CRIMINAL PROCEDURE—ENTRAPMENT—INTOLERABLE DEGREE OF GOVERNMENTAL INVOLVEMENT IN CRIME INFRINGES UPON DEFENDANTS' CONSTITUTIONAL LIBERTIES OF DUE PROCESS—*United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978).

Henry Neville and William Twigg were convicted by a jury of the illegal manufacture of methamphetamine hydrochloride (speed).[1] The facts revealed that Robert Kubica, arrested in May, 1976, for the illegal manufacture of speed, agreed thereafter to assist the Drug Enforcement Administration (DEA) by serving as an informant.[2] Accordingly, pursuant to a request by DEA officials, Kubica telephoned Neville in October, 1976, and proposed that they establish a speed laboratory.[3] Over the next several months, Kubica and Neville formulated plans defining the roles that each was to play: Kubica would locate a site for production and obtain necessary equipment and ingredients while Neville would tend to acquisition of funds and distribution of the drug.[4]

The government proceeded to furnish Kubica with phenyl-2-propanone, a chemical indispensable to the manufacture of speed and yet the most difficult to procure.[5] In addition, DEA officials rented a farmhouse to serve as the location for the laboratory, provided glassware for the narcotics operation, and established arrangements with chemical supply houses whereby Kubica would be able to purchase other requisite materials.[6] Neville contributed $1,500

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[1] United States v. Twigg, 588 F.2d 373, 374 (3d Cir. 1978). Specifically, the two defendants were found guilty of conspiracy to manufacture and possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846 (1976), 18 U.S.C. § 2 (1976); and manufacture of a controlled substance in violation of 21 U.S.C. § 841(a)(1) (1976). Neville was additionally convicted of use of a telephone to implement the manufacture of a controlled substance, 21 U.S.C. § 843(b) (1976), 18 U.S.C. § 2 (1976); and possession of methamphetamine hydrochloride, 21 U.S.C. § 844(a) (1976). 588 F.2d at 374–75.

[2] 588 F.2d at 375. Kubica had pled guilty and received a four-year sentence, out of which was born his collaboration with the DEA to impede illicit narcotics traffic. *Id.* *See* note 86 *infra*.

[3] 588 F.2d at 375. Kubica and Neville had been acquainted for twenty years and, in fact, had managed a speed laboratory together in 1973, producing several pounds of the amphetamine. The record does not otherwise indicate the reason for DEA attention to Neville. *Id.* at n.2.

[4] *Id.* at 375. Using equipment supplied by the DEA, Kubica recorded certain telephone conversations between the two discussing such operations. *Id.*

[5] *Id.* Government agents financed the supply of two and one-half gallons of phenyl-2-propanone at a cost of $475. *Id.*

[6] *Id.* at 375–76. The informant conducted such business with chemical supply houses under the name of "Chem Kleen." *Id.* at 376.

which Kubica used to acquire the apparatus.[7] On March 1, 1977, William Twigg became involved with Neville in the criminal enterprise, apparently to repay a debt he owed to the latter.[8] On the same day, laboratory construction within the farmhouse was completed.[9]

Kubica, the sole party possessing chemical knowledge, took charge during the manufacturing phase of the venture, soliciting minor tasks to be performed by Neville and Twigg.[10] Approximately six pounds of the drug was produced within a week.[11] Neville departed from the farmhouse on March 7, carrying the criminal "fruit" in a suitcase and was arrested by DEA officials while driving away.[12] The farmhouse was raided and Twigg placed under arrest.[13]

On appeal, Neville and Twigg did not raise a traditional entrapment defense but claimed that the extent of police involvement in the crime constituted a violation of their rights to due process.[14] Judge Rosenn, speaking for the majority in *United States v. Twigg*,[15] held that although the defendants were not entrapped as a matter of law, "governmental involvement in the criminal activities of this case . . . reached 'a demonstrable level of outrageousness.' "[16] The defendants' convictions were reversed[17] on the ground of fundamental fairness inherent in the due process clause of the fifth amendment.[18]

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[7] *Id.* at 376. Neville thus financed approximately eighty percent of the chemicals and instruments. *Id.* at 384 (Adams, J., dissenting).

[8] *Id.* at 376. Twigg's participation in the scheme was significantly less than that of Neville. *See id.* at 381–82. Twigg did accompany Kubica to various chemical distribution centers, *id.* at 376, and, at Kubica's order, purchased a separatory funnel. *Id.* at 380.

[9] *Id.* at 376.

[10] *Id.* at 376, 380–81. Twigg was often directed to run errands at local stores for food and drink, while Neville passed a considerable amount of time away from the farmhouse, *id.* at 376, to arrange for sale of the amphetamine. Petition for Rehearing in Banc at 4, United States v. Twigg, No. 78-1315 (3d Cir., filed Jan. 17, 1978).

[11] 588 F.2d at 376.

[12] *Id.* Quantities of cocaine and speed, in addition to the drugs contained in the suitcase, were discovered during the search of Neville's car. *Id.*

[13] *Id.* Kubica prompted the raid on the defendants by contacting DEA officials. *Id.*

[14] *Id.* at 375. An entrapment defense is normally predicated upon the lack of the accused's predisposition to commit the crime. At trial, the jury found that Neville and Twigg were predisposed and, consequently, not entrapped. *Id.* at 376. This finding was not contested upon appeal. *Id.* at 376 n.5.

Neville also argued that the search warrant was invalid and that the jury received erroneous instructions on reasonable doubt. *Id.* at 375 n.1. The Third Circuit held such contentions to be without merit. *Id.*

[15] 588 F.2d at 373 (3d Cir. 1978).

[16] *Id.* at 376, 380.

[17] *Id.* at 375. Neville's conviction for possession of cocaine was the only count sustained. *Id.*

[18] *See id.* at 377, 381.

Dissenting, Judge Adams countered that the facts in the case at bar did not support a constitutional framework of review;[19] undercover police action in *Twigg* was merely comparable to that found in other cases dismissing such a defense.[20]

The impact and ramifications of *Twigg's* successful departure from the traditional entrapment defense can best be understood by first positioning the case in relation to the history of federal entrapment law. In 1932, the Supreme Court of the United States created precedent[21] when it sustained the defense of entrapment in *Sorrells v. United States*.[22] Chief Justice Hughes, in formulating the

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[19] *Id.* at 383 (Adams, J., dissenting).

[20] *Id.* at 386–89 (Adams, J., dissenting).

[21] Two significant decisions precede this date. The landmark case of *Woo Wai v. United States* in 1915 marks the first occasion that a federal circuit court finds entrapment. *See* Woo Wai v. United States, 223 F. 412, 415 (9th Cir. 1915). There, Immigration Commission agents approached the defendant and proposed a scheme for illegal importations of Chinese into the United States. *Id.* at 413. Woo Wai declined the offer, and for approximately one and one-half years the officers urged his participation through letters, personal visits, and repeated assurances as to the manner in which the plan would be safely implemented. *Id.* at 413–14. Woo Wai finally acquiesced. *Id.* at 414. The court noticed the absence of evidence demonstrating that the defendant had previously been engaged in such illicit importations, *id.*, and held that public policy prohibited a conviction obtained where the "criminal intention to commit the offense had its origin" in the minds of the government agents. *Id.* at 415.

In *Casey v. United States*, the Supreme Court, through Justice Holmes, declined to find the existence of entrapment. Casey v. United States, 276 U.S. 413 (1928). Casey, a lawyer suspected of smuggling drugs to his prisoner-clients addicted to morphine, was exposed by federal officials. *Id.* at 422 (Brandeis, J., dissenting). The agents had installed a dictaphone to overhear the defendant's conversation with certain prisoners who previously agreed to cooperate with the government and to purposefully request the supply of drugs from the defendant. *Id.* The case is noted here for the opinion proffered by Justice Brandeis in his dissent, who stated that although the government may profit by stratagem used to catch a criminal, it "may not provoke or create a crime and then punish the criminal, its creature." *Id.* at 423 (Brandeis, J., dissenting). For the Court to permit conviction of a "detective-made criminal" is "tantamount to a ratification by the Government of the officers' unauthorized and unjustifiable conduct." *Id.* at 423–24 (Brandeis, J., dissenting). The Justice stressed that the prosecution in the case *sub judice* must be defeated, independent of any asserted right of the accused, in order to shield the integrity of courts and governmental entities. *Id.* at 425 (Brandeis, J.,dissenting). Justice Brandeis herein issued the seed of subsequent Supreme Court deliberation regarding the entrapment defense. *See* Hampton v. United States, 425 U.S. 483 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). These cases are discussed at length at notes 22–69 *infra* and accompanying text.

[22] 287 U.S. 435 (1932). A prohibition officer posing as a tourist approached the defendant, initiated conversation, and inquired without success whether any liquor could be obtained. *Id.* at 439. A second request met with a second refusal. *Id.* Further conversation in which the officer shared common war experiences with the defendant and played upon the latter's sympathies led to a third request for liquor which was fulfilled. *Id.* The Court, in upholding the entrapment defense, reasoned that the defendant had been an innocent citizen with no prior disposition to commit the unlawful act. *Id.* at 441, 448. The plan was deemed to originate in the

parameters of the defense, held that ruse and artifice were properly within the arsenal of government agents when utilized to expose unlawful undertakings.[23] Prosecution would not be undermined merely because government officers provided an opportunity for the potential defendant to commit the crime.[24] However, "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense . . . ."[25] The Court thus drew a distinction between preventing crime and creating it;[26] should the latter be deemed to occur, the government may be estopped from prosecution in the interest of public policy.[27] Chief Justice Hughes concluded that it belies congressional intent in enacting a criminal statute to allow its enforcement to be abused by government agents' instigation of the very act they wish to punish.[28] The *Sorrells* Court herein set forth a statutory intent/subjective analysis approach to entrapment which concentrates on the conduct of the defendant and the absence or presence of his predisposition to commit the crime.[29]

In a separate opinion, Justice Roberts offered an alternative view of the basis for the entrapment doctrine: public policy, rather than congressional intent, forbids a conviction where a governmental official visualizes the crime and induces its performance by one not intending to so act.[30] It is the role of the judicial tribunal to prevent the debasement of governmental decency and to preserve the "purity of its own temple" by refusing to sanction such abuse of the criminal law.[31] "[C]ourts must be closed to the trial of a crime instigated by

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mind of the agent rather than in the mind of the defendant and, as such, was a "creature" of the agent's "purpose." *Id.* at 441.

[23] *Id.* at 441.

[24] *Id.*

[25] *Id.* at 442.

[26] *Id.* at 444. Chief Justice Hughes relied on federal case law of the Eighth Circuit. *See* Butts v. United States, 273 F. 35, 38 (8th Cir. 1921).

[27] The *Sorrells* Court referred to a Fourth Circuit opinion. *See* Newman v. United States, 299 F. 128, 131 (4th Cir. 1924).

[28] 287 U.S. at 448.

[29] Although eight members of the Court agreed as to the finding of entrapment, they differed as to the legal basis for the defense. *Id.* at 453 (Roberts, J., concurring). This subjective determination of entrapment, however, continues to represent the controlling position of the Supreme Court today. *See* Hampton v. United States, 425 U.S. 483 (1976); United States v. Russell, 411 U.S. 423 (1973).

[30] 287 U.S. at 454–55 (Roberts, J., concurring). The manipulation of deceptive practices to expose ongoing crime is otherwise permissible in regard to society's "war with the criminal classes." *Id.* at 453.

[31] *Id.* at 457.

the government's own agents."[32] This perspective will be considered by later courts to constitute the public policy/objective approach to entrapment which concentrates on the conduct of the government and the absence or presence of overreaching and instigative design in its actions.[33]

The Supreme Court reviewed the structure of the entrapment defense twenty-six years later in *Sherman v. United States*.[34] Chief Justice Warren, delivering the opinion of the Court, essentially reaffirmed the analysis presented by the *Sorrells* majority,[35] and advised that subterfuge is a viable weapon of the government in the battle against illicit sales of narcotics.[36] Yet boundaries are imposed upon the overzealous police official; the duty of law enforcement officers encompasses the deterrence of crime, but never its causation.[37] Congress does not intend its statutes to be corrupted by permitting the prosecution of violations where a "criminal design" springs from the mind of an official who sows the seeds of disposition in an otherwise innocent person.[38] The *Sherman* Court, capsulizing the subjective approach to entrapment enunciated in *Sorrells*, confirmed that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[39]

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[32] *Id.* at 459.

[33] Even if the defendant lacks predisposition and is "otherwise innocent," he is nevertheless "guilty" since he does in fact commit the act. *Id.* at 456. It is the role of the government in the crime which serves to defeat the prosecution. *Id.* at 454–56. This alternative announced by Justice Roberts retains the minority support of the Supreme Court today. *See* Hampton v. United States, 425 U.S. 483, 495 (Brennan, J., dissenting); United States v. Russell, 411 U.S. 423, 436 (Douglas, J., dissenting) and 439 (Stewart, J., dissenting).

[34] 356 U.S. 369 (1958). A government informer, Kalchinian, encountered the defendant several times at a doctor's office where both were under treatment for drug addiction. *Id.* at 371. Chance meetings established a rapport and frank discussion between the two of attempts to overcome the habit. *Id.* Kalchinian complained that the treatment was failing and repeatedly implored the defendant to provide him with a source of narcotics until the latter finally acquiesced. *Id.* A unanimous Court held that the defendant had been entrapped. *Id.* at 373. As in *Sorrells*, though, the Justices disagreed in regard to the legal foundation for the defense of entrapment and the proper formula to apply. *Id.* at 378 (Frankfurter, J., concurring).

[35] *Id.* at 376–77.

[36] *Id.* at 372.

[37] *Id.*

[38] *Id.* "Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search." *Id.* Justice Frankfurter, extending the analogy in his concurrence, explained that statutes are silent on the issues of entrapment as they are silent on the issue of suppression of illegally obtained evidence. *Id.* at 381 (Frankfurter, J., concurring). Yet congressional enactments presuppose a supervisory power of the courts to grant the defense. *Id.* (Frankfurter, J., concurring).

[39] *Id.* at 372.

A concurring opinion, however, advocated a reexamination of the *Sorrells* rule.[40] Justice Frankfurter, echoing in part the words of Justice Roberts, criticized the reasoning of the majority as fallacious in its insistence that congressional intent supports and founds the doctrine of entrapment.[41] Rather, the defendant's guilt is engendered in the very violation of the statute.[42] "[C]onduct is not less criminal because [it is] the result of temptation."[43] Yet the prosecution falters due to the objectionable methods used by the government, for public trust decries the judicial tribunal from sanctioning a lawless enforcement of the law.[44] The proper objective test, then, in evaluating the presence of entrapment, should focus on the acts of the government; any predisposition on the part of the defendant is irrelevant to a determination since it is not linked to the underlying rationale for the doctrine.[45] Justice Frankfurter observed that a case-by-case inspection is necessary to a finding of reprehensible police action likely to persuade persons not otherwise "ready and willing" to carry out the offense.[46] Factors to be considered would include the manner of inducement, the type of crime involved, and the difficulty of the investigation.[47] In essence, Justice Frankfurter counseled a stalwart public policy approach to entrapment that shifts attention away from the accused to the quality of police behavior, and called upon the courts to administer justice accordingly.[48]

In 1973, a divided Supreme Court confronted the issue of entrapment again in *United States v. Russell*.[49] Justice Rehnquist, writ-

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[40] *Id.* at 378–79 (Frankfurter, J., concurring).

[41] *Id.* at 379–80 (Frankfurter, J., concurring).

[42] *Id.* (Frankfurter, J., concurring).

[43] *Id.* at 380 (Frankfurter, J., concurring).

[44] *Id.* (Frankfurter, J., concurring). Justice Frankfurter quoted Justice Holmes, dissenting in *Olmstead v. United States*: "[I]t [is] less evil that some criminals should escape than that the Government should play an ignoble part." Olmstead v. United States, 277 U.S. 438, 470 (1938) (Holmes, J., dissenting).

[45] 356 U.S. at 382–83. (Frankfurter, J., concurring). "Permissible police activity does not vary according to the particular defendant concerned." *Id.* at 383 (Frankfurter, J., concurring).

[46] *Id.* at 384 (Frankfurter, J., concurring).

[47] *Id.* at 384–85 (Frankfurter, J., concurring).

[48] *Id.* at 378–85 (Frankfurter, J., concurring).

[49] 411 U.S. 423 (1973). An undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs supplied the defendants, already engaged in the manufacture of speed, with an essential scarce ingredient known as phenyl-2-propanone (P-2-P). *Id.* at 425. The officer did not otherwise become involved in the manufacture of the amphetamine and a subsequent search of the defendants' laboratory revealed an additional bottle of P-2-P. *Id.* at 425–26. The Court of Appeals for the Ninth Circuit reversed the conviction of the district court on the ground that " 'an intolerable degree of governmental participation in the criminal enterprise' " mandated dismissal of the case, regardless of the defendant's conceded predisposition. *Id.* at 274 (quoting

ing for the majority, reasserted the holdings of *Sorrells* and *Sherman* and emphasized the predominant importance of the defendant's predisposition in any delicate balance between criminal tendency and governmental influence to commit the crime.[50] Infiltration by police officials into criminal narcotics operations and limited participation in such activities are proper investigatory tactics which do not violate an individual's constitutional rights.[51] Moreover, since the defense of entrapment does not rest in the heritage of the nation's Constitution, then absent encroachment upon some independent right of the accused, the twin constituents of due process and fundamental fairness do not arise.[52] In dicta, however, Justice Rehnquist admitted that "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."[53] Perhaps unwittingly, he thus heralds the due process approach to entrapment, as later cases, including *Twigg*, will testify.[54] Yet the due process rationale was not

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United States v. Russell, 459 F.2d 671, 672 (9th Cir. 1972)). Two alternative theories were introduced to support this proposition. *Id.* First, the court alluded to a line of recent cases holding that entrapment occurs as a matter of law whenever the government provides the accused with contraband. *Id.* at 427–28. *See* United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970). Second, the "non-entrapment rationale" of *Greene v. United States*, another Ninth Circuit decision, recognized that an excessive degree of governmental enmeshing in the criminal act is "repugnant" to a system of justice. 411 U.S. at 428. *See* Greene v. United States, 454 F.2d 783 (9th Cir. 1971). The court of appeals in *Russell* unified these two strands of defense and reversed conviction on the ground of due process and fundamental fairness. 411 U.S. at 428. The Supreme Court reversed. *Id.* at 436.

[50] 411 U.S. at 433–34.

[51] *Id.* at 432. It is also permissible, then, for government agents to supply a drug ring with "some item of value." *Id.*

[52] *Id.* at 430. Any analogy between entrapment and the exclusionary rule applied to illegal search and seizures is thus flawed, according to the Court, since in the latter situation an independent constitutional right is infringed. *Id.*

[53] *Id.* at 431–32. Justice Rehnquist implied that for an accused to benefit from such a remedy despite his predisposition, the governmental acts would have to be as grossly shocking as those demonstrated in *Rochin v. California*. *Id.* There, police officers took the defendant to a hospital and forced an emetic into his stomach so that he would vomit two capsules of morphine, which the officers subsequently used as proof of narcotics possession. *Id.* Rochin v. California, 342 U.S. 165 (1952).

[54] In 1971, the Ninth Circuit foreshadowed the admission of Justice Rehnquist and witnessed the birth of the due process variation to entrapment. Greene v. United States, 454 F.2d 783, 788 (9th Cir. 1971) (Merrill, J., dissenting). *See also* note 49 *supra*.

In 1973, Judge Friendly in *United States v. Archer* responded to Justice Rehnquist's dicta in *Russell* and related the role of due process to effective law enforcement:

> [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

adopted by the dissenting Justices in *Russell*,[55] who supported the public policy/objective test established by the minority opinions in *Sorrells* and *Sherman*.[56]

Justice Rehnquist maintained a traditional posture in *Hampton v. United States*,[57] a 1976 case decided by a plurality of the Court.[58] In reaffirming the majority stance of *Sorrells*, *Sherman* and *Russell*, he posited that entrapment arises only where government agents initiate the criminal pattern.[59] Therefore, the essential question deals with the intent of the accused to commit the offense; where predisposition exists, entrapment does not.[60] In regard to the supervisory role of the courts, Justice Rehnquist warned that the defense is not to serve as a vehicle for the federal judiciary to give a " 'chancellor's foot'

> 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.

United States v. Archer, 486 F.2d 670, 676–77 (2d Cir. 1973) (footnote omitted).

[55] 411 U.S. at 437–39 (Douglas, J., dissenting) and 439–49 (Stewart, J., dissenting).

[56] *Id.* Justice Stewart indicated that several federal courts presently adhere to the objective test as enunciated by Justice Roberts and Justice Frankfurter, which stresses the conduct of the police officer rather than the intent of the defendant as the dispositive element in a finding of entrapment. *Id.* at 445–46 n.3. Furthermore, a majority of the commentators prefer the objective reasoning. *Id. See, e.g.*, the ALI MODEL PENAL CODE § 2.13 (Official Draft 1962), which defines entrapment to include "methods of persuasion or inducement [used by a public law enforcement official] which creates a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." ALI MODEL PENAL CODE § 2.13 (Official Draft 1962). *See also* the revised New Jersey Code of Criminal Justice which adopts an identical passage. N.J. STAT. ANN. § 2C:2-12(a)(2) (West Cum. Supp. 1979).

Justice Stewart also faulted the predisposition/subjective formula as misleading, unreliable and prejudicial to the defendant in that it allows into evidence hearsay and past criminal convictions to prove intent. 411 U.S. at 443–44 (Stewart, J., dissenting). For further discussion of the admission and exclusion of evidence where entrapment is at issue, see Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 200 (1976). *See also* note 106 *infra* and accompanying text.

[57] 425 U.S. 483 (1976).

[58] *Id.* The parties differed as to the facts. According to the government, the defendant met Hutton, an acquaintance who was also a DEA informant, and offered to sell a quantity of heroin if a buyer could be located. *Id.* at 485–86. The sale was transacted through the informant and a DEA official posing as a narcotics dealer. *Id.* at 486. According to the defendant, however, he was in need of cash, and Hutton had suggested selling a non-narcotic drug which could produce the same effects as heroin and which he offered to obtain from a friend. *Id.* at 486–87. The two might then distribute the drug for profit to persons who would believe they were buying heroin. *Id.* at 487. The defendant argued that he did not intend to sell heroin and claimed that he was entrapped or, in the alternative, that his due process rights were violated by egregious police tactics. *Id.*

[59] *Id.* at 488–89.

[60] *Id.*

veto" to governmental action of which it disapproves.[61] Instead, fifth amendment due process rights are viable avenues only where police action has infringed upon a constitutional right of the individual.[62]

Justice Powell, concurring, refrained from a per se negation of due process concepts whenever the defendant is deemed predisposed.[63] Since the measure of potential criminal involvement is variable, a tribunal of justice should remain flexible in accordance with its supervisory role and exercise of discretion under the circumstances.[64] The Justice conceded that "the cases, if any, in which proof of predisposition is not dispositive will be rare."[65] Yet in a threshold formulation of the due process alternative to entrapment, he declared that where "[p]olice overinvolvement in crime . . . reach[es] a demonstrable level of outrageousness" conviction will be barred.[66]

A dissent forwarded by Justice Brennan, however, recalled the public policy view of entrapment bequeathed by the concurrences in *Sherman* and *Sorrells* and the dissent in *Russell*.[67] Entrapment may occur despite the conceded guilt of the accused where inquiry discloses unconscionable police methods utilized to obtain conviction.[68] Overall, *Hampton* is a case of momentous import because it has been interpreted as allowing a due process defense founded on the outrageous nature of police behavior.[69]

Federal entrapment law has followed a trajectory that is highlighted by the Supreme Court's recognition of three possible analyses. A subjective vision of entrapment, which has tended to hold the sway of the Court, features the defense as statutory in origin and studies the "genesis of the intent" to commit the crime.[70] An objec-

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[61] *Id.* at 490.

[62] *Id.* Furthermore, if the police do act in an illegal manner toward the defendant, the proper solution lies in prosecution of the police rather than release of the defendant. *Id.*

[63] *Id.* at 495 (Powell, J., concurring).

[64] *Id.* at 494 n.5, 495 (Powell, J., concurring). *See also* note 38 *supra*.

[65] *Id.* at 495 n.7 (Powell, J., concurring).

[66] *Id.* (Powell, J., concurring).

[67] *Id.* at 495–96 (Brennan, J., dissenting).

[68] *Id.* (Brennan, J., dissenting).

[69] *See* United States v. Twigg, 588 F.2d at 378–79 (fundamental fairness prohibits conviction where police conduct "outrageous"); United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978) (due process defense based on outrageous nature of government conduct); United States v. Leja, 563 F.2d 244, 246 (6th Cir. 1977) (over-involvement of government agents may violate due process or warrant reversal under court's supervisory powers).

[70] Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1102 (1951).

tive explanation of entrapment, favored among the commentators, is rooted in public policy and discourages the sullying effect on the judicial process which would succeed any sanction of tainted governmental behavior.[71] Finally, a due process/fundamental fairness concern is an emerging trend, still in its infancy, which seeks to maximize the freedom of the individual to be constitutionally protected from pervasive police action in the criminal context.[72]

An understanding of the theories espoused by the court in *United States v. Twigg* begins by relating the case to the law which precedes it. Judge Rosenn, speaking for the Third Circuit, found that an intolerable degree of governmental involvement in the criminal manufacture of speed unjustifiably imposed upon the defendants' constitutional liberties inherent in the due process clause of the fifth amendment.[73] Neville's predisposition to commit the offense had foreclosed any contention of traditional entrapment;[74] Twigg was precluded ab initio from raising the defense since he had not been solicited to partake in the venture by a law enforcement officer.[75] Prosecution was held to be barred, instead, by the flagrant nature of police activity.[76]

The court believed that the factual history present in *Twigg* was distinguishable from prior Supreme Court case law which had repudiated the fundamental fairness alternative.[77] *Russell* had dealt with infiltration of a drug ring already in existence,[78] whereas in *Twigg* the criminal plan materialized at the behest of a government informer who recommended the scheme to a law-abiding citizen.[79] *Hampton* had centered on the sale of drugs as opposed to their manufacture in *Twigg*,[80] but the same discrepancy existed between the

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[71] United States v. Russell, 411 U.S. at 445–46 (Stewart, J., dissenting); Donnelly, *supra* note 70, at 1102.

[72] *See* Comment, Hampton v. United States: *Last Rites for the "Objective" Theory of Entrapment?*, 9 COLUM. HUMAN RIGHTS L. REV. 223, 260 (1977).

[73] 588 F.2d at 377, 380–81.

[74] *Id.* at 376. Kubica testified in regard to their joint manufacture of speed several years antecedent, *id.*, and to Neville's willingness to recreate the lab upon Kubica's stimulus. *Id.* at 381. Neville failed to offer any evidence that he was not predisposed. *Id.* at 376.

[75] *Id.* at 376. Twigg had been introduced to Kubica by Neville. *Id.* Entrapment may normally be pleaded only by those induced through government agents. *Id.* at 381.

[76] *Id.* at 380, 381.

[77] *Id.* at 377. *Russell* and *Hampton* were the two cases that dealt with this issue. *Id.*

[78] *Id. See* note 49 *supra*.

[79] *Id.* at 381. Although Neville had previously been convicted on drug charges, "he was peacefully minding his own affairs" at the time Kubica made contact. *Id.*

[80] *Id.* at 377. *See* note 58 *supra*.

two in regard to conception of the crime.[81] Moreover, the distribution of narcotics would normally demand greater expediency for successful detection and generate a higher threshold of acceptable governmental comportment.[82] The court in *Twigg* grasped that the key to *Hampton* and *Russell* lay in their very bequest of the due process possibility, to be assumed by an appropriate case where official behavior indeed shocked a " 'universal sense of justice.' "[83]

Simultaneously, Judge Rosenn articulated the balance that exists between societal safeguarding of personal privacy and social desire for efficacious enforcement of drug laws.[84] Yet, notwithstanding an appreciation of the challenges faced by the DEA, its overwhelming part

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[81] *Id.* at 378. *But see id.* at 378, n.7 and note 58 *supra*.

[82] 588 F.2d at 378. *See* Justice Powell's advisement in *Hampton* that factors to be considered in a due process deliberation include the type of offense and the requisite means of its discovery. Hampton v. United States, 425 U.S. at 495-96 n.7. *See also* 588 F.2d at 378 n.6. *But see* 588 F.2d at 387 (Adams, J., dissenting).

[83] 588 F.2d at 377 (quoting United States v. Russell, 411 U.S. at 41–42). Judge Rosenn turned to other federal decisions to help specify the proper attributes of police "outrageousness" which would justify an invocation of the due process clause. 588 F.2d at 379–80. In *Greene v. United States*, a special investigator of bootleg whiskey became associated through an informer with defendants already engaged in manufacture. Greene v. United States, 454 F.2d 783, 784 (9th Cir. 1971). The still was raided and the criminals imprisoned. *Id.* at 784. After their release, the agent reestablished contact and participated for a number of years in the defendants' illicit business by providing sugar, offering to supply various equipment, and purchasing the product. *Id.* at 785–86. In fact, the agent constituted the sole customer of the whiskey. *Id.* at 787. The court of appeals recognized that the traditional entrapment defense was unavailable due to the defendants' predisposition, but governmental overreaching was nevertheless held to prohibit conviction. *Id.* at 786. Although none of the official acts were deemed outrageous per se, their combination was sufficiently excessive to warrant the court's concern. *Id.* at 787. "[W]hen the Government permits itself to become enmeshed in criminal activity, from beginning to end, . . . the same underlying objections which render entrapment repugnant to American criminal justice are operative." *Id.*

The court in *Twigg* aligned itself with *Greene* and distinguished *United States v. Leja* and *United States v. Smith*, where fundamental fairness defenses were rejected. 588 F.2d at 379-80. *See* United States v. Leja, 563 F.2d 244 (6th Cir. 1977); United States v. Smith, 538 F.2d 1359 (9th Cir. 1976). In both *Leja* and *Smith*, the criminal germ was nurtured by the defendants before DEA officials appeared to further entice the wrongdoing. 588 F.2d at 380. Hence, these cases were deemed inapplicable to *Twigg*, where the government "lure[d] the defendant into a conspiracy." *Id.*

Judge Rosenn also mentioned *United States v. West*, where an entrapment defense (objective approach) was maintained on the ground of intolerable police conduct when an informant persuaded a friend and hitherto innocent person to sell diluted heroin to an undercover officer. *Id.* at 379. *See* United States v. West, 511 F.2d 1083, 1085 (3d Cir. 1975). *But see* 511 F.2d at 1086, where the *West* court acknowledged as well the absence of predisposition to commit the crime (subjective approach).

[84] 588 F.2d at 380. "Infiltration of criminal operations by informers and undercover agents is an accepted and necessary practice." *Id. See* Sherman v. United States, 356 U.S. at 381 (Frankfurter, J., concurring); United States v. Archer, 486 F.2d at 677.

in the drama of the case *sub judice* could not be countenanced.[85] A review of the facts displayed that Kubica, an informer, had propositioned Neville to manufacture the amphetamine.[86] DEA agents provided a location for production and ensured supply of a critical ingredient which defendants might not have been able to procure independently.[87] Chemical distribution centers were notified to provide materials to Kubica who would operate under the alias, "Chem Kleen."[88] Kubica purchased almost all the equipment,[89] managed the laboratory, and constituted the sole party possessed with technical expertise.[90] Assistance tendered by the defendants was trivial and at the instruction of the informer.[91] Drawing these facts together, Judge Rosenn ruled that such dramatic governmental intromission trespassed upon outstanding principles of fundamental fairness.[92]

In a dissenting opinion, Judge Adams argued that the degree of interference in the criminal process had been immoderate rather than unconstitutional.[93] DEA initiative in the case at bar had failed to manifest the "outrageousness" dictated by *Hampton* as the emblem of a due process defense;[94] the *Twigg* majority had thus abused an alternative proffered by the Supreme Court to be utilized only in the

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[85] 588 F.2d at 380.

[86] *Id.* The court insinuated that Kubica's motivation as informant was questionable, since his own criminal sentence stood to be lightened by such performance. *Id.*

[87] *Id. See* note 5 *supra* and accompanying text.

[88] 588 F.2d at 380.

[89] *Id.* Twigg obtained a separatory funnel, but at Kubica's order. *Id.*

[90] *Id.* at 380–81.

[91] *Id.* at 381. The court evinced surprise that the government would diminish the jail term of Kubica, who had possibly operated as many as one hundred speed laboratories, in order to convict Neville and Twigg, who lacked scientific ability needed to establish one laboratory. *Id.* n.9. In addition, at the time Kubica effected communication with Neville, the latter had not exhibited any criminal intentions which would logically warrant DEA scrutiny. *Id.* at 381. *But see id.* at 388 (Adams, J., dissenting) where it is suggested that Neville's "contacts" made him a worthy target.

[92] *Id.* at 381. Although Twigg would normally not lie within the sphere of protection radiated by a traditional entrapment defense, *see* note 75 *supra*, the more novel due process approach could embrace this issue in his favor. *Id.* at 381–82. Especially convincing to the court was the absence of Twigg's contribution to the scheme—he offered nothing in regard to capital, equipment or ingenuity. *Id.* at 382. He appeared on the criminal scene the very day laboratory production commenced; the defendants were arrested one week later. *Id.* at 376. Twigg's involvement stemmed from a debt he owed to Neville, and, accordingly, it is probable that he would not even have profited from future sale of the drug. *Id.*

Twigg's release was also mandated by the "general rule . . . that one conspirator cannot be convicted if all of the co-conspirators have been acquitted." *Id.* at n.11. *See* note 1 *supra*.

[93] *Id.* at 383, 386 (Adams, J., dissenting).

[94] *Id.* at 383, 385 (Adams, J., dissenting). *See* 425 U.S. at 495 n.7.

rarest of circumstances.[95] Although Judge Adams questioned the ethical wisdom of such law enforcement practices generally,[96] he maintained that their ultimate legitimacy in terms of fundamental fairness did not rest upon any establishment of governmental intervention.[97] *Twigg*, as the progeny of *Hampton* and *Russell*, should have inherited their judicial philosophy and rejected nullification of sullied but licit police action.[98]

Twigg augments the controversy which has surrounded entrapment from its very inception as a recognized doctrine. Two discrepancies as to the facts underlie the conflicting viewpoints articulated in *Twigg*. Despite a jury finding of predisposition to commit the crime,[99] the majority tends to minimize the defendants' criminal initiative[100] while the dissent tends to maximize it.[101] Likewise, the majority's emphasis on governmental technique is also inversely proportionate to the minority's treatment of it.[102] The essential

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[95] 588 F.2d at 385 (Adams, J., dissenting). Judge Adams construed the facts in *Twigg* to be less meritorious of due process consideration than those in *Hampton*, where the defense was ultimately defeated. *Id.* at 386 (Adams, J., dissenting). Firstly, the DEA had furnished contraband in *Hampton*. *Id.* Secondly, government stimulation of the crime, present in both cases, was common to undercover enterprises. *Id.* Finally, government provision of an isolated farmhouse in *Twigg* was justified in view of Neville's prior threat to guard the laboratory with a shotgun. *Id.* n.12 (Adams, J., dissenting).

Judge Adams suggested that the majority's reliance on other federal decisions was similarly inappropriate. *Id.* at 386 (Adams, J., dissenting). *United States v. West* was effectively overruled by *United States v. Hampton*, *id.*, and *Greene v. United States* concerned less demonstrable overreaching than appeared in *Hampton* or *Twigg*. *Id.* n.15 (Adams, J., dissenting).

[96] *Id.* at 383, 389 (Adams, J., dissenting).

[97] *Id.* at 387 (Adams, J., dissenting). Several reasons were forwarded by the dissent as a basis for this theory. *Id.* Primarily, consensual crime detection often encompassed forms of enticement. *Id.* n.17 (Adams, J., dissenting). *Hampton* had similarly focused on government involvement and yet the Court had still refused to sanction a due process defense. *Id.* at 387 (Adams, J., dissenting). The causal relationship between government maneuver and due process reaction was further undermined in that any contention of official inducement was actually linked to the concept of predisposition, which, in turn, formed the very breath of a traditional entrapment defense. *Id.* In light of the fact that Neville had readily acceded to Kubica's illegal suggestion, *id.* at 387–88 n.18 (Adams, J., dissenting), neither defendant deserved to profit from the defense. *Id.* at 387 (Adams, J., dissenting). Kubica, meanwhile, had merely assumed the same responsibilities of manufacture as had been arranged in his previous partnership with Neville several years earlier. *Id.* at 388 (Adams, J., dissenting). Finally, an issue of outrageousness is dependent upon the particular set of criminal circumstances. *Id.* at 387 (Adams, J., dissenting). Skillful drug investigation has been typically preceded by forms of instigation; conversely, drug enforcement would be hampered by significant emphasis on enticement. *Id.* at 387–88 (Adams, J., dissenting).

[98] *Id.* at 389 (Adams, J., dissenting).

[99] *Id.* at 376.

[100] *See id.* at 380–81.

[101] *See id.* at 387 n.18 (Adams, J., dissenting).

[102] *Id.*

questions remain: Were the defendants in fact predisposed? Did the government in fact instigate the crime? The disparity in analysis dividing the court is actually part of the circular configuration harkening back to the three possible foundations for the entrapment defense—subjective, objective, or due process—since each instructs a different focus.

Twigg is novel because it departs from familiar subjective/objective landmarks and explores the constitutional structure of a due process defense.[103] Yet each of the three perspectives on entrapment, as crystallized by the Supreme Court, is imbued with its own virtues and pitfalls.[104] The subjective rationale, focusing on the defendant, conforms to the purported aim of the law of crimes in that it seeks to differentiate between the culpable and the innocent.[105] The test is continually attacked, however, for its ancillary rule of evidence which allows the accused's predisposition to be proven by hearsay, rumor, and prior criminal record.[106] Thus, the very purpose of the test becomes deformed through its implementation, since tolerable police behavior is measured by the particular defendant's quality of reputation, which, in turn, perpetuates a discriminatory law enforcement.[107]

On the other hand, an objective definition of entrapment, emphasizing the nature of governmental participation in the crime, is commendable in its attempt to protect the integrity of the judicial

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[103] *Twigg's* impact on the future direction of entrapment is discussed in a recent New Jersey bank robbery case, where the factual interplay between criminal intent and governmental seduction parallels that found in *Twigg*. United States v. Parsons, No. 78-356 (D.N.J., filed Mar. 2, 1979). As their predecessors had done, the defendants in *Parsons* conceded predisposition to commit the offense but alleged that the extent of official involvement was an outrage and a violation of their rights to due process. *Id.* at 1–2. District Court Judge Meanor ruled that *Twigg* failed to dictate the outcome of the case *sub judice* due to a single but intrinsic distinction that the *Parsons* defendants had originated the illegal plot. *Id.* at 15.

A due process contention was also rejected in a Second Circuit case where the court determined that genesis of the plan by the defendants, rather than by the government, served to defeat the claim. United States v. Corcione, 592 F.2d 111, 113, 115 (2d Cir. 1979). The appellants were convicted of drug charges despite significant governmental overreaching. *Id.* at 114–115.

[104] Judge Adams, dissenting in *Twigg*, summarized the ramifications of the subjective/objective applications of entrapment. 588 F.2d at 382–83 (Adams, J., dissenting).

[105] Note 39 *supra* and accompanying text; Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 271 (1976).

[106] *See, e.g.*, United States v. Russell, 411 U.S. at 443–44 (Stewart, J., dissenting); Sherman v. United States, 356 U.S. at 382–83 (Frankfurter, J., concurring).

[107] 411 U.S. at 443–44 (Stewart, J., dissenting). Due to the likelihood that the jury will find predisposition, the government may engage in extreme methods to entice the defendant marked by a criminal record. *Id.* (Stewart, J., dissenting).

system and deter misconduct of police and informers.[108] However, the practical consequences of the objective view may undermine its original goals where the process leads to acquittal of defendants who deserve punishment, rather than freedom, for violating the law.[109] Standardized police procedures may be difficult to formulate due to the properties of undercover investigation.[110] Finally, the objective construct is flawed in that it does not appreciate the constitutional implications which arise upon unlawful governmental comportment.[111]

A non-entrapment due process defense, centering on the impropriety of official action, augurs equal treatment of all defendants in its disregard of an accused's criminal history.[112] The defendant is ensured protection in both state and federal trials through insulation of the fundamental fairness doctrine from legislative enactment as well as through the continued sustenance of the fifth and fourteenth amendments.[113] A due process alternative intensifies the rights of the criminal-individual by according constitutional status to principles of entrapment. The harbinger of such a defense is police action so outrageous that it shocks the conscience of the court and offends a universal and humane sense of justice.[114]

In *United States v. Twigg*, the extent of police intrusion in creating and executing the crime was thus found unconstitutional.[115] By initiating contact with the defendant and proposing the criminal idea itself, and by providing the materials, site and expertise required to commit the offense, DEA officials were held to have crossed the boundary of legitimate law enforcement into forbidden territory of repugnant police tactics.[116] The court ruled that, in fundamental fairness, defendants who were victims of such tainted practices must be released.[117]

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[108] *See* 356 U.S. at 385 (Frankfurter, J., concurring); ALI MODEL PENAL CODE § 2.10, Comment at 20 (Tentative Draft 1959). The exclusionary rule, utilized in certain areas of criminal law, shares these intentions. *See* note 11 *infra*.

[109] *See* note 118 *infra* and accompanying text.

[110] *See, e.g.*, United States v. Russell, 411 U.S. at 432 (infiltration of narcotics ring lawful due to difficulties of traditional investigative techniques in the drug field).

[111] Comment, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. at 660.

[112] This is also the ideal of the objective test. 411 U.S. at 439–45 (Stewart, J., dissenting).

[113] *See* Comment, *supra* note 111, at 660.

IOWA L. REV. at 660.

[114] United States v. Twigg, 588 F.2d at 377 (quoting United States v. Russell, 411 U.S. at 431–32).

[115] 588 F.2d at 380–81.

[116] *Id.*

[117] *Id.* at 380–82.

Herein lies, at once, both the beauty and flaw of the due process alternative to entrapment as exemplified by *Twigg*. Although legal integrity may justify establishing an impediment to prosecution where police have exceeded their authority to expose the wrongdoer, freedom for the equally blameworthy defendant is a questionable result.[118] To liberate the criminal in order to discipline the police is an attractive but anomalous measure of justice in this context.[119]

Yet a broader range of vision is possible. The entrapment doctrine has been a child of the courts' concern since the twentieth century sophistication of the agent-provocateur device. Judicial uneasiness in regard to this contemporary type of law enforcement rests upon several factors. Police undercover activities which seek to anticipate crime rather than unmask it, as in *Twigg*, may unwittingly aggravate the number of offenses committed.[120] Designs which depend upon large expenditures of finances and human resources in order to net the small-time criminal may be of negligible social value.[121] Federal agents endanger their integrity by becoming an inseparable part of the vice they set out to eliminate.[122]

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[118] Neville and Twigg intended to violate the law; had Kubica been a confederate, rather than an informer, their convictions undoubtedly would have been sustained. Twigg's acquittal is especially notable since he was not a direct object of the governmental snare. *See* note 75 *supra* and accompanying text.

[119] *See* United States v. Parsons, No. 78-356 at 16 (D.N.J. Mar. 2, 1979). There Judge Meanor stated:

> Courts struggle to keep executive law enforcement activity within constitutional bounds with limited weapons to utilize against unlawful enforcement of the law. The only weapon easily available is to prevent trial or vacate a conviction. This frees the guilty on grounds having nothing to do with their criminal responsibility . . . but [it] is only done in the interests of a judicial duty more fundamental than criminal law administration—adhering to the commands of the Constitution.

Id.

Similar concerns are present in other areas of criminal law, where the exclusionary rule has been invoked to suppress evidence that is the fruit of overreaching governmental action. 411 U.S. at 430; *see* notes 108–09 *supra* and accompanying text. The entrapment remedy is distinct in that it leads to dismissal of the charge itself. Nevertheless, the argument has been raised that the same principles of due process which stimulated the Supreme Court to muster its supervisory powers and create the exclusionary rule in regard to illegal searches, seizures, and confessions, should be applied to entrapment. 411 U.S. at 430–31. The Court rejected such contentions in *United States v. Russell*. *Id.* Furthermore, Justice Rehnquist opined in *Hampton v. United States* that illicit police action should result in prosecution of the police rather than in release of the guilty defendant. 425 U.S. at 490.

[120] "An investigator for a Senate Subcommittee concerned with federal drug enforcement, in noting that almost ten million dollars a year was being poured into the narcotics trade by the government, suggests that this may be subsidizing organized crime." Marx, *Undercover Cops: Creative Policing or Constitutional Threat?*, 4 CIVIL LIBERTIES REV. 34, 43 (1977).

[121] Hampton v. United States, 425 U.S. at 498 (Brennan, J., dissenting); Greene v. United States, 454 F.2d at 788 (Merrill, J., dissenting).

[122] *See, e.g.*, United States v. Archer, 486 F.2d at 676–77.

At the pinnacle of such considerations is the role of the judiciary as a stabilizing force between governmental thrust and public expectation.[123] Implicit in the function of the court is the duty to ensure that policeman and citizen alike abide by the legal structure in which we live. Constitutional notions may not be twisted to permit the abolition of crime by criminal means. "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[124] Within this realm, *Twigg* signifies a fidelity to the essence of our Constitution.

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[123] Sherman v. United States, 356 U.S. at 380 (Frankfurter, J., concurring); Casey v. United States, 276 U.S. at 423–25 (Brandeis, J., dissenting).

[124] Olmstead v. United States, 277 U.S. at 485 (Brandeis, J., dissenting).