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Entrapment, Shocked Consciences, and the Staged Arrest

Bennett L. Gershman*

I. INTRODUCTION

On November 1, 1973, in the Criminal Court of the City of New York, Kings County, Stephen Vitale was arraigned on a charge of armed robbery. According to the complaining witness, Morton Hirsch, Vitale placed a pistol against Hirsch's head, threatened him, and robbed him of over \$8,000. The supporting affidavit of Police Officer Brian Cosgrove stated that as Vitale was fleeing from the robbery scene, Cosgrove arrested him and seized a pistol from him.¹

On the surface, this proceeding appeared no different from thousands of similar proceedings taking place daily in criminal courts throughout the country. In fact, Vitale, Hirsch, and Cosgrove were undercover agents; New York's Special Anti-Corruption Prosecutor had authorized their activities² as part of a program to detect corruption in the criminal justice system.³ False court documents, false statements made to judges, and

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1. *People v. Vitale*, No. K340266 (Crim. Ct. of New York City, Kings County, N.Y. Nov. 1, 1973).

2. *Nigrone v. Murtagh*, 46 A.D.2d 343, 344-45, 362 N.Y.S.2d 513, 514-15 (1974), *aff'd*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

3. Pursuant to an executive order of the Governor of New York State, a special prosecutor was appointed to investigate corruption in the New York City criminal justice system. N.Y. ADMIN. CODE tit. 9, §§ 1.55-1.59 (1972). This action was prompted, in part, by the Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedures, popularly known as the "Knapp Commission," which recommended the appointment of a special and independent prosecuting attorney who would not be subject to the inherent limitations on local prosecutors, including dependence on the police in order to prosecute effectively. COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES, THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 13-16 (1972) (hereinafter cited as KNAPP REPORT).

The author of this Article served from 1973-1976 as a Special Assistant Attorney General in the office of the Special Prosecutor of the State of New York. In that capacity, he investigated and prosecuted numerous corruption cases.

false testimony given to a grand jury provided the staged arrest with "legitimacy."⁴ As a result of this investigation, undercover agents obtained evidence implicating three judges and two defense attorneys in a corrupt scheme to affect legal proceedings in the *Vitale* case.⁵

The efforts to prosecute these allegedly corrupt officials resulted in swift and resounding judicial condemnation of the state's undercover procedure. In *Rao v. Nadjari*,⁶ a federal court labeled the prosecutor's conduct "foul, illegal and outrageous."⁷ Echoing this shock, a state appellate court in *Nigrone v. Murtagh*⁸ declared that "[s]uch a perversion of the criminal justice system by an overzealous prosecutor is illegal, outrageous and intolerable and we condemn it."⁹ The latter court quoted the celebrated dissent of Justice Brandeis in *Olmstead v. United States*:¹⁰

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against this

One of the principal issues that he litigated for that office was the propriety of the staged arrest technique, the subject of this Article.

There has been a dramatic increase from 1970 to 1978 in the prosecution and conviction of federal and state public officials for crimes involving corrupt activities. See U.S. DEP'T. OF JUSTICE, *FEDERAL PROSECUTIONS OF CORRUPT PUBLIC OFFICIALS 1970-1978* (1979). There does not appear to be any separate statistical study on corruption in the court system. There is no reason to expect, however, that corruption in the court system is any less pervasive than corruption in other branches of government. The author's experience as a prosecutor reinforces this belief.

For literature on the subject of corruption, see *Judicial Discipline and Tenure: Hearings on S. 295, S. 522, & S. 678 Before the Subcomm. on Improvements in Judicial Machinery and the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); KNAPP REPORT, *supra*, at 15, 187; J. BORKIN, *THE CORRUPT JUDGE* (1980); R. CONDON, *OPERATIONAL GUIDE TO WHITE-COLLAR CRIME ENFORCEMENT, MANAGING INVESTIGATION INTO PUBLIC CORRUPTION* (1977); R. LYMAN, W. FLETCHER & J. GARDNER, *PREVENTION, DETECTION AND CORRECTION OF CORRUPTION* (1977); G. NAFTALIS, *WHITE COLLAR CRIMES* (1980).

4. *Nigrone v. Murtagh*, 46 A.D.2d 343, 347, 362 N.Y.S.2d 513, 517 (1974).

5. See Brief for Respondent at 7, 13, *Nigrone v. Murtagh*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

6. No. 75 Civ. 2376 (S.D.N.Y. Sept. 30, 1975).

7. *Id.* See *Rao, Jr. v. Nadjari*, No. 75 Civ. 2377 (S.D.N.Y. Sept. 30, 1975).

8. 46 A.D.2d 343, 362 N.Y.S.2d 513 (1974), *aff'd*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

9. 46 A.D.2d at 347, 362 N.Y.S.2d at 517.

10. 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

pernicious doctrine this Court should resolutely set its face.¹¹

In contrast to the above condemnation, the courts traditionally have condoned the use of undercover techniques against private citizens when they involved both deception and participation in serious offenses, such as narcotics offenses, because these techniques are practically indispensable to crime detection.¹² Such crimes are usually conducted covertly. There are no "victims" to complain to law enforcement officials, and there is little tangible evidence of past unlawful activity. In the narcotics area, for example, the Supreme Court has recognized that "law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices."¹³

Not surprisingly, therefore, the experienced law enforcement officials who directed the *Vitale* case concluded that it was permissible to expose corruption in the well-insulated and procedurally complex system of justice by penetrating that system with a contrived case involving an undercover agent posing as a defendant.¹⁴ They believed that a realistic and effective investigation was possible only if they fabricated a criminal case and shepherded it through the various stages in the justice system. With the sham arrest as bait, and with the investigators' careful monitoring of the case, an act of corruption could be detected.

In part II, this Article discusses the relatively spare and unsettled case law relating to the staged arrest, reflected primarily in *United States v. Archer*¹⁵ and *Nigrone v. Murtagh*.¹⁶ Part

11. 46 A.D.2d at 348, 362 N.Y.S.2d at 517-18.

12. See *Hampton v. United States*, 425 U.S. 484, 495-96 n.7 (1976) (Powell, J., concurring); *United States v. Russell*, 411 U.S. 423, 432 (1973).

13. *United States v. Russell*, 411 U.S. at 432. One may argue that there is a similar need for undercover techniques in investigations of judicial corruption. See notes 297-99 *infra* and accompanying text.

14. Brief for Respondent at 6, *Nigrone v. Murtagh*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

15. 486 F.2d 670 (2d Cir. 1973).

16. 46 A.D.2d 343, 362 N.Y.S.2d 513 (1974), *aff'd*, 36 N.Y.2d 421, 330 N.E.2d 34, 369 N.Y.S.2d 75 (1975). Aside from these two cases, there has been virtually no critical commentary or scholarly analysis of this investigative procedure, its relation to the doctrine of entrapment, or its illumination of the need for greater judicial control over investigative methods that the courts find offensive and unfair. The absence of significant legal analysis in this area is surprising, for while such an undercover operation admittedly is imaginative, innovative, and controversial, its use parallels other investigative techniques that recently have proven effective and successful in discovering corruption at other levels of government. See, e.g., *United States v. Jannotti*, No. 81-1020 (3d Cir. Feb. 11, 1982);

III of this Article examines the defense of entrapment, one of the most confusing and controversial legal doctrines, and its application to the staged arrest. Because the staged arrest ineluctably raises questions of offensive government conduct that neither constitutes unlawful entrapment nor invades any independent rights of citizens, part IV considers the analysis of courts that have invoked the due process clause to limit government investigations. In view of the failure of these courts to provide any meaningful due process standards to control police undercover practices, part V sets out objective criteria helpful in evaluating the due process implications of undercover procedures in general, and the staged arrest in particular. Finally, part VI proposes, as a safeguard against government abuse of power, a procedure similar to the warrant procedure for obtaining judicial authorization to conduct certain types of undercover investigations, in this instance a "staged arrest warrant."

II. THE STAGED ARREST: CASE LAW

When a federal prosecutor and a state prosecutor employed the simulated arrest during two unrelated government investigations into the criminal justice system in New York City, both investigations resulted in criminal prosecutions. In *United States v. Archer*, the Court of Appeals for the Second Circuit reversed the convictions of three defendants—a prosecutor, a defense attorney, and a bail bond agent—for violations of the Federal "Travel Act"¹⁷ on the ground that the evidence was insufficient to show that the defendants used federal interstate facilities to commit the offenses of bribery and conspiracy.¹⁸ Thereafter, a state grand jury indicted the same defendants for violations of state bribery and conspiracy laws.¹⁹ Their convictions were affirmed on appeal over claims that the

text accompanying notes 248-56 *infra*. Hence, legal analysis directed at the staged arrest would be extremely valuable in assessing the lawfulness of other types of creative and controversial law enforcement operations.

17. 18 U.S.C. § 1952 (1976). The so-called "Travel Act," entitled "Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises," in substance prohibits the use of any facility in interstate or foreign commerce to commit or promote "unlawful activity," defined to include offenses involving gambling, avoidance of liquor taxation, narcotics, prostitution, extortion, bribery, or arson.

18. 486 F.2d 670, 672 (2d Cir. 1973).

19. *Klein v. Murtagh*, 44 A.D.2d 465, 355 N.Y.S.2d 622, *aff'd*, 34 N.Y.2d 988, 318 N.E.2d 606, 360 N.Y.S.2d 416 (1974) (court refused to dismiss the indictment on the grounds of double jeopardy).

use of the staged arrest technique barred prosecution.²⁰

In the aftermath of *United States v. Archer*—perhaps upon a suggestion contained in that opinion²¹—a New York State prosecutor used the same investigative procedure to infiltrate the justice system. As a result, three defendants—a judge and two lawyers—were indicted for perjury. In *Nigrone v. Murtagh*, an appellate court scathingly condemned the use of the staged arrest.²² A majority, however, found that the perjury was independent of the misconduct and denied the motions to dismiss the indictments.²³

A. *UNITED STATES V. ARCHER*

The staged arrest was conceived in February, 1972, as part of an intensive combined federal and local investigation into corruption within the New York criminal justice system.²⁴ Federal prosecutors had reportedly received “abundant information about the widespread fixing of cases in the Queen’s County District Attorney’s office”²⁵ and believed that it was essential to arrange undercover penetration of corrupt activities.²⁶

According to the scheme,²⁷ a federal narcotics agent named Sante Bario assumed the name of Salvatore Barone and posed as a resident alien and member of the Las Vegas underworld. Arrested and charged with the illegal possession of two handguns,²⁸ Bario met a bail bond agent named Wasserberger, who, in turn, introduced Bario to a Queens attorney named Klein.²⁹

20. *People v. Archer*, 68 A.D.2d 441, 417 N.Y.S.2d 507 (1979), *aff’d*, 49 N.Y.2d 978, 406 N.E.2d 804, 428 N.Y.S.2d 949, *cert. denied*, 449 U.S. 839 (1980).

21. 468 F.2d at 672 n.1 (“A special prosecutor has since been named by the Governor of New York to investigate precisely the kind of corruption in offices of New York City district attorneys at which the federal prosecutor’s activities here were aimed.”).

22. 46 A.D.2d 343, 347, 362 N.Y.S.2d 513, 516-17 (1974), *aff’d*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

23. *Id.* at 348, 362 N.Y.S.2d at 518.

24. *United States v. Archer*, 486 F.2d at 672.

25. *Id.* at 683. (on petition for rehearing).

26. *Id.* at 672.

27. *Id.* at 672-74.

28. Provided with two loaded pistols, a fake Nevada driver’s license, and a false immigration card, Bario was arrested by a New York City police officer assigned to the investigation. *Id.*

29. Wasserberger told Bario that he knew a Queens attorney named Frank Klein, with “big connections,” who could “do something” for Bario. Wasserberger said that it was unfortunate that the case was going before the grand jury because “it could have been taken care of before the lower court” and that they should try to “get the case kicked out before it went any further.” *Id.* at 673.

Wasserberger and Klein, together with the Queens assistant district attorney Norman Archer,³⁰ fabricated a story to justify Bario's possession of the guns.³¹ Klein told Bario that the price for this fix was \$15,000, which Bario paid in marked bills.³²

After a dress rehearsal in Klein's office, Bario went before the grand jury and, guided by leading questions from Archer, told his story. Prior to deliberations, Archer minimized the seriousness of Bario's offense and advised the grand jury, untruthfully, that the arresting officer's observations might have been insufficient to justify the arrest. The grand jury returned no indictment.³³

Klein, Archer, and Wasserberger were ultimately convicted of violating the Federal Travel Act by utilizing interstate facilities to commit unlawful activities.³⁴ The court of appeals, however, reversed on the narrow ground of insufficient proof.³⁵ Writing for a unanimous court, Judge Friendly went beyond this narrow ground to criticize, in dicta, the prosecution's undercover techniques. "We do not at all share the Government's

30. Klein advised Bario that, under the circumstances, "the only thing then left to do was to have the grand jury return no indictment" but that this would cost money—"probably between \$10,000 and \$15,000 in cash." Wasserberger later informed Bario that part of the money would have to go to the Queens assistant district attorney who would present the case to the grand jury. *Id.*

31. The three men concocted a story whereby Bario would testify that he worked for a Las Vegas hotel and was obliged to carry a pistol, for which he had a Nevada license. *Id.* at 674.

32. *Id.*

33. Bario claimed that he was unaware that the Nevada license was invalid in New York. When one of the grand jurors asked Archer whether he had verified the existence of the Nevada pistol permit, Archer responded that he had. *Id.*

34. The predicate for federal jurisdiction was three telephone calls: a call from Klein returning a call from Bario in Newark, New Jersey; unsuccessful attempts by Wasserberger to reach Bario in Las Vegas; and a call to Klein from Bario from Paris. *Id.* at 673-74.

35. *Id.* at 672. The court found that the three telephone calls were "insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States." *Id.* at 683. The court concluded that Klein's return calls to Bario were outside the purview of the federal act because the communication was "totally fabricated" by the government. *Id.* at 681. Wasserberger's calls to Las Vegas also were "provoked" by the government and, moreover, could not have promoted any unlawful activity since Bario merely used the hotel number as a ruse and was not a guest there. *Id.* at 682. Finally, leaving open the question of whether a call from an undercover agent can ever meet the requirement of the Act, the Court said that the Paris call from Bario was a casual occurrence; a call from New York could have served its purpose equally well. *Id.* at 682-83. See *Rewis v. United States*, 401 U.S. 808 (1971); *United States v. Corallo*, 413 F.2d 1306 (2d Cir.), cert. denied, 396 U.S. 958 (1969).

pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; the federal prosecutor . . . went beyond any proper prosecutorial role,"³⁶ and "authorized [agents] to engage in crimes under New York law."³⁷

Since the government had not implanted the criminal design in the minds of the defendants, Judge Friendly concluded that they could not raise the defense of entrapment. But a judicial rebuke for the undercover tactics employed in *Archer* was nonetheless apparent. Judge Friendly went on to distinguish this case from the typical federal narcotics undercover investigation, in which agents posing as prospective purchasers induce a sale of drugs.³⁸ According to Friendly, government agents in a narcotics investigation do not commit independent crimes of their own.³⁹ In *Archer*, however, government agents did commit crimes independent of the criminal acts for which the defendants were prosecuted.⁴⁰ In conclusion, Judge Friendly observed: "[T]here is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums."⁴¹

The *Archer* case provided no sound basis for its criticism of the staged arrest. The court did not discuss the apparent necessity for undercover penetration of the justice system.⁴² It did not propose alternative procedures, nor did it say whether it would accept some limited use of a staged arrest technique.⁴³ Moreover, the court neither discussed nor attempted to balance the competing harms. It did not evaluate the complex and serious problem of corruption in the justice system—starkly dramatized by the conduct of the *Archer* conspirators.⁴⁴ Nor did it

36. 486 F.2d at 672.

37. *Id.* at 675.

38. *Id.*

39. *Id.* at 675-76.

40. *Id.* at 675. The court is presumably referring to the offenses of criminal possession of a weapon, N.Y. PENAL LAW §§ 265.01-265.04 (McKinney 1974); perjury in the first degree, N.Y. PENAL LAW § 210.15 (McKinney 1965); and offering a false instrument for filing in the first degree, N.Y. PENAL LAW § 175.35 (McKinney 1965).

41. 486 F.2d at 676-77. Judge Friendly relied on language in *United States v. Russell*, 411 U.S. 423 (1973), one of the principal entrapment decisions.

42. See text accompanying notes 288-90 *infra*.

43. See text accompanying notes 289-90 *infra*.

44. Although the seriousness of the problem would not alone justify any

explain or examine its assumption that the deception by government agents necessarily constituted an adverse consequence or harm to society.⁴⁵ More specifically, the court, in its broad remonstrances directed at governmental law breaking, did not identify the substance of the crimes allegedly committed, or suggest whether they were evils or mere technicalities.⁴⁶ The court also failed to analyze satisfactorily whether the undercover agent possessed a culpable mental state, or *mens rea*, traditionally required for criminal behavior.⁴⁷ In sum, the court in *Archer* displayed a visceral repugnance for the conduct of the law enforcement officials—conduct that clearly shocked its conscience—without providing a well-reasoned basis for its conclusion.

B. *PEOPLE V. ARCHER*

In the state proceedings that followed the dismissal of the federal indictment, Archer was found guilty of receiving a bribe.⁴⁸ On appeal, the reviewing court affirmed his conviction, holding that the staged arrest procedure violated neither due process nor a sense of justice.⁴⁹

The court, noting that Archer never claimed that he was entrapped or that he was an unwilling participant in the

type of law enforcement response, it is a factor that one must consider in balancing the harm caused by the crime against the harm, if any, caused by the government's conduct. The government made this argument, but the court did not elaborate upon it. See 486 F.2d at 677 n.8.

45. There surely is a considerable difference between government agents robbing and beating innocent civilians to gather evidence against a gang of muggers—the court's vivid illustration—and the unspecified harm to the justice system that allegedly occurred in *Archer*. Although the court acknowledged different levels of offensiveness of government conduct, *id.* at 676, it did not explain how one can measure or discover such differences. See text accompanying notes 355-62 *infra*.

46. See text accompanying notes 301-20 *infra*.

47. The court did suggest that governmental participation in narcotics offenses is distinguishable from governmental participation in staged arrests because in the former case the government agent has "no criminal intent." 486 F.2d at 675. The court's assertion, however, was conclusory, and did not suggest why criminal intent is lacking in narcotics cases but is present in *Archer*.

48. *People v. Archer*, 68 A.D.2d 441, 417 N.Y.S.2d 507 (1979), *aff'd*, 49 N.Y.2d 978, 406 N.E.2d 804, 428 N.Y.S.2d 949, *cert. denied*, 449 U.S. 839 (1980). A prior motion to dismiss on double jeopardy grounds was denied. See *Klein v. Murtagh*, 44 A.D.2d 465, 355 N.Y.S.2d 622, *aff'd*, 34 N.Y.2d 988, 318 N.E.2d 606, 360 N.Y.S.2d 416 (1974).

As a result of a pretrial "investigative technique hearing," the reviewing court had a more complete record on the issue of governmental misconduct. *People v. Archer*, 68 A.D.2d at 446, 417 N.Y.S.2d at 511.

49. *People v. Archer*, 68 A.D.2d at 449, 417 N.Y.S.2d at 513.

scheme,⁵⁰ did not consider those defenses. Instead, it analyzed the case under the due process clause of the state constitution, which "imposes higher standards on police conduct" than federal due process standards.⁵¹ Under a state due process analysis, the court considered the following four factors: whether the government "manufactured a crime which otherwise would not likely have occurred," or merely involved itself in ongoing criminal activity; whether the defendant's reluctance or unwillingness to commit the crime was overcome by appeals to humanitarian instincts such as sympathy, past friendship, temptation of exorbitant gain, or persistent solicitation; whether the government's motive was "simply a desire to obtain a conviction" rather than "to prevent further crime or protect the populace;" and whether the government engaged in "criminal or improper conduct repugnant to a sense of justice."⁵² In considering these factors, the court said that it would focus on the overriding law enforcement objective of crime prevention rather than on the officials' possible "encouragement of and participation in sheer lawlessness."⁵³

Applying these factors to Archer's case, the court determined that no due process violation had occurred. First, the government did not manufacture a crime that would not likely have occurred because the defendants "were engaged in ongoing criminal activity long prior to the appearance on the scene of the government agent."⁵⁴ In addition, Archer was not involved because of any temptation, inducement, or instigation by the government. The attorney Klein independently brought Archer into the conspiracy as the central figure in the fix.⁵⁵ Furthermore, the government acted in good faith and not for venal reasons.⁵⁶ Finally, the government did not commit crimes⁵⁷ or engage in improper conduct inconsistent with a

50. *Id.* at 447, 417 N.Y.S.2d at 511.

51. *Id.* at 446, 417 N.Y.S.2d at 511. See N.Y. CONST. art. 1, § 6 ("No person shall be deprived of life, liberty or property without due process of law."). See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

52. 68 A.D.2d at 446-47, 417 N.Y.S.2d at 511.

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

54. 68 A.D.2d at 447, 417 N.Y.S.2d at 511.

55. *Id.*

56. According to the court, "the record conclusively establishes that the government's motivation in this affair was to weed out existing corruption and restore the integrity of the criminal justice system in Queens County." *Id.* at 447, 417 N.Y.S.2d at 511-512.

57. Although "taken literally," the government's conduct "could well fall, prima facie, within the prohibitions of our Penal Law," such conduct, even if

sense of justice. The court found that the government tried to limit its deception to the minimum extent necessary, and conveyed the plan in advance to the highest-ranking state judge. Furthermore, the deception of the grand jury was planned and engineered by the conspirators themselves, not by the government.⁵⁸ In sum, while cautioning that it might be wiser to develop judicial guidelines to circumscribe such deception, the court found that the conduct of the law enforcement officials was not improper.⁵⁹

The state court's analysis of the staged arrest was more so-

technically criminal, was justified as a "reasonable exercise of [the government's] official powers, duties or functions." *Id.* at 448, 417 N.Y.S.2d at 512. The court referred to N.Y. PENAL LAW § 35.05 (McKinney 1975) which provides: "[C]onduct which would otherwise constitute an offense is justifiable and not criminal when: . . . [s]uch conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions." The *Practice Commentary* states that the provision "was designed to exempt peace officers and other public servants from criminal liability for conduct reasonably performed by them in the course of their duties . . . such as possession of narcotics, policy slips and tear gas." Hechtman, *Practice Commentaries to N.Y. PENAL LAW § 35.05* (McKinney 1975). See *People v. Mattison*, 75 A.D.2d 959, 428 N.Y.S.2d 355 (1980).

Eighteen states in addition to New York have included law enforcement justification statutes in their criminal codes. See ARK. STAT. ANN. § 41-503 (1975); COLO. REV. STAT. § 18-1-701 (1973); CONN. GEN. STAT. § 53a-17 (1977); DEL. CODE ANN. tit. 11, § 704.11 (1979); GA. CODE § 26-901(b) (1978); HAWAII REV. STAT. § 703-307 (1976); IOWA CODE ANN. § 411 (West 1979); KY. REV. STAT. § 503.040 (1975); LA. REV. STAT. ANN. § 14.18(1) (West 1974); ME. REV. STAT. ANN. tit. 17a, § 102 (Pamphlet 1976); N.H. REV. STAT. ANN. § 627.5 (1974); N.D. CENT. CODE § 12.1-05-02 (1976); OHIO REV. CODE ANN. § 2901.05(c)(2) (Page Special Supp. 1973); OR. REV. STAT. § 161.195 (1979); 18 PA. CONS. STAT. ANN. § 504 (Purdon 1973); TEX. PENAL CODE ANN. § 9.21 (Vernon 1974); UTAH CODE ANN. § 76-2-401(2) (1978); WIS. STAT. § 939.45 (1979).

The *Model Penal Code* also includes such a provision. See MODEL PENAL CODE § 3.03 (Proposed Official Draft 1962).

58. According to the court, this deception "constituted the very means" by which the defendants carried out the crime. 68 A.D.2d at 448, 417 N.Y.S.2d at 512.

59. *Id.* at 449, 417 N.Y.S.2d at 512-13. Following this affirmance, the New York Court of Appeals also affirmed the defendant's conviction. See *People v. Archer*, 49 N.Y.2d 978, 406 N.E.2d 804, 428 N.Y.S.2d 949, cert. denied, 449 U.S. 839 (1980). Archer then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming that the prosecutorial action constituting the basis for his conviction had violated due process. The district court denied the petition without opinion, and the Court of Appeals for the Second Circuit affirmed. *Archer v. Commissioner of Correction*, 646 F.2d 44 (2d Cir. 1981). The circuit court noted that in cases where convictions were reversed because of outrageous police conduct, "the impermissible police conduct was inflicted directly upon the defendant." *Id.* at 47. The court expressly left open the question of whether conduct of law enforcement officials not inflicted directly upon the defendant—as in Archer's case—might be outrageous enough to constitute a denial of due process. *Id.* In any event, "the conduct here at issue did not reach that level." *Id.*

phisticated than that of the Second Circuit. Rather than merely reacting negatively to the investigators' techniques, the court attempted to establish meaningful criteria to evaluate the appropriateness of the investigators' actions. Although it did not elaborate on its suggestion of developing "judicial guidelines," its criteria provide guidelines in formulating an objective due process analysis.⁶⁰

C. *NIGRONE V. MURTAGH*

The undercover operation in *Nigrone v. Murtagh* was triggered by an individual who claimed he dealt directly with a member of the judiciary to "fix" a criminal case in New York City.⁶¹ The New York Special Prosecutor decided to investigate by infiltrating the court system with a sham case. A police officer, using the alias "Stephen Vitale," stole approximately \$8,200 in cash from a businessman, at gunpoint.⁶² Vitale was charged, arrested, and released upon paying his bail of \$10,000, set by a judge unaware of the charade.⁶³

The prosecutor engaged another undercover agent, Mrs. Gatti, to contact United States Customs Court Judge Paul R. Rao, an old family friend, to enlist his help for Vitale, representing that Vitale was the son of "dear friends." Judge Rao told Mrs. Gatti that the best way to handle the matter was to obtain a lawyer who "knew the judge" in the case. Judge Rao recommended his son, Paul Rao, Jr., a practicing attorney. Gatti immediately contacted Rao, Jr., who agreed to represent Vitale. Rao, Jr., helped Vitale prepare a phony story about how he raised the \$10,000 cash bail; advised Vitale that he would need money to "talk to" certain people who could help "squash" Vitale's case; discussed Vitale's case with a civil court judge, who in turn apprised a superior court judge that there was money to be made in the Vitale case; and informed his law partner, Salvatore Nigrone, that "the hook was in" (a euphe-

60. See notes 229-35 *infra* and accompanying text.

61. See Brief for Respondent at 12, *Nigrone v. Murtagh*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975). The court did not dispute that "allegedly specific information about corruption in the criminal justice system" stimulated the use of the technique. 46 A.D.2d at 344, 362 N.Y.S.2d at 514.

62. See notes 1-5 *supra* and accompanying text. For a discussion of the facts in the case, see *Nigrone v. Murtagh*, 46 A.D.2d 343, 344-46, 362 N.Y.S.2d 513, 513-16 (1974). See also Brief for Respondent at 6, *Nigrone v. Murtagh*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

63. The prosecutor's office also contrived a false criminal record for Vitale, indicating that he had two prior arrests. 46 A.D.2d at 345, 362 N.Y.S.2d at 515.

mism for a "fix") in the Vitale case.⁶⁴

A grand jury subsequently indicted Vitale. Neither the prosecutor presenting the evidence to the grand jury nor the grand jurors were aware that the story was a fabrication and that no actual robbery had occurred. A special anticorruption grand jury then was convened. In testifying before that special grand jury, the defendants lied about their prior activities.⁶⁵ Perjury indictments against Rao, Rao, Jr., and Nigrone followed. The defendants moved to dismiss the indictments on the ground of prosecutorial misconduct, urging specifically that the prosecutor committed criminal acts and disgraced the criminal process. The appellate division, which sustained the indictments, nevertheless unanimously concurred that the prosecutor had committed serious misconduct.⁶⁶

64. *Id.* at 344-46, 362 N.Y.S.2d at 515-16.

65. The Raos and Nigrone waived immunity and testified to their knowledge and participation in the "fix." Their perjury became apparent when the prosecutor introduced into evidence several incriminating conversations that the government had surreptitiously taped and recorded. *Id.* at 346, 362 N.Y.S.2d at 516.

Judge Rao was indicted on two counts of perjury in the first degree for denying that he ever told Gatti (1) how to handle her problem in affecting a judge's actions in a criminal case; and (2) that the bail problem could be handled by getting a lawyer who knew the judge. Record on Appeal at 126-31, Nigrone v. Murtagh, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

Rao, Jr., was indicted on seven counts of perjury in the first degree for denying (1) that he had ever told Vitale that he would have to get money so that he would "know how to talk" to other people who could question his case; (2) that he had seen a judge, other than the judge presiding in the case, about the Vitale case; (3) that he had ever seen anyone in the court system to obtain assistance in the Vitale case; (4) that he had ever discussed with Vitale or anyone else whether a "hook was in" in the Vitale case; (5) that he helped create a "phony" story or defense for Vitale; (6) that he had no knowledge that the bail money was the proceeds of the robbery; and (7) that Vitale had never told him that his parents had not furnished the bail. *Id.* at 164-80.

Nigrone was indicted on one count of perjury in the first degree for testifying that he had never asked Rao, Jr., if the "hook was in" in the Vitale case. *Id.* at 112-14.

66. The court wrote:

There is no doubt whatsoever that, upon the facts here presented, the office of Special Prosecutor has exceeded its proper prosecutorial function. The deception of grand jurors, Judges and Assistant District Attorneys and the filing of false official documents are absolutely intolerable. The criminal justice system operates to protect the individual from both unsubstantiated accusations of guilt and illegal or outrageous conduct by an overreaching prosecutor. It is an impartial arbiter, exercising its judgment, for the most part, after law enforcement authorities have completed their function of detecting crime and apprehending the alleged criminal. When, as here, the criminal justice system is made an unwitting accomplice of an overzealous prosecutor, before the fact, its impartiality is destroyed and contempt for the law encouraged.

46 A.D.2d at 347, 362 N.Y.S.2d at 516-17.

The court objected most to the presentation of the fictitious case to the grand jury, since the purpose was not for a determination of whether Vitale had committed a crime or to exonerate him of an accusation, but rather to legitimize his undercover role as a criminal facing prosecution, and to allow the defendants to influence the case corruptly.⁶⁷ Having broadly condemned the misconduct of the prosecutor,⁶⁸ however, a majority of the court held that the perjury indictments were valid.⁶⁹ Given the important public interest in uncovering corruption, and the corresponding duty of all citizens to assist the grand jury in arriving at the truth, "[n]o person called before a duly constituted Grand Jury may be permitted to have any excuse to lie."⁷⁰ Moreover, the court did not find the case so egregious that it violated due process. The prosecutor neither manufactured nor participated in the defendants' perjury. Although he induced them to commit bribery, "that conduct was negligible once the Special Grand Jury entered the picture. It was then that a new and independent inexcusable wrong was allegedly committed."⁷¹

The two dissenting judges shared the majority's outrage at the "Javert type techniques" of the prosecutor, particularly his "profanation of the sacred institution—the Grand Jury."⁷² The dissent catalogued at least ten crimes that the prosecutor may have committed,⁷³ and criticized the prosecutor's motive in

67. *Id.* at 347, 362 N.Y.S.2d at 517. The court felt that such a misuse of the justice system was "illegal, outrageous and intolerable." *Id.*

68. The court noted that "[i]f the justice system is to have any usefulness, it must be respected and believed. The necessary confidence cannot be preserved when Grand Juries and Judges are duped in charades composed of lies and deceptions fabricated by the law officers of the State." *Id.*

69. *Id.* at 348, 362 N.Y.S.2d at 518.

70. *Id.* at 348-49, 362 N.Y.S.2d at 518.

71. *Id.* at 350, 362 N.Y.S.2d at 519. Noting that the defendants never claimed they were illegally entrapped, or that the government violated any of their personal constitutional rights, the court refused to extend the exclusionary rule. *See Wong Sun v. United States*, 372 U.S. 471 (1963).

72. 46 A.D.2d at 355, 359, 362 N.Y.S.2d at 524, 528. For a history of the grand jury, see 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 305-24 (5th Am. ed. 1847); 1 W. HOLDSWORTH, HISTORY OF THE ENGLISH LAW 321-23 (7th rev. ed. 1956); 1 F. POLLOCK & F. MATTLAND, THE HISTORY OF ENGLISH LAW 151 (2d ed. 1901). For a history of the grand jury in America, see R. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941 (1963).

Modern commentators, however, have viewed the grand jury as a legal fiction, clothing with respectability, neutrality, and independence what are in truth the actions of the prosecutor. *See M. FRANKEL & G. NAFTALIS, THE GRAND JURY* 21-23 (1977). *See also* Gershman, *The "Perjury Trap,"* 129 U. PA. L. REV. 624, 630-33 (1981).

73. 46 A.D.2d at 352, 362 N.Y.S.2d at 522. The alleged crimes included per-

summoning the defendants before the grand jury.⁷⁴ The dissenters, however, unlike the majority, would have dismissed the indictments. Quoting from *Rochin v. California*,⁷⁵ a case in which the Supreme Court reversed, on due process grounds, a state narcotics conviction because the evidence was forcibly extracted from the defendant's stomach, the dissenting judges concluded that the behavior of the prosecutor violated due process since the prosecutor did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."⁷⁶ The dissent noted that due process, although usually applied to trial procedures, has recently been extended to cover pretrial investigative procedures, particularly if the exclusionary rule fails to provide an effective remedy.⁷⁷ There was a considerable difference, according to the dissent, between undercover investigations of criminal projects actually in progress and infiltration into ostensibly innocent institutions.⁷⁸ The dissent also disagreed with, but did not elaborate upon, the majority's assertion that there was no violation of the defendants' constitutional or other cognizable rights.⁷⁹

Upon reading the majority and dissenting opinions,⁸⁰ one is

jury in the first degree, forgery in the second degree, offering a false instrument for filing in the first degree "and various misdemeanors." *Id.*

74. The dissent claimed that the prosecutor attempted to "set . . . up" the defendants. *Id.* at 355, 362 N.Y.S.2d at 524.

75. 342 U.S. 165 (1952).

76. 46 A.D.2d at 356, 362 N.Y.S.2d at 525 (quoting *Rochin v. California*, 342 U.S. at 172; see text accompanying note 179 *infra*).

77. *Id.* The dissent cited *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). In *Toscanino*, the court remanded the case for a hearing regarding allegations that the defendant was forcibly brought into the United States after being kidnapped and tortured. *Id.* at 281.

78. The opinion noted:

Infiltration by deceit without the utilization of the judicial process may well be necessary in the never ending and legitimate war against crime, but despoilation of the fountain of justice itself must be refused sanction as violative of every sense of decency, enlightened public policy and a due regard for the observance of good morals and ethical conduct.

46 A.D.2d at 355, 362 N.Y.S.2d at 524 (emphasis omitted).

79. *Id.* at 358, 362 N.Y.S.2d at 527. The dissent also disputed, without elaboration, the majority's attempt to "erect a Berlin wall" between the *Vitale* case, and the subsequent perjury indictments. *Id.*

80. On appeal, the court of appeals affirmed on procedural grounds, without reviewing the merits of the criticized conduct. *Nigrone v. Murtagh*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

After this affirmation, the case was vigorously litigated. Actions for declaratory and injunctive relief by Rao and Rao, Jr., brought in the District Court for the Southern District of New York were dismissed. *Rao v. Nadjari*, No. 75 Civ. 2376 (S.D.N.Y. Sept. 30, 1975); *Rao, Jr. v. Nadjari*, No. 75 Civ. 2377 (S.D.N.Y. Sept.

struck by the authors' unusually hyperbolic and vituperative language. The Second Circuit's language in *Archer*, in contrast, is restrained. One would not expect this expression of outrage by the same state appellate court that affirmed the conviction in *Archer*; the facts in the two cases are not sufficiently dissimilar to call for such markedly different characterizations of the prosecutor's conduct.

Like the Second Circuit in *United States v. Archer*, the court in *Nigrone* did not satisfactorily analyze its criticism of the prosecutor's commission of crimes. The court failed to examine the necessity for the procedure and whether alternative techniques were available to gather evidence of corruption in the court system. The court's emotional rhetoric also precluded a dispassionate discussion of the specific harm that the prosecutor's conduct occasioned, and whether that harm was outweighed by the uncovering of corruption. Moreover, the court did not explain why it is any less criminal for a government officer to participate in narcotics or counterfeiting conspiracies than to infiltrate the court system.

Two doctrinal limits that might provide the principled and rigorous analysis so apparently lacking in the several judges' outraged opinions were raised, but never developed in these decisions. The first of these limits, the doctrine of entrapment,⁸¹ requires an analysis of both the particular undercover technique employed and the general policies that questionable undercover tactics advance or disserve. The second doctrine, due process,⁸² offers an even more particular analytical frame-

30, 1975). In a subsequent action, the Extraordinary Special and Trial Term dismissed the indictments on Dec. 2, 1975, predicated its decision upon the presentation of allegedly improper evidence to the grand jury that indicted the defendants. On appeal, however, the indictments were reinstated. *People v. Rao*, 53 A.D.2d 904, 386 N.Y.S.2d 441 (1976).

The defendants then renewed their motions to dismiss the indictments in the trial court. The court granted Rao's motion, finding that the evidence to support the two perjury counts was insufficient. *People v. Rao*, 177 N.Y.L.J., March 17, 1977, at 14-15 (Kings County N.Y. Sup. Ct.). The court denied motions to dismiss as against Rao, Jr., and Nigrone. Nigrone's indictment was subsequently dismissed on the ground that electronically recorded evidence necessary to prove the perjury was improperly sealed and therefore required suppression. *People v. Rao, Jr.*, 177 N.Y. L.J., September 13, 1977, at 12.

A jury later convicted Rao, Jr., of perjury in the third degree. See N.Y. PENAL LAW § 210.05 (McKinney 1965). This conviction was reversed on grounds of prosecutorial misconduct amounting to a violation of due process. *People v. Rao*, 73 A.D.2d 88, 425 N.Y.S.2d 122 (1980).

81. See notes 83-169 *infra* and accompanying text.

82. See notes 170-263 *infra* and accompanying text.

work for isolating and balancing the elements of harm, prosecutorial good faith, and unfairness.

III. ENTRAPMENT AND THE STAGED ARREST

Entrapment is one of the most confusing and controversial legal doctrines.⁸³ Unknown at common law,⁸⁴ it evolved into a substantive criminal defense only in the last fifty years.⁸⁵ The word itself should not connote sinister and legally unacceptable behavior on the part of government officials in luring citizens into crime.⁸⁶ The courts consistently have recognized that it is permissible—and often indispensable—for government officials to contrive traps and to utilize deception to obtain evidence of crime.⁸⁷ Entrapment becomes unlawful and constitutes a defense only when governmental officials entice innocent persons into crime.⁸⁸ Thus, the critical inquiries are the nature of the enticement and the character of the person enticed. Neither of these issues is easily resolved. In examin-

83. See *Sherman v. United States*, 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 263 (1942); Note, "The Serpent Beguiled Me and I Did Eat"—*The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942, 943 (1965).

The doctrine of entrapment has inspired an immense body of scholarly literature. See Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 167 n.13 (1976), in which the author catalogues numerous commentaries on the subject.

84. DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F.L. REV. 243, 244 (1967); Mikell, *supra* note 83, at 245-46.

85. In *Sorrells v. United States*, 287 U.S. 435 (1932), the Supreme Court first discussed the validity of entrapment, its theoretical basis, and its procedural elements. The Court had adverted to the doctrine earlier in *Casey v. United States*, 276 U.S. 413, 418-19 (1928), but had not discussed it thoroughly.

In *United States v. Whittier*, 28 F. Cas. 591 (C.C.E.D. Mo. 1878) (No. 16,688), apparently the first federal case in which a court considered the doctrine, the court decided the case, not on the ground of entrapment, but on the ground that the defendant's acts did not come within the statutory prohibition. In *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915), a federal court held, for the first time, that defendants were entitled to an acquittal, when government agents repeatedly solicited them to commit the crime with which they were charged.

86. See *People v. Braddock*, 41 Cal.2d 794, 802, 264 P.2d 521, 525 (1953) ("It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career.") (quoting *People v. Schwartz*, 109 Cal. App. 2d 450, 455, 240 P.2d 1024, 1027 (1952)); R. PERKINS, CRIMINAL LAW 1031 (2d ed. 1969). Law enforcement officials are permitted to "trap . . . the unwary criminal" but are not permitted to "trap . . . the unwary innocent." *Sherman v. United States*, 356 U.S. 369, 372 (1958).

87. See, e.g., *United States v. Russell*, 411 U.S. 423, 432 (1973); *United States v. DeSapio*, 435 F.2d 272, 281-82 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

88. See *Sherman v. United States*, 356 U.S. 369, 372-73 (1958); *Casey v. United States*, 276 U.S. 413, 423-24 (1928) (Brandeis, J., dissenting).

ing entrapment, this Article will provide a brief overview of the law of entrapment, and discuss its application to undercover tactics in general, and to the staged arrest in particular.

A. THE DEFENSE OF ENTRAPMENT

Although some lower courts had long mentioned entrapment in dicta and had accepted it as a defense,⁸⁹ the Supreme Court first considered the doctrine in 1932.⁹⁰ Since then, the Court has closely reexamined entrapment in three other cases.⁹¹ From this concise body of law, it is possible to isolate the elements, rationale, scope, and procedure of the defense. The four cases involved defendants convicted of contraband violations.⁹² In each case, a government agent either instigated the defendant's criminal behavior or infiltrated ongoing criminal activity.

In *Sorrells v. United States*,⁹³ the Supreme Court, in reversing a conviction for illegal sale of liquor, held that under the circumstances, a defense of entrapment was available as a question of fact and should have been submitted to the jury.⁹⁴ The undisputed proof on the issue of entrapment showed that a federal prohibition agent visited the defendant and repeatedly asked him for liquor.⁹⁵ Eventually, after the agent had ingratiated himself with the defendant, the defendant acquiesced.⁹⁶ Additional proof showed that the defendant strenuously resisted the agent's importuning, had a good character, and was not involved in the liquor business. In rebuttal, government witnesses testified that the defendant had the "general reputa-

89. See note 85 *supra*.

90. *Sorrells v. United States*, 287 U.S. 435 (1932).

91. *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958). The Supreme Court considered entrapment in several other decisions, but never reviewed its substantive or procedural aspects. See *Osborn v. United States*, 385 U.S. 323 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); *Lopez v. United States*, 373 U.S. 427 (1963).

92. The large majority of cases raising the entrapment defense involve contraband violations. See *Park*, *supra* note 83, at 223 n.198, 230 n.223. Thus far, the Supreme Court has not closely examined the limits of the entrapment defense in a noncontraband case. See *Hampton v. United States*, 425 U.S. 484, 493 (1976) (Powell, J., concurring).

93. 287 U.S. 435 (1932).

94. *Id.* at 452.

95. *Id.* at 439-40.

96. Aware that the defendant was a World War veteran and a member of the same division as the agent had served in, the agent engaged him in conversation about common war experiences. *Id.*

tion of a rum-runner."⁹⁷

Agreeing that entrapment was a valid defense, a majority of the Court formulated a two-part test. The first element of the test focuses on the behavior of the government official and requires some form of governmental inducement of the defendant's act.⁹⁸ By contrast, the second element focuses on the defendant's character and mental state—the defendant must be a law-abiding citizen with no predisposition toward the crime.⁹⁹ This formulation has been termed the "subjective" test of entrapment because it is primarily concerned with the character and mental state of the defendant.¹⁰⁰

The Court based its rationale for the defense on three theories. First, the Court invoked estoppel principles, refusing to allow the government to prosecute a defendant for a crime it instigated.¹⁰¹ Second, the Court said that it would be against public policy to prosecute a defendant under these circumstances; the Court had to stop the prosecution "to protect [the government] from the illegal conduct of its officers and to preserve the purity of its courts."¹⁰² Third, the Court relied on statutory construction, claiming that the statute defining the crime in question could not have been intended to apply if gov-

97. *Id.* at 441.

98. The Court used the words "instigated," "lured," "repeated and persistent solicitation," and "[took] advantage of sentiment aroused," to characterize the actions of the government official. *Id.*

99. In the language of the opinion, the second element is satisfied when a defendant, such as Sorrells, has "no previous disposition to commit [the crime]," is an "industrious," "law-abiding citizen," has no "criminal design," is "an innocent person" against whom the government "originates" the "criminal design" and then "implant[s] in the mind of [the] innocent person the disposition to commit the alleged offense." *Id.* at 441-42.

100. See *Hampton v. United States*, 425 U.S. 484, 496-97 (1976) (Brennan, J., dissenting); *United States v. Russell*, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting). Others have called this test the "federal defense," the "genesis of the criminal designs" formula, or the "origin of the criminal intent" formula. See Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1102 (1951); Park, *supra* note 83, at 165-66.

This formulation is the rule in the federal courts and all but seven state jurisdictions. See *People v. Barraza*, 23 Cal.3d 675, 689, 591 P.2d 947, 955, 153 Cal. Rptr. 459, 467 (1979) (listing the jurisdictions that have rejected the federal rule).

101. 287 U.S. at 452. The Court never seriously disputed that the defendant possessed the requisite *actus reus* and *mens rea* necessary for criminal liability. *Id.* at 445-46. See W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 175-76 (1972).

The Supreme Court suggested a distinction between estoppel and entrapment in two other cases, *Raley v. Ohio*, 360 U.S. 423 (1959), and *Cox v. Louisiana*, 379 U.S. 559 (1965). See Note, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046 (1969).

102. 287 U.S. at 446.

ernment officials abused their power by luring innocent persons into committing crimes just to punish them.¹⁰³

In a separate opinion joined by Justices Brandeis and Stone, Justice Roberts proposed a different formulation of the defense. This alternative test only asks whether the government official instigated the crime, and does not focus upon the alleged innocence of the defendant.¹⁰⁴ This formulation has been termed the "objective" test of entrapment because it is primarily concerned with the government's method of capturing criminals.¹⁰⁵ The rationale for the doctrine lies not in a "strained and unwarranted" interpretation of a statute that renders guiltless defendants whose criminal acts, coupled with their intent to do the acts, plainly brings them within the statutory definition of the crime.¹⁰⁶ Rather, "the true foundation of the doctrine [is] in the public policy which protects the purity of government and its processes."¹⁰⁷ Viewed in this manner, entrapment becomes a question of law for the court, and not a jury question fraught with "false issue[s]" such as the defendant's previous criminal behavior and bad reputation.¹⁰⁸

The Supreme Court addressed the entrapment defense again in *Sherman v. United States*,¹⁰⁹ in a review of a narcotics conviction. Whereas the *Sorrells* Court sought to establish the elements and basis of the defense, the *Sherman* Court, relying on *Sorrells*, decided whether the defendant proved entrapment

103. *Id.* at 448. Thus, "in the light of a plain public policy and of the proper administration of justice," the defendant's acts were not within the statutory prohibition. *Id.* at 451.

104. 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.

Id. at 459.

105. See, e.g., W. LAFAVE & A. SCOTT, *supra* note 101, at 371-72. The objective test has also been referred to as the "hypothetical person" defense and the "officer's conduct" test. See Donnelly, *supra* note 100, at 1102; Park, *supra* note 83, at 165-66.

The objective test has been adopted by the Model Penal Code and the proposed new Federal Criminal Code. See MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962); U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (1971). Commentators on the subject overwhelmingly have opted for the objective test. See W. LAFAVE & A. SCOTT, *supra* note 101, at 371-73; authorities cited in Park, *supra* note 83, at 167 n.13.

106. 287 U.S. at 456.

107. *Id.* at 455.

108. *Id.* at 458.

109. 356 U.S. 369 (1958).

as a matter of law, and reassessed the proper formulation for making that determination.

The facts in *Sherman* resemble those in *Sorrells*.¹¹⁰ A government informer named Kalchinian first met Sherman at the office of a doctor who was treating both for narcotics addiction. After several meetings, and after their friendship had begun to develop, Kalchinian, claiming that he was not responding to treatment, repeatedly asked Sherman if he knew where to obtain narcotics and whether Sherman could supply him with some. Although Sherman resisted these initial entreaties, Kalchinian's repeated complaints of suffering eventually caused him to acquiesce, and obtain narcotics for Kalchinian on several occasions. Sherman did not profit financially from these transactions. The issue of entrapment was submitted to the jury. Sherman was convicted, and sentenced to ten years' imprisonment.¹¹¹

The Supreme Court unanimously reversed, holding that entrapment was established as a matter of law.¹¹² The Court disagreed, however, on the proper basis for the decision, the disagreement paralleling the division in *Sorrells*. Relying on the subjective test of the *Sorrells* majority, Chief Justice Warren, for a five-member majority, concluded it was "patently clear" that the government agent "induced" Sherman to obtain narcotics for him, thereby satisfying the first element of the entrapment test.¹¹³ Furthermore, the Court found that Sherman was an "innocent party" who was "beguile[d] . . . into committing crimes which he otherwise would not have attempted,"¹¹⁴ thereby satisfying the second element of the defense.¹¹⁵ The

110. *Id.* at 371.

111. *Id.* at 372.

112. *Id.* at 373.

113. *Id.* The Court emphasized that repeated requests were necessary to overcome Sherman's "refusal," "evasiveness," and "hesitancy" before the agent finally obtained Sherman's "capitulation." *Id.* It is not clear from the opinion to what extent these repeated requests satisfy the element of inducement or their relevancy on the issue of predisposition.

114. *Id.* at 376. The Court noted: "Law enforcement does not require methods such as this." *Id.* *Quaere* whether the Court is not in fact employing a variation of the objective or police-conduct test of entrapment.

115. The Court barely analyzed the issue of predisposition. It rejected the government's argument that Sherman's two prior narcotics convictions demonstrated his predisposition. It also rejected, in conclusory language, the government's claim that Sherman evinced a "ready complaisance" to accede to the agent's request. The Court noted that no evidence existed that Sherman was in the narcotics trade; no narcotics were found in his apartment; he did not profit from the sales to Kalchinian; and he was trying to overcome his drug habit at the time of the events in question. *Id.* at 375.

majority reaffirmed, and explicitly refused to reexamine,¹¹⁶ the statutory construction rationale of the *Sorrells* majority.¹¹⁷

Justice Frankfurter, and the three Justices who joined in his concurring opinion, strongly disagreed with the subjective test, arguing that it was analytically confusing, an inadequate guide to lower courts, and divergent from the true ends of justice.¹¹⁸ In a frequently quoted passage embodying the objective formulation that he preferred, Justice Frankfurter observed: "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."¹¹⁹ Frankfurter also noted that the court, not the jury, should decide whether the police acted impermissibly. He argued that this is the only way that the court can protect the integrity of its processes from abuse by law enforcement officials, as well as provide meaningful standards for the future guidance of official conduct.¹²⁰

Since *Sherman*, the Court has considerably narrowed the defense of entrapment on two occasions. In each case, the Court considered whether the doctrine of entrapment is available to a concededly predisposed defendant following substantial government involvement and assistance in a narcotics enterprise. In *United States v. Russell*,¹²¹ an undercover agent infiltrated an illicit drug laboratory, gained the confidence of the defendants, and agreed to supply an essential chemical in return for one-half of the drug produced.¹²² Russell was convicted, and on appeal urged that he had established entrapment as a matter of law, despite his conceded predisposition,¹²³

116. *Id.* at 376.

117. It agreed that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." *Id.* at 372.

118. *Id.* at 382-83 (Frankfurter, J., concurring).

119. *Id.* at 382. It is "sheer fiction," said Frankfurter, to suggest that Congress did not intend its penal statutes to cover the tempting of innocent persons. If such were the case, a defendant should be relieved of the consequences of his act, whether the tempter is a private person or a government official, and such is not the case. *Id.* at 379. See *United States v. Burkley*, 591 F.2d 903, 911 n.15 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979); *United States v. Perl*, 584 F.2d 1316, 1320 (4th Cir.), *cert. denied*, 439 U.S. 1130 (1979).

120. 356 U.S. at 385.

121. 411 U.S. 423 (1973).

122. *Id.* at 425-26. The evidence showed that the chemical supplied by the government agent was difficult to obtain, and that the government made it more so by inducing some chemical supply firms in the area to cease selling the drug. *Id.* at 426-27.

123. *Id.* at 427.

because of intolerable government participation in the criminal activity.¹²⁴ In *Hampton v. United States*,¹²⁵ the defendant was convicted of selling heroin. Under the defendant's version of the transaction, the heroin that he allegedly sold to a government agent was the same drug that the government earlier had supplied to him through another agent. Conceding his predisposition,¹²⁶ Hampton requested an entrapment instruction that required acquittal if the jury found the degree of governmental participation that he alleged.¹²⁷

As in *Sorrells* and *Sherman*, the Justices' votes reflected disagreement over whether the focus of the doctrine should be on the defendant's character or on the conduct of the government. Using the subjective test, five Justices upheld both Russell's and Hampton's convictions, concluding that the entrapment defense was not available to either defendant.¹²⁸ Arguably, neither proved sufficient government inducement or solicitation under the test's first element. More importantly, both also conceded that they were predisposed to commit the crime, thus failing to meet the second element of the test.¹²⁹ The four dissenting Justices in *Russell*, and the three dissenting Justices in *Hampton*, used the previously rejected objective test, ignored the defendant's predisposition as irrelevant, and found that the government conducted itself improperly.¹³⁰ Because the defendants met the requirement of the objective test, the dissenters would have upheld their entrapment defenses.¹³¹

An examination of these cases reveals three salient points. First, the Court has refused to adopt the Roberts-Frankfurter objective test that makes the entrapment defense turn on the conduct of the government; *Russell* and *Hampton* illustrate the Court's continued adherence to the subjective test set out by

124. The Court of Appeals for the Ninth Circuit reversed Russell's conviction on the sole ground that an undercover agent supplied an essential chemical for manufacturing the drug which formed the basis of the conviction. The court held that as a matter of law, "a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise." *United States v. Russell*, 459 F.2d 671, 673 (9th Cir. 1972).

125. 425 U.S. 484 (1976).

126. *Id.* at 489-90.

127. *Id.* at 487-88.

128. *Hampton v. United States*, 425 U.S. at 490 (concession of predisposition "rendered this defense unavailable"); *United States v. Russell*, 411 U.S. at 436 (finding of defendant's predisposition "fatal to his claim of entrapment").

129. *Hampton v. United States*, 425 U.S. at 490; *United States v. Russell*, 411 U.S. at 436.

130. *Hampton v. United States*, 425 U.S. at 496-97; *United States v. Russell*, 411 U.S. at 436-37, 446, 449-50.

131. 425 U.S. at 497; 411 U.S. at 436, 450.

the *Sorrells* majority.¹³² Second, the Court has limited the defense to a narrowly defined class of unsuspecting victims. It emphasized that the defense of entrapment did not give the judiciary unfettered power to veto any law enforcement technique it did not like, but only those that trapped innocent victims.¹³³ Third, the Court refused to elevate the doctrine of entrapment, traditionally a nonconstitutional defense,¹³⁴ to a constitutional level, even where the actions of law enforcement officials violate fundamental principles of due process.¹³⁵ A majority of the Court indicated, however, that principles of due process might be independently applicable if government involvement in crime reached an as yet undefined "demonstrable level of outrageousness."¹³⁶ Thus, although some support for a more objective view of entrapment exists, the doctrinal view currently prevailing requires the government to induce a subjectively innocent, unsuspecting victim into committing a crime.

132. The majority in *Russell* clearly stated: "We decline to overrule these cases. *Sorrells* is a precedent of long standing that has already been reexamined in *Sherman* and implicitly there reaffirmed." *United States v. Russell*, 411 U.S. at 433.

133. The *Russell* Court noted that for a court to determine what kind and degree of government involvement is excessive "introduces an unmanageably subjective standard which is contrary to the holdings of this Court in *Sorrells* and *Sherman*." *Id.* at 435.

134. *Id.* at 433. The Supreme Court noted in *Russell* that because the defense was "not of a constitutional dimension," Congress could broaden the substantive definition if it chose to. *Id.* The proposed new Federal Criminal Code would do just that. U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (1971).

135. "The [constitutional] analogy is imperfect," said the Court. *United States v. Russell*, 411 U.S. at 430. In *Russell* and *Hampton*, the government official "violated no independent constitutional right" of the defendant. *Hampton v. United States*, 425 U.S. at 490-91. *United States v. Russell*, 411 U.S. at 430.

Just as courts fashioned the exclusionary rule to deter the police from committing unlawful searches and seizures, *Mapp v. Ohio*, 367 U.S. 643 (1961), and from coercing confessions, *Jackson v. Denno*, 378 U.S. 368 (1964), so might the courts fashion a similar rule to deter investigative methods that violate fundamental standards of fairness. Several commentators have urged the constitutionalization of the entrapment defense. See generally Note, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655 (1974); Note, *Entrapment—A Due Process Defense—What Process Is Due?* 11 SW. U.L. REV. 663 (1979); Note, *The Defense of Entrapment: Next Move - Due Process?* 1971 UTAH L. REV. 266; Note, *supra* note 83.

136. 425 U.S. at 495 n.7 (Powell, J., and Blackmun, J., concurring). Since the three dissenting Justices in *Hampton* would invoke due process in cases of excessive government involvement in crime, *id.* at 497 (Brennan, J., Stewart, J., and Marshall, J., dissenting), it appears that a due process defense is available to a predisposed defendant who has been entrapped by flagrant governmental misconduct.

B. ENTRAPMENT AS A LIMITATION ON UNDERCOVER POLICE PRACTICES

Although defendants frequently assert entrapment as a defense in prosecutions resulting from undercover police activity, the defense is rarely sustained.¹³⁷ Contrary to what may be a common perception, undercover police activity that aids and abets the commission of crime does not necessarily qualify as impermissible entrapment.¹³⁸ A growing body of case law in the lower courts¹³⁹ attests to the Supreme Court's view that "entrapment is a relatively limited defense."¹⁴⁰ There are two reasons for this.

First, strong pragmatic considerations limit the use of entrapment. The necessity for undercover techniques and the inherently contradictory evidence of a defendant's predisposition lead courts and juries to reject the defense. Certain kinds of crime are almost impossible to detect without the use of undercover tactics. For example, contraband crimes such as narcotics, weapons, and currency violations usually require disguised government involvement or solicitation to gather evidence of the criminal activity.¹⁴¹ This is also true of official corruption, white collar crime, and organized crime.¹⁴² In these crimes, there is no victim to report the crime to the police and to provide evidence of wrongdoing; there are no eyewitnesses because the criminal behavior is clandestine, and involves conduct that is mutually beneficial to all participants; and there is a dearth of tangible or otherwise observable proof of crime to provide the police with clues.

Defendants also will find it difficult to prove lack of predisposition. To raise entrapment, defendants as a practical matter must admit to having committed the proscribed act, and must rely instead on the excuse that the government instigated a crime that they otherwise would not have committed.¹⁴³ Yet

137. See Park, *supra* note 83, at 178 n.44. Park statistically demonstrates the infrequency with which the entrapment defense is accepted. The author's experience as a prosecutor, and as a defense attorney involved in considerable criminal litigation for fifteen years, supports this conclusion.

138. See notes 83-136 *supra* and accompanying text.

139. See, e.g., *United States v. Crossman*, 663 F.2d 607, 610 (5th Cir. 1981); *United States v. Rippey*, 606 F.2d 1150, 1154-55 (D.C. Cir. 1979); *United States v. Ordner*, 554 F.2d 24 (2d Cir. 1977); *United States v. Steinberg*, 551 F.2d 510 (2d Cir. 1977).

140. *United States v. Russell*, 411 U.S. 423, 435 (1973).

141. See notes 12-13 *supra* and accompanying text.

142. See *id.*

143. Although defendants theoretically could assert entrapment, as well as a claim that they did not commit the proscribed act, see *Scriber v. United*

the successful government official involved will undoubtedly claim that the defendant unhesitatingly succumbed to the inducement.¹⁴⁴ A jury, confronted with contradictory evidence of the defendant's innocent predisposition, and a tacit recognition that undercover police methods frequently are indispensable to uncovering and prosecuting crimes,¹⁴⁵ in practice will probably reject such a defense.

Apart from practical reasons, the definition of entrapment under the majority formulation, as interpreted by the courts, gives the defense limited utility. As noted above,¹⁴⁶ in practice this test requires defendants to prove, first, that the government agent induced them to commit the crime, and second, that they were not ready and willing and were not awaiting a "propitious opportunity" to commit the crime.¹⁴⁷ To be successful, defendants must show a fairly significant degree of governmental inducement. Government initiation of the crime, without more, is usually insufficient to sustain the defense.¹⁴⁸

States, 4 F.2d 97, 98 (6th Cir. 1925), juries might view such a claim with skepticism.

144. See generally MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962).

145. A widely accepted jury instruction on entrapment contains the following passage:

For example, when the government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer either directly or through an informer or other decoy to purchase narcotics from the suspected person.

1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 13.09 (3d ed. 1977). See *Park*, *supra* note 83, at 176-77 n.39.

146. See notes 83-136 *supra* and accompanying text.

147. The test, as phrased here, is from the oft-cited passage in Judge Learned Hand's opinion in *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952).

148. There is considerable confusion and controversy over the degree of proof necessary to satisfy the element of inducement. Most courts require a defendant raising the entrapment defense to demonstrate something more than mere solicitation. See *Lopez v. United States*, 373 U.S. 427, 434-37 (1963); *United States v. Burkley*, 591 F.2d 903, 911-12 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979); *United States v. Borum*, 584 F.2d 424, 429 n.9 (D.C. Cir. 1978); *United States v. Spain*, 536 F.2d 170, 173 (7th Cir.), *cert. denied*, 429 U.S. 833 (1976); *United States v. Catanzaro*, 407 F.2d 998, 1001 (3d Cir. 1969). The Second Circuit, however, apparently requires no more than mere solicitation to establish inducement. See *United States v. Greenberg*, 444 F.2d 369, 371 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States v. Henry*, 417 F.2d 267, 269 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970); *Sherman v. United States* 200 F.2d 880, 883 (2d Cir. 1952).

Apart from the quantum of proof necessary to satisfy the element of inducement, courts must also decide when the evidence requires them to submit the defense of entrapment to the jury. Compare *United States v. Riley*, 363 F.2d 955, 959 (2d Cir. 1966) (if inducement has been shown, production by defendant of any evidence negating predisposition requires submission of defense to

Defendants must also offer substantial proof of their unwillingness to commit the crime.¹⁴⁹ Proof that they were ready and willing to commit either the crime charged or a similar crime, without the intervention of a government official, almost invariably defeats the defense.¹⁵⁰ Further, if predisposition is conceded or proved—as it usually is in cases in which the defendants are involved in criminal activity¹⁵¹—courts will apparently condone any amount of governmental involvement in the crime short of conduct bordering on the patently outrageous.¹⁵² Finally, the limited appellate review of factual issues determined by a jury,¹⁵³ and the majority test's classification of entrapment as a factual question,¹⁵⁴ realistically foreclose reversal of the verdict on grounds of entrapment except in the most egregious cases.¹⁵⁵ Thus, both pragmatic and legal con-

jury) with *United States v. Burkley*, 591 F.2d 903, 914 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979) (jury must be instructed on entrapment if there is any basis in evidence for finding that government induced an otherwise unpredisposed person to commit crime).

149. The courts are not consistent in their definition of predisposition; they generally require very little proof to demonstrate predisposition or, correlatively, substantial proof to show lack of predisposition. *See United States v. Borum*, 584 F.2d 424, 428-29 (D.C. Cir. 1978); *United States v. Bower*, 575 F.2d 499, 504 (5th Cir.), *cert. denied*, 439 U.S. 983 (1978); *United States v. Swets*, 563 F.2d 989, 990-91 (10th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); *United States v. Spain*, 536 F.2d 170, 173-74 (7th Cir. 1976), *cert. denied*, 429 U.S. 833 (1977); *United States v. Williams*, 487 F.2d 210, 211 (9th Cir. 1973); *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952).

150. *See, e.g., United States v. Bower*, 575 F.2d 499, 504 (5th Cir.), *cert. denied*, 439 U.S. 983 (1978) ("The Government's provision of aid, incentive, and opportunity for commission of the crime amounts to an entrapment only if it appears that the defendant has done that which he would never have done were it not for the inducement of Government operatives.").

151. *See, e.g., United States v. Corcione*, 592 F.2d 111, 115-16 (2d Cir.), *cert. denied*, 440 U.S. 975 (1979); *United States v. Russell*, 411 U.S. 423, 433 (1973); *Greene v. United States*, 454 F.2d 783, 786 (9th Cir. 1971).

152. *See Hampton v. United States*, 425 U.S. 484, 488-89 (1976); *United States v. Russell*, 411 U.S. 423, 434-36 (1973). *But see United States v. Twigg*, 588 F.2d 373, 376-77 (3d Cir. 1978).

153. *See United States v. Prairie*, 572 F.2d 1316, 1320 (9th Cir. 1978) (quoting *United States v. Rangel*, 572 F.2d 147, 149 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976)) ("[e]ntrapment as a matter of law exists only where there is undisputed testimony making it *patently clear* that an otherwise innocent person was induced to commit the act complained of by the trickery, persuasion or fraud of a government agent.") (emphasis in original); *United States v. Groessel*, 440 F.2d 602, 606 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971) (evidence "was not so overwhelming that it was 'patently clear' or 'obvious' that [defendant] was entrapped as a matter of law").

154. *See Sherman v. United States*, 356 U.S. 369, 377 (1958); *Sorrells v. United States*, 287 U.S. 435, 452 (1932).

155. Entrapment as a matter of law was found in the following cases: *Sherman v. United States*, 356 U.S. 369, 373 (1958); *United States v. West*, 511 F.2d

siderations make entrapment a limited defense in actions based on undercover police practices.

C. THE APPLICABILITY OF ENTRAPMENT TO THE STAGED ARREST

From the discussion so far, it is not surprising that the defense of entrapment, as traditionally formulated, apparently offers very little assistance to a defendant ensnared in a staged arrest. In *United States v. Archer*¹⁵⁶ and *Nigrone v. Murtagh*,¹⁵⁷ for example, the entrapment defense was not vigorously asserted, and the courts barely mentioned the defense. The factual settings in those cases, however, rendered entrapment unavailable. This does not mean, of course, that entrapment may never be raised as a defense in a staged arrest proceeding. To analyze properly whether the entrapment defense would ever be applicable to the staged arrest under the majority test of entrapment, and its focus upon inducement and predisposition, one must differentiate between two levels of government undercover activity encompassed in the staged arrest. The first level involves the fabrication of a case. The second level involves the actual solicitation of persons to engage in a corrupt plot.

The actual implementation of the staged case—the first level—does not appear to implicate the entrapment defense. Although officials have designed the simulated case to permit the investigators to observe closely corrupt behavior within the system, they have not attempted actual solicitation of corrupt

1083, 1087 (3d Cir. 1975); *United States v. McGrath*, 468 F.2d 1027, 1031 (7th Cir. 1972), *rev'd*, 412 U.S. 936 (1973), *aff'd on remand*, 494 F.2d 562 (7th Cir. 1974); *Greene v. United States*, 454 F.2d 783, 786 (9th Cir. 1972); *United States v. Bueno*, 447 F.2d 903, 906 (5th Cir. 1971); *Williamson v. United States*, 311 F.2d 441, 445 (5th Cir. 1962); *United States v. Klosterman*, 248 F.2d 191, 195-96 (3d Cir. 1957); *United States v. Jannotti*, 501 F. Supp. 1182, 1200 (E.D. Pa. 1980), *rev'd*, No. 81-1020 (3d Cir. Feb. 11, 1982). *United States v. Chisum*, 312 F. Supp. 1307, 1312 (C.D. Cal. 1970); *United States v. Owens*, 228 F. Supp. 300, 305 (D.D.C. 1964); *People v. Strong*, 21 Ill. 2d 320, 326, 172 N.E.2d 765, 768 (1961); *Jones v. State*, 285 So. 2d 152, 160 (Miss. 1973).

It appears, however, that *Hampton v. United States*, 425 U.S. 484 (1976), and *United States v. Russell*, 411 U.S. 423 (1973), have overruled many of the foregoing cases. In *United States v. McGrath*, 412 U.S. 936 (1973), following the grant of certiorari, the Supreme Court vacated the judgment and remanded the case for consideration in light of *United States v. Russell*. Upon remand, the court of appeals concluded that *Russell* "is the controlling law . . . and that the defense of entrapment was not available to McGrath." *United States v. McGrath*, 494 F.2d 562, 563 (7th Cir. 1974).

156. 486 F.2d 670, 682 (2d Cir. 1973).

157. 46 A.D.2d 343, 349, 362 N.Y.S.2d 513, 518 (1974), *aff'd*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

behavior. Thus, they have not met the first element of the prevailing test. One could argue that by penetrating the system with a sham case, the investigators have induced judicial and court officials to engage in routine court matters necessary to process the case. But this is clearly not the kind of inducement sufficient to invoke the entrapment defense. Moreover, at this level law enforcement officials responsible for setting up the case naturally would welcome the initiation of corrupt suggestions by judges, lawyers, or other court personnel, as such behavior would obviate any claims that the government solicited the offense, or that the initiator lacked predisposition.

Entrapment doctrine would, therefore, not come into play in the staged arrest setting until the second level, when the government actively solicits or induces criminal activities. Once the case has entered the court network, the investigators likely will not wait passively for an individual to make a corrupt overture. More likely, either the roleplaying agents, such as the sham defendant, the arresting officer, or another undercover agent perhaps posing as a friend of the defendant, will seek to initiate contact with persons in the system in the hope that such intervention might yield corrupt responses. The investigators in the *Archer* and *Nigrone* cases used the latter approach. In *Archer*, an undercover agent approached bailbondsman Wasserberger with the aim of helping Bario;¹⁵⁸ in *Nigrone*, an undercover agent posing as a friend of the family spoke to Judge Rao about helping Vitale.¹⁵⁹ In both cases, these solicitations produced corrupt responses which invited further undercover investigation. Given this form of government inducement, some courts would hold that the defendant has proven at least the first element of the entrapment defense.¹⁶⁰

Even assuming, however, that these initial inducements and perhaps even further governmental solicitations of others take place, one must also consider the second critical element of the entrapment defense, the defendant's predisposition. Under the majority test, a showing that the defendant was ready and willing to engage in corrupt behavior will defeat a claim of entrapment regardless of the degree of government inducement.¹⁶¹ Generally, in cases of white collar crime and offi-

158. 486 F.2d at 673.

159. 46 A.D.2d at 345, 362 N.Y.S.2d at 515.

160. See note 148 *supra* and accompanying text.

161. See text accompanying notes 128-29, 151-52 *supra*.

cial corruption, the courts are extremely reluctant to accept a defendant's claims of lack of predisposition. Some courts have said, for example, that in cases involving receipt of bribes by public officials, the defense of entrapment is simply unavailable.¹⁶² Similarly, in cases where an undercover agent has assumed the role of a dishonest official willing to be bribed, the courts usually find that the bribe giver was predisposed to commit the offense and therefore cannot claim that he was entrapped.¹⁶³

The unwillingness of courts to accept lack of predisposition claims in cases involving white collar crime and official corruption may be attributed to several factors. The considerations of necessity, contradictory evidence on the element of predisposition, and the narrow legal definition of entrapment restrict the defense's application to cases of official corruption in particular, just as they restrict its application to undercover police practices in general.¹⁶⁴ Entrapment is particularly difficult to assert for defendants accused of the former type of crime because of the positions of trust they occupy and the resulting attitude that their conduct must be above temptation.¹⁶⁵ Courts feel that they must punish any breach of that trust, regardless of the nature of the inducement. Thus, police officers who succumb to a \$50,000 bribe to overlook narcotics violations may have lacked predisposition because they would never have taken a bribe but for the irresistible nature of the temptation. It is unlikely, however, that a court would sustain their entrapment defenses; as police officers, the defendants occupy such important positions of public trust that they are duty bound to resist such temptation.¹⁶⁶

By contrast, if a similar police officer solicited the bribe from a motorist who had been stopped for intoxicated driving, the courts might be more receptive to a claim of entrapment by the motorist.¹⁶⁷ The motorist does not occupy a position of

162. *State v. Dougherty*, 86 N.J.L. 525, 534-35, 93 A. 98, 102 (Sup. Ct.), *rev'd on other grounds*, 88 N.J.L. 209 (Ct. Err. & App. 1915).

163. See *United States v. Steinberg*, 551 F.2d 510, 514 (2d Cir. 1977); *United States v. Rosner*, 485 F.2d 1213, 1220-23 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States v. Greenberg*, 444 F.2d 369, 371-72 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971).

164. See notes 141-55 *supra* and accompanying text.

165. See *State v. Dougherty*, 86 N.J.L. 525, 535, 93 A. 98, 102 ("It is no valid excuse, for the commission of a crime, by a person holding a public office, that he was tempted. His integrity must be above temptation."); *Donnelly*, *supra* note 100, at 1115. See also *Scriber v. United States*, 4 F.2d 97, 98 (6th Cir. 1925).

166. See *Donnelly*, *supra* note 100, at 1115.

167. See *id.* at 1115 n.71 and cases cited therein.

public trust. Also, considerations of public policy might not weigh as heavily against the motorist as they would against the police officer who receives a bribe. The courts might not want public officials who exercise power to offer handsome inducements to vulnerable citizens to violate the law. There are different standards of conduct for a police officer and a private citizen, as well as different thresholds of resistance to temptation. Moreover, there is a question of whether the arbitrary solicitation of bribes from motorists advances any legitimate law enforcement interest. Finally, a motorist who initiates bribes is easily detected and prosecuted. There is no need to use undercover agents to solicit such actions. Detection of corrupt acts by police officers, in contrast, is much more difficult.

Thus, the majority formulation of entrapment would be of limited support to a defendant charged with an offense arising out of a staged arrest. Even if faced with egregious government conduct, the defendant would not be able to use the defense successfully. The minority formulation of the defense would, however, provide a doctrinal basis for challenging such a prosecution. Under the latter approach, there is a critical, objective inquiry into the methods that the government officials use to bring about the defendant's arrest.¹⁶⁸ Thus, a court employing the minority test could determine that the government's conduct in the staged arrest was sufficiently offensive to require dismissal of the indictment. Yet very few jurisdictions have adopted the minority view of entrapment.¹⁶⁹ The only alternative, therefore, for many defendants who have been subjected to unreasonable government treatment is reliance on a due process analysis. The central issues under this approach, as under a minority entrapment approach, are whether the staged arrest is offensive or outrageous, and what standards a court should use to make such a judgment. Unfortunately, the present due process analysis of undercover police activities does not adequately address these issues.

IV. DUE PROCESS LIMITS ON UNDERCOVER INVESTIGATIONS

A. THE FUNCTION OF DUE PROCESS IN CRIMINAL LAW

Due process is the constitutional mechanism for protecting

168. See text accompanying notes 104-08 *supra*.

169. See notes 100, 105 *supra*.

and enforcing certain moral values.¹⁷⁰ In the area of criminal law one can identify two such overriding values: ensuring the reliability of the guilt-finding process,¹⁷¹ and preserving the integrity of a person's body and mind.¹⁷² The first value applies to criminal trials or other criminal proceedings in which a defendant's guilt is adjudicated. The second value applies to governmental oppression, either physical or psychological, of individuals.

This second moral imperative is the one relevant to the staged arrest, because the government in a staged arrest may be unreasonably and offensively intrusive. To protect this overriding value in similar cases, courts have invoked due process to limit government conduct that brutalizes, abuses, or harasses,¹⁷³ invades privacy,¹⁷⁴ or in other ways unreasonably intrudes into people's lives.¹⁷⁵ The Bill of Rights contains specific

170. For a discussion of the early history and development of due process, see R. MOTT, *DUE PROCESS OF LAW* (1926). Two excellent articles examining the role of due process in criminal law are: Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319 (1957), and Ratner, *The Function of the Due Process Clause*, 116 *U. PA. L. REV.* 1048 (1968).

171. The Supreme Court has furthered this objective by using a due process analysis to apply to the states provisions in the Bill of Rights that ensure a fair trial and a reliable determination of guilt. See *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (first amendment right to a public trial); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (sixth amendment right to a speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (sixth amendment right to compulsory process); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (sixth amendment right to impartial jury); *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment right to confrontation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment protection against self-incrimination); *Russell v. United States*, 369 U.S. 749 (1962) (sixth amendment right to notice of criminal charges); *Powell v. Alabama*, 287 U.S. 45 (1932) (sixth amendment right to effective assistance of counsel). Accordingly, due process protection has been rendered virtually co-extensive with the specific guarantees of the Bill of Rights.

Apart from these specific constitutional protections, the Supreme Court has fashioned additional protections to ensure the reliable adjudication of a defendant's guilt. It has used due process to require trial before an impartial judge, see *Ward v. Village of Monroe*, 409 U.S. 57, 61-62 (1972); to require guilt to be established beyond a reasonable doubt, see *In re Winship*, 397 U.S. 358, 361-64 (1970); to outlaw inflammatory or unfair prosecutorial summations, see *Griffin v. California*, 380 U.S. 609, 615 (1965); to forbid the use of fraudulent evidence, see *Miller v. Pate*, 386 U.S. 1, 7 (1967); to require disclosure of exculpatory evidence, see *United States v. Agurs*, 427 U.S. 97, 112 (1976); to bar the use of irrational legal presumptions, see *United States v. Romano*, 382 U.S. 136, 138-41 (1965); and to suppress courtroom identifications based on unfair pre-trial lineup procedures, see *Foster v. California*, 394 U.S. 440, 443 (1969).

172. See notes 173-76 *infra* and accompanying text.

173. See *Rochin v. California*, 342 U.S. 165, 172 (1952); *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974).

174. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

175. See *Hampton v. United States*, 425 U.S. 484, 497 (1976) (Brennan, J., dis-

provisions that parallel and reinforce this limitation on the government's power to oppress arbitrarily or cause harm to persons.¹⁷⁶ The Supreme Court has encountered greater doctrinal difficulty when invoking due process to protect some relative and indefinite concepts such as personal dignity and privacy, than when it employs due process to protect the accuracy and fairness of the adjudicative process. The reason for this doctrinal difficulty is readily apparent. To protect personal dignity and privacy, a court may often have to restrict the ability of officials to detect and prove criminal activity.¹⁷⁷

The classic case illustrating the due process limits on police investigation tactics is *Rochin v. California*. In *Rochin*, the Supreme Court determined that the police officers' use of a stomach pump to force two capsules of narcotics from the defendant's stomach offended due process.¹⁷⁸ The Supreme Court, in a famous opinion by Justice Frankfurter, reversed Rochin's conviction in the state courts:

[T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.¹⁷⁹

At the time of Rochin's conviction, the only federal basis

senting); *United States v. Twigg*, 588 F.2d 373, 378-80 (3d Cir. 1978). See also *Cox v. Louisiana*, 379 U.S. 559, 568-71 (1965); *Raley v. Ohio*, 360 U.S. 423, 437-39 (1959).

176. The fourth amendment bars the government from unreasonably searching persons, seizing their belongings, or rummaging through their houses, see *Boyd v. United States*, 116 U.S. 616, 622-32 (1886), thereby protecting their privacy and the integrity of their bodies and minds from government invasion. The fifth amendment protects criminal defendants from being involuntarily retried for the same crime, thereby limiting the government's power to harass and oppress them by threatened and repeated prosecutions. See *Palko v. Connecticut*, 302 U.S. 319, 322-23 (1937). The eighth amendment prevents the government from inflicting cruel or unusual punishment. See *Weems v. United States*, 217 U.S. 349, 368-80 (1910).

177. One of the principal reasons for the constitutional rule excluding illegally seized evidence "is to deter [the police]—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). Plainly, however, while protecting the privacy and integrity of the individual, this "exclusionary rule" keeps reliable and probative evidence from the fact-finders, thereby undermining an accurate determination of guilt.

178. 342 U.S. 165, 166, 174 (1952).

179. *Id.* at 172.

for challenging state criminal justice was the due process clause of the fourteenth amendment. Justice Frankfurter acknowledged that standards for due process enforcement were "indefinite and vague."¹⁸⁰ The applicable standard was whether the police methods "'offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'"¹⁸¹ Just as coerced confessions were offensive to human dignity, the methods in *Rochin* were offensive to "a sense of justice."¹⁸²

The "evanescent standards" that the Court employed to overturn *Rochin's* conviction¹⁸³ have served as the principal benchmark by which the courts determine the permissible scope of investigative methods.¹⁸⁴ Although Justice Frankfurter claimed that due process was not "a matter of judicial caprice,"¹⁸⁵ it is understandable that a test that depends on the shock capacity of the consciences of particular judges has created confusing and unpredictable results. For example, the Supreme Court refused to sustain an action against a sheriff for false imprisonment in a case of mistaken identity.¹⁸⁶ An erroneous imprisonment might give rise to a *Rochin* violation, however, if the sheriff "deliberately and repeatedly refused to check the identity of a complaining prisoner against readily available mug shots and fingerprints."¹⁸⁷ If a police officer pursues and arrests a suspect out of revenge, following the dismissal of a civil lawsuit that the officer brought against the suspect, due process bars prosecution.¹⁸⁸ Yet in a recent decision, the Supreme Court refused to find a *Rochin* due process violation where, to secure evidence, the police deliberately violated an

180. *Id.*

181. *Id.* at 169 (quoting *Malinski v. New York*, 324 U.S. 401, 416-17 (1945) (Frankfurter, J., dissenting)).

182. *Id.* at 173.

183. *Id.* at 177 (Black, J., concurring). This case illustrates the ongoing debate on the court between those Justices who view due process as embodying a philosophy of fundamental fairness to be determined by "a disinterested inquiry pursued in the spirit of science," *id.* at 172, and critics of that approach, notably Justice Black. The latter would opt for applying to the states all of the protections embodied in the Bill of Rights—in *Rochin*, the fourth and fifth amendments—as opposed to an "accordion-like" philosophy whose "nebulous standards," *id.* at 175, "have been used to nullify state legislative programs passed to suppress evil economic practices." *Id.* at 177.

184. See *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

185. *Rochin v. California*, 342 U.S. at 172.

186. *Baker v. McCollan*, 443 U.S. 137 (1979).

187. *Id.* at 148 (Blackmun, J., concurring).

188. *United States v. Hastings*, 447 F. Supp. 534, 537-40 (E.D. Ark. 1977).

individual's fourth amendment rights knowing that the defendant lacked standing to challenge the violation.¹⁸⁹

In addition to creating unpredictable results, the *Rochin* principle is frequently raised as a bar to conviction, but is sustained only in extreme situations.¹⁹⁰ In cases of government-sanctioned violence, for example, illegal kidnapping and torture may violate the *Rochin* due process test,¹⁹¹ whereas "unnecessary and unreasonable" violence to effectuate an arrest may not.¹⁹² The use of force by prison guards generally does not violate due process, even if the force is excessive,¹⁹³ whereas an unprovoked assault on a prisoner does violate due process.¹⁹⁴ The use of physical force in fingerprinting and including a suspect in a line-up is reasonable and not shocking to the conscience,¹⁹⁵ whereas forcibly compelling a suspect to submit to

189. *United States v. Payner*, 447 U.S. 727, 737 n.9 (1980). See text accompanying notes 374-78 *infra*.

190. For example, two Supreme Court cases decided shortly after *Rochin* presented examples of arguably conscience-shocking police methods. In one case, *Irvine v. California*, 347 U.S. 128 (1954), police investigators made repeated illegal entries into defendant's home, where they installed a microphone which they used to overhear incriminating conversations. *Id.* at 130-31. In the other case, *Breithaupt v. Abram*, 352 U.S. 432 (1957), at the request of police investigators, a physician inserted a hypodermic needle into the defendant's unconscious body to obtain a blood sample used to convict him of vehicular manslaughter. *Id.* at 433. *Rochin* was distinguished in both cases, in the first because no "coercion, violence or brutality to the person" was committed, 347 U.S. at 133, and in the second because "nothing 'brutal' or 'offensive'" was involved, 352 U.S. at 435.

Only three federal cases since 1952 have held that the *Rochin* standard was expressly controlling. See *LeGrande v. Redman*, 423 F. Supp. 524, 527 (D. Del. 1976); *United States ex rel. Guy v. McCauley*, 385 F. Supp. 193, 198 (E.D. Wis. 1974); *United States v. Townsend*, 151 F. Supp. 378, 384 (D.D.C. 1957). See also *United States v. Toscanino*, 500 F.2d 267, 273-75 (2d Cir. 1974).

191. *Id.* at 275-76. But see *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65-66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Winter*, 509 F.2d 975, 987-88 (5th Cir.), *cert. denied sub nom.* *Parks v. United States*, 423 U.S. 825 (1975); *United States v. Cotten*, 471 F.2d 744, 747-49 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); *Hobson v. Crouse*, 332 F.2d 561, 561-62 (10th Cir. 1964).

192. *United States v. Lawrence*, 434 F. Supp. 441, 446 (D.D.C. 1977) (shooting fleeing suspect in the back may have been "unnecessary and unreasonable," but not so outrageous as to bar defendant's prosecution).

193. See *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom.* *John v. Johnson*, 414 U.S. 1033 (1973); *Lock v. Jenkins*, 464 F. Supp. 541, 549 (N.D. Ind. 1978), *modified*, 641 F.2d 488 (7th Cir. 1981); *LeGrande v. Redman*, 423 F. Supp. 524, 528 (D. Del. 1976). Cf. *Martinez v. Rosado*, 474 F. Supp. 758, 760-61 (S.D.N.Y. 1979), *rev'd*, 614 F.2d 829 (2d Cir. 1980) (summary judgment for guard reversed because issue of excessive force was in factual dispute).

194. *Vargas v. Correa*, 416 F. Supp. 266, 269 (S.D.N.Y. 1976). See also *Meredith v. Arizona*, 523 F.2d 481, 484 (9th Cir. 1975).

195. *Appeal of Maguire*, 571 F.2d 675, 677 (1st Cir.), *cert. denied*, 436 U.S. 911 (1978).

the swabbing of a bodily organ for blood stains is shocking.¹⁹⁶ The use of force, such as choking and pinching, to prevent a suspect from disposing of evidence is not shocking,¹⁹⁷ whereas forcing a pregnant woman to submit to a body cavity search is shocking.¹⁹⁸

This reluctance to accept the due process argument except in the most egregious cases may be attributable, in part, to the difficulty in evaluating police practices where the police have infringed no specific constitutional right. One court recently observed: "Where the line between permissible and impermissible police conduct is to be drawn is hard to figure and even more difficult to express. There simply are no sharply defined standards in this area."¹⁹⁹ An added reason for this reluctance is the view of some courts that the Constitution entrusts law enforcement to the executive branch, and that in the absence of a violation of a specifically protected right, the judiciary should not exercise "a 'chancellor's foot' veto over law enforcement practices of which it did not approve."²⁰⁰

Under the *Rochin* standard, government conduct that is brutal, offensive, or "shocks the conscience" may violate due process. Relying on this subjective test, courts have handed down varied and unpredictable rulings, generally finding a violation of due process only in the most flagrantly offensive situations. As this Article points out below,²⁰¹ courts use this same subjective test in cases involving undercover police practices and, therefore, hand down similarly unpredictable rulings which fail to guide the subsequent courts that also must analyze governmental misconduct.

B. DUE PROCESS AND UNDERCOVER POLICE PRACTICES

1. *The Supreme Court*

The Supreme Court occasionally has referred to constitutional limitations on undercover police conduct, particularly in

196. *United States v. Townsend*, 151 F. Supp. 378, 386-87 (D.D.C. 1957).

197. *People v. Bracamonte*, 15 Cal. 3d 394, 540 P.2d 624, 124 Cal. Rptr. 528 (1975); *State v. Santos*, 101 N.J. Super. 98, 243 A.2d 274 (1968); *State v. Young*, 15 Wash. App. 581, 550 P.2d 689 (1976).

198. *United States ex rel. Guy v. McCauley*, 385 F. Supp. 193, 198-99 (E.D. Wis. 1974).

199. *United States v. Hastings*, 447 F. Supp. 534, 539 (E.D. Ark. 1977).

200. *United States v. Russell*, 411 U.S. 423, 435 (1973). The Supreme Court has on occasion, however, specifically suggested that the executive branch take disciplinary measures against offending officials. See *United States v. Payner*, 447 U.S. 727, 733-34 n.5 (1980); *Irvine v. California*, 347 U.S. 128, 138 (1954).

201. See notes 202-63 *infra* and accompanying text.

the context of entrapment analysis. In *Sherman v. United States*, the Court sustained the defendant's entrapment defense,²⁰² and compared undercover methods that entice innocent persons into crime with coerced confessions and unlawful searches,²⁰³ implying that all such practices are uniformly objectionable because they involve government misconduct flagrantly offensive to the dignity of the individual.²⁰⁴ On two other occasions the Supreme Court declared that certain types of government behavior—described as “the most indefensible sort of entrapment by the State”—amounted to a violation of due process.²⁰⁵ In *Raley v. Ohio*,²⁰⁶ the Court held that due process barred the conviction of persons for refusing to answer questions before a state investigating commission because the defendants relied upon the government's assurances that they had a constitutional privilege to refuse to answer.²⁰⁷ In *Cox v. Louisiana*,²⁰⁸ the Court held that due process precluded the conviction of the defendant for disorderly conduct for picketing “near” a courthouse in violation of a local ordinance when government officials advised the defendant that such a demonstration would be lawful and not covered by the terms of the statute.²⁰⁹

Although these cases present analytical difficulties under entrapment doctrine,²¹⁰ they demonstrate that the Court sees a relationship between unfair and deceptive government behav-

202. 356 U.S. 369, 373 (1958).

203. *Id.* at 372. When the government entices an innocent person into crime, “stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search.” *Id.*

204. Indeed, the language in some of the entrapment decisions characterizing the government's behavior is reminiscent of the language used in *Rochin*, i.e., conduct that is “shocking to the sense of justice,” *Sorrells v. United States*, 287 U.S. 435, 446 (1932), “abhorrent,” *id.* at 449, and “lawless,” *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring), clearly suggesting that due process considerations are relevant, as they should be, in cases of excessive police involvement in crime.

205. *Cox v. Louisiana*, 379 U.S. 559, 571 (1965); *Raley v. Ohio*, 360 U.S. 423, 438-39 (1959).

206. 360 U.S. 423 (1959).

207. *Id.* at 437-39.

208. 379 U.S. 559 (1965).

209. *Id.* at 568-71. For a discussion of whether *Raley* and *Cox* are predicated on entrapment, as opposed to estoppel principles, see Note, *supra* note 101, at 1046-51.

210. The government did not disguise its official identity in either case, nor did government officials induce the defendants to commit what the defendants believed were criminal offenses. Moreover, in contrast with traditional entrapment principles, the Court specifically found in *Raley*, and intimated in *Cox*, that there was no official intent to deceive. *Cox v. Louisiana*, 379 U.S. at 571; *Raley v. Ohio*, 360 U.S. at 438. In *Raley*, however, the Court noted that “[t]here

ior and the due process clause. The cases suggest, at least in theory, that certain "entrapment-like" practices might violate due process; yet in all of the foregoing opinions, because the Court found that the entrapment defense was valid, it had no occasion to rule on the validity of a due process analysis if the entrapment defense were unavailable. In *United States v. Russell*, the Court faced the latter situation. The undercover agent in *Russell* infiltrated a drug ring, provided the conspirators with a key ingredient necessary for manufacturing the drug, and even participated in the manufacturing process.²¹¹ The Court of Appeals for the Ninth Circuit reversed the conviction because, in its view, fundamental concepts of due process protected against "an intolerable degree of governmental participation in [a] criminal enterprise" carried out by "overzealous law enforcement."²¹²

Reversing the circuit court, a narrow majority of the Supreme Court believed that the questionable practices were justified. It reasoned that the government invaded no protected rights of the accused nor violated any laws.²¹³ Moreover, the defendant's proclivity toward crime, essential to overcoming an entrapment defense, was conceded.²¹⁴ The Court's passing reference, in dictum, to the due process claim is significant. Specifically citing the *Rochin* case, the Court announced: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is *so outrageous* that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."²¹⁵ The instant case, however, was "distinctly not of that breed."²¹⁶ Under this frequently quoted language in *Russell*,²¹⁷ a judge

was active misleading" by the government, implying that the defendants were not criminally predisposed but, on the contrary, law-abiding citizens. *Id.*

211. 459 F.2d 671, 672 (9th Cir. 1972). See note 122 *supra* and accompanying text.

212. *Id.* at 673-74.

213. The Court noted that "the Government's conduct here violated no independent constitutional right of the respondent. Nor did Shapiro violate any federal statute or rule or commit any crime in infiltrating the respondent's drug enterprise." *United States v. Russell*, 411 U.S. at 430.

214. *Id.* at 433.

215. *Id.* at 431-32 (emphasis added).

216. *Id.* at 432.

217. Post-*Russell* decisions reviewing undercover police methods often refer to this dictum as a basis for invoking due process. 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. Register*, 496 F.2d 1072, 1081 (5th Cir. 1974); *United States v. Archer*, 486 F.2d 670, 676 (2d Cir. 1973).

may find a due process violation if, in the judge's opinion, the government's conduct is sufficiently "outrageous." Thus, *Russell* not only provided a more precise, albeit subjective test of due process in a case involving undercover police practices, it also intimated that a court may find a due process violation even if a defendant is predisposed to commit the crime and an entrapment defense is, therefore, unavailable.

At first glance, the Court in *Hampton v. United States* apparently rejected the *Russell* dictum, and ruled that if the defendant cannot prove entrapment, there can be no due process violation.²¹⁸ In *Hampton*, an undercover agent provided Hampton with drugs which he then was induced to sell to other undercover agents. Although several lower courts found similar conduct repugnant enough to violate due process,²¹⁹ a bare majority in *Hampton* upheld the conviction. The Court found first that entrapment was unavailable because the defendant conceded that he was predisposed,²²⁰ and, second, that due process was not implicated.²²¹ The three Justices in the *Hampton* plurality appeared to conclude that a due process analysis is inapplicable if a defendant is predisposed.²²² The two concurring and the three dissenting Justices, however, seemed to endorse the use of a due process analysis in cases of very extreme governmental misconduct, even if the defendant is predisposed.²²³

218. 425 U.S. 484, 489-90 (1976).

219. *United States v. West*, 511 F.2d 1083 (3d Cir. 1975); *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), *rev'd*, 412 U.S. 936 (1973), *aff'd on remand*, 494 F.2d 562 (7th Cir. 1974); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970).

220. 425 U.S. at 490.

221. *Id.* at 490-91. Five Justices, including a three-Justice plurality consisting of Chief Justice Burger and Justices White and Rehnquist, and concurrences from Justices Powell and Blackmun, found that due process was not violated. Justices Brennan, Stewart, and Marshall dissented, finding that due process was violated. Justice Stevens took no part in the decision.

222. *Id.* at 488-89.

223. The concurring Justices rejected the view that due process is unavailable if entrapment cannot be sustained because of the defendant's predisposition. Referring to Judge Friendly's statement in *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973), that it would be "unthinkable" to permit the government, in effect, to join a gang of hoodlums and practice violence on innocent citizens, Justices Powell and Blackmun suggested that in a clear case of excessive government overinvolvement in crime, as perhaps in the *Archer* case, due process could bar prosecution. *Hampton v. United States*, 425 U.S. at 493 (Powell, J., concurring). The concurring Justices recognized the doctrinal and practical difficulties in defining the limits of police involvement in crime when predisposition is not an issue. *Id.* at 494-95 n.6. Nevertheless, they noted that judgments of fairness and the identification of appropriate standards of police behavior are implicit in the concept of judicial review, and must be made even if predisposition is conceded. *Id.* at 495. Cases in which proof of predisposition

Thus, the Supreme Court seems to allow defendants to prove a due process violation despite their concession that they cannot establish entrapment. This result is necessary to guard adequately against governmental overreaching. The appropriate test, however, is the subjective test that the Court endorsed in *Russell*. As noted above,²²⁴ such a test is vague, leads to unpredictable results, and gives little guidance to courts facing similar situations in the future.

2. *The Lower Courts*

a. *Contraband Cases*

Despite the Supreme Court's reluctance to apply detailed due process limitations to police conduct, some recent lower court decisions present a more sophisticated analytical framework by which to measure, under the due process clause, the permissible limits of government investigation. In *People v. Isaacson*,²²⁵ the police arrested a heavy drug user named Breniman for possession of narcotics, and used physical force and the threat of prosecution to coerce him into participating in an undercover investigation, even though the police knew, but did not reveal, that the capsules he had possessed were not narcotic substances. Under this compulsion, Breniman telephoned an acquaintance, Isaacson, to beg for drugs to finance his legal fees. Breniman telephoned the reluctant Isaacson seven times, sobbing and pleading, before Isaacson finally

is not dispositive "will be rare." *Id.* at 495 n.7. Moreover, "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." *Id.*

The dissenting opinions in *Russell* and *Hampton* would have invoked both due process and the minority approach to entrapment to reverse the convictions. *Id.* at 496-97 (Brennan, J., dissenting). Accordingly, if one combines the concurrence's endorsement of the *Russell* dictum and the dissent's willingness to invoke due process, it seems fair to conclude that a majority of the Supreme Court views due process as a permissible means of controlling certain outrageous kinds of undercover activities, even if entrapment is inapplicable.

As one might imagine, however, the *Hampton* decision plainly has had an inhibiting effect on lower federal courts that earlier had relied on due process to bar prosecutions. Courts that had invoked due process reversed themselves, *United States v. McGrath*, 494 F.2d 562 (7th Cir. 1974), and routinely affirmed subsequent convictions raising colorable due process claims on appeal. *See, e.g., United States v. Corcione*, 592 F.2d 111 (2d Cir.), *cert. denied*, 440 U.S. 975 (1979); *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977); *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); *United States v. Smith*, 538 F.2d 1359 (9th Cir. 1976); *United States v. Register*, 496 F.2d 1072 (5th Cir. 1974).

224. See notes 183-98 *supra* and accompanying text.

225. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

agreed to provide Breniman with cocaine.²²⁶ At the trial, the defendant's entrapment claim was rejected because he had not proved lack of predisposition. He was then convicted.

Branding the police conduct "inexplicable" and "reprehensible,"²²⁷ the New York Court of Appeals ruled that due process mandated dismissal of the indictment. Unlike the Supreme Court in *Russell*, the New York court did more than just characterize the government's conduct as "outrageous" without analyzing its conclusion. Instead, it isolated four factors that, "viewed in totality," demonstrated "a brazen and continuing pattern in disregard of fundamental rights."²²⁸ First, the court found that the police manufactured a crime that would not likely have occurred, rather than merely involving themselves in ongoing criminal activity.²²⁹ Second, the police engaged in serious misconduct "repugnant to a sense of justice."²³⁰ Apart from the violence they practiced on Breniman, the refusal of the police to reveal that the capsules found on Breniman were innocuous substances was "deceptive, dishonest and improper."²³¹ Third, the government engaged in persistent solicitation and appeals to sympathy to overcome defendant's reluctance.²³² Fourth, the police demonstrated an overriding desire to obtain a conviction as an end in itself, without any indication of a desire to prevent further crime, for example, by cutting off the source of the narcotics.²³³

These four factors are the same factors applied by a lower New York court in *People v. Archer* to find a staged arrest valid, and not violative of due process.²³⁴ As in that case, the four criteria were helpful in sorting out the facts to determine, in a more objective manner, whether the state's conduct was sufficiently flagrant to bar the prosecution. There may, however, be other factors, which this Article examines below,²³⁵ that would make the analysis even more complete.

In another narcotics case in which the reversal of a convic-

226. *Id.* at 516, 378 N.E.2d at 80, 406 N.Y.S.2d at 716.

227. *Id.* at 514, 378 N.E.2d at 79, 406 N.Y.S.2d at 715.

228. *Id.* at 523, 378 N.E.2d at 84, 406 N.Y.S.2d at 720.

229. "[A] crime of this magnitude would not have occurred without active and insistent encouragement and instigation by the police and their agent." *Id.* at 522, 378 N.E.2d at 83-84, 406 N.Y.S.2d at 720.

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

231. *Id.*

232. *Id.*

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

234. 68 A.D.2d 441, 446-47, 417 N.Y.S.2d 507, 511 (1979). See note 52 *supra* and accompanying text.

235. See notes 389-395 *infra* and accompanying text.

tion rested on due process grounds, the Court of Appeals for the Third Circuit, in *United States v. Twigg*,²³⁶ focused on the government's excessive involvement in the crime. In *Twigg*, as in *Isaacson*, the government enlisted the cooperation of a narcotics offender named Kubica to help apprehend other drug traffickers.²³⁷ The government set up and supplied the chemical ingredients for a "speed laboratory." The defendants were brought into the operation for financial reasons. Otherwise, they played a minor role, and provided little assistance. As a result of their participation they were convicted of illegally manufacturing a controlled substance.

The court of appeals first determined that this was not a case of entrapment because the prosecution had sufficiently proved the defendants' predisposition.²³⁸ The court found, however, that the extent of the police immersion in the crime "was so overreaching as to bar prosecution of the defendants as a matter of due process of law."²³⁹ The court distinguished *Hampton*, the Supreme Court case that did not find a due process violation in similar circumstances, on two grounds. *Hampton* concerned an illegal sale rather than the illegal manufacture of drugs.²⁴⁰ Also, unlike *Hampton*, government agents in *Twigg* "conceived and contrived" the crime rather than simply supplying ingredients or the contraband itself.²⁴¹

In justifying its conclusion that there was a due process violation, the court used the subjective test found in *Russell* and *Hampton* and found that the instant case reached "a demonstrable level of outrageousness."²⁴² Yet the court also analyzed this conclusion in more detail, suggesting several factors that led to its holding. First, the defendants had no apparent criminal designs, and they lacked the expertise to set up a laboratory without government assistance.²⁴³ Moreover, the government initiated, established, and directed a criminal operation rather than investigating an existing narcotics labora-

236. 588 F.2d 373 (3d Cir. 1978).

237. Kubica was arrested by federal agents in 1976 for illegally manufacturing drugs. He pleaded guilty to one felony count and received a four-year sentence. He previously had been convicted in state courts of similar charges. *Id.* at 375.

238. *Id.* at 376.

239. *Id.* at 377.

240. The court noted that since selling drugs is "a much more fleeting and elusive crime to detect than the operation of an illicit drug laboratory," the government is required to use "more extreme methods of investigation." *Id.* at 378.

241. *Id.*

242. *Id.* at 380.

243. *Id.* at 381 n.9.

tory.²⁴⁴ Finally, the government generated new crimes merely to press criminal charges.²⁴⁵

Isaacson and *Twigg* appear to be the only post-*Russell* cases involving contraband prosecutions that reversed convictions on due process grounds. In both cases, the courts at least attempted to go beyond *Russell*'s broad standard. Although they are not complete in their analyses, they point out the direction toward which courts must proceed, and provide a guide for the development of more extensive standards.²⁴⁶

b. Corruption Cases

Two other reported cases in which courts have applied due process because of outrageous police conduct have involved prosecutions of defendants for official corruption. In *United States v. Jannotti*²⁴⁷—one of several cases resulting from an undercover operation popularly denominated "Abscam"—the trial judge set aside guilty verdicts on the grounds of entrapment and due process.²⁴⁸ In *Jannotti*, undercover FBI agents, assisted by a career swindler named Weinberg,²⁴⁹ disguised themselves as representatives of wealthy Arab sheiks who wished to invest huge sums of money in Philadelphia. In various meetings with the undercover investigators, Schwartz, the President of the Philadelphia City Council, and Jannotti, a member of the Council, assured them that they would solve any problems that arose in connection with the sheik's proposals. In return, the agents insisted, over Schwartz's and Jannotti's protests, that they accept large sums of cash, threatening to withdraw their offer if the city officials refused. Thus, Schwartz received \$30,000 and Jannotti received \$10,000 cash, which, under the jury's findings, were bribes for guaranteeing the officials' support.

The court concluded that the defendants proved entrapment as a matter of law, and that the government violated due process. In its rebuttal of the entrapment defense, the government's only proof of the defendants' predisposition was their

244. *Id.* at 381.

245. *Id.*

246. See notes 264-388 *infra* and accompanying text.

247. 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, No. 81-1020 (3d Cir. Feb. 11, 1982).

248. *Id.* at 1205.

249. The court described Weinberg as the "archetypical amoral fast-buck artist." *Id.* at 1193. He had agreed to cooperate with the government when faced with a substantial prison sentence for an unrelated crime. *Id.*

acceptance of the money.²⁵⁰ The court held that this proof was insufficient.²⁵¹ First, the cash amounts were "exceedingly generous," constituting a "substantial temptation to a first offense." Second, the agents did not ask or expect the defendants to do anything improper on behalf of the hotel venture. Third, the agents led the defendants to believe that, if they did not accept the money, the project would not come to Philadelphia. In short, "the governmental inducement . . . was calculated to overwhelm."²⁵²

This "governmental overreaching" also violated due process. Unlike the court in *Isaacson*, and to a lesser extent the court in *Twigg*, the *Jannotti* court did not present a very detailed explanation of the factors involved in its conclusions. Instead, it used more general criticisms, claiming that the government's techniques went far beyond the necessities of legitimate law enforcement. While the court conceded that it would be permissible for government agents to set up an undercover business entity, and to "hint" that corrupt overtures "would be welcome," it was neither necessary nor appropriate to add further incentives "virtually amounting to an appeal to civic duty."²⁵³

The district court's ruling in *Jannotti* was reversed by the Court of Appeals for the Third Circuit.²⁵⁴ Recognizing the jury's unusual opportunity to view the defendants' acts on videotape, the court held that a reasonable jury could find predisposition in the minds of Jannotti and Schwartz.²⁵⁵ The court of appeals also overturned the due process ruling, but, as with the lower court opinion, provided little explanation of the due process criteria it employed. Distinguishing the *Twigg* case where "the government initiated and was actively involved in the operation of the criminal enterprise itself," the court rea-

250. *Id.* at 1200.

251. *Id.*

252. *Id.*

253. *Id.* at 1204. As a further ground for invoking due process, the court, citing *United States v. Archer*, argued that "the federal courts should not sanction the artificial federalization of purely state crimes." *Id.* Moreover, "it is surely not within the legitimate province of federal agents to embark upon a program of corrupting municipal officials, merely to demonstrate that it is possible." *Id.* at 1205. In a subsequent case also arising out of an "Abscam" prosecution, the district court took an approach contrary to that in *Jannotti*. In *United States v. Myers*, 527 F. Supp. 1206, 1247-48 (E.D.N.Y. 1981), the court denied defendants' post trial motions to set aside their convictions on due process grounds.

254. *United States v. Janotti*, No. 81-1020, (3d Cir. Feb. 11, 1982), *rev'g* 501 F. Supp. 1182 (E.D. Pa. 1980).

255. *Id.*

soned that the Abscam agents "merely created the fiction that [they] sought to buy the commodity—influence—that the defendants proclaimed they already possessed." This type of conduct did not constitute the necessary "outrageousness."²⁵⁶

The only other recent decision barring prosecution on due process grounds concerns, appropriately enough, the staged arrest. In *People v. Rao*, discussed earlier,²⁵⁷ the New York Appellate Division condemned the prosecutor's use of the simulated arrest to investigate corruption, but refused to dismiss perjury indictments arising from a related grand jury inquiry.²⁵⁸ After the case was sent back to the lower court, the defendant was convicted of perjury. He then appealed his conviction to the same court that earlier had condemned the investigative procedure, yet had not held it violative of due process. This time the court reversed the conviction, and apparently overruled its prior decision, holding that the prosecutor had violated due process. The court predicated its decision on two grounds: the manner in which the prosecutor obtained a perjury indictment in the grand jury and the manufacturing of a fictitious crime.

The court concluded that in obtaining the perjury indictments, the prosecutor had "befouled and besmirched" the criminal justice system by violating the attorney-client relationship, withholding exculpatory evidence from the grand jury, giving "erroneous, coercive and misleading instructions" to control the grand jury's determination, and asking numerous leading questions. The prosecutor allegedly committed these "transgressions" "to satiate his appetite for indictments."²⁵⁹

The staged arrest, the court's other due process ground, provoked the court to even greater outrage. It characterized the procedure as "vigilante justice,"²⁶⁰ demonstrating the prosecutor's "undisguised contempt for the rule of law."²⁶¹ In its moral indignation, however, the court ignored its apparently controlling decision in *Archer*, in which the court upheld a staged arrest despite a due process challenge.²⁶² Since the *Archer* case sustained virtually the same investigative tech-

256. *Id.*

257. See note 80 *supra*; notes 61-79 *supra* and accompanying text.

258. 73 A.D.2d 88, 90, 425 N.Y.S.2d 122, 124 (1980). See text accompanying note 66 *supra*.

259. 73 A.D.2d at 96-97, 425 N.Y.S.2d at 127-28.

260. *Id.* at 100, 425 N.Y.S.2d at 130.

261. *Id.* at 96, 425 N.Y.S.2d at 127.

262. See text accompanying notes 48-60 *supra*.

nique found so offensive in *Rao*, however, the *Rao* court may have been concentrating on the prosecutor's aggravated misconduct before the grand jury, an occurrence that was not present in *Archer*.

More importantly, the *Rao* court ignored *Archer's* four criteria for evaluating due process.²⁶³ Instead, it employed the vague standards of *Russell* and *Rochin* and reacted to the prosecutor's actions because of a shocked judicial conscience. Thus, courts in subsequent cases are left only with a condemnation of the particular practices in this situation, an inadequate guide for cases that do not conform to these facts.

V. THE RELEVANT CRITERIA IN A DUE PROCESS ADJUDICATION AND THEIR APPLICATION TO THE STAGED ARREST

The preceding examination of the use of due process in undercover investigations reveals that courts generally will not hesitate to find a due process violation arising from a prosecutor's undercover activities. Unfortunately, the examination also reveals that most courts have adopted the substantive due process test, which vaguely describes a violation as conduct that individual judges find "outrageous." The *Isacson* case, and to a lesser extent the *Twigg* case, stand out as attempts to dislodge the shocked judicial conscience test, and to establish in its place meaningful objective criteria by which to measure the lawfulness of police undercover tactics in general, and the staged arrest in particular. Using these criteria as guides, it is possible to formulate an objective due process analysis that will effectively curb prosecutorial bad faith, abuse, and excess in the undercover investigation of crime.

This Article will divide its proposed due process criteria into two groups that represent two levels of analysis—one focusing on ends, and the other focusing on means. The first level seeks to determine whether the government's ends are legitimate, that is, whether the government has a permissible and substantial law enforcement objective for its undercover investigation. The two factors contained in this group are the factual justification for the operation and the government's good faith. If these first-level factors reveal that the government's ends are legitimate, the court must then consider the second level. This level seeks to determine whether the gov-

263. See text accompanying note 52 *supra*.

ernment's means were legitimate, that is, whether its undercover investigative techniques were necessary and proper. The six factors contained in this group are the necessity of the operation, the government's participation in the criminal activity, the nature of the government's solicitation, the social harm the undercover techniques might cause, the violation of individual rights, and the government's effort to minimize harmful consequences.

A. THE LEGITIMACY OF ENDS

1. *Factual Justification*

Due process protects citizens against arbitrary government action. The government's arbitrary subjection of individuals to solicitation or surveillance, and its capricious temptation of persons to commit crimes for no other purpose than to obtain convictions, is the very sort of abuse that the due process clause is designed to curb. The court in *United States v. Twigg*²⁶⁴ felt that the dangers arising from the lack of a factual justification created a due process violation.²⁶⁵ Absent a factual predicate, government interference by undercover methods leads directly to a police state.²⁶⁶

To illustrate the dangers of allowing the government to proceed without a factual justification, consider the results of letting the government act on the basis of each of three different levels of factual support. If the government bases its under-

264. For a discussion of *Twigg*, see text accompanying notes 234-43 *supra*.

265. 588 F.2d 373, 381 (3d Cir. 1973). The court found it "baffling" that the government made an arrangement to deal with a serious felon who may have run from 50 to 100 narcotics laboratories "in exchange for the convictions of two men with no apparent criminal designs, and without the expertise required to set up a single laboratory." *Id.* at 381 n.9. One student commentary suggests that the basis for the holding in *Twigg* was the government's lack of any factual predicate to investigate the defendants. See Note, *Due Process Defense When Government Agents Instigate and Abet Crime*, 67 GEO. L.J. 1455 (1979).

266. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928), where Justice Brandeis said in dissent:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the [Constitution].

See also *Katz v. United States*, 389 U.S. 347, 358-59 (1967); *On Lee v. United States*, 343 U.S. 747, 762 (1962) (Douglas, J., dissenting); Note, *supra* note 265, at 1471; Note, *supra* note 83, at 951; Comment, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63, 80-81 (1967).

cover investigation on facts indicating present criminal activity, or suggesting that a particular individual is about to commit a crime,²⁶⁷ the government is not overreaching in affirmatively soliciting particular groups or individuals; there is no danger of arbitrary prosecution. If the government bases its investigation on facts that indicate that official corruption exists, but that fail to identify particular individuals, the government does not violate due process as long as it does not actively target any particular person. By providing a simulated opportunity for any potential offender to engage in the crime, or even by going further and "spreading the word" about the opportunity, as the agent did in *United States v. Jannotti*,²⁶⁸ the government does not actively interfere with a person's capacity to make an independent decision.

But if the government has no factual basis for its investigation, the government violates due process if it approaches individuals at random. The government would then be using intrusive and deceptive undercover weaponry to test the integrity or criminal propensities of citizens at large. This is deeply disturbing for several reasons. First, it constitutes a serious invasion into a person's privacy, and, once allowed, has boundless potential as a tool of oppression and intimidation. In addition, subjecting citizens indiscriminately to a test of their integrity neither prevents crime nor aids in the detection of crime as much as it seduces into crime persons who are pliant and easily tempted.²⁶⁹ Finally, undercover integrity tests are inefficient; they consume scarce resources whose more proper use lies in tracking down law breakers. Thus, law enforcement agencies should justify themselves not by the treacherous, bootstrapping practice of randomly approaching people, hoping that they will succumb to crime, but by the more painstaking effort to apprehend criminals.

An investigation using a staged arrest may violate the requirement of factual justification, depending on the extent of its factual predicate. The government may possess specific information that particular individuals are involved in corrupt activities, as in the first hypothetical situation, and not violate due process even if it deliberately solicits those individuals.²⁷⁰

267. See *Hoffa v. United States*, 385 U.S. 293 (1966).

268. No. 81-1020 (3d Cir. Feb. 11, 1982); see notes 247-256 *supra* and accompanying text.

269. See notes 275-86 *infra* and accompanying text.

270. This was the situation in both the *Archer* and *Nigrone* cases. In *Archer*, "federal prosecutors had been given abundant information about the

Or the government may possess information that supports a general suspicion of corruption, and not violate due process if it does not actively target particular people.²⁷¹ If there is no information of corruption, and the operation is used merely to test the integrity of random members of the court system, the staged arrest violates due process standards regardless of the degree to which it solicits particular individuals.²⁷²

2. *The Government's Good Faith*

This second criterion evaluates whether the government used the undercover investigative procedure in good faith, or more precisely, whether the government's assumed purpose in using the procedure is to investigate ongoing or anticipated crime to gather evidence of such wrongdoing or is, instead, to create a new crime simply for the sake of punishing the wrongdoer. Both *Isaacson*²⁷³ and *Twigg*²⁷⁴ used this criterion in finding a violation of due process. The question in analyzing the government's good faith is whether the investigative conduct demonstrates specific substantive law enforcement goals, such as the interdiction of the supply and distribution of narcotics,

widespread fixing of cases in the Queens Country District Attorney's office." 486 F.2d 670, 683 (2d Cir. 1973). In *Nigrone*, the court noted the existence of "allegedly specific information about corruption." 46 A.D.2d 343, 344, 362 N.Y.S.2d 513, 514 (1974).

271. This general suspicion can be based, for example, on suspicious relationships between judges and attorneys, or on suspicious patterns of results in particular cases.

272. The Office of the Attorney General of the United States recently issued "guidelines" to federal investigative agencies engaged in criminal investigations and undercover operations. The guidelines limit undercover operations of the Federal Bureau of Investigation by prohibiting the agents, unless the Director of the Bureau otherwise approves, from offering inducements to individuals to engage in illegal activity unless "there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type." See DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS 14 (1981) (hereinafter cited as GUIDELINES ON UNDERCOVER OPERATIONS).

With respect to criminal investigations generally, the guidelines note that "individuals and organizations should be free from law enforcement scrutiny that is undertaken without a valid factual predicate and without a valid law enforcement purpose." To this end, the guidelines authorize the opening of an investigation only when there are facts or circumstances that "reasonably indicate" a federal criminal violation has occurred, is occurring, or will occur. See DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S GUIDELINES ON CRIMINAL INVESTIGATIONS OF INDIVIDUALS AND ORGANIZATIONS 1, 3 (1980) (hereinafter cited as GUIDELINES ON CRIMINAL INVESTIGATIONS).

273. See text accompanying note 233 *supra*.

274. See text accompanying notes 244-45 *supra*.

or the gathering of evidence against a police official suspected of corruption. If the prosecution can identify such concrete goals, it would tend to negate bad faith. Absent such a concrete showing, a court should deem the procedure suspect.

Of all the relevant due process criteria, illicit government motivation is the most subjective. Any inquiry into motive requires extremely difficult value judgments, and very delicate assessments of official acts. This difficulty is demonstrated in the district court's decision in *United States v. Jannotti*.²⁷⁵ There the court found that the government's motivation was improper.²⁷⁶ The court agreed, however, that the undercover procedure was necessary, and the initiation of bribe overtures appropriate.²⁷⁷ The court also noted its "distress and disgust at the crass behavior" of the corrupt defendants revealed by the recorded and videotaped evidence.²⁷⁸ How, then, could the court conclude that the government's motivation was improper? Presumably, the governmental inducement was so overwhelming that it constituted an inordinate temptation for the defendants to become corrupt. And this inducement, the court believed, revealed the government's true purpose: to prove "not that the defendants were corrupt city officials, but that, exposed to strong temptation, they could be rendered corrupt."²⁷⁹ No objective support for this conclusion existed; it was a subjective evaluation based on circumstantial evidence.

Although cases like *Jannotti*, in which the government's motivation is not readily apparent, do occur, there are many other cases in which the government's bad or good faith is clearer. For example, if the government bargains with a serious chronic offender to elicit his cooperation against persons not presently engaged in crime,²⁸⁰ or becomes both the defendant's supplier and purchaser of contraband, and refrains from investigating other potential sources of the defendant's supply,²⁸¹ the defendant has a compelling argument that the government's true purpose is to create new crime, not to pursue legitimate law enforcement goals. On the other hand, if the

275. See text accompanying notes 247-53 *supra*.

276. 501 F. Supp. 1182, 1200 (E.D. Pa. 1980). See text accompanying note 279 *infra*.

277. 501 F. Supp. at 1204.

278. *Id.* at 1205.

279. *Id.* at 1200.

280. See *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

281. *United States v. West*, 511 F.2d 1083 (3d Cir. 1975).

government carefully infiltrates an ongoing crime,²⁸² feigns interest in the defendant's criminal overtures to gain the defendant's confidence,²⁸³ or sets up a controlled operation that it believes will attract already existing criminals,²⁸⁴ the government's motive is clearly legitimate. It seeks to promote central law enforcement objectives: the prevention, detection, and prosecution of crime.

An investigation using a staged arrest may violate this criterion also, depending on the government's motivation in using it. A court would have to evaluate all of the circumstances before making such a determination. In the *Archer*²⁸⁵ and *Nigrone*²⁸⁶ cases, interestingly, the courts did not dispute the prosecutors' good faith. In *People v. Rao*, however, the appellate court denounced the prosecutor for contriving to "set up" the defendant for a perjury charge before the grand jury.²⁸⁷ In making this determination, courts should be aware of its subjective aspects, and require that concrete goals of law enforcement be identified before concluding that the government acted in good faith.

B. THE LEGITIMACY OF MEANS

1. *Necessity for the Operation*

Even if the government's ends are legitimate, one must still justify the particular means that the government uses to achieve those ends. One factor in determining whether the government's investigative techniques violate due process is the necessity for using the undercover operation. If the investigative procedure is not necessary to achieve legitimate law enforcement goals, its use may not be a proper exercise of government power, particularly if the deceptive techniques invade the privacy of the individual under investigation. In making such a determination, two questions are relevant: does the crime under investigation reasonably require use of undercover techniques or are less offensive alternative techniques available; and is the investigative technique reasonably related to the investigative goals?

One must first ask whether the undercover investigation is

282. *United States v. Russell*, 411 U.S. 423 (1973).

283. *Lopez v. United States*, 373 U.S. 427 (1963).

284. *United States v. Borum*, 584 F.2d 424 (D.C. Cir. 1978).

285. 486 F.2d 670, 683 (2d Cir. 1973).

286. 46 A.D.2d 343, 348, 362 N.Y.S.2d 513, 517 (1974).

287. 73 A.D.2d 88, 98, 425 N.Y.S.2d 122, 129 (1980). See generally Gershman, *supra* note 72.

necessary or whether the government can obtain evidence of wrongdoing without infiltration or deceit. Certain crimes are readily discoverable with the use of less intrusive measures. Crimes of violence, for example, such as assault, robbery, burglary or rape, ordinarily are provable by testimonial evidence from complaining victims and eyewitnesses, as well as by tangible evidence, such as the proceeds of the crime or the instrumentalities used in its commission. On the other hand, crimes conducted clandestinely and without complaining victims, narcotics crimes for example,²⁸⁸ frequently require investigators to use undercover techniques. If reasonable and less excessive nonundercover alternatives exist, however, courts may view the use of undercover techniques as an unnecessary abuse of power if they intrude into the private domain of the individual.²⁸⁹ The "least drastic alternative" test currently restricts other highly intrusive investigative procedures. In applying for an eavesdropping warrant to intercept verbal communications electronically, for example, a government official must certify that other investigative procedures have been tried and failed, appear unlikely to succeed if tried, or are too dangerous.²⁹⁰ A similar consideration should apply in evaluating, under due process, the overall fairness of undercover techniques that also intrude heavily into people's lives.

Assuming that undercover infiltration is necessary, one must then ask whether the particular undercover technique is reasonably related to the investigative goals. A particular undercover technique is not reasonably related if less extreme undercover techniques would be as effective in curbing the crime. In *United States v. Russell*²⁹¹ and *Hampton v. United*

288. See note 13 *supra* and accompanying text; *United States v. Rosner*, 485 F.2d 1213, 1223 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

289. The Supreme Court has implicitly included consideration of the available investigative alternatives in approving various undercover methods to expose narcotic crimes. In *United States v. Russell*, 411 U.S. 423 (1973), the Court stated: "Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices." *Id.* at 432. Moreover, "there are circumstances when the use of deceit is the only practicable law enforcement technique available." *Id.* at 436. Similarly, in *Hampton v. United States*, 425 U.S. 484 (1976), Justice Powell noted in his concurring opinion: "One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity." *Id.* at 495-96 n.7 (Powell, J., concurring).

290. See 18 U.S.C. § 2518(1)(c) (1976). See also *C. FISHMAN, WIRETAPPING AND EAVESDROPPING* 118-28 (1978).

291. 411 U.S. 423 (1973).

States,²⁹² the Supreme Court approved fairly extreme undercover methods as reasonably suited to the investigative objective, interdicting the manufacture and distribution of narcotics. In *United States v. Twigg*, however, although not disputing the necessity of an undercover operation, the court of appeals sharply distinguished between the sale of illegal drugs, which "may require more extreme methods of investigation,"²⁹³ and a drug distribution conspiracy which is not as "fleeting and elusive [a] crime to detect," and presumably requires less extreme undercover methods.²⁹⁴ Similarly, the district court in *United States v. Jannotti* condoned the undercover technique used to expose municipal corruption—the establishment of fictitious business entities and the initiation of bribes²⁹⁵—but condemned the excessive nature of the bribe offers.²⁹⁶ In other words, although the undercover procedure was proper in the abstract, its implementation was so extreme that it violated due process.

An investigation using a staged arrest satisfies this criterion because it is the only viable method of detecting judicial corruption. None of the appellate courts reviewing the propriety of the staged arrest, however, examined whether the procedure was necessary.²⁹⁷ This is surprising in view of the apparent necessity for the staged arrest. First, undercover techniques are necessary in uncovering and gathering evidence of corruption within the judicial system because no less offensive alternatives are available.²⁹⁸ Like narcotics violations, con-

292. 425 U.S. 484 (1976).

293. 588 F.2d 373, 378 (3d Cir. 1978).

294. *Id.*

295. 501 F. Supp. 1182, 1204 (E.D. Pa. 1980).

296. *Id.*

297. The lower court in *People v. Archer*, however, did characterize the staged arrest as virtually "indispensable" to flushing out corruption in the judicial system. 177 N.Y.L.J., March 10, 1977, at 13 (Queens County N.Y. Sup. Ct.). The District Attorney of Kings County, whose grand jury was utilized to obtain the indictment in the fictitious case, stated in an affirmation that the staged arrest was "faithfully utilized . . . to promote the fair and legitimate interests of law enforcement." Record on Appeal at 206, *In re Nigrone v. Murtagh*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

The New York State Bar Association formally requested permission to file a memorandum amicus curiae in the Court of Appeals in *Nigrone v. Murtagh*, 46 A.D.2d 343, 362 N.Y.S.2d 513 (1974), endorsing the concept of staged arrest. The court denied the request on March 17, 1975.

298. See *United States v. Rosner*, 485 F.2d 1213, 1223 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States v. DiSapio*, 435 F.2d 272, 282 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 198-99 (1967); Gershman, *supra* note 72, at 628 n.11.

spiracies to "fix" criminal cases, for example, produce no complaining victims. Moreover, official corruption does not produce tangible evidence. Crimes such as bribery provide no tangible proof of past or present criminality, such as instrumentalities, contraband, or other visible evidence. The evidence of a corrupt judicial deal consists of an unheard conversation, an unseen benefit, or a corrupt dismissal which official court records could not prove.²⁹⁹ Questioning witnesses, the one possible nonundercover technique that could reveal information, would expose the investigation and alert the targets, who might then destroy the little available evidence, or collectively tailor their stories.

Second, the staged arrest is reasonably related to the investigative goals; less extreme undercover methods will not be effective. Just as the undercover agent needs to establish "legitimacy" to gain the confidence of a narcotics ring, so does an undercover agent investigating the court system need to establish his or her credentials. The only practical means to establish these credentials is to pose as a real defendant seeking to purchase justice. Other investigative techniques, such as electronic eavesdropping³⁰⁰ or visual surveillance, although of possible use later in the investigation, cannot provide the initial base for launching the investigation.

2. *Government's Participation in Criminal Activity*

In infiltrating and gathering evidence of a criminal conspiracy, or in providing a simulated opportunity for defendants to engage in crime, government agents often commit acts that would be subject to penal sanction if committed by private persons. An important criterion of due process is, therefore, the degree of governmental criminal activity that is permissible.

One can divide the criminal activity that undercover techniques generate into two broad categories. The first category encompasses situations in which the government involves itself directly in the criminal operation under investigation. Typi-

299. The court records would only reveal that the court arrived at the result asserted by the prosecutor, which is of limited probative value.

300. Investigators probably could not use electronic eavesdropping, even if theoretically effective, if the information supporting the required warrant related to conduct that occurred in the past. See C. FISHMAN, *supra* note 290, at 108-10. Whether information is too stale would depend on the facts of the case. Where the facts demonstrate a continuing course of criminal conduct, the passage of time becomes less critical. See *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972).

cally, the agents must engage in some form of contractual transaction—purchase or sale—to prosecute the wrongdoer. In most contraband cases, for example, undercover agents must purchase drugs, infiltrate a drug conspiracy, or involve themselves in the manufacture or distribution process of an existing criminal ring. Or, in investigating a political machine, government agents might pose as corrupt persons and offer bribes. Although these acts technically could be considered crimes, courts conclude that they are not, either upon a law enforcement justification theory,³⁰¹ or upon the theory that no crime has been committed because the agents lack felonious intent.³⁰²

This category of criminal activity is a recognized consideration under due process.³⁰³ Excessive government involvement in the crime not only perverts the ends of law enforcement, as Justice Brandeis understood in his *Olmstead* dissent,³⁰⁴ it also may unfairly punish persons only peripherally involved in the crime,³⁰⁵ persons lured back into criminal behavior who had tried to reform,³⁰⁶ or persons easily susceptible to temptation.³⁰⁷ The difficulty lies in determining the degree to which government involvement becomes so excessive that it violates due process. On the one hand, courts have held that government infiltration of a criminal operation, the temporary supply of essential items for its continued success, and the assumption of a major role in the operation's ongoing affairs do not constitute undue involvement.³⁰⁸ On the other hand, the courts would hardly permit government agents to instigate muggings merely to convict members of a gang of hoodlums.³⁰⁹ Between these two extremes lies a broad spectrum of hypothetical cases in which it is not clear if due process is violated. One can iden-

301. See note 57 *supra*.

302. See *United States v. Rosner*, 485 F.2d 1213, 1223 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974). But see *United States v. Ehrlichman*, 376 F. Supp. 29, 35 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977) (defendant was convicted of violating a citizen's fourth amendment rights).

303. See *Sherman v. United States*, 356 U.S. 369, 372 (1957); *Hampton v. United States*, 425 U.S. 484, 493 n.4 (1976) (Powell, J., concurring).

304. See text accompanying notes 10-11 *supra*.

305. See *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978).

306. *Sherman v. United States*, 356 U.S. 369 (1958).

307. *Sorrells v. United States*, 287 U.S. 435 (1932).

308. *United States v. Russell*, 411 U.S. 423 (1973); *United States v. Gonzalez*, 539 F.2d 1233 (9th Cir. 1976); *United States v. Reifsteck*, 535 F.2d 1030 (8th Cir. 1976).

309. *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973), *quoted in Hampton v. United States*, 425 U.S. 484, 493 n.4 (1976) (Powell, J., concurring).

tify, however, several considerations that might be helpful in making that determination: whether the government's involvement was of long duration; whether the government's involvement was direct and continuous; and whether the government's involvement was necessary for the continued success of the operation.³¹⁰

One consideration is worth separate emphasis: whether the government instigated and created the criminal operation. If the government actually initiates the crime as in *Twigg*,³¹¹ *Jannotti*,³¹² and *Isaacson*,³¹³ the question of the nature, extent, and duration of the government's involvement under a due process standard takes on critical significance. If the government's role is dominant and substantial, the court may view the government as the actual perpetrator of the crime.³¹⁴ This argument is even stronger if, as in *Twigg*, the defendant lacks the

310. In one extreme case involving violations of liquor regulations, *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), the Ninth Circuit condemned as "wholly impermissible" the participation of a government agent in establishing and sustaining a criminal operation for several years. An agent contacted two defendants with whom he had previously been involved in the production of bootleg alcohol and pressured them to re-establish operations. The agent's involvement was substantial: he offered to provide a still, a still site, still equipment, and an operator. He actually provided two thousand pounds of sugar at wholesale. The illicit operation lasted for three and one-half years. During this period, the government agent was the only customer, and he paid for the liquor with government funds. The court found entrapment inapplicable since the defendants had the predisposition to sell bootleg whiskey. The court reversed nonetheless, saying "[w]hen the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative." *Id.* at 787.

311. See text accompanying notes 236-37 *supra*.

312. See text accompanying note 249 *supra*.

313. See text accompanying note 225 *supra*.

314. In *Twigg*, *Jannotti*, and *Isaacson*, the courts found the government's activities excessive enough to violate due process. By contrast, courts have been more reluctant to find a due process violation if the investigation infiltrates an ongoing crime. In several cases in which the government's involvement in the operation was substantial, the courts emphasized that the government penetrated an ongoing operation and assumed a role that the defendants expected it to play. Thus, where the government infiltrated a counterfeiting scheme and did the actual printing, the court found that since the defendant initiated the crime and directed the operation, the defendant could not rely on due process. *United States v. Reifsteck*, 535 F.2d 1030, 1035 (8th Cir. 1976). Similarly, courts have sustained several other cases of arguably excessive government involvement largely because the defendants were predisposed, and because the government infiltrated an ongoing crime and merely "facilitated" its operation. See, e.g., *United States v. Corcione*, 592 F.2d 111 (2d Cir.), *cert. denied*, 440 U.S. 975 (1979); *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978); *United States v. Gonzalez*, 539 F.2d 1238, 1240 (9th Cir. 1976); *United States v. Register*, 496 F.2d 1072 (5th Cir. 1974); *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

expertise, ability, or inclination to begin to carry out the crime without government assistance.³¹⁵ But even if the government merely infiltrates an ongoing crime, there must be a point at which its involvement becomes intolerable. It is disturbing to see government officials thoroughly and continuously involved in criminal operations, even if they are acting to gather evidence of criminality. A difficult balance is required. But in a close case, the wise judge may well conclude that it is "a less evil that some criminals should escape than that the Government should play an ignoble part."³¹⁶

The second broad category of governmental criminal activity encompasses those situations in which the investigators are not directly involved in the crimes they are investigating. This category includes two subsections. One subsection includes those crimes committed by the government agent that are necessary to make the eventual criminal operation successful. In one case, for example,³¹⁷ an undercover agent entered an establishment suspected of gambling violations. To establish the legitimacy of his disguised role, he placed bets himself and was arrested. The conviction was reversed on the ground that the defendant lacked criminal intent. The other subsection includes those crimes that are only marginally related to the criminal investigation, and independent of any crimes committed by the defendant.³¹⁸ In one narcotics case, for example, the defendant argued that the government's payment of the informant's living expenses violated the state's prostitution laws.³¹⁹

Courts generally condone the government's involvement in crimes included in the first subsection. As long as the crimes are reasonably necessary to carry out the investigation, the courts realize that these acts are justifiable and do not violate due process.³²⁰ Crimes included in the second subsection, how-

315. 588 F.2d 373, 381 n.9 (3d Cir. 1978).

316. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

317. *State v. Torphy*, 78 Mo. App. 206 (1899).

318. See, e.g., *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978); *United States v. Spivey*, 508 F.2d 146 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975); *United States v. Quatermain*, 467 F. Supp. 782 (E.D. Pa. 1979); *United States v. Owens*, 228 F. Supp. 300 (D.D.C. 1964).

319. *United States v. Prairie*, 572 F.2d 1316, 1319 n.4 (9th Cir. 1978).

320. See, e.g., *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); *United States v. Quinn*, 543 F.2d 640 (8th Cir. 1976); *United States v. Van Maanen*, 547 F.2d 50 (8th Cir. 1976); *United States v. Gonzalez*, 539 F.2d 1238 (9th Cir. 1976); *United States v. Lue*, 498 F.2d 531 (9th Cir. 1974); *United States v. Greenbank*, 491 F.2d 184 (9th Cir.), *cert. denied*, 417

ever, have come under greater criticism since the government need not have committed the crime to gather its evidence against the defendant. Just as the government may not excessively enmesh itself in the criminal activity under investigation, so too must it refrain from unnecessary illegal activity. Although some courts have found such conduct irrelevant for due process purposes,³²¹ others have found such conduct intolerable.³²²

An investigation using a staged arrest meets this criterion. Although the government will likely commit crimes in both broad categories, it does not violate due process in doing so. Its agents commit a crime in the first category in dealing with judicial officials to arrange a "fix" in the manufactured case, thus participating in the crime under investigation. As noted above, participation in this type of crime can violate due process if the government's involvement becomes too excessive.³²³ Yet staged arrests have not generally involved the agent-defendant in a significant role.³²⁴ Although the government manufactures the crime, its subsequent involvement is insubstantial and thus not objectionable. Moreover, in the aftermath of *Russell* and *Hampton*, the courts have been cautious in condemning as overinvolvement questionable undercover practices.³²⁵ This reluctance, combined with the relatively limited governmental participation in the crime under investigation, renders this criminal behavior immune from a due process attack.

The government's agents also are likely to commit crimes in the second category, crimes that are not the crimes being investigated—in this instance acts of official corruption. In manufacturing the staged arrest they may violate state law, for example, by filing false documents and false statements before

U.S. 931 (1974); *State v. Dingman*, 232 S.W.2d 919 (Mo. 1950); *People v. Joyce*, 47 A.D.2d 562, 363 N.Y.S.2d 634 (1975); *People v. Mills*, 91 A.D. 331, 86 N.Y.S. 529, *aff'd*, 178 N.Y. 274, 70 N.E. 786 (1904); *State v. Busscher*, 81 Nev. 587, 407 P.2d 715 (1965).

321. *United States v. Szycher*, 585 F.2d 443 (10th Cir. 1978); *United States v. Spivey*, 508 F.2d 146 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975).

322. *United States v. Quatermain*, 467 F. Supp. 782 (E.D. Pa. 1979); *United States v. Owens*, 228 F. Supp. 300 (D.D.C. 1964).

323. See text accompanying notes 308-16 *supra*.

324. In *United States v. Archer*, the three codefendants fabricated the agent's story and supervised its presentation to the jury. See text accompanying notes 27-33 *supra*. In *Nigrone v. Murtagh*, the agent's attorney prepared the agent's phony story and made all the arrangements for the fix. See text accompanying notes 63-65 *supra*.

325. See *Park*, *supra* note 83, at 189.

judges and juries.³²⁶ Although some courts have harshly condemned these actions,³²⁷ other courts have noted that the commission of these technical crimes was justified as a reasonable exercise of the police power, and did not violate concepts of fairness.³²⁸ The latter position is more reasonable, since these crimes are not crimes independent of and unrelated to the defendant's illegal activities. They are necessary to make the eventual criminal operation successful. Moreover, although a court may castigate a prosecutor for lying to judges and grand jurors,³²⁹ the immorality of lying may be outweighed by the morality of exposing corruption in the judicial system.³³⁰ Thus, even though the government commits crimes in a staged arrest proceeding, the crimes are not excessive, nor are they unjustified. As a result, a staged arrest meets this criterion of due process.

3. *Nature of the Solicitation*

Justice Frankfurter once observed that "[h]uman nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."³³¹ As the *Isaacson* case demonstrates, government inducements can sometimes be offensive enough to violate due process.³³² Overzealous solicitations reveal law enforcement officers aggressively bent on pressuring citizens to commit a crime for law enforcement's sake, rather than as an incident to detecting and preventing ongoing crime. And the greater the government's pressure, the greater the possibility of luring into crime innocent persons not disposed to breaking the law.

Solicitations vary considerably, as do the personalities of the people subject to their temptation. The predisposition test of entrapment³³³ often glosses over the varieties of induce-

326. See note 40 *supra* and accompanying text.

327. See text accompanying notes 36-37, 66-68 *supra*.

328. See text accompanying notes 57-58 *supra*.

329. See text accompanying notes 36-37, 66-68 *supra*.

330. The subject of the morality of lying has generated an ongoing debate among philosophers. One school holds that lying is absolutely immoral, regardless of the consequences. See I. KANT, *THE METAPHYSIC OF ETHICS* 267 (1836). Opposed to this is the view that some lying is morally permissible where it has socially desirable consequences. See C. FRIED, *RIGHT AND WRONG* 69-78 (1978); S. PUFENDORF, *IV LAW OF NATURE AND NATIONS IN EIGHT BOOKS* ch. 1, subch. 16 (B. Kenneth trans. 1729). See generally S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978).

331. *Sherman v. United States*, 356 U.S. at 384 (Frankfurter, J., concurring).

332. See text accompanying notes 207, 228-33 *supra*.

333. See text accompanying notes 98-99 *supra*.

ments and dimensions of character, simplistically inquiring whether the defendant demonstrated a readiness and willingness to engage in crime. Under a due process test, however, one ought to analyze the nature and extent of the inducement and the character of the person solicited, not to determine the defendant's inclination to crime but, rather, to determine the government's sense of fair play. Inducements might consist of, for example, simple requests,³³⁴ repeated and persistent requests,³³⁵ physical threats,³³⁶ promises of romantic involvement,³³⁷ promises of exorbitant gain,³³⁸ or appeals to sickness,³³⁹ sympathy,³⁴⁰ friendship, or pride.³⁴¹ Persons subject to the solicitations might include, for example, chronic offenders requiring very little inducement,³⁴² prior offenders who may have decided to reform but are very susceptible to pressure,³⁴³ prior offenders who need more persuasion to return to crime,³⁴⁴ innocent people who are weak and vulnerable to temptation,³⁴⁵ or innocent people who resolutely obey the law but might succumb to attractive inducements.³⁴⁶ Due process should limit those solicitations that are excessive in light of the type of individual they are directed toward, even though under the entrapment doctrine one could probably show predisposition.³⁴⁷

Several courts have essentially used this criterion, holding that the government's solicitations were too extreme. In *United States v. Jannotti*, for instance, the district court found that the

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

335. See, e.g., *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

336. See, e.g., *United States v. Johnson*, 565 F.2d 179 (1st Cir. 1977).

337. See, e.g., *United States v. Hinkle*, 637 F.2d 1154 (7th Cir. 1981).

338. See, e.g., *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978).

339. See, e.g., *Sherman v. United States*, 356 U.S. 369 (1958).

340. See, e.g., *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1966).

341. See, e.g., *Sorrells v. United States*, 287 U.S. 430 (1932).

342. See, e.g., *Lewis v. United States*, 385 U.S. 206 (1967).

343. See, e.g., *United States v. Ordner*, 554 F.2d 24 (2d Cir. 1977).

344. See, e.g., *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978).

345. See, e.g., *United States v. Steinberg*, 551 F.2d 510 (2d Cir. 1977).

346. See, e.g., *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980), rev'd, No. 81-1020 (3d Cir. Feb. 11, 1982).

347. The courts generally do not inquire into the subjective state of mind of the defendant in evaluating the defendant's predisposition. Rather, the inquiry usually relates to the promptness or willingness of the defendant to engage in the criminal activity. See note 150 *supra* and accompanying text. Thus, a defendant's weak will may likely cause the court to find predisposition, although the same weakness may be a significant factor in finding that the government's solicitation was excessive.

nature and extent of the solicitations were so excessive that it violated principles of fairness under due process.³⁴⁸ The bribes were very large, the defendants were not requested to do anything improper, and the defendants were led to believe that if they did not accept the money, the project would not come to their city.³⁴⁹ Similarly, in *People v. Isaacson*, the court found that the solicitations were excessive, unfair, and explicitly a ground for reversal under due process.³⁵⁰ The informant made repeated telephone calls to the defendant, recalling their friendship and sobbing that he faced life imprisonment, that his parents and friends had abandoned him, and that he needed money to hire a lawyer and raise bail.³⁵¹

One should, however, view the nature of the solicitation and the other due process factors, just as the court did in *Isaacson*, in conjunction with other aspects of the undercover operation.³⁵² Some solicitations by themselves might be egregious enough to violate due process.³⁵³ With others, it would be necessary to inquire into the nature of the transaction, the defendant's state of mind, and the government's conduct apart from the solicitation.

An investigation using a staged arrest may be unduly intrusive and, therefore, violate this criterion. Excessive and improper solicitations may occur in the course of the investigation after the initial crime has been contrived and sent into the justice system. The government agents might be excessive in their entreaties of defense attorneys or others to help the agents escape the prosecutor's charges. As is the case under an objective entrapment test, such solicitations would be subject to scrutiny under due process because of their capacity, as in *Jannotti*,³⁵⁴ to tempt into crime persons who otherwise would not likely break the law.

4. Societal Harm

Another important criterion under due process is whether

348. 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, No. 81-1020 (3d Cir. Feb. 11, 1982). See text accompanying notes 247-56 *supra*.

349. See text accompanying note 252 *supra*.

350. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978). See text accompanying notes 227-32 *supra*.

351. See 44 N.Y.2d at 516, 378 N.E.2d at 80, 406 N.Y.S.2d at 716.

352. See text accompanying notes 225-30 *supra*.

353. Arguably this was the case in *Sherman v. United States*, 356 U.S. 369 (1958), in which the Court found entrapment as a matter of law. The Court was not presented with a due process argument and did not discuss the issue.

354. See text accompanying notes 250-52 *supra*.

the undercover activity produced concrete social harm. Undercover conduct that causes or threatens harm to innocent persons or institutions is totally alien to proper police functions. Paraphrasing Judge Friendly's pronouncement in *United States v. Archer*, it would be unthinkable for government agents to infiltrate a gang of juveniles and perpetrate rapes to gather evidence for prosecution.³⁵⁵ Such conduct not only constitutes an intolerable participation in crime, but also involves unnecessary and gratuitous harm to society. There is absolutely no law enforcement justification for such conduct, and government techniques that cause or threaten such harm implicate due process.

With few exceptions, courts have failed to notice or to evaluate the social harm that undercover investigations cause. In *United States v. Russell*, a government agent supplied a drug manufacturing ring with an essential ingredient for producing drugs.³⁵⁶ The government permitted the ring to manufacture and distribute the drugs into society for over a month before making arrests.³⁵⁷ This use of government power to aid and abet the dissemination of drugs that could have resulted in serious injury to citizens was improper. By contrast, if the undercover agents purchase contraband, but do not sell it, they obviate the possibility of harm to society.³⁵⁸ Also, no harm would result if, in a case like *Russell*, the government agent purchased or recovered the manufactured drugs so that they could not reach channels of commerce.³⁵⁹

Other cases have involved real and tangible social harm that the courts did not adequately address. In one case, for example, a government agent joined a burglary ring, stood by as a burglary proceeded in his presence, and then helped to dispose of the proceeds.³⁶⁰ In another case, government agents, in violation of state game laws, killed animals in concert with the defendants.³⁶¹ In yet another case, government agents sat by

355. 486 F.2d 670, 676-77 (2d Cir. 1973).

356. 411 U.S. 423 (1973). See text accompanying notes 121-24 *supra*.

357. See text accompanying note 122 *supra*.

358. Thus, a case such as *Hampton v. United States*, 425 U.S. 484 (1976), causes less societal harm than *Russell*, even though the government's conduct may be subject to criticism for other reasons. See text accompanying notes 125-26 *supra*.

359. See *United States v. Smith*, 538 F.2d 1359 (9th Cir. 1976) (government agents handed over illicitly manufactured drugs to federal drug enforcement agency on pretext of placing drugs in safety deposit box).

360. *People v. Joyce*, 47 A.D.2d 562, 363 N.Y.S.2d 634 (1975).

361. *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976).

while people extorted money to induce official action, knowing that those officials would retain the money for their own use.³⁶² These cases do not cause the level of harm that government brutality or threats of physical violence to innocent persons cause; however, they isolate another factor pertinent to due process.

Although an investigation using a staged arrest may cause some societal harm, the degree of this harm is small enough not to invalidate the investigation on due process grounds. Certainly there is no tangible harm to society; narcotics are not being disseminated, nor are lives or property being injured. The staged arrest might, however, affect the public's confidence in the impartiality of its judicial institutions. In addition, by injecting a sham case into the court system, falsifying court papers, and lying to judges and grand jurors, the government investigators threaten the integrity of these institutions by making them unwitting accomplices in the investigation, and by demonstrating contempt for procedures and safeguards created for the legitimate resolution of disputes. Yet it is common knowledge that prosecutors often use the court system's rules and procedures, particularly the grand jury, to further the interests of law enforcement, even though this decreases the public's confidence in the courts' impartiality.³⁶³ Moreover, if those same institutions are tainted with corruption, and justice is a purchasable commodity, then it is likely that the public already holds the legal system in contempt and would welcome the staged arrest as a needed antidote.

The use of fictitious court proceedings and the grand jury to establish the credentials of undercover agents in preparation for the exposure of corruption does not, therefore, appear inherently evil or improper. The staged arrest undoubtedly affects the publicly perceived integrity or impartiality of the system to some extent. But one must balance this nebulous harm against the benefits derived from eradicating misconduct from that system. This admittedly is difficult to resolve objectively. On balance, however, this relatively small harm should not alone violate due process.³⁶⁴

362. *United States v. DiSapio*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

363. See note 72 *supra*.

364. Of course, this societal harm could combine with other adverse factors, causing a staged arrest to violate due process. This possibility is a strong reason to adopt the preventative due process safeguards discussed below. See notes 389-412 *infra* and accompanying text.

5. *Violation of Individual Rights*

Undercover police practices that deliberately violate an individual's rights inescapably implicate due process.³⁶⁵ Although government officials involved in an undercover investigation might be justified in engaging in technically criminal conduct to establish their credentials and to further their investigative role,³⁶⁶ there can be no justification for the knowing and deliberate violation of the rights of individuals.

It is clear that the government's infringement of the protected rights of the defendant automatically invokes due process limitations.³⁶⁷ One court, for example, held that the government violated a defendant's rights, and thus violated due process, by abducting and torturing him.³⁶⁸ Similarly, a court concluded that due process and other constitutional protections applied when the government forcibly invaded the suspect's body.³⁶⁹ A difficult question arises, however, if the undercover activity invades the rights of a third party, not the rights of the defendant. Ordinarily, rights are personal, and only the person aggrieved may claim a violation of those rights.³⁷⁰ The government's violation of the rights of a third party, however, ought to be a relevant consideration in assessing, under due process, the overall fairness of the investigative conduct.

The New York Court of Appeals adopted this approach in *People v. Isaacson*.³⁷¹ The defendant in *Isaacson* did not contend that the government infringed his personal rights. The proof showed, however, that to elicit the cooperation of the third party informant, the police beat, kicked, and threatened to shoot him. The police also cruelly deceived him by apprising him, falsely, that he faced a long prison term.³⁷² The court found this treatment repugnant enough to be a principal factor in its decision to reverse the defendant's conviction on state due process grounds. Although the defendant's rights were not violated, the court believed that countenancing such conduct

365. See text accompanying notes 178-200 *supra*.

366. See text accompanying notes 357-364 *supra*.

367. *Hampton v. United States*, 425 U.S. 484, 490 (1976) ("The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant.") (plurality opinion) (emphasis in original); *United States v. Russell*, 411 U.S. 423, 435 (1973).

368. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

369. *Rochin v. California*, 342 U.S. 165 (1957).

370. See *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

371. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

372. *Id.* at 515, 378 N.E.2d at 79, 406 N.Y.S.2d at 715.

would condone police brutality and suggest that the end justifies the means.³⁷³

The *Isaacson* court's approach contrasts with the Supreme Court's approach in *United States v. Payner*.³⁷⁴ In *Payner*, an investigation by the Internal Revenue Service focused on a particular bank. Learning that an executive of this bank, an innocent third party, carried important documents in his briefcase, government agents devised an illegal scheme in which they entered the bank executive's private room, seized the briefcase, searched it, and copied several hundred documents. One of the copied documents was critical in the prosecution of the defendant for falsifying his income tax return. The federal district court suppressed the seized evidence under its supervisory powers, but also found that the government violated due process, concluding that the government "knowingly and purposefully obtained the briefcase materials with *bad faith hostility* toward the strictures imposed on their activities by the Constitution."³⁷⁵

The Supreme Court reversed, rejecting the two grounds for the district court's decision. It concluded that the supervisory power concept did "not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court."³⁷⁶ More importantly, although the Court did not dispute that the unlawful briefcase search may have violated fundamental fairness if conducted against the defendant,³⁷⁷ the Court found due process did not protect the third party because "the limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the defendant."³⁷⁸

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

374. 447 U.S. 727 (1980).

375. *United States v. Payner*, 434 F. Supp. 113, 130 (E.D. Ohio) (emphasis in original), *aff'd per curiam*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980). The court explicitly found that the government affirmatively counseled its agents that the fourth amendment standing limitation permitted them to deliberately conduct an unconstitutional search against persons to secure evidence against the real targets of the investigation. 434 F. Supp. at 132-33.

376. 447 U.S. at 735. In light of *United States v. Russell*, 411 U.S. 423 (1973), and *Hampton v. United States*, 425 U.S. 484 (1976), it does not appear that the supervisory power concept is distinct from due process, at least in terms of undercover investigative conduct. For cases discussing the supervisory power concept, see *Rea v. United States*, 350 U.S. 214 (1956); *McNabb v. United States*, 318 U.S. 332 (1943).

377. 447 U.S. at 737 n.9.

378. *Id.*

Notwithstanding this language, one may still conclude that the violation of an individual's rights, including the rights of a third party, should be a significant factor in evaluating, under due process, the propriety of the government's conduct. By itself, this factor is not dispositive in federal courts, as the *Payner* case suggests. But state courts can certainly consider the violation of a third party's rights as a due process criterion under their state constitutions.³⁷⁹ Moreover, one may argue that *Payner* allows even federal courts to consider the violation of a third party's rights if other factors, as in *Isaacson*, contribute to the due process violation. Combined with other excessive actions, such conduct may then render investigative methods so egregious as to violate principles of fairness.

An investigation using a staged arrest may violate individual rights and thus meet this criterion. Rights could be infringed in the implementation of the staged arrest, as in any other investigative operation. Violations of individual rights did not occur in the *Archer* or *Nigrone* cases,³⁸⁰ however, and such violations need not be, and should not be, a part of a staged arrest plan.

6. *Minimization of Harm*

In evaluating whether the government violated due process, one should consider its attempts to limit harmful consequences to societal and to individual rights, because such attempts shed light on the fairness of the procedure and the motives of the government agency.³⁸¹ This is not to say that the failure to minimize potentially adverse social consequences necessarily suggests improper conduct or bad faith. Rather, it suggests that affirmative attempts to minimize harm might allay criticism of the operation based on other due process factors. Although far from dispositive, minimization of harm can be another useful tool for analytical purposes.

Congress has endorsed this principle by enacting a statute requiring government officials to minimize the potential harm

379. See, e.g., note 51 *supra* and accompanying text.

380. See text accompanying notes 24-79 *supra*.

381. The United States Attorney General's office has issued guidelines recommending the principle of minimizing harm in undercover investigations. See GUIDELINES ON CRIMINAL INVESTIGATIONS, *supra* note 272, at 3 ("Before employing a technique, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means."); *id.* at 10, 12 (need "to minimize the risks of harm and intrusion;" FBI shall take reasonable steps to minimize certain types of undercover activity).

to society or the rights of individuals in using one particularly intrusive investigative technique—electronic eavesdropping.³⁸² Congress intended to give law enforcement all of the essential tools to combat crime, but insisted that those tools be used carefully so that the government would not unnecessarily infringe upon the rights of individual privacy.³⁸³ Accordingly, when electronically monitoring conversations, law enforcement officials must refrain from intercepting and recording conversations not related to their investigation.³⁸⁴

In many other cases, the government is clearly able to minimize the harm its operation might cause by using voluntary measures. For example, in one investigation in which the government infiltrated a drug manufacturing ring and assisted in establishing and operating the laboratory, the government prevented the public distribution of the manufactured drugs by procuring them itself.³⁸⁵ Similarly, in *United States v. Twigg*, the government located its drug laboratory in a farmhouse in an isolated area because the defendant had announced that he intended to stand guard at the site with a loaded shotgun.³⁸⁶

The government might conduct an investigation using a staged arrest in a manner preventing it from satisfying this criterion. Yet, there are many steps it could take to minimize the harms of a staged arrest. In *People v. Archer*, for example, officials instructed the undercover agent not to record or transmit the proceedings mechanically before the grand jury, and to limit his testimony solely to the story concocted by defendant Klein.³⁸⁷ Moreover, the government claimed, and the court agreed, that it took affirmative steps to limit the deception of judges to the minimum extent necessary. Finally, the government communicated the plan to the Chief Judge of the highest court in New York State, thereby demonstrating candor and good faith. Another way in which the government could minimize harm in some instances would be not to proceed to the

382. 18 U.S.C. § 2518(5) (1976) requires that an eavesdropping warrant must "contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception."

383. See *Scott v. United States*, 436 U.S. 128 (1978). See also C. FISHMAN, *supra* note 290, at 203.

384. There is considerable judicial confusion over the concept of minimization in the area of wiretapping. See, e.g., C. FISHMAN, *supra* note 290, at 203-04.

385. *United States v. Smith*, 538 F.2d 1359 (9th Cir. 1976).

386. 588 F.2d 373, 386 n.12 (Adams, J., dissenting).

387. 68 A.D.2d 441, 417 N.Y.S.2d 507, 510 (1979), *aff'd*, 49 N.Y.2d 978, 406 N.E.2d 804, 428 N.Y.S.2d 949, *cert. denied*, 449 U.S. 839 (1980).

grand jury.³⁸⁸

VI. PREVENTATIVE DUE PROCESS: A WARRANT FOR THE STAGED ARREST

Although the entrapment doctrine cannot adequately prevent the abuses that might arise if the government uses staged arrests,³⁸⁹ courts could employ the due process criteria identified above to condemn overly intrusive undercover investigative practices. Yet even if these criteria were adopted, government officials might be reluctant to manufacture staged arrests because of their highly controversial nature.³⁹⁰ Moreover, the criteria would operate only after the fact, and would not be able to prevent the possible harms from occurring. Thus, the most effective restraint on investigative excesses would not operate after the staged arrest operation was complete, but would operate before it began. It would allow the government to carry out only those investigations that are reasonable and proper, and would prohibit all others.

Prosecutors have long been subject to one such restraint: the constitutional requirement of a warrant in advance of searches and seizures.³⁹¹ This provision of the fourth amendment was designed to prevent arbitrary and unjustified governmental intrusions.³⁹² It requires a "neutral and detached"

388. Investigators could structure the case so that attempts to induce corrupt responses from court officials would occur prior to any grand jury presentation. Also, in some jurisdictions, a felony case could be processed by a "prosecutor's information" as opposed to a grand jury indictment. See N.Y. CRIM. PROC. LAW § 195.40 (McKinney 1974).

389. See text accompanying notes 83-169 *supra*.

390. Both the federal and state appellate courts in *Archer* and *Nigrone* soundly criticized the technique. See text accompanying notes 36-37, 67 *supra*.

391. U.S. CONST. amend. IV.

392. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974). An "unjustified" search is a search that interferes with a person's security when there is no good reason to do so. An "arbitrary" search is an unregulated and general rummaging beyond the scope of the official's power.

General warrants and writs of assistance that allowed arbitrary and indiscriminate searches and seizures were the "immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980). As the Supreme Court explained in *Stanford v. Texas*, 379 U.S. 476 (1965):

Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles

magistrate to determine whether there is probable cause to suspect that a crime is being or has been committed, rather than leaving that determination to a police officer "engaged in the often competitive enterprise of ferreting out crime."³⁹³ Also, the search warrant must describe the place that the officers will search and the persons or things they will seize, so that the police do not have unlimited discretion in their investigation.³⁹⁴

Thus, a properly detailed staged arrest warrant could prevent abuses in an investigation using a staged arrest just as the search warrant prevents abuses in police searches and seizures.³⁹⁵ Although one could not advocate their use on fourth amendment grounds, since staged arrests do not involve searches or seizures,³⁹⁶ there are other ways to establish staged arrest warrants. Legislatures could pass statutes mandating their use based on the legislatures' general police powers, or courts could mandate their use based either on common law or on constitutional grounds such as due process.³⁹⁷

If government officials routinely applied for staged arrest warrants that set out their factual predicate, their investigative alternatives, the details of the manufactured crime and its predicted progression through the judicial system, their solicitation methods, and their predicted involvement in the crime under investigation, the warrants would mitigate the abuses to

of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer."

Id. at 481-82.

393. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

394. *Stanford v. Texas*, 379 U.S. 476 (1965); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

395. Others have suggested the use of investigative warrants in other contexts. For example, an official British report proposed that the police must obtain a warrant from a magistrate before soliciting a person to commit an offense. REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE (Cmd. No. 3997) 42 (1929). For other proposals, see Comment, *Present and Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 U. COLO. L. REV. 261, 283 (1969); Comment, *The Applicability of the "New" Fourth Amendment to Investigations by Secret Agents: A Proposed Delineation of the Emerging Fourth Amendment Right to Privacy*, 45 WASH. L. REV. 785 (1970); Donnelly, *supra* note 100. A task force report on organized crime also recommends that some form of judicial authorization circumscribe simulated offenses and false oaths. See REPORT OF THE TASK FORCE ON ORGANIZED CRIME 52-53 (1976).

396. See *United States v. Dionisio*, 410 U.S. 1, 15 (1973); *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968).

397. It is questionable whether law enforcement agencies, as a practical matter, would seriously consider utilizing a warrant procedure in investigations unless legally required to do so. See Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 215 n.16 (1975).

which staged arrests are prone. As noted above, staged arrests may not meet five of the due process criteria, depending on the circumstances: the government's factual justification,³⁹⁸ its good faith,³⁹⁹ the nature of its solicitation,⁴⁰⁰ the violation of individual rights,⁴⁰¹ and the government's effort to minimize harmful consequences.⁴⁰²

By requiring a factual predicate, a description of the investigator's suspicions, and the facts underlying those suspicions, a warrant would not only ensure that the government's actions are not unjustified or arbitrary,⁴⁰³ but would also guarantee that the government acted on the basis of specific substantive law enforcement goals, and would thus negate an accusation that the government acted in bad faith.⁴⁰⁴ To establish a sufficient factual justification, the prosecutor may, for example, reveal general information about widespread fixing of cases in a particular court, as in the *Archer* case,⁴⁰⁵ or specific information that a particular government official has acted corruptly, as in the *Nigrone* case.⁴⁰⁶ A longstanding pattern of questionable decisions involving the same judges and lawyers might also suffice. By contrast, if an affidavit recites only a generalized suspicion that government officials may be responsive to corrupt overtures, or otherwise discloses that the prosecutor wishes only to test the integrity of individuals at random, the court should swiftly veto the investigation.

A description of the government's solicitation plans that includes the individuals whom it would approach and the inducements it would offer would give the magistrate an indication of whether the solicitation is excessive. For example, a plan to approach a judge with a bribe offer of \$20,000 to dismiss a minor offense should be closely scrutinized. Similarly, a plan to importune repeatedly a defense attorney to suborn perjury also should be carefully examined. If not limited by some form of judicial oversight, such solicitations might lead persons not truly criminally disposed to commit crimes that they would

398. See text accompanying notes 270-72 *supra*.

399. See text accompanying notes 285-87 *supra*.

400. See text accompanying note 354 *supra*.

401. See text accompanying note 380 *supra*.

402. See text accompanying notes 387-88 *supra*.

403. See text accompanying notes 264-69 *supra*.

404. See text accompanying notes 273-84 *supra*. In addition, by requiring an early statement of the crime the government wishes to investigate, the warrant diminishes the subjective element of this criterion. See *id*.

405. See text accompanying notes 24-26 *supra*.

406. See text accompanying notes 61-64 *supra*.

otherwise not commit.⁴⁰⁷

If the government sets out the specific nature of its proposed operation, giving detailed information as to where and when it will occur and whom it will involve, the magistrate could also determine whether the operation intrudes upon any individual's rights. For example, information indicating the government has used, or will have to use, undue force to persuade an informant to participate in the staged arrest calls for judicial suspicion.

Finally, by including the full details of the staged arrest plan, and by ensuring that the government's proposals are reasonable and proper, the warrant would require the government to minimize the social and individual harms that a staged arrest could produce. For instance, the government officials should provide the court with a careful and detailed description of the staged arrest plan and its implementation. They should apprise the magistrate of the crime they intend to simulate, the actors involved, and the likelihood of harm to persons or property. They should also disclose whether the plan contemplates false representations to judges or grand jurors or the use of false official documents. The court would then be able to determine whether the government has acted in good faith in an attempt to minimize harmful consequences from the operation to the least amount necessary for the investigation's effectiveness.

The warrant would not only work to prevent these five possible abuses, it would also work to guarantee that the staged arrest would meet the three criteria described earlier: the necessity for the staged arrest,⁴⁰⁸ the government's participation in criminal activity,⁴⁰⁹ and the generation of social harms.⁴¹⁰

An analysis of the lack of available investigative alternatives would reassure the magistrate that the investigator must use the staged arrest technique to ferret out judicial corruption. The affidavit should explain that the only practicable way to detect the individuals suspected of corrupt acts is to fabricate a criminal case as bait for the suspected "fix." It should articulate the reasons why alternative investigative techniques would compromise the secrecy of the investigation, or would require recruitment of public or private individuals with divided loyal-

407. See text accompanying notes 331-51 *supra*.

408. See text accompanying notes 297-300 *supra*.

409. See text accompanying notes 323-30 *supra*.

410. See text accompanying notes 363-64 *supra*.

ties. Because such an undercover investigation is necessary,⁴¹¹ given a factual justification for the operation, the magistrate should not be too hesitant in finding that the investigators have satisfied this requirement.

As pointed out above, if the government sets forth, as required, the crimes and the harm to society it may have to commit, the warrant encourages their minimization because the magistrate will veto any excessively harmful plan. This warrant proposal thus guarantees, as far as possible, that the five most easily implicated due process criteria are met. It also provides even further assurances that the three criteria that staged arrest investigations probably meet are not violated.

An investigative warrant is a controversial approach, and one not likely to be embraced by law enforcement officials unless legally required. Nevertheless, if proposed investigative conduct involves extreme undercover methods of crime detection or intrudes into sensitive areas of government, law enforcement might wisely opt for some form of warrant procedure. Indeed, it is quite possible that in contrast to its condemnation in *Nigrone*, the *Archer* court sustained the government's questionable tactics because the prosecutor submitted his official plan to the Chief Judge of the Court of Appeals in advance.⁴¹² This limited disclosure implied both good faith and recognition that the investigative technique demands justification. Thus, judicial authorization should be employed to legitimize the prospective use of a staged arrest.

VII. CONCLUSION

This Article has examined the principal judicial limits on the undercover investigative technique known as the staged arrest. The courts have vigorously condemned this technique as a flagrant example of law enforcement misconduct, and have only cautiously approved it as a necessary device to expose corruption in the judicial system. Unquestionably, the frequent, unjustified, or arbitrary use of this procedure demands judicial control. But because the entrapment doctrine is generally ineffective, the only available judicial control is due process. And given the courts' inadequate definition of due process, an acceptable analysis requires the use of a more detailed set of criteria—as set forth above. These criteria, which provide effective postinvestigation control, in conjunction with the war-

411. See notes 297-300 *supra* and accompanying text.

412. See text accompanying notes 57-58 *supra*.

rant requirement, which provides effective preinvestigation control, eliminate the unattractive features of the staged arrest procedure, and create a viable method to detect and deter judicial corruption.