminal activity in order to prosecute an individual, without reference to predisposition.

Three leading due process defense cases illustrate the efficacy of this defense in controlling offensive undercover "sting" operations. In *United States v. Twigg*,[140] the defendants were convicted

135. *Compare Hampton*, 425 U.S. at 494 n.6 (due process defense a constitutional defense for judge to decide) (Powell, J., concurring), *and Russell*, 411 U.S. at 432 (same), *and* United States v. Twigg, 588 F.2d 373, 379 (1978) (same), *and* Abramson & Linderman, *supra* note 25, at 154 (due process defense a question of law) *with Russell*, 411 U.S. at 433 (entrapment not a constitutional defense), *and Sorrells*, 287 U.S. at 452 (entrapment is generally a question of fact for jury to decide).

136. *Compare Russell*, 411 U.S. at 450 (Stewart, J., dissenting) (would hold defendant entrapped, despite predisposition) *and* Greene v. United States, 454 F.2d 783, 786-87 (9th Cir. 1971) (due process defense bars prosecution of predisposed defendants) *with Russell*, 411 U.S. at 433 (entrapment not available to a predisposed defendant).

137. *See Twigg*, 588 F.2d at 377 (discussing the difference between entrapment and due process defenses concerning defendants induced by a third party not connected with the government).

138. *Compare Twigg*, 588 F.2d at 377, *with* Annot., 61 A.L.R. 2d 677 (entrapment generally not available to the defendant who denies committing the offense). *But see* Comment, *Denial of the Crime and the Availability of the Entrapment Defense in the Federal Courts*, 22 B.C.L. REV. 911 (1981) (trends towards availability of entrapment defense in cases of government misconduct).

139. United States v. Ramirez, 710 F.2d 535, 541 (9th Cir. 1983); United States v. Jannotti, 673 F.2d 578, 607 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

140. 588 F.2d 373 (3d Cir. 1978). For articles discussing the *Twigg* case at length, see Gershman, *supra* note 63, at 607-08; Moloy, *supra* note 132, at 588-89; Note, *Due Process Defense When Government Agents Instigate and Abet Crime*, 67 GEO. L. J. 1455 (1979) (*Twigg* casenote).

In *Twigg*, the defendants were convicted essentially for manufacturing and conspiring to traffic methamphetamine, or "speed". A government informant had contacted one of the defendants to seek his involvement in setting up a "speed" factory. Both defendants agreed to participate. While one of the de-

of manufacturing and conspiring to sell a controlled substance. In reversing the conviction, the Court of Appeals for the Third Circuit stated that predisposition was not controlling in cases involving the due process defense.[141] The court noted that the defendants had not been involved in an ongoing criminal activity and that the illegal plan had originated with the government.[142] The court also stated that, absent the government's assistance, the defendants lacked the capacity to commit the offense.[143] Moreover, defendant-Twigg "contributed nothing in terms of expertise, money, supplies or ideas" to the criminal enterprise.[144] Accordingly, the *Twigg* court applied a totality of the circumstances test and dismissed the convictions due to government overinvolvement in all essential stages of the crime.[145]

The *Twigg* case typifies a factual setting that demands a due process defense. Predisposition and other factors had barred the defendants in *Twigg* from raising the defense of entrapment.[146] The police misconduct was patently outrageous, however, and the conviction could not stand. The court's only option was the due process defense.[147] The level of government overinvolvement in the criminal activity in *Twigg* unquestionably exceeded that of either *Russell* or *Hampton* and necessitated dismissal. In *Twigg*, the government not only originated the intent to manufacture and sell the illicit drug, but it also effectively controlled the operation from start to finish.[148] The *Twigg* court, therefore, properly reversed the defendant's conviction notwithstanding the predisposition limitation inherent in the entrapment defense.

A second case, *People v. Isaacson*,[149] illustrates an appropriate

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fendants was responsible for financing and distributing the "speed", the government's involvement was far more substantial. The government provided its informant with the essential chemical ingredient, the balance of the necessary chemicals, all expertise and the "factory" facility itself. Furthermore, the informant took complete charge of the factory operation. *See id.* at 375-76. In reversing the defendant's conviction, the *Twigg* court noted that predisposition was not controlling in cases involving the due process defense. The circuit court emphasized that the illegal plan originated with the government and that the defendants had not been involved in any ongoing criminal activity. *Id.* at 382.

141. *Twigg*, 588 F.2d at 378-79.

142. *Id.* at 381-82.

143. *Id.* at 381.

144. *Id.* at 382.

145. *Id.* at 381-82.

146. *Id.* at 376.

147. *Id.* at 380-82.

148. *Id. See also* United States v. Gonzales, 539 F.2d 1238, 1240 (9th Cir. 1976) (due process violated only if government directs criminal enterprise from start to finish).

149. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978). For a more complete discussion of *Isaacson*, see Gershman, *supra* note 63, at 605-06; Moloy, *supra* note 132, at 590-91; O'Connor, *supra* note 134, at 45-53.

application of the due process defense by a prominent state court. In *Isaacson*, the New York Court of Appeals confronted a situation where a predisposed defendant was convicted as a result of police misconduct. In this instance, the New York state police physically abused, threatened, and deceived a drug user in order to gain his cooperation as an undercover informant.[150] Consequently, the informant desperately sought to persuade the defendant to sell him illicit drugs in New York. In reversing the defendant's conviction, New York's highest court reasoned that "the police conduct, when tested by due process standards, was so egregious and deprivative as to impose upon [the court] an obligation to dismiss."[151] Moreover, the *Isaacson* court concluded that the sole motivation of the government was the desire to obtain a conviction and not to prevent further crime or to protect the public.[152]

Rather than simply reversing defendant's conviction on due process grounds, however, the *Isaacson* court fashioned four factors that should be considered in determining whether police misconduct violates the fifth amendment. These factors are: (1) whether the government manufactured the crime which otherwise would not have occurred, or merely involved itself in an ongoing criminal activity; (2) whether the government agents themselves engaged in criminal or otherwise improper conduct; (3) whether the government overcame defendant's reluctance to commit the crime with appeals to sympathy, past friendship, exorbitant gain, or with persistent solicitations in the face of defendant's unwillingness; and (4) whether the government had a legitimate motive for conducting the investigation.[153] Under the *Isaacson* test, no single factor is dispositive, and a totality of the circumstances approach is applied in determining whether to reverse a defendant's conviction.

Isaacson is another example of a modern court attempting to condemn an offensive government operation without the benefit of the traditional entrapment defense. Undoubtedly, the police misconduct in *Isaacson*, like the misconduct in *Twigg*, exceeded the level of government misconduct in either *Russell* or *Hampton*. In an effort to effectively harness the elusive standards of the fifth amendment,[154] the *Isaacson* court articulated four identifiable fac-

150. 44 N.Y.2d at 514-17, 378 N.E.2d at 79-80, 406 N.Y.S.2d at 715-16.

151. *Id.* at 518-19, 378 N.E.2d at 81, 406 N.Y.S.2d at 717.

152. *Id.* at 522-23, 378 N.E.2d at 84, 406 N.Y.S.2d at 720.

153. *Id.* at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719. *See* O'Connor, *supra* note 134, at 45-53 (discussing *Isaacson* test).

154. The *Isaacson* court supported the application of the due process defense by stating:

> There may be those who fear that dismissal of convictions on due process grounds may portend an unmanageable subjectivity. Such apprehension is unjustified for courts by their very nature are constantly called upon to

tors to consider in resolving due process cases. Furthermore, *Isaacson* reinforces the view that the due process defense has survived the attempted repudiation by *Hampton* and may be successfully used as a new defense for combatting offensive law enforcement practices. The question, however, is whether the Supreme Court will ultimately adopt the *Isaacson* test in future cases.[155]

Finally, the due process defense was effectively applied in a drug trafficking case remarkably similar to *De Lorean*. In *United States v. Batres-Santolino*,[156] the defendants were indicted, as a result of a government undercover sting operation, for conspiracy to import cocaine and for conspiracy to possess cocaine with the intent to distribute it. As in *De Lorean*, the defendants in this instance had never imported cocaine before and had no independent foreign supply source of their own.[157] The federal district court dismissed the indictment as a matter of law based on the due process defense.[158] In so doing, the court emphasized that the government had supplied all the drugs to the defendants.[159] Moreover, the defendants had not been involved in a drug-related enterprise until the government undercover agents came on the scene.[160] The *Batres-Santolino* court also noted that, although the defendants had some culpability,[161] they had not embarked nor were they about to embark on any criminal activity until the government agents set into motion the criminal operation.[162] Therefore, the conduct of the government in *Batres-Santolino* violated fundamental fairness and the conviction was barred by the due process guarantees of the fifth amendment.

De Lorean and the Due Process Connection

It is clear that *Twigg*, *Isaacson*, and *Batres-Santolino* provide a more satisfactory explanation of the *De Lorean* verdict than a traditional entrapment analysis. Although De Lorean must bear some culpability, he was not involved in any criminal enterprise until the government agents set into motion the drug trafficking opera-

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make judgments and, though differences of opinion often surround human institutions, this is the nature of the judicial process.

44 N.Y.2d at 524-25, 378 N.E.2d at 85, 406 N.Y.S.2d at 721.

155. *See* O'Connor, *supra* note 134, at 51-53 (recommends that Supreme Court adopt *Isaacson* test).

156. 521 F. Supp. 744 (N.D. Cal. 1981).

157. *Id.* at 751.

158. *Id.* at 753.

159. *Id.* at 752.

160. *Id.* The *Batres-Santolino* court emphasized that almost all the cases which have rejected a due process defense involve defendants who were engaged in an ongoing criminal enterprise. *Id.* at 751 n.6.

161. *Id.* at 752.

162. *Id.*

tion.[163] The government agents admitted in *De Lorean* that they initiated, financed, and managed the trafficking operation.[164] De Lorean possessed neither the expertise nor the connections necessary to import cocaine. The trier of fact in *De Lorean*, like that in *Batres-Santolino*, likely concluded that under the circumstances it was inconceivable that the accused would have entered the world of international drug smuggling on his own.[165] Unlike *Russell* and *Hampton*, *De Lorean* did not involve the infiltration of an ongoing criminal enterprise by government undercover agents. Moreover, the $60 million "investment" offered to De Lorean by the government went far beyond the "reasonable inducement"[166] that courts have held appropriate in undercover law enforcement operations. Finally, the *De Lorean* sting operation was not designed to ferret out existing criminal activity in the interest of the public, but rather it was designed to place an individual in the business of crime for the first time in order to facilitate a prosecution.

In short, the level of government instigation and overinvolvement in the criminal activity in *De Lorean* likely shocked the jury's sense of justice and contributed significantly to the acquittal. The traditional entrapment defense, with its focus on predisposition, simply was not an appropriate remedy in this instance. Indeed, the post-trial comments of the *De Lorean* jurors confirm that the conduct of the government, not the conduct of the defendant, was on trial in the *De Lorean* case.[167] Notwithstanding De Lorean's culpa-

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163. *See supra* notes 102-04. The fact that a defendant, in an entrapment or due process case, is a first time offender and regularly employed may indicate that he or she is not inclined towards crime. *See* United States v. West, 511 F.2d 1083, 1086 (3d Cir. 1975).

164. *See supra* notes 102-04 and accompanying text. For cases in which courts have condemned the government over-involvement in criminal activity, see *Twigg*, 588 F.2d at 379-81; *West*, 511 F.2d at 1085; Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971).

165. *See Bates-Santolino*, 521 F. Supp. at 748, 751-52. *See also* United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983) (defendant's capacity to commit the crime independent of the government a factor in determining government overreaching).

166. *See* United States v. Kaminski, 703 F.2d 1004, 1009 (7th Cir. 1983) (inducement must be "reasonable"); United States v. Jannotti, 673 F.2d 578, 598-99 (2d Cir.) (size of inducement in relation to defendant's station in life may be a relevant factor), *cert. denied*, 457 U.S. 1106 (1982). *See supra* notes 63-75 and accompanying text.

167. On Thursday, August 16, 1984, 8 of the 12 jurors who acquitted De Lorean appeared before the press to explain their verdict. Prov. J., August 17, 1984, at A-6, col. 1. The jurors were identified by numbers assigned to them during the selection process and stated as follows:

No. 36 —"If not for entrapment, there would have been a hung jury."

No. 81 —"The *government's conduct* was offensive."

No. 140 —"The way the *government agents* operated in this case was not appropriate."

Id. (emphasis added). These comments show that jurors focused on the conduct of the government and not on the conduct of the defendant. As Alan Dersho-

bility, the jury properly acquitted him in a defensible reaction to offensive undercover law enforcement practices.

While due process principles may explain the *De Lorean* verdict, they do not adequately explain the particular interests actually affected by *De Lorean*-type undercover operations. As previously indicated, the due process defense is triggered only by instances of outrageous government conduct shocking to the universal sense of justice.[168] Yet, it is not clear why the level of government misconduct need acquire outrageous proportions before the Constitution can intervene on behalf of an aggrieved citizen. The Constitution should be equally offended by undercover police activities of a highly intrusive nature with respect to defendants, like De Lorean, who are not themselves obvious targets of criminal investigation. Implicit in an entrapment or due process defense is a recognition of every citizen's right to be free from being harassed, targetted, or induced into crime by the government.[169] This right is at the core of an individual's basic concern for the privacies of life. Therefore, any analysis of the interests affected by offensive government undercover operations must include a discussion of the constitutional guarantees of the right of privacy.[170]

THE UNDERCOVER OPERATION AND THE RIGHT OF PRIVACY

It is well established that the individual's right of privacy is a fundamental right guaranteed by the Constitution.[171] Nearly 100 years ago, the Supreme Court stated that the protection of the fourth amendment applies "to all invasions on the part of the gov-

witz of Harvard Law School stated, "De Lorean's guilt or innocence played no role in this. All the attention was focused on the government, and he was presented as a victim." N.Y. Times, August 17, 1984, at B6, col. 2. *See also Tybor, supra* note 102.

168. United States v. Russell, 411 U.S. 423, 432 (1973) (*quoting* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960)).

169. Note, *Entrapment: A Source of Continuing Confusion in the Lower Courts*, 5 AMER. J. TRIAL ADVOC. 293, 303 (1981) (a fundamental right not to be harrassed discussed); *see also* Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 216-21 (1975) (right to be free from undercover surveillance discussed).

170. *See* Osborn v. United States, 385 U.S. 323, 343-44 (1966) (Douglas, J., dissenting) (entrapment implicates privacy principles); Wolf v. Colorado, 338 U.S. 25, 28-29 (1949) (arbitrary intrusion by the police constitutes invasion of privacy), *overruled in part*, Mapp v. Ohio, 367 U.S. 643, 655 (1961). *See also*, Dix, *supra* note 169, at 211-212 (discussion of privacy interests affected by entrapment cases); Marx, *supra* note 9 (examples of undercover operations that threaten privacy interests).

171. Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy constitutes a fundamental right implicit in Constitution); *see also* Katz v. United States, 389 U.S. 347 (1967) (personal right of privacy available in government surveillance cases); Boyd v. United States, 116 U.S. 616 (1886) (early case emphasizing importance of individual's privacy right against government intrusion).

ernment and its employees of the sanctity of a man's home and the privacies of life."[172] While the parameters of the right of privacy remain unsettled,[173] the defendant's privacy expectations are often at issue in cases of offensive law enforcement practices.[174] Admittedly, privacy law is a broad and expanding area of constitutional law. The following discussion of privacy, therefore, focuses on the interplay of this fundamental right with the growing use of government undercover operations that often include electronic surveillance, paid informants, government-supplied contraband, and significant intrusion into the private lives of citizens. This discussion will show that the right of privacy is a fundamental interest protected by the entrapment and due process defenses and should be employed to impose a standard of reasonableness upon the exercise of discretion by government law enforcement agents.[175]

The Rise of a Constitutional Theory of Privacy

The right of privacy has been termed the "basis of individuality"[176] and the "right to be let alone."[177] While the United States Constitution does not explicitly mention the right of privacy, the Supreme Court has declared that privacy is a fundamental right implicitly guaranteed by the constitutional scheme under which we live.[178] The constitutional right of privacy has been described by

172. Boyd v. United States, 116 U.S. 616, 630 (1886).

173. *See* Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289 (1981); Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 197-216; *see also* Keisling, *The Case Against Privacy*, STUDENT LAW., September 1984, at 25 (evidence suggests that Americans desire *less* privacy).

174. *See, e.g.*, Walter v. United States, 447 U.S. 649 (1980) (pornographic films protected by fourth amendment against warrantless seizure by federal agents); United States v. Chadwick, 433 U.S. 1 (1977) (footlocker protected by fourth amendment from unreasonable search); Chimel v. California, 395 U.S. 752 (1969) (limiting scope of search pursuant to a lawful arrest); Alderman v. United States, 394 U.S. 165 (1969) (governmental intrusion into one's home via electronic surveillance by police limited); Katz v. United States, 389 U.S. 347 (1967) (judicial authorization is a required antecedent to electronic surveillance); Abel v. United States, 362 U.S. 217 (1960) (police searches for evidence of crime present situations demanding greatest protection of individual's privacy).

175. *See infra* notes 211-12.

176. R. CLARK, CRIME IN AMERICA 287 (1970), *quoted in* United States v. White, 401 U.S. 745, 763 (1971) (Douglas, J., dissenting); Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579, 1588-1600 (1978).

177. Katz v. United States, 389 U.S. 347, 350 (1967); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See also* Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). For a discussion of the various definitions of the right of privacy, see Gerety, *Redefining Privacy*, 12 HARV. C.R.—C.L.L. REV. 233, 233-246 (1977) (history and descriptions of privacy right discussed).

178. *See* Roe v. Wade, 410 U.S. 113 (1973) (right of privacy is a fundamental right guaranteed implicitly by Constitution); Eisenstadt v. Baird, 405 U.S. 439

the Court simply as "the right to be free from unreasonable governmental intrusion"[179] in one's private papers,[180] dwellings,[181] conversations,[182] as well as decision making,[183] bodily integrity,[184] and mental processes.[185] According to Justice Brandeis, the purpose of the privacy right is to prevent "every unjustifiable intrusion by the government upon the privacy of the individual."[186] Therefore, in order to ensure adherence to constitutional safeguards, courts should carefully scrutinize a government undercover operation that intrudes into the private life of a targetted individual.

In search and seizure cases, privacy interests are most often

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(1972) (right of privacy constitutes fundamental right); Stanley v. Georgia, 394 U.S. 557 (1969) (right to be free from governmental intrusion constitutes fundamental right); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy constitutes a fundamental right implicitly guaranteed by Constitution).

179. *See* Silverman v. United States, 365 U.S. 505, 511 (1961). *See also* Berger v. New York, 388 U.S. 41, 53 (1967) (Court discusses intrusion principle).

180. U.S. CONST. amend. IV ("papers" protected). *See, e.g.*, Gouled v. United States, 255 U.S. 298, 305 (1921) (search for and seizure of private papers without a warrant violates fourth amendment).

181. U.S. CONST. amend. IV ("houses" protected). *See, e.g.*, Payton v. New York, 445 U.S. 573, 585 (1980) (house); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) (office); United States v. Jeffers, 342 U.S. 48 (1951) (hotel room).

182. *See, e.g.*, Alderman v. United States, 394 U.S. 165 (1969) (oral statements protected against unreasonable search and seizure under fourth amendment); Katz v. United States, 389 U.S. 347, 352-53 (1967) (fourth amendment protects a person's private conversations as well as his private premises); Berger v. New York, 388 U.S. 41 (1967) (conversations within unreasonable search and seizure restrictions of fourth amendment); Silverman v. United States, 365 U.S. 505, 511-12 (1961) (illegally seized conversations are excludable from criminal trial). *But see* United States v. White, 401 U.S. 745 (1971) (plurality) (otherwise private conversations not protected if government agent consents to carry electronic recording device). For a critical discussion of *White*, see *infra* note 209.

183. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (privacy interest in making certain fundamental decisions protected); Roe v. Wade, 410 U.S. 113 (1973) (privacy interest in making certain family-related decisions protected).

184. U.S. CONST. amend. IV ("persons" protected). *See, e.g.*, Schmerber v. California, 384 U.S. 757, 767-70 (1966) (absent emergency, integrity of an individual's person cannot be violated on the mere chance that desired evidence might be found); Rochin v. California, 342 U.S. 165 (1952) (stomach pumping to secure evidence not permitted). *See also* Gerety, *supra* note 177, at 266 (the body constitutes "the most basic vehicle of selfhood").

185. *See* Stanley v. Georgia, 394 U.S. 557, 565-66 (1969) (Constitution prohibits government intrusion into one's mental processes); Davis v. Mississippi, 394 U.S. 721, 727 (1969) (probing into an individual's private life and thoughts marks an interrogation or a search). *See also* Groot, *The Serpent Beguiled Me And I (Without Scienter) Did Eat—Denial Of Crime And The Entrapment Defense*, 1973 LAW F. 254, 274-76 ("psychic privacy" principle prohibits government from intruding upon a citizen's mental state in order to stimulate criminal conduct).

186. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See also* Wolf v. Colorado, 338 U.S. 25, 27 (1949) (fourth amendment protects the "security of one's privacy against arbitrary intrusion by the police"), *overruled in part*, Mapp v. Ohio, 367 U.S. 643, 655 (1961).

treated as arising out of the fourth and fifth amendments.[187] Both amendments have been recognized as relating to the personal security of the individual.[188] The Supreme Court has indicated that "the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned by the fifth amendment."[189] In short, an unwarranted intrusion by government agents violates the fourth amendment, and the use of the evidence derived therefrom violates the fifth amendment.[190] Thus, the fifth amendment provides the backbone of not only the due process defense, but the privacy defense as well.

Privacy and the Government Misconduct Defenses

In the entrapment and due process defenses, the government is prevented from convicting a defendant because of its own instigation and illegal conduct in the criminal activity. Government law enforcement misconduct, termed "dirty business"[191] by Justice Holmes, is not confined to instances of entrapment or outrageous government misconduct. It pervades notions of the right of privacy as well. The same "dirty business" that invokes the entrapment and due process defenses in cases of government instigated crime is present in privacy cases as well.[192] A case in which the government selects an "otherwise innocent" individual, induces the individual to commit an offense, surrounds him with contraband and government agents, and then selectively records key stages of the crime is as much a violation of privacy as it is a violation of due process or entrapment principles.

As stated by Justice Douglas, "[e]ntrapment is merely a facet of a much broader problem [and] [t]ogether with illegal searches and seizures, coerced confessions, wiretapping and bugging, it repre-

187. Katz v. United States, 389 U.S. 347, 351-53 (1967); Boyd v. United States, 116 U.S. 616, 630 (1886) (fourth and fifth amendments running "almost into each other").

188. Boyd v. United States, 116 U.S. 616, 633 (1886).

189. *Id.*

190. *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., dissenting). *See* Wingo, *Rewriting Mapp and Miranda: A Preference For Due Process*, 31 U. KAN. L. REV. 219, 239-45 (1983) (fifth amendment, and not Exclusionary Rule, should bar evidence seized in violation of fourth amendment); Note, *Due Process Privacy and the Path of Progress*, 1979 LAW F. 469 (1979) (discussing overlap of fourth and fifth amendments).

191. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting) (referring to wiretapping and other undercover police practices).

192. Osborn v. United States, 385 U.S. 323, 343-44 (1966) (Douglas, J., dissenting). *See* Dix, *supra* note 169 at 293-94 (fourth amendment implicated by government undercover operations); Groot, *supra* note 185, at 951 (government induced crime violates fourth amendment).

sents lawless invasion of privacy."[193] Theories of entrapment, due process and privacy are all aimed at displacing the notion that the end justifies the means in law enforcement practices.[194] The defense of entrapment prevents the government from instigating a crime by implanting a criminal design in the mind of an otherwise innocent individual,[195] the due process defense serves to ensure fundamental fairness in the administration of justice,[196] and the right of privacy protects the citizen's right to be let alone.[197] All three defenses are concerned with prohibiting government from improperly intruding into the lives of innocent people. Therefore, the individual's privacy interests become a necessary consideration in cases of entrapment and outrageous government misconduct.

The defendant's privacy expectations become especially important in cases where the government undercover operation relies on extensive and calculated use of such law enforcement techniques as paid informants,[198] government supplied contraband,[199] and elec-

193. *Osborn*, 385 U.S. at 343-44 (Douglas, J., dissenting).

194. *Id.* at 344 (Douglas, J., dissenting).

195. See *supra* note 23 and accompanying text.

196. *See supra* notes 111-17 and accompanying text.

197. *See supra* note 177 and accompanying text. In determining the propriety of government conduct, modern courts focus on the individual's "justifiable," "legitimate," or "reasonable" expectations of privacy as the cornerstone of the interest protected. Smith v. Maryland, 442 U.S. 735, 740 (1979). *See generally* Ashdown, *The Fourth Amendment and the Legitimate Expectation of Privacy*, 34 VAND. L. REV. 1289 (1981) (discusses cases employing "expectation" test); O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment Protected Privacy*, 13 NEW ENG. L. REV. 662 (1978) (overview of "expectation" approach to privacy). The "reasonable expectation of privacy" test depends on two inquiries. *Smith*, 442 U.S. at 740. First, the Court asks whether the individual has exhibited an actual or subjective expectation of privacy by his conduct. *Id.* Under *Katz*, the Court considers whether the individual has shown that "he seeks to preserve [that which has been intruded upon] as private." *Katz*, 389 U.S. at 351. Second, the Court asks whether the individual's subjective expectation of privacy is one that society is prepared to recognize as "reasonable" or "justifiable" under the circumstances. Under *Katz*, the individual's expectation, viewed objectively, must be "justifiable." *Id.* at 353. Thus, the individual's interest is weighed against the interest of society. This approach necessarily requires a case by case analysis to determine the reasonableness of an individual's claim to privacy. The problem, therefore, is that this formula becomes subject to judicial manipulation and renders prospective determinations of one's privacy interest nearly impossible. *See* Ashdown, *supra*, at 1310.

The "reasonable expectation of privacy" test has understandably produced mixed results. *See* Ashdown, *supra*, at 1303-10. It appears that the individual's expectation of privacy extends to whatever objects or situations a majority of the Supreme Court is willing to accept as "reasonable." Consequently, this approach to privacy has been criticized as too narrow and inconsistent with Court precedents in this area. *See* Ashdown, *supra* at 1302-10.

198. The use of governmental undercover informants raises several practical and moral considerations. As a practical matter, courts are loathe to vest with credibility information supplied by an informant absent some indicia of reliability. *See, e.g.*, Illinois v. Gates, 103 S. Ct. 2317 (1983) (totality of circumstances must be considered in addition to informant's conclusionary information). Un-

tronic surveillance.[200] Privacy interests are particularly vulnerable to the indiscriminate use of recording devices. Recording practices can be used in such a manner as to manipulate the defendant's actual role in the criminal activity.[201] A well prepared undercover

derstandably, information or testimony provided by a government informant that is based upon rumor, speculation, or spite lacks the requisite trustworthiness necessary for developing a proper factual predicate sufficient to support a criminal proceeding. *See* Fletcher v. United States, 158 F.2d 321 (D.C. Cir. 1946) (court must warn jury concerning credibility of informant witness). One practice which federal courts have rejected as inherently unreliable is the use of government informants on a contingent fee basis. *See, e.g.*, Williamson v. United States, 311 F.2d 411 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965); United States v. Curry, 284 F. Supp. 458 (N.D. Ill. 1968). Absent compelling justification by the government, a contingent fee informant's vested interest in generating an arrest may give license to a variety of unwarranted provocations which serve to instigate rather than investigate crime. *See* United States v. Silva, 180 F. Supp. 557, 559 (S.D.N.Y. 1959) (discusses instigation dangers inherent in use of compensated informant). Similarly, informants who are either paid substantial sums of money or are cooperating in order to obtain government immunity from a pending prosecution also have a significant vested interest in the successful prosecution of the targetted individual. *See* United States v. Jones, 362 F. Supp. 114, 116-17 (E.D. Pa. 1973) (informant's testimony discredited due to vested interest in outcome of case). Greed and self-preservation are unhealthy motivations for an informant with demonstrated criminal tendencies and tend to color the conduct of the undercover operation. Finally, significant moral considerations are generated by a criminal justice system that must rely upon the "Judas syndrome" in order to combat crime. *See* Sarasota Herald-Tribune, November 26, 1983, at 4-C (article in which attorney J. Tony Serra refers to use of informants as the "Judas Syndrome"). While the practice of employing an undercover "Judas" in limited circumstances may be necessary to infiltrate certain criminal operations, it is a practice which any free society should not embrace without some sense of repulsion. *See generally* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 YALE L.J. 1091 (1951) (indiscriminate use of government informants criticized).

199. Government-supplied contraband in undercover operations also raises significant problems concerning the reliability of the circumstances giving rise to a criminal prosecution. Although the use of government-supplied contraband has been upheld by a divided Supreme Court, *Hampton*, 425 U.S. 484 (1976) (plurality), it nevertheless should be scrutinized carefully in order to determine whether the government may have in fact manufactured a given crime. *See* United States v. Dilet, 265 F. Supp. 980, 986 (S.D.N.Y. 1966) (criticizes practice of government-supplied contraband). Moreover, the practice of government-supplied contraband also impinges upon privacy interests inasmuch as it injects an element of criminality into the life of an individual who might otherwise never have been exposed to contraband if let alone.

200. The use of electronic surveillance by the government imposes a heavy responsibility on courts in their supervision of procedural fairness. Berger v. New York, 388 U.S. 41, 56 (1967). In *Berger*, the court invalidated New York's electronic eavesdropping law and warned that the "indiscriminate use of [electronic recording] devices in law enforcement raises grave constitutional questions under the fourth and fifth amendments." *Id.* at 62, *quoting* Lopez v. United States, 373 U.S. 427, 441 (1963). *See infra* note 209 (consensual recording devices discussed).

201. *Id.* at 344-54 (Douglas, J., dissenting). *See* Hodges, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother*, 3 HAST. CONST. L.Q. 261 (1976); Comment, *Electronic Surveillance: The New Standards*, 35 BROOK L. REV. 49 (1968).

agent can carefully stage his encounters or conversations with a suspect to create a false impression of eager criminality on the part of the suspect. Similarly, a selective use of bugging and videotaping can effectively avoid the recording of encounters which are non-incriminating and counter-productive to the government's case. This effect is often achieved by the simple practice of not recording the initial contact with the suspect in which the instigation and inducement of the criminal activity occur. This omission by the government conveniently renders any determination of government instigation difficult, if not impossible. Moreover, recorded materials may be altered with little difficulty in order to create a desired result.[202] Many of these abuses would be redressed simply by subjecting the prospective use of electronic surveillance in a planned undercover operation to the judicial scrutiny of a neutral magistrate.[203]

A finding that instances of outrageous government conduct and entrapment also implicate the individual's fundamental right of privacy would have important consequences for government undercover operations. First, a citizen could only be targetted by the government for a planned undercover operation[204] based upon an articulable and reasonable suspicion that the individual is involved

202. *Osborn*, 385 U.S. at 352 n.14 (Douglas, J., dissenting).

203. The Supreme Court has stated that by requiring the use of a warrant authorized by a neutral magistrate, "we minimize the risk of unreasonable assertions of executive authority." Arkansas v. Sanders, 442 U.S. 753, 759 (1979). Historically, the absence of carefully drawn and limited warrants for searches of private places and effects was considered one of the prime causes of the American Revolution. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting), *overruled in part*, Chimel v. California, 395 U.S. 768 (1969). Moreover, the warrant requirement has been viewed by the Court as "an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971). *See also* ROSCOE POUND, AMERICAN TRIAL LAWYERS FOUNDATION, ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES 14 (1974) (no electronic surveillance should be conducted without a court order); Gershman, *Staged Arrest, supra* note 63, at 633-38 (warrant requirement urged in undercover operations).

204. A preplanned undercover "sting" operation involves a carefully formulated and concerted effort by law enforcement officials to infiltrate and terminate suspected criminal activity. It is comprehensive by its nature and typically includes the sustained use of extensive electronic surveillance including consensual recording devices, undercover operatives, targetted suspects, and government established "cover" operations. For a discussion of the undercover tactics used by the government in the ABSCAM investigations, see United States v. Carpentier, 689 F.2d 21 (2d Cir. 1982), *cert. denied*, 459 U.S. 1108 (1983). *See also Marx, supra* note 9 (several undercover operations involving various police practices discussed). The recommendations posed by this article are limited to comprehensive and sustained government undercover operations and do *not* apply to conventional investigatory practices.

or is about to become involved in criminal activity.[205] The factual predicate necessary to justify targetting a suspect should be measured against an objective standard[206] to avoid arbitrary intrusions into a citizen's private life and to ensure compliance with guarantees of due process and equal protection. Second, the courts should generally require a warrant,[207] subject to the usual exceptions,[208] whenever law enforcement officials seek to execute a comprehensive undercover operation utilizing surreptitious, electronic surveillance against a targetted individual. A warrant requirement would

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205. *See* United States v. Batres-Santolino, 521 F. Supp. 744, 752 (N.D. Cal. 1981) (government undercover operation improper where defendants were not embarked or about to embark on criminal activity). The minimal requirement that the government possess an articulable and reasonable suspicion of criminality before targetting an individual is consistent with Supreme Court decisions that limit the unconstrained exercise of discretion by government officials in situations involving minimal yet protected intrusions into the private life of individuals. *See, e.g.*, Reid v. Georgia, 448 U.S. 438 (1980) (reasonable and articulable suspicion of criminality required before subjecting travellers to investigatory stop and seizure at airport terminal); Brown v. Texas, 443 U.S. 47 (1979) (reasonable and articulable suspicion of criminality required before police can stop individuals and demand identification); Delaware v. Prouse, 440 U.S. 648 (1979) (articulable and reasonable suspicion required before selectively stopping and detaining automobile operators); Terry v. Ohio, 392 U.S. 1 (1968) (articulable and reasonable suspicion of criminal activity required before police can stop and frisk a suspect). *See also* Note, *Entrapment in the Federal Courts: Sixty Years of Frustration*, 10 NEW ENG. L. REV. 179, 218-19 (1974) (discusses various federal standards required in order to target a defendant for investigation).

206. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) (articulable and reasonable suspicion measured against an objective standard); *see also* Scott v. United States, 436 U.S. 128, 137 (1978); Beck v. Ohio, 379 U.S. 89, 96-97 (1964).

207. The Warrant Clause of the fourth amendment provides that "no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV. In Gouled v. United States, 255 U.S. 298 (1921), the Supreme Court stated:

> *[W]hether entrance to the home* or office of a person suspected of a crime *be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance*, or in the guise of a business call, and whether the owner be present or not when he enters, *any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment*
> . . . .

Id. at 306 (emphasis added). *See also* Osborn v. United States, 385 U.S. 323, 344-46 (1966) (Douglas, J., dissenting) (urging warrant requirement in undercover-type operations); Tybor, *Entrapment, supra* note 92, at 4 col. 2 (legislation will likely be introduced requiring a warrant for undercover operations).

208. *See, e.g.*, United States v. Oliver, 104 S. Ct. 1735 (1984) ("open fields" exception discussed); South Dakota v. Opperman, 428 U.S. 364 (1976) ("inventory" exception discussed); United States v. Watson, 423 U.S. 411 (1976) (search incident to lawful arrest discussed); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ("consent" exception discussed); Coolidge v. New Hampshire, 403 U.S. 443 (1971) ("plain view" exception discussed); Terry v. Ohio, 392 U.S. 1 (1968) ("stop and frisk" exception discussed); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) ("hot pursuit" exception discussed); Agnello v. United States, 269 U.S. 20, 30 (1925) (search "incident to arrest" discussed).

protect the suspect against unrestricted discretion by law enforcement agents in recording selective conversations. It would also preclude excessive government reliance on consensual recording practices[209] beyond the scrutiny of an impartial magistrate except

209. *See* United States v. White, 401 U.S. 745 (1971) (plurality) (recording devices carried secretly by consenting undercover agent constitute an exception to the warrant requirement). The fictitious consent theory established in *White*, however, is seriously flawed as it relates to the privacy expectations of the individual. Furthermore, the "consent" exception as articulated in *White* has been improperly expanded by law enforcement officials whenever it is applied to government agents actively involved in an undercover "sting" operation.

There are several reasons why consensual recording devices violate privacy. First, there is often a substantial difference between the style and content of recorded versus non-recorded conversations. *White*, 401 U.S. at 762-63 (Douglas, J. dissenting); Greenwalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitions Monitoring with the Consent of a Participant In A Conversation*, 68 COLUM. L. REV. 213 (1968). For example, a topic of conversation which is appropriate to a "private" dinner table at a restaurant, nonetheless, may be inappropriate for broadcast to the entire world. *See, e.g., Katz*, 389 U.S. 347, 352 (1967) (illegal wiretapping of a private telephone conversation constitutes a government-proffered "broadcast to the world"). "Free" conversations take on a distinctively different style and flavor of discourse as compared to the recorded word. It is ludicrous to contend that private individuals should reasonably expect that a seemingly "private" conversation among select individuals is being simultaneously recorded or broadcasted to unknown distant parties. Words spoken in confidential settings are often spoken with the understanding that one's companion will not subject the informal conversation to literal exactitude or legal precision. Moreover, a growing social awareness of the unrestrained use of recording devices by government secret agents will most assuredly result in stifling spontaneous discourse and contribute to social paranoia. *See White*, 401 U.S. at 762-63 (Douglas, J., dissenting); Greenwalt, *supra*, at 216; Marx, *supra* note 9.

Second, the risk that a particular conversation with a confidant is being electronically transmitted and preserved for evidentiary purposes is neither ordinary nor usual. An individual normally must assume that individual's with whom one confides may breach the trust and provide law enforcement officials with the proper basis for procuring a necessary search warrant. This type of risk is quite different from the risk that a participant in a conversation, at any time and for any reason, may be recording words for an undisclosed undercover law enforcement investigation. Further, it would be Orwellian indeed for individuals to normally assume that they have been targetted for undercover investigation and may at all times be surrounded by secret government informers. Thus, it is fundamentally unfair to impose this increased risk of scrutiny and misinterpretation on an unwitting suspect without consent or judicial scrutiny. *Osborn*, 385 U.S. 323, 346-47 (1966) (Douglas, J., dissenting); Greenwalt, *supra*, at 218.

Finally, the use of electronic recording devices, by definition, constitutes a "search and seizure" of words under the fourth amendment. *See supra* note 182. By allowing a government undercover agent to record private conversations without first specifying the communication sought, the government is effectively utilizing a "general warrant" in violation of the fourth amendment. *See* Ashdown, *supra* note 197, at 1316; Marx, *supra* note 9, at 34; Greenwalt, *supra* note 209, at 216-23. As a result, the unrestricted use of electronic surveillance against criminal suspects may become a substitute for skillful police work and scientific investigation. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs*, 60 YALE L.J. 1091, 1111 (1951) (invasions of privacy and entrapment techniques are a substitute for "skillful and scientific

in extreme circumstances. Third, evidence procured by the use of extensive electronic surveillance in the absence of a warrant would be inadmissible at trial under the Exclusionary Rule.[210] These requirements would promote the essential purpose of the fourth amendment which is to impose a standard of "reasonableness"[211] upon the exercise of discretion by government officials.[212] The sug-

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investigation" by police). The notion of allowing the government to consent away the individual's reasonable expectation of privacy is contrary to the fourth amendment and is subject to potential abuse.

It is not necessarily the position of this comment that the use of all participant recording devices are *per se* unconstitutional. Recording devices are very often used "defensively" by private individuals for legitimate purposes. *See e.g.*, Greenwalt, *supra* note 209, at 214, 224-25. Even the use of such devices for "offensive" purposes by private individuals not connected with the government are arguably permissible. It is simply urged that in light of the serious social consequences involved the planned use of secret recording devices by the government for "offensive" purposes against private individuals should be subject to the warrant requirement of the fourth amendment. To hold otherwise, gives the government law enforcement apparatus unbridled discretion in targetting private individuals for unspecified reasons beyond the scrutiny of an impartial magistrate. *Id.* at 214-21. Aside from the privacy interests at stake in the "consent" exception, it is suggested that law enforcement officials have misinterpreted *White* whenever participant recording devices are used by actual government agents in face to face encounters with a suspect. The *White* case did not concern the active and sustained involvement of the government itself in an organized, pre-planned undercover "sting" operation. In *White*, the informant was a third party who consented to monitor certain criminal conversations with the defendant. While the *White* Court approved the use of third-party electronic monitoring under these limited circumstances, it never endorsed the wholesale use of such practices without a warrant in more extreme instances of government orchestrated crime. In such instances, the government has moved beyond the limited use of third-party monitoring and has adapted the "consent" exception to warrantless surveillance of suspects by the government *itself*. This expanded use of the "consent" exception is inconsistent with not only *White* but modern notions of the personal right of privacy as well. *See White*, 401 U.S. at 755 (Brennan, J., dissenting) (indicates that *White* opinion not valid after *Katz* decision).

210. *See* Weeks v. United States, 232 U.S. 383, 393 (1914) (Exclusionary Rule applied to federal courts); Mapp v. Ohio, 367 U.S. 643, 659 (1961) (Exclusionary Rule applied to state courts). *See also* Comment, *The Defense of Entrapment: Next Move-Due Process?*, 15 UTAH L. REV. 266, 273 (1971) (urges application of Exclusionary Rule in entrapment cases). The application of the Exclusionary Rule would prevent the admissibility of illegally obtained evidence at the trial of a targetted defendant. Presently, undercover operations are governed by internal law enforcement rules. Evidence derived in violation of an internal agency rule is not subject to the Exclusionary Rule and, thus, may be used against a defendant at trial. *See* United States v. Caceres, 440 U.S. 741 (1979) (evidence derived from I.R.S. agent's violation of internal agency rule against "consensual electronic surveillance" not subject to Exclusionary Rule).

211. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 315 (1978); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Cady v. Dombrowski, 413 U.S. 433, 439 (1973); Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

212. A standard of "reasonableness" is imposed by courts upon the exercise of discretion by government agents, including law enforcement officials, in order "to safeguard the privacy and security of individuals against arbitrary invasions . . . ." Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978), *quoting* Camara

gested guidelines would also reduce the exposure of the government to lawsuits by innocent third parties injured as a result of mismanaged undercover operations.[213] Most importantly, abusive practices and unwarranted intrusions into the private lives of the citizenry would be minimized by submitting all pre-planned undercover operations against targetted individuals to the strictures of the fourth amendment.

De Lorean and a Privacy Perspective

In *De Lorean*, the government did not subject the undercover operation to a prior determination of reasonableness by a neutral and detached magistrate. The entire operation was governed by the unfettered discretion of government agents. Although sixty-five audiotapes and five hours of videotapes were made over a four month period in 1982, several encounters with De Lorean were either unrecorded or inaudible.[214] For example, not one of the initial conversations between the government informant and De Lorean was recorded.[215] Also, the principal informant in *De Lorean* failed to record critical conversations which the defense claimed contained threats and inducements by the government.[216] Forms that authorized the videotaping of critical sessions were back-dated[217] and investigative notes were rewritten by government agents.[218] Furthermore, the entire undercover operation was conducted against an individual who was beset by financial crisis and who had no criminal background. The government proceeded against Mr. De Lorean based on the unsubstantiated statements of a

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v. Municipal Court, 387 U.S. 523, 528 (1967). *Accord* Arkansas v. Sanders, 442 U.S. 753, 759 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976); United States v. Ortiz, 422 U.S. 891, 895 (1975); Beck v. Ohio, 379 U.S. 89, 97 (1964).

213. According to a recent House Subcommittee report released in April, 1984, innocent third parties allegedly damaged as a result of undercover operations have filed lawsuits against the government seeking more than $446 million in damages. *The Brief*, 40 A.C.L.U. OF ILL. at 7 (1984) (background information concerning program entitled "Undercover Operations and the Rights of the Innocent").

214. Hoover, *A Trial of Images*, *supra* note 1, at 25 (several conversations not recorded by informant though ordered by F.B.I. agents); Wall St. J., August 17, 1984, at 3, col. 3-4 (initial conversation unrecorded and not corroborated).

215. *See supra* note 214.

216. *See Defendant's Outrageous Government Conduct Memorandum*, *supra* note 2 at 4.

217. F.B.I. Special Agent John Valestra, posing as a financier named "Vicenza," testified at trial that he had back dated agency forms that formally authorized the videotaping of two important meetings with Mr. De Lorean. N.Y. Times, August 17, 1984, at B6, col. 4.

218. F.B.I. Special Agent Benjamin Tisa, posing as a banker named "Benedict," testified at trial that he had altered and rewritten some of his investigative notes. N.Y. Times, August 17, 1984, at B6, col. 4.

paid government informant[219] who was an admitted perjurer with a prior record of drug trafficking.[220] In short, the government initiated an extensive intrusion into the private life of Mr. De Lorean in a manner which could not have passed scrutiny by a neutral and detached magistrate. Undoubtedly, the form and extent of the government's invasion of De Lorean's privacy in this instance contributed to his jury acquittal.

As indicated by *De Lorean*, government undercover operations can be inefficient and abusive. By their very nature, they involve an unprecedented and pervasive intrusion on the individual's right of privacy. The indiscriminate use of con men, cameras, and contraband by the government raises grave constitutional questions that the entrapment and due process defenses cannot resolve. The modern undercover operation has moved beyond impermissible inducements and police misconduct and has become an all-encompassing investigatory practice. The threat to constitutional liberty increases exponentially when government overinvolvement is coupled with a staged and selectively recorded web of deception and intrigue initiated against a suspect by law enforcement officials. By scrutinizing such practices under the fourth amendment, courts can not only prevent undercover operations from overwhelming a targetted individual, but can preserve the integrity and resources of the criminal justice system as well.

CONCLUSION

In 1886, the Supreme Court warned that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes and procedure."[221] Nowhere is this admonition more true than in the area of law enforcement misconduct. Government undercover operations are growing in scope and frequency, posing significant problems for modern courts. While *De Lorean* may not be typical of most undercover investigations, it illustrates the potential for abuse when law enforcement agents are allowed to operate with unfettered discretion. Therefore, several recommendations are suggested to clarify and reform the law concerning government undercover operations.

First, efforts to alter the traditional entrapment defense have only served to further confound this important defense. Therefore,

219. The initial conversations between informant-Hoffman and De Lorean, which led to the initiation of the undercover operation, were not corroborated independently by the F.B.I.. Wall St. J., August 17, 1984, at 3, col. 3-4. Moreover, Mr. Hoffman was reportedly paid $111,643 between January, 1982 and May, 1984 by the government for his assistance. N.Y. Times, August 17, 1984, at B6, col. 4-5. *See supra* note 198 (problems of paid informants discussed).

220. *See supra* note 98.

221. Boyd v. United States, 116 U.S. 616, 635 (1886).

courts should accept entrapment as a "limited defense" applicable only to instances of government instigated crime involving a non-predisposed defendant. Second, the Supreme Court should expressly recognize and define the due process defense at the earliest opportunity in order to provide guidance to the lower courts in dealing with instances of outrageous government conduct, regardless of the culpability of the defendant. There is considerable support for such a defense in Supreme Court precedents, various lower court cases, and the *De Lorean* verdict as well. The four factors articulated in *Isaacson*[222] provide a clear and workable framework for the defense, and the Supreme Court should adopt them as the proper inquiries in a due process case. Third, the courts, Congress, and various state legislatures should re-examine the use of comprehensive, undercover law enforcement operations against private citizens and expressly apply fourth amendment protections. Further, the government should not target a citizen for extensive, pre-planned undercover investigation without articulable and reasonable suspicion, measured by an objective standard, that the individual is involved in criminality. A warrant requirement for all electronic secret surveillance by government agents would reduce the possibility of abuse and render the actions of such agents accountable, in advance, to a neutral and detached magistrate. Otherwise, the practice of employing unrestricted law enforcement sting operations threatens to constitute a "silent approach" and "slight deviation" from proper legal procedure and portends ominous abuse by government law enforcement agencies.

These recommendations serve to strengthen the legitimate interests of law enforcement officials and private citizens. Culpable individuals would be prosecuted successfully and juries would be allowed to fulfill their critical function without deviation from carefully formulated jury instructions. For whatever else may emanate from the *De Lorean* verdict, the general public has shown that it will not countenance unrestricted and intrusive government undercover operations that serve to create crime rather than to protect the public.

Kevin Hackett O'Neill

222. *See* People v. Isaacson, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978). *See supra* notes 153 & 155 and accompanying text (*Isaacson* test described and endorsed as basis of due process defense).