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TOWARD AN EXPANDED VIEW OF THE DUE PROCESS CLAIM IN ENTRAPMENT CASES*

Paul Marcus†

INTRODUCTION

The United States has a very serious crime problem,¹ indicated not only in terms of bare numbers but also in terms of the many individuals directly affected by crime.² Significantly, crime has an adverse effect on the way we view ourselves and our society.³

* This is the written version of a lecture given in February 1988 while the author was Distinguished Visiting Professor at the Georgia State University College of Law.

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1. See FBI, 1987 UNIFORM CRIME REPORTS 163 (1988):

Nationwide, law enforcement agencies made an estimated 12.7 million arrests in 1987 for all criminal infractions except traffic violations. When the arrest volume was related to the total United States population, the arrest rate was 5,330 per 100,000 inhabitants. In cities with populations of 250,000 or more, the rate was 7,808, the highest recorded. . . . Increases of 25 percent were shown for both total arrests and arrests for violent crimes in the 10-year period, 1978-1987. . . . The 1987 drug abuse violation arrest total was 13 percent above the 1986 figures and 38 percent higher than in 1983.

Id.

2. See Davis, *The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DE PAUL L. REV. 329 (1989). Summarizing calculations recently published by the Justice Department, Professor Davis states that "[o]ne out of every 133 Americans will be murdered," 83% "will be victims or intended victims of violent crimes at some point in their lives," and nearly 30% "will be the victim of a robbery or attempted robbery." *Id.* at 331-32.

3. In the fall semester of 1988, the author was a visiting professor at the University of Geneva, Criminal Law Department, Geneva, Switzerland. During that time I observed a nation which has a virtually nonexistent violent crime rate. The impact of such a rate on the way people live is readily apparent. People are willing to walk in the evenings by themselves seemingly with no fear; they are not reluctant to send their teenage children out at night in unsupervised activities; public transportation thrives in the middle of all major cities at almost all times of the day; and though people at parties discuss many issues, violent crime is not one of them. Moreover, the Swiss newspapers and television commentators give little time to discussion of criminal justice. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1987, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS 123 (1988) (survey shows 40% of U.S. citizens think the crime rate in their area is increasing, slightly more than 40% think it has remained the same, and less than 20% think it is decreasing).

The crime problem in the United States is a very difficult one and will not go away quickly.⁴ Certainly, much needs to be done in the United States to combat crime. Our society needs to attack more vigorously both the underlying causes of crime and the way in which criminal activity is detected, investigated, charged, and resolved. Still, I strongly advocate a position which may appear to be naive regarding law enforcement needs vis-à-vis crime problems.⁵ My view is that in the name of combatting violent crime we have gone too far, or more precisely we have allowed law enforcement officials to go too far in detecting and investigating crime. We have reached the state of police involvement in crime that Judge Brown of the Fifth Circuit wrote of more than twenty-five years ago, where "enough is more than enough—it is just too much."⁶ Our justice system has allowed and encouraged law enforcement officials to instigate crime and at times create crime where crime would not have existed without government involvement. I propose a sharply expanded view of the way in which the due process clause of the fifth and fourteenth amendments is applied so as to limit overinvolvement by law enforcement officials in crime.⁷

I. THE TRADITIONAL DUE PROCESS DOCTRINE

In several important areas an expansive view of the due process clause is not necessary, because other well established constitutional doctrines address claims regarding overinvolvement of the police. For instance, if law enforcement officers fail to give adequate warnings regarding the fifth amendment privilege

4. For an excellent treatment of the causes of crime, as well as the impact throughout society, for both the United States and Switzerland, see Clinard, *Cities With Little Crime* (ASA Rose Monograph 1978).

5. For the similar views of some prominent judges, see *infra* text accompanying notes 36, 40, and 47.

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

7. The commentators have been virtually unanimous in calling for more aggressive application of the due process clause in this area. See, e.g., Abramson & Lindeman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. L. 139 (1980); Mascolo, *Due Process, Fundamental Fairness, and Conduct That Shocks the Conscience: The Right Not to be Enticed or Induced to Crime by Government and Its Agents*, 7 W. NEW ENG. L. REV. 1 (1984); Comment, *When Use of the Entrapment Defense is Barred; Is There a Viable Alternative Defense?*, 5 COOLEY L. REV. 203 (1988) [hereinafter Comment, *Entrapment Defense*]; Comment, *Entrapment, De Lorean and the Undercover Operation: A Constitutional Connection*, 18 J. MARSHALL L. REV. 365 (1985); Comment, *Entrapment and Due Process: How Far is Too Far?*, 58 TUL. L. REV. 1207 (1984).

against self-incrimination, under *Miranda v. Arizona*⁸ statements made by suspects in custody responding to interrogation will be inadmissible to prove guilt at trial.⁹ Similarly, under the fourth amendment search and seizure provision, evidence will be excluded if police officers failed to obtain a required warrant prior to searching or seizing.¹⁰ Even in the usual case involving application of entrapment law, the defendant will not be convicted if the police improperly instigated the crime.¹¹

Numerous cases of police overinvolvement remain, however, which are not so easily handled by looking to the standard attacks on the admission of evidence or on convictions. For instance, warnings under *Miranda* become somewhat irrelevant if the defendant has been deprived of adequate food and clothing for too long a period,¹² has been cut off from others during interrogation,¹³ or has been lied to regarding the charges against her.¹⁴ In such situations the United States Supreme Court has not hesitated to reverse the defendants' convictions by applying the due process clause rather than the fifth amendment privilege against self-incrimination.¹⁵

8. 384 U.S. 436 (1966).

9. *Miranda v. Arizona*, 384 U.S. 436 (1966). While statements obtained in violation of *Miranda* may not be used to prove the guilt of the defendant at trial, they may be used to impeach the defendant's in-court testimony. See *Harris v. New York*, 401 U.S. 222 (1971).

10. The seminal case in this area is *Mapp v. Ohio*, 367 U.S. 643 (1961), which applied the fourth amendment to the states and established the exclusionary rule for evidence unlawfully obtained under the Constitution. *But see* *United States v. Leon*, 468 U.S. 897 (1984), which put forth the so-called "good faith" exception to the rule of exclusion. Now evidence may be admitted if the police officers in reasonable good faith relied on a judicial warrant which later turned out to be invalid. *Id.* at 913.

11. The key issue in most entrapment prosecutions will be whether the defendants were predisposed to commit the crime. See Judge Learned Hand's statement in *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952): "[W]as the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence[?]"

12. See *Brooks v. Florida*, 389 U.S. 413 (1967) (petitioner's "confession," in which he implicated himself in a prison riot and which followed two weeks of detention in a tiny bare cell shared by two other inmates, during which time the petitioner was forced to remain naked and was fed only twelve ounces of soup and eight ounces of water per day, held involuntary as the result of coercion).

13. *Id.*

14. *Lynnum v. Illinois*, 372 U.S. 528 (1963).

15. See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936):

The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." It would be difficult to conceive of methods more revolting to the

Similarly, in the fourth amendment setting, the Supreme Court has held that certain activities by law enforcement officials are so contrary to a civilized society that these activities will not be permitted under the due process clause. The most famous case in this area is *Rochin v. California*,¹⁶ in which law enforcement officers forced a suspect to undergo a stomach pumping procedure in a medical facility. Writing for the majority, Justice Felix Frankfurter found that such police conduct could not be tolerated as a matter of due process. He explained the basis for the Court's conclusion:

Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notion of justice of English-speaking peoples even toward those charged with the most heinous offenses." These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," or are "implicit in the concept of ordered liberty."¹⁷

Entrapment issues are somewhat more problematic when examining police overinvolvement in crime. Most jurisdictions in the United States, including the federal system, have adopted an entrapment test which focuses on the defendant's state of mind prior to the commission of the crime.¹⁸ If the evidence shows that the defendant was "predisposed" to commit the crime, the entrapment defense will fail. In these jurisdictions,¹⁹ once the

sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

Id. at 286 (citation omitted). In *Brown*, the defendants confessed to murder following prolonged torture by state officials which included a partial hanging and severe whippings with a leather strap. *Id.* at 280-83.

16. 342 U.S. 165 (1952).

17. *Rochin v. California*, 342 U.S. at 169 (citations omitted).

18. As a result, this test is normally referred to as the "subjective test," which looks to the individual propensities of the defendant. For a discussion of the point, see P. MARCUS, *THE ENTRAPMENT DEFENSE* ch. 2 (1989).

19. Approximately twelve jurisdictions use the so-called objective test which looks entirely to the government conduct to determine if such conduct was excessive. *Id.* at ch. 3.

entrapment defense fails because the defendant was predisposed, the question of government overinvolvement in crime then becomes one of constitutional dimension. Could another claim, under the due process clause, be successful in attacking government overinvolvement in crime?²⁰

II. THE BASIS FOR THE DUE PROCESS ATTACK

The Supreme Court has never expressly held that a due process claim can be successful in cases where the entrapment defense fails. It is virtually beyond dispute, however, that a majority of the Justices—given the appropriate case—would so hold. The Court has referred to the due process claim in language which has persuaded virtually all state and federal judges dealing with the issue that such a constitutional claim exists. For instance, in *United States v. Russell*,²¹ Justice Rehnquist stated that “[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed.”²² Justice Powell, in *Hampton v. United States*,²³ intimated that the due process claim could be accepted, though with difficulty: “I emphasize that the cases, if any, in which proof of predisposition is not dispositive will be

20. The due process claim is different from the entrapment defense though both claims may arise in the same case. *See, e.g.*, *United States v. Graves*, 556 F.2d 1319, 1322 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978): “[A]part from any question of predisposition of a defendant to commit the offense in question, governmental participation may be so outrageous or fundamentally unfair as to deprive the defendant of due process of law” (quoting *United States v. Quinn*, 543 F.2d 640 (8th Cir. 1976)).

Judge Brown explained the point clearly: “[The due process claim’s] kinship to entrapment is not that the act of a Government representative induced the commission of a crime. Rather, it is that the means used to ‘make’ the case are essentially revolting to an ordered society.” *Williamson v. United States*, 311 F.2d 441, 445 (Brown, J., concurring).

21. 411 U.S. 423 (1973).

22. *United States v. Russell*, 411 U.S. at 431–32 (citation omitted). In *Russell*, the defendant was convicted of unlawfully manufacturing the drug methamphetamine. The undercover agent investigating the defendant’s activities had supplied the defendant with an essential ingredient used to manufacture the drug. *Id.* at 424–26.

Along with Chief Justice Burger and Justice White, Justice Rehnquist apparently retreated from this view in *Hampton v. United States*, 425 U.S. 484 (1976), where his plurality opinion concluded, in Justice Powell’s words, that “no matter what the circumstances, neither due process principles nor our supervisory powers could support a bar to conviction in any case where the Government is able to prove predisposition.” *Id.* at 495 (Powell, J., concurring).

23. 425 U.S. 484 (1976).

rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction."²⁴ Justice Brennan echoed these comments in *Mathews v. United States*,²⁵ stating that "[s]ome governmental conduct might be sufficiently egregious to violate due process."²⁶

Today, looking to these statements, as well as to cases such as *Rochin v. California*,²⁷ state and lower federal judges consistently write that a due process claim can be entertained if the government action is "so outrageous that it violates the concept of fundamental fairness inherent in due process and shocks the sense of universal justice mandated by the due process clause."²⁸ Perhaps the best statement of the proposition was put forth by Judge Friendly:

[T]here is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.²⁹

Few lawyers today challenge the existence of a due process claim regarding government overinvolvement in crime. What is truly amazing, however, is how few cases have arisen in which the due process challenge has been used to strike down a conviction. The leading case on point is *United States v. Twigg*,³⁰ in which the defendant was convicted of manufacturing and possessing narcotics with the intent to distribute.³¹ A government agent contacted the defendant, and encouraged him to set up a

24. *Hampton v. United States*, 425 U.S. at 495 n.7.

25. 108 S. Ct. 883 (1988).

26. *Mathews v. United States*, 108 S. Ct. at 888 (Brennan, J., concurring) (citation omitted).

27. 342 U.S. 165 (1952).

28. *State v. Pleasant*, 38 Wash. App. 78, 82, 684 P.2d 761, 764 (1984) (citing *Hampton v. United States*, 425 U.S. 484, 493 (1976)).

29. *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973).

30. 588 F.2d 373 (3d Cir. 1978).

31. *United States v. Twigg*, 588 F.2d at 375.

“speed” laboratory.³² Ultimately, the defendant agreed and handled financing and distribution for the operation, but it was the government officer who obtained the equipment and materials necessary to produce the drug.³³ During this period the government officer controlled the manufacturing process and the laboratory.³⁴ The court found that the government involvement in the creation of the crime in this case was “so overreaching as to bar prosecution of defendants as a matter of due process of law.”³⁵ The court focused its attention on the fact that in this case—unlike other similar cases—the defendant was not shown to have been actively involved in the production or distribution of narcotics until after the government agent induced him to engage in such activities. The majority noted that:

[T]he DEA agents deceptively implanted the criminal design in [the defendant’s] mind. They set him up, encouraged him, provided the essential supplies and technical expertise, and when he . . . encountered difficulties in consummating the crime, they assisted in finding solutions. This egregious conduct on the part of government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs. Fundamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred.³⁶

*United States v. Lard*³⁷ is another case where the government involvement was simply too extensive to be condoned. In *Lard*, state and federal agents attempted to buy illegal weapons and explosives from the defendant.³⁸ The defendant initially refused to provide the weapons, but ultimately agreed after numerous requests by the government officials.³⁹ The due process language of the court, once again, is striking: “[The agent’s] conduct was not aimed at facilitating discovery or suppression of ongoing illicit dealings and unregistered firearms. Rather, it was aimed

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 377.

36. *Id.* at 381.

37. 734 F.2d 1290 (8th Cir. 1984).

38. *United States v. Lard*, 734 F.2d at 1292.

39. *Id.*

at creating new crimes for the sake of bringing criminal charges against Lard, who, before being induced was lawfully and peacefully minding his own affairs."⁴⁰

*People v. Isaacson*⁴¹ is another extreme case in which the due process clause was used to void a conviction. In this case, a police informant induced the defendant to commit a drug offense.⁴² The informant had previously been arrested by the New York State Police for possession of a controlled substance.⁴³ During questioning following arrest, a police investigator struck the arrestee "with such force as to knock him out of a chair, then kicked him, resulting in a cutting of his mouth and forehead, and shortly thereafter threatened to shoot him."⁴⁴ When the police lab report revealed the "controlled substance" to be nothing but caffeine, the police failed to inform the arrestee. Instead, the police used the threat of a lengthy prison term to induce the arrestee to assist in producing drug arrests.⁴⁵ The informant then contacted the defendant and pleaded with him to make a cocaine sale, finally tricking the defendant, at police request, into crossing the state line to complete the sale.⁴⁶ Dismissing the indictment, the New York Court of Appeals condemned the police conduct as "an incredible geographical shell game" which revealed "the ugliness of police brutality [and] . . . a brazen and continuing pattern in disregard of fundamental rights."⁴⁷

III. THE APPLICATION OF THE DUE PROCESS CLAUSE

Many courts express willingness to strike down convictions on due process grounds when police conduct is viewed as sufficiently outrageous. Cases actually voiding convictions, however, are very few in number, as courts have given the due process clause extremely limited application. For example, in *United States v. Tobias*,⁴⁸ the due process claim failed even though a government undercover drug agent established an illegal drug laboratory for

40. *Id.* at 1297.

41. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

42. *People v. Isaacson*, 44 N.Y.2d at 514-18, 378 N.E.2d at 79-81, 406 N.Y.S.2d at 715-17.

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

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

45. *Id.*, 378 N.E.2d at 79-80, 406 N.Y.S.2d at 715-16.

46. *Id.* at 516-18, 378 N.E.2d at 80-81, 406 N.Y.S.2d at 716-17.

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

48. 662 F.2d 381 (5th Cir. Unit B Nov. 1981), *cert. denied*, 457 U.S. 1108 (1982).

the defendant, sent him the necessary chemicals for the lab, and on at least thirteen different occasions gave advice to the defendant as to the manufacturing process for the drug.⁴⁹ Although the court concluded that the facts in the case “set the outer limits to which the government may go in the quest to ferret out and prosecute crimes,”⁵⁰ the court affirmed the defendant’s conviction.

Even in cases in which the defendant has been “pretargeted” for investigation and prosecution by government agents,⁵¹ the due process clause is rarely invoked successfully. Indeed, the Fifth Circuit expressly overruled a case in which due process was held to be violated when such “pretargeting” had occurred. In *United States v. Cervantes-Pacheco*,⁵² the court refused to invalidate the conviction when it was shown that the informant would be compensated “based on the government’s evaluation of his overall performance.”⁵³ Instead of utilizing a due process approach to such a predetermined investigation, the court found that the jury could “weigh the defendant’s arguments about the inherent unreliability of ‘purchased’ testimony.”⁵⁴

Numerous other cases demonstrate that judges are very reluctant to apply the due process analysis even in cases of extreme government involvement in crime.⁵⁵ To be sure, the

49. *United States v. Tobias*, 662 F.2d at 384.

50. *Id.* at 387.

51. Pretargeting refers to the situation in which a particular defendant is picked out for the undercover agent’s or informant’s efforts by the government. Often the undercover agent is not paid for her efforts unless the pretargeted defendant is arrested or convicted. *See United States v. Lane*, 693 F.2d 385, 388 (5th Cir. 1982) (contingent fee arrangement with informant did not violate entrapment standards since informant did not implicate pretargeted defendants); *Williamson v. United States*, 311 F.2d 441, 444 (5th Cir. 1962) (conviction based on informant’s testimony reversed because government failed to justify or explain the contingent fee arrangement with informant).

52. 826 F.2d 310 (5th Cir. 1987).

53. *United States v. Cervantes-Pacheco*, 826 F.2d at 311. Although the informant testified that his fee did not depend on the ultimate conviction of the defendant, *id.* at 312, a dissenting judge insisted that the fee “depended upon the outcome of the case and the quality of [the informant’s] testimony.” *Id.* at 316 (Goldberg, J., dissenting).

54. *Id.* at 316. *Cervantes-Pacheco* overruled *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962), which had established the rule that an informant paid on a contingency fee basis is per se an incompetent witness. *Cervantes-Pacheco*, 826 F.2d at 312. The court compared such an informant’s testimony with testimony procured through a plea bargain. *Id.* at 315. As the dissent noted, however, recognizing that plea bargain arrangements increase incentives to give perjured testimony does not justify legitimizing yet another incentive to lie. *Id.* at 316 (Goldberg, J., dissenting).

55. Undoubtedly, the most controversial cases in which the courts generally refused to apply the due process analysis were the so-called ABSCAM prosecutions. The FBI, in

United States Supreme Court has been perhaps the most reluctant court in the country to apply the due process clause in this area. The leading case is *Hampton v. United States*,⁵⁶ in which the evidence showed, in dissenting Justice Brennan's view, that "the Government's agent deliberately set up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser."⁵⁷ Justice Brennan maintained that in this situation the "Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary."⁵⁸ Even in this extreme situation the majority of the Court found no difficulty in affirming the conviction. The Court rationalized that the government agents were acting in concert with the defendant and that the defendant was predisposed to commit the crime for which he was convicted: "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."⁵⁹ While Justices Powell and Blackmun were not willing to concur in Justice Rehnquist's statement that perhaps the due process clause could never apply in this area,⁶⁰ the two concurring Justices concluded that the facts in this case did not bar conviction of the predisposed defendant as a matter of due process.⁶¹

CONCLUSION

I believe we have lost sight of the reasons for allowing substantial government involvement in the detection and

a series of cases, offered bribes to government officials. Subsequently, some of the officials accepted the bribes and were then prosecuted for official corruption. In the leading case, *United States v. Jannotti*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982), the court *en banc* refused to find a due process violation because the behavior of the FBI agents did not rise to the necessary level of outrageousness. *Id.* at 609. The dissenting opinion of Judge Aldisert is a strong indictment of the government's position in connection with the ABSCAM cases: "Federal public policy, and, indeed, basic social policy, dictate that it is better to let a technical transgressor go free than to allow federal law enforcement officials to manufacture crime that entraps the unwary innocent." *Id.* at 615 (Aldisert, J., dissenting). Interestingly, state judges have been considerably more receptive to the due process claims than federal judges. *See, e.g.*, *State v. Glosson*, 462 So. 2d 1082 (Fla. 1985); *State v. Hohensee*, 650 S.W.2d 268 (Mo. 1982); *Commonwealth v. Matthews*, 347 Pa. Super. Ct. 320, 500 A.2d 853 (1985).

56. 425 U.S. 484 (1976).

57. *Hampton v. United States*, 425 U.S. at 498 (Brennan, J., dissenting).

58. *Id.* (Brennan, J., dissenting).

59. *Id.* at 490.

60. *See supra* note 22 and accompanying text.

61. *Id.* at 492-95 (Powell, J., concurring).

investigation of crime. Our justice system allows this activity in order to stop crime and to incarcerate criminals. Undoubtedly the process of detecting and investigating crime is a difficult one in which we should resist reversing convictions simply based on our feelings of being offended by "some fastidious squeamishness or private sentimentalism about combating crime too energetically."⁶² Still, to have judicial opinions which hold that the due process clause only forbids the government from entirely manufacturing crime is intolerable.⁶³ More preferable, and more compatible with fundamental fairness is Justice Frankfurter's view that the courts of the United States must "accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals."⁶⁴ This means that the due process clause requires a close and very careful judicial scrutiny of intensive police involvement in crime. For example, the Supreme Court should have strongly condemned the conduct of the government officers in the *Hampton* case where the government essentially both sold the narcotics to the defendant and bought the narcotics back from him. I agree with Judge Hastie's view as stated twenty-five years ago in a virtually identical case:

But when the government's own agent has set the accused up in illicit activity by supplying him with narcotics and then introducing him to another government agent as a prospective buyer, the role of government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing.⁶⁵

Without question, as the Supreme Court has noted, a certain amount of "stealth and strategy are necessary weapons in the arsenal of the police officer,"⁶⁶ and "the government may use

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

63. The Ninth Circuit has held that generally to constitute a due process violation, the government must have "engineered and directed the criminal enterprise from start to finish." *United States v. Williams*, 791 F.2d 1383, 1386 (9th Cir. 1986). See Comment, *Entrapment Defense*, *supra* note 7, at 221.

64. *Sherman v. United States*, 356 U.S. 369, 381 (1958) (Frankfurter, J., concurring).

65. *United States v. West*, 511 F.2d 1083, 1085 (3d Cir. 1975).

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

artifice and strategem to ferret out criminal activity.”⁶⁷ But when the government is involved in the creation of crime, when police officers persuade reluctant individuals to complete a crime, and when agents are allowed to focus exclusive attention in a “contingent fee arrangement” on specific defendants, law enforcement goes beyond mere stealth and strategy and becomes conduct which is, simply put, shocking to the conscience. This conduct does and should offend the common sense of fair play and decency, and should be offensive to American citizens. In short, it is conduct which violates the due process clause. Without such a conclusion, our faith in the efficient, effective, and legitimate means of law enforcement will be eroded, and confidence in the government’s handling of the criminal justice system will be destroyed. Justice Brandeis made the point so very well more than fifty years ago:

Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, 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 the pernicious doctrine this Court should resolutely set its face.⁶⁸

67. *United States v. Ramirez*, 710 F.2d 535, 541 (9th Cir. 1983) (citing *Sorrells v. United States*, 287 U.S. 435, 441 (1932)).

68. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).