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THE DUE PROCESS DEFENSE IN ENTRAPMENT CASES: THE JOURNEY BACK*

Paul Marcus**

I. THE PROBLEM

An accused who asserts as a defense that the government has violated the due process clause in order to entrap him must take a curious position. Normally, the defendant admits committing the underlying crime and also admits — at least for the sake of the due process argument — that the government could defeat an entrapment defense by establishing the defendant's predisposition. The defendant then recites the government's activities in connection with the underlying crime, and contends that this governmental behavior is so outrageous that prosecuting him is unconstitutional.

Defendants claiming due process violations in entrapment cases have not fared well in federal or state courts.¹ For example, in a recent case the defendant showed that the FBI persuaded a woman to provide sexual favors to a man to lure him into selling illegal drugs to government agents.² The court found this conduct was "very unsavory" but not outrageous enough to dismiss the indictment.³ In another case a government drug agent provided everything the defendant needed to establish an illegal drug laboratory.⁴ Despite proof that the agent sent the defendant the chemicals necessary for the lab and advised him about the manufacturing process on more than a dozen occasions, the court did not find a due process violation.⁵ And, in a well-publicized Ninth Circuit case, despite findings that the government agent explained the details of a counterfeit credit card scheme to the defendant, proposed that the defendant establish such an operation, supplied the defendant with coun-

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1. Certainly, the argument has proved more successful in state courts than in federal courts. See generally, P. MARCUS, *THE ENTRAPMENT DEFENSE* 308-14 (1989) (state judges often take more expansive view of due process claims, particularly in light of individual state constitutional provisions).

2. *United States v. Simpson*, 813 F.2d 1462, 1464 (9th Cir.), cert. denied, 484 U.S. 898 (1987).

3. 813 F.2d at 1465.

4. *United States v. Tobias*, 662 F.2d 381, 383-84 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982).

5. *United States v. Tobias*, 662 F.2d at 384. The court did note that these facts "set the outer limits to which the government may go in the quest to ferret out and prosecute crimes." *Id.* at 387.

terfeit credit cards, and then arrested the defendant when he used the cards, the court affirmed the conviction.⁶

It will take a great deal to persuade courts that entrapment-like schemes violate due process.⁷ Some courts have announced that they have *never* overturned convictions on this basis.⁸ Nevertheless, the due process claim — while not thriving — is alive and beginning to be considered seriously in at least one important area. It is my purpose here to applaud this development and promote its growth.

II. THE LAW

Though often raised together, the due process claim and the entrapment defense are distinctly and significantly different. In most jurisdictions in the United States the entrapment defense looks to the subjective state of mind of the defendant to determine if she was predisposed to commit the crime prior to any governmental instigation.⁹ The due process defense looks to the activities of the government officers — rather than the activities of the defendant — in an attempt to determine whether the government has overstepped the boundaries of what Justice Cardozo called standards “implicit in the concept of ordered liberty.”¹⁰ As the Ninth Circuit succinctly stated, the due process claim “differs from a claim of entrapment. The entrapment defense turns on the defendant’s predisposition. The test laid down here focuses exclusively on the government’s conduct. Thus, while both issues may arise in a case, they present analytically different questions.”¹¹ The second major difference be-

6. *United States v. Citro*, 842 F.2d 1149, 1151 (9th Cir.), *cert. denied*, 488 U.S. 866 (1988). Numerous other examples could demonstrate the difficulty of succeeding on a due process defense in entrapment cases. *See, e.g.*, *United States v. Emmert*, 829 F.2d 805 (9th Cir. 1987) (no due process violation when government agents offered college student \$200,000 finder’s fee to secure supply of cocaine for government agent); *United States v. Luttrell*, 889 F.2d 806 (9th Cir. 1989) (government’s unsolicited offer of almost \$1,000,000 to defendants to persuade them to make illegal use of lawful resource was not constitutional violation), *reh’g en banc granted*, 906 F.2d 1384 (1990).

In *Luttrell* the due process violation was found, but it was linked to the lack of a reasonable suspicion to initiate an undercover operation rather than the “shocking” behavior on the part of the government agents. *Id.* at 811; *see infra* notes 57-73 and accompanying text (discussing Ninth Circuit development of reasonable suspicion test).

7. While difficult, it is not impossible to persuade the courts of such due process violations. *See infra* note 24 (citing cases recognizing validity of due process claim).

8. *See, e.g.*, *United States v. Miller*, 891 F.2d 1265, 1267 (7th Cir. 1989).

9. The federal system and about three-quarters of the states use this “subjective” approach. About a dozen states follow an “objective” approach to determine whether the government’s conduct was inappropriate. *See P. MARCUS, supra* note 1, at 41-51 (1989) (outlining objective and subjective tests of various states).

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

11. *United States v. Luttrell*, 889 F.2d at 813 n.7 (citations omitted). Unfortunately, the two concepts are merged in several opinions, clouding the distinct nature of entrapment and due process claims. In *Miller*, the court discussed the defendant’s unavailing due process defense claim and emphasized the fact that the defendant “most importantly . . . failed to refute the government’s substantial evidence of his predisposition to distribute cocaine.” 891 F.2d at 1268. When the due

tween these defenses is that the entrapment assertion normally is resolved as a question of fact by the jury,¹² while the due process contention, which focuses on the limitations of the Constitution, is determined by the judge as a matter of law.¹³

The Supreme Court decided *United States v. Russell*¹⁴ on entrapment grounds,¹⁵ but also referred to the possibility of a due process ground for reversing the conviction. Writing for the majority, Justice Rehnquist noted that due process might be violated when "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."¹⁶

When Justice Rehnquist apparently attempted to retreat from this independent due process ground in *Hampton v. United States*,¹⁷ Justice Powell wrote a concurring opinion to recognize the legitimacy of the due process defense and at the same time narrow the defense¹⁸ to cases when "[p]olice over-involvement in crime . . . reach[es] a demonstrable level of outrageousness."¹⁹ Justice Brennan echoed this view of a valid but limited due process defense in *Matthews v. United States*²⁰ when he stated that "some governmental conduct might be sufficiently egregious to violate due process."²¹

Few convictions, at the federal or state level,²² have been reversed on the ground that the defendant was entrapped as a result of a due process violation.²³ Yet the doctrine of an independent due process defense consistently has

process claim is properly viewed as a separate defense, the question of the defendant's predisposition becomes irrelevant. The court's focus should be on the nature of the government's conduct. The court in *Luttrell* correctly stated the law when it observed, "[u]nlike the defense of entrapment, the defense of outrageous government conduct is available even if a defendant was predisposed to convict the crime." 889 F.2d at 811.

12. See, e.g., *United States v. Janotti*, 673 F.2d 578 (3d Cir.) (en banc) (issue of predisposition of defendant for jury to decide), cert. denied, 457 U.S. 1106 (1982).

13. See, e.g., *United States v. Graves*, 556 F.2d 1319, 1322 (5th Cir. 1977) (due process claim is question of law for the judge), cert. denied, 435 U.S. 923 (1978).

14. 411 U.S. 423 (1973).

15. The Court found that the defendant was predisposed to commit the crime. *Id.* at 436.

16. *Id.* at 431-32.

17. 425 U.S. 484 (1976). Justice Rehnquist argued that the Court should recognize a due process defense only if the government's outrageous conduct actually violated a right of the defendant. *Id.* at 490. As Judge Easterbrook stated in *Miller*, this would mean violation of "a personal right secured by the Constitution rather than invented for the occasion." *United States v. Miller*, 891 F.2d at 1271 (Easterbrook, J., concurring). Justice Rehnquist's opinion on this point in *Hampton* gathered the support of only two other Justices (Chief Justice Burger and Justice White). *Hampton v. United States*, 425 U.S. at 485.

18. *Hampton v. United States*, 425 U.S. at 490 (Powell, J., concurring).

19. *Id.* at 495 n.7.

20. 485 U.S. 58 (1988).

21. *Id.* at 67 (Brennan, J., concurring) (recognizing due process defense but deciding case on statutory interpretation and federal common law rather than Constitution).

22. Unquestionably state judges have been far more sympathetic to constitutional claims of defendants than federal judges. See *supra* note 1 (state judges often take more expansive view of due process claims).

23. One of the broadest uses of the due process claim in the federal courts may be found in

been reaffirmed.²⁴ While some would question the continued validity of the due process defense,²⁵ most of those who are critical of the defense recognize its validity but call for a narrow application of it.²⁶

United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), where government agents were intimately involved in setting up and running a drug laboratory. In United States v. West, 511 F.2d 1083, 1086 (3d Cir. 1975), the court never mentioned due process but reversed a conviction, stating that the nature and extent of government agents' involvement — in both selling narcotics to the defendant and buying them back from him — was intolerable.

24. Many courts have explicitly noted the validity of the due process claim. See, e.g., United States v. Porter, 764 F.2d 1, 8 (1st Cir. 1985) (recognizing due process defense in context of the difficulty of proving claim in contraband cases); United States v. Graves, 556 F.2d at 1322 (acknowledging due process claim and holding that whether defendant prevails is question of law for judge); State v. Pleasant, 38 Wash. App. 78, 82, 684 P.2d 761, 764 (1984) (government actions must be outrageous to sustain due process claim).

Most courts, however, have been reluctant to ground decisions on a due process foundation. For example, in drug procurement cases, some courts have taken the position that a due process violation will only be found where the government has "engineered and directed the criminal enterprise from start to finish." United States v. Williams, 791 F.2d 1383, 1386 (9th Cir. 1986).

25. Based on Chief Justice Rehnquist's language in Hampton v. United States, 425 U.S. at 490, and the Court's opinion in United States v. Payner, 447 U.S. 727 (1980), Judge Easterbrook of the Seventh Circuit has rejected the notion that a due process claim is still valid. In *Payner* the defendant challenged the search of a bank vice president's briefcase on both fourth amendment and due process grounds. The Court refused to apply the due process standard, noting that the defendant could not assert that the government's activity violated any protected right of his. United States v. Payner, 447 U.S. at 737 n.9. The *Payner* case is not fully on point, however, because the opinion emphasized the particular defendant's inability to show a privacy interest violated by a search of someone else's briefcase. Justice Powell was concerned about extending "the supervisory power to suppress evidence." *Id.* at 734.

Judge Easterbrook's concurring opinion in United States v. Miller argues that there is no due process contention and that as a matter of policy "when push comes to shove, we should reject the contention that the criminal must go free because the constable was too zealous." United States v. Miller, 891 F.2d at 1271. The majority in *Miller* recognized that some have questioned the continued validity of the due process claim but wrote that a prosecution could be precluded if the government's conduct "violated that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the due process clause of the Fifth Amendment." *Id.* at 1267 (quoting United States v. Russell, 411 U.S. at 432).

26. Judge Fagg, dissenting in United States v. Jacobson, 893 F.2d 999, 1004 (8th Cir.), *rev'd*, — F.2d — (8th Cir. 1990) (en banc), on the reach of the due process clause, nevertheless recognized its continued validity:

This court "may some day be presented with a situation in which the conduct of law enforcement agents [in initiating an undercover investigation] is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, [but Jacobson's case] is distinctly not of that breed."

893 F.2d at 1004 (quoting United States v. Russell, 411 U.S. at 431-32); see *infra* notes 74-84 and accompanying text (discussing United States v. Jacobson).

While judges have not been enthusiastic about applying the due process principle in the entrapment area, most commentators have strongly argued for a broader due process defense. See, e.g., Marcus, *Toward an Expanded View of the Due Process Claim in Entrapment Cases*, 6 GA. ST. U.L. REV. 73 (1989) (due process defense in entrapment cases should be expanded); Mascolo, *Due Process, Fundamental Fairness, and Conduct that Shocks the Conscience: The Right Not to be*

III. THE CHALLENGE

Some judges have specifically called for abolition of the due process defense in entrapment cases. Until recently, Chief Justice Rehnquist himself has been the most visible and vocal opponent of this application of the due process clause. He argued, for a three-Justice plurality in *Hampton v. United States*, that due process principles should be applied in entrapment cases only "when the Government activity in question violates some protected right of the defendant."²⁷

This is a curious view of the application of due process. Presumably the argument is that unless the defendant would otherwise have a substantive constitutional right to raise, he ought not be able to seek protection under a broad interpretation of the due process clause. But in cases in which other rights have been violated, defendants do not normally need to rely on the protection of the due process clause. In a situation in which an improper search or a prohibited interrogation implicates fourth or fifth amendment concerns, for example, the defendant usually will not need to argue due process values because his position will already have been vindicated by the suppression of evidence.

A more fundamental objection to this narrow view of the application of the due process clause is its underlying assumption that the due process violation concerns only the particular defendant in the particular case where the government action is called into question. This is analogous to the rule that individual defendants have standing under the fourth or fifth amendments only if their personal privacy interests have been directly affected by the government's activities.²⁸ Due process concerns, however, never have been applied so narrowly or defined so exclusively. Instead, throughout our history the Supreme Court has discussed broadly the impact of the due process clause in criminal cases. The Court has not related the government conduct to the individual involved; instead the Court has spoken in terms of activity that is, in Justice Rehnquist's words, "so outrageous [that the government is absolutely barred] from invoking judicial process to obtain a conviction."²⁹

Enticed or Induced to Crime by Government and its Agents, 7 W. NEW ENG. L. REV. 1 (1984) (same); Abramson & Lindeman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. L. 139 (1980) (same).

27. *Hampton v. United States*, 425 U.S. at 490.

28. Consider *Rakas v. Illinois*, 439 U.S. 128 (1978), *reh'g denied*, 439 U.S. 1122 (1979), where the Court, per Justice Rehnquist, held that fourth amendment claims could be asserted only by individuals who could demonstrate that

the challenged search or seizure violated the Fourth Amendment rights of the criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

Id. at 140.

29. *United States v. Russell*, 411 U.S. at 431-32.

Justice Frankfurter spoke directly to this point of broad constitutional principles in the most famous of the due process cases, *Rochin v. California*,³⁰ in which the defendant was forced to have his stomach pumped. The question the courts should evaluate, Justice Frankfurter wrote, is whether the government behavior would "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."³¹ This language is broad, and it hardly focuses on the defendant's need to demonstrate, besides shocking governmental activities, a violation of a particular right of that defendant.

Perhaps the best refutation of the Rehnquist position is found in an opinion written by Judge Henry Friendly in *United States v. Archer*.³² In apparent anticipation of the Rehnquist "added constitutional right violation" argument, Judge Friendly wrote of the shocking government behavior in a hypothetical case in which the defendant's direct constitutional rights might not otherwise have been violated:

[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 governmental-induced criminality.³³

Judge Friendly was correct. We should not permit the government to prosecute individuals where the government conduct itself was outrageous or egregious. We should not permit such prosecutions, not because a particular person's rights were violated, but rather because such government activity, in Justice Frankfurter's words, does "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."³⁴

30. 342 U.S. 165 (1952).

31. *Id.* at 169. Justice Frankfurter also made the following statement in his dissenting opinion in *Harris v. United States*, 331 U.S. 145 (1947):

It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole.

Id. at 173 (Frankfurter, J., dissenting).

32. 486 F.2d 670 (2d Cir. 1973).

33. *Id.* at 676-77.

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

The argument in recent times against the use of due process principles in entrapment cases has shifted away from Justice Rehnquist's "added constitutional right violation" viewpoint. Instead, more and more often judges attack directly the application of the due process clause in cases in which the entrapment defense would be unsuccessful because the defendant was predisposed to commit the underlying crime. Judge Easterbrook did this recently in his concurring opinion in *United States v. Miller*.³⁵ *Miller* itself was a somewhat routine entrapment case: the court found against the defendant on both the entrapment and due process arguments.³⁶ The defendant complained of the employment of an informer on a contingent fee basis when the informer was both the defendant's former girl friend and a known cocaine addict.³⁷ The majority in *Miller* had little difficulty finding against the defendant on the entrapment ground because the evidence was clear that the defendant had been predisposed to commit the crime of conspiracy to distribute cocaine.³⁸ The court also found against the defendant on the due process ground because it concluded that it was not sure that the government's "behavior was improper, let alone 'truly outrageous.'" ³⁹

Judge Easterbrook, in his concurring opinion, agreed with the court's disposition of the case under the traditional forms of analysis; however, he would have gone farther and ended consideration of the due process claim in entrapment cases. He put the matter directly:

When push comes to shove, we should reject the contention that the criminal must go free because the constable was too zealous. Why raise false hopes? Why waste litigants' and judges' time

35. 891 F.2d 1265, 1271-73 (7th Cir. 1989) (Easterbrook, J., concurring).

36. *Id.* at 1268.

37. *Id.* at 1266.

38. *Id.* at 1268. The majority stated:

Most importantly, *Miller* has failed to refute the government's substantial evidence of his predisposition to distribute cocaine. The government was minimally involved in *Miller*'s criminal activities; its informant introduced *Miller* to Agent Squire and set up two drug sales. The Constitution does not bar prosecution when the government or its employees "merely afford opportunities or facilities for the commission of the offense."

Id.

39. *Id.* The court focused on three main points. First, it had previously adopted the rule that contingent fee payments to government informants were not per se outrageous. Instead the trier of fact could consider such arrangements as evidence relating to the credibility and reliability of an informant. Second, no evidence was brought forward demonstrating that the government had supplied the informant with drugs or had knowingly supported her continued use of drugs. Finally, despite a showing that the informant earlier had been sexually intimate with the defendant, both the defendant and the informant testified that their sexual relationship had ended before the informant began her employment with the government, they never resumed their former intimacy, and the government apparently did not even know about this prior relationship during the time of the informant's employment with the government. *Id.*

searching for and rejecting on the facts defenses that ought not exist as a matter of law. Everyone has better things to do.⁴⁰

Judge Easterbrook offered two reasons why the court should reject the due process contention. First, he looked to the "false hope" dilemma. The Seventh Circuit has never reversed a conviction on the basis of the "outrageous governmental conduct" defense.⁴¹ To offer this defense as a serious possibility, he seemed to say, is unfair both to the courts and to the defendants.

Second, and more forcefully, he wrote that the defense is not appropriate where narrow standards cannot be fashioned for law enforcement officials. Otherwise, he noted, this becomes "more like a claim that the government is violating the community's moral standards."⁴² And, if that is to be the basis for the defense, "this is a political problem" and "Congress can hold oversight hearings or pass a law; we shouldn't apply a chancellor's foot veto."⁴³ Moreover, he wrote, even if such a defense were to be viewed as good policy, it is simply impossible to apply in specific cases. He stated the proposition vigorously:

"Outrageousness" as a defense does more than stretch the bound of due process. It also creates serious problems of consistency. The circuits that recognize a "due process defense" can't agree on what it means. How much is "too much"? The nature of the question exposes it as (a) unanswerable, and (b) political. What, if anything, could separate stirring up of crime in unpalatable ways here from the Operation Greylord methods [we] sustained? From the "creative" endeavors in Abscam? From any of the "sting" operations? From the rest of the sordid drug business, so dependent on caitiff⁴⁴ assistants? Any line we draw would be unprincipled and therefore not judicial in nature. More likely there would be no line; judges would vote their lower intestines. Such a meandering, personal approach is the antithesis of justice under law, and we ought not indulge it. Inability to describe in general terms just what makes tactics too outrageous to tolerate suggests that there is no definition — and "I know it when I see it" is not a rule of any kind, let alone a command of the Due Process Clause.⁴⁵

40. *Id.* at 1271 (Easterbrook, J., concurring).

41. *Id.*

42. *Id.*

43. *Id.*

44. Webster's defines "caitiff" as "a mean, evil or cowardly person." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, UNABRIDGED 254 (2d ed. 1971).

45. *United States v. Miller*, 891 F.2d at 1272-73 (Easterbrook, J., concurring). He continued:

Methods such as those used to ensnare Miller do not injure bystanders and so do not trouble me. Other judges are offended by immorality (such as sponsoring an informant's use of sexual favors as currency) or by acts that endanger informants (such as supplying them with drugs for personal use) but not by a traditional sting. This shows the subjective basis of the concern — all the more reason not to have

Judge Easterbrook's position is forceful, but ultimately it should be rejected, as it has been by every one of the federal circuit courts to consider it. Let us look at his "false hope" proposition. This surely is an attractive concept, for it would seem very wrong to create large hopes in the minds and hearts of defendants and defense attorneys when we know that these hopes would then be shattered by hardnosed federal and state judges. To state the proposition in this rather flip fashion, however, is to demonstrate its weakness. As a preliminary matter, one must question whether any defendant or defense attorney raising a due process claim can seriously harbor false hopes. All lawyers in this area, both prosecution and defense, know that few cases successfully put forth the due process argument. To suggest that defendants and lawyers should not have false hopes is to suggest the obvious.

Moreover, Judge Easterbrook misses the mark on why the presence of the defense is important. Its significance lies not in the fact that it will often be successful; it will not. Rather it is important because it creates outer limits on appropriate law enforcement techniques and because it clearly demonstrates to the legal and law enforcement communities, and to society at large, that courts are indeed willing to draw some lines that cannot be crossed even in pursuit of criminals.⁴⁶ This, unquestionably, is the lesson of cases such as *Rochin*.⁴⁷ Though it cannot be denied that this principle will be invoked in only the rarest of fact patterns, a contrary rule would mean that the claim of outrageous governmental behavior could *never* be raised. The reality that the defense will not often be successful does not eliminate the need for such a defense in the unusual case.

Judge Easterbrook's second argument also has some degree of strength. That is, if reasonable people could not possibly agree on the application of the defense, doesn't that prove that it is a defense that itself "is not a rule of any kind, let alone a command of the Due Process Clause"?⁴⁸ The initial response to this argument must be that it is not factually accurate. There will be fact situations where reasonable people could agree that the law enforcement behavior was utterly outrageous. Certainly, Judge Friendly's hypothetical problem of government agents beating some members of a gang in order to get to other members of a gang is just such a case.⁴⁹ So, too, is the similar fact pattern in the New York state case of *People v. Isaacson*.⁵⁰ In *Isaacson*, police

such a doctrine in our law.

Id.

46. In this sense, the due process theory is very much like the exclusionary rule in the fourth amendment area, where the rule is not often successfully invoked but its presence is important both to deter improper police procedure and promote judicial integrity, as stated first by Justice Clark in *Mapp v. Ohio*, 367 U.S. 643 (1961).

47. See *supra* notes 30-31 and accompanying text (discussing significance of *Rochin v. California*).

48. *United States v. Miller*, 891 F.2d at 1273 (Easterbrook, J., concurring).

49. *United States v. Archer*, 486 F.2d at 676-77.

50. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

agents induced a former drug user to act as an informant against the defendant. The officer convinced the informant by striking the informant "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."⁵¹ Could there be any judge, including Judge Easterbrook, who would disagree with the New York court's dismissal of the indictment and condemnation of the police conduct as "police brutality [and] . . . a brazen and continuing pattern in disregard of fundamental rights"?⁵²

The application of due process principles in the entrapment area raises thorny problems. There will be cases, such as the Abscam investigations, where some judges will be shocked and others will not.⁵³ Is this sufficient reason to abandon the basic principle that outrageous police conduct cannot be used as the foundation for a criminal prosecution? The Supreme Court has repeatedly emphasized the difficulties inherent in the application of the due process clause, yet has never retreated from its view that due process principles are central to our system. Justice Powell made this point in one of the famous right to counsel cases, *Argersinger v. Hamlin*,⁵⁴ when he noted that "due process, perhaps the most fundamental concept in our law, embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial."⁵⁵ This, too, was the thrust of Justice Frankfurter's words in *Rochin*:

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.⁵⁶

IV. THE ROAD BACK

The broad attacks on the use of due process principles in the entrapment area have not prevailed. Instead, even when entrapment claims prove unsus-

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

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

53. The vigorous difference of opinion in *United States v. Janotti*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982), serves as an example. There the majority was willing to permit the question of predisposition to go to the jury as a matter of fact. *Id.* at 606. The dissent argued that the court should determine the question as a matter of law so as to protect against the use of police state tactics by the FBI. *Id.* at 609-10.

54. 407 U.S. 25 (1972).

55. *Id.* at 49 (Powell, J., concurring). Justice Rehnquist joined in this opinion.

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

cessful, we are beginning to see significant opinions emphasizing both the language and spirit of the due process clause. The most important of these is a thoughtful panel opinion written by Judge Dorothy Nelson of the Ninth Circuit in *United States v. Luttrell*.⁵⁷ The court's constitutional analysis tracked the two traditional bases for due process attacks in the entrapment area. The first of these is what the court called the "sphygmomanometer test."⁵⁸ To use somewhat plainer language, this test is a reflection of the sort of reasoning involved in *Rochin*: a determination of the conduct by the government to see if it is so extreme as to shock the judicial conscience.⁵⁹ As Judge Nelson correctly pointed out,⁶⁰ and as noted earlier,⁶¹ defendants promoting this test have not fared well in the courts. Even "very unsavory government conduct" has been insufficient to demonstrate that the governmental activity was "so grossly shocking and so outrageous as to violate the universal sense of justice."⁶²

The second due process test involves a more narrowly defined issue. Here the question is whether the government "directed and engineered the criminal enterprise from start to finish."⁶³ While this test is more narrowly defined, like the first, it has not been utilized with much success by defendants in entrapment cases, principally because few criminal operations truly have been dominated and controlled by government agents. Normally, as in *Luttrell*, the operation is a blend of the talents of both the defendants and the government agents.

The due process test which forms the basis for the court's disposition in *Luttrell* is one which has been invoked rarely in either state or federal courts.⁶⁴ The test asks whether the government had any reason to believe that

57. 889 F.2d 806. The record developed at trial showed an egregious situation involving a police undercover operation. The police, using large sums of money, targeted two individuals in connection with the operation without prior suspicion of any illegal activities by the individuals. *Id.* at 808-09, 812; *see infra* notes 80-89 and accompanying text (concerning courts' ability to perceive law enforcement necessities and determine appropriate due process limits on police conduct).

58. *United States v. Luttrell*, 889 F.2d at 811. A sphygmomanometer is a device used by doctors to measure blood pressure. *Id.*

59. *Id.*

60. *Id.*

61. *See supra* notes 2-6 and accompanying text (discussing cases where substantial police efforts to entrap the defendant were insufficient to cause dismissal of case).

62. *United States v. Luttrell*, 889 F.2d at 811.

63. *Id.* at 812. Such an operation was found in *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), where the government established and maintained a criminal bootlegging operation, provided essential equipment and ingredients, and was the only customer for the illegal liquor production. There, the court reversed because it did not believe that "the government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators." *Id.* at 787.

64. However, the test is not entirely unknown. For instance, in *Shrader v. State*, 101 Nev. 499, 706 P.2d 834 (1985), the court found entrapment as a matter of law and held that "when the police target a specific individual for an undercover operation, they must have reasonable cause to believe that the individual is predisposed to commit the crime." *Id.* at 501-02, 706 P.2d at 836.

the ultimate targets of its undercover operation were previously engaged in illegal activity. While the Ninth Circuit never before had established such a requirement of a reasonable suspicion,⁶⁵ Judge Nelson noted that it had "suggested" this requirement on several earlier occasions.⁶⁶ Although the court may have suggested such a requirement earlier, it had never based a judicial holding on it as the three-judge panel in *Luttrell* did.

Judge Nelson offered several reasons for the need to establish a reasonable suspicion requirement for the undercover sting operation. Foremost among those reasons was that the Bill of Rights establishes limits on government conduct in the area of law enforcement and such limits are crossed if government operations impact on affected individuals who are "to all reasonable appearances . . . minding their own business."⁶⁷ Judge Nelson stated:

The principle that people who are scrupulously conforming to the requirements of the law should not be made the objects of highly intrusive, random police investigations is an important ingredient of our liberty. We see substantial mischief in any pattern of law enforcement that arbitrarily targets for intrusion the lives of individuals [where there is no specific suspicion].⁶⁸

The court also observed that spending valuable resources to conduct such suspicionless operations results in ineffective and arbitrary law enforcement.⁶⁹ Unlike the situation where the government is acting in response to known or suspected criminal operations, an operation based on no specific suspicious behavior makes little sense. Besides concerns with inefficiency and arbitrariness, the court feared that such operations create grave problems of serious deprivations of individual liberty, particularly with the presence of a paid informant who is "a member of a group that in its eagerness to gain rewards does not always obey the niceties of police protocol."⁷⁰ The court explained the sorts of difficulties that could be expected to arise in such cases:

Many informants play their roles because of completed or prospective plea bargaining arrangements. They have a strong incentive to

65. Other courts have explicitly rejected such a requirement. Indeed, in *Miller* the court stated the rule quite directly: "The Constitution does not require the government to have a preexisting good faith basis for suspecting criminal activity before initiating an undercover investigation" *United States v. Miller*, 891 F.2d at 1269 (citing *United States v. Thoma*, 726 F.2d 1191, 1198-99 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984)).

66. In *Citro*, the court spoke in approving terms of the case in which the government simply attempted to attach itself to an ongoing operation for the purpose of closing it down and prosecuting the operators. *United States v. Citro*, 842 F.2d at 1153. Similarly, in *Simpson*, the court noted that there was "no suggestion that the FBI agents created the criminal enterprise. To the contrary, the FBI already had a 'tremendous amount of knowledge with regard to [Simpson's] activities' when they targeted him for investigation." *United States v. Simpson*, 813 F.2d at 1470.

67. *United States v. Luttrell*, 889 F.2d at 813.

68. *Id.*

69. *Id.*

70. *Id.*

find targets for police investigation, regardless of the reasonableness or the accuracy of their information. Their tips to the police may be based either on legitimate information about the criminal underworld or they may be wholly fabricated. The origin of the information may be direct observation or it may be innuendo, conjecture or even just plain animus. While in some cases informant activities may be conducted in a fair and decent manner, in others there appears to be little regard for fundamental concepts of honesty and fair play.⁷¹

In response to these concerns, the court held that the government must have "reasoned grounds" to involve a subject in an undercover operation.⁷² In its conclusion, the court underscored the need for courts "to scrutinize these operations for government overreaching and to do so with the greatest care."⁷³

The *Luttrell* opinion already has generated considerable debate and criticism. Indeed, the Ninth Circuit has agreed to rehear the case en banc.⁷⁴ Perhaps the sharpest criticism came from Judge George Fagg, dissenting from a panel decision of the Eighth Circuit. That court, in *United States v. Jacobson*,⁷⁵ expressed concerns similar to those which formed the basis of the Ninth Circuit's opinion. In *Jacobson*, by a 2-1 majority, the court also established a reasonable suspicion requirement, although it based its holding on a different ground than that in *Luttrell*. The court there held that government undercover operations without individualized suspicion would allow the defense to claim entrapment as a matter of law, without reaching the constitutional question.⁷⁶ The Eighth Circuit, en banc, rejected this holding and, in an opinion by Judge Fagg, found that due process principles — not entrapment law — govern the involvement of the state in undercover operations.⁷⁷

The court, en banc, spent little time dealing with the panel's holding on entrapment as a matter of law. Judge Fagg's dissent in the panel opinion was, though, quite stirring. While he argued that the court was actually reaching a due process holding in the guise of deciding an entrapment case,⁷⁸ his chief concern was the basic rationale for the holding. Fagg was even more critical

71. *Id.* at 813-14.

72. The court declined to enumerate "what circumstances may constitute reasoned grounds," deferring to the trier of fact to make the initial judgment. *Id.* at 814.

73. *Id.*

74. *United States v. Luttrell*, 906 F.2d 1384 (9th Cir. 1990)

75. 893 F.2d 999 (8th Cir.), *vacated and reh'g en banc granted*, 899 F.2d 1549 (1990).

76. This is a rather unusual, although not unprecedented view. See *supra* note 64 (citing another "entrapment as a matter of law" case). Normally the question is: Did the defendant appear reluctant in response to government instigation, i.e. was she predisposed to commit the crime? Rarely will the courts ask whether, at the time of the instigation, the government *knew* of the defendant's predisposition.

77. *United States v. Jacobson*, No. 88-2097 (8th Cir. Oct. 15, 1990) 1990 WL 152735.

78. "If the panel believes the government has violated due process by embarking on a suspicionless investigation against Jacobson, it should say so." *United States v. Jacobson*, 893 F.2d at 1003 (Fagg, J., dissenting) (citing *United States v. Luttrell*, 889 F.2d at 813).

of the Ninth Circuit's rationale in *Luttrell*. Principally, he argued that courts could not scrutinize government operations in the manner suggested by the majority, for law enforcement officers are in decidedly better positions to understand the necessities of such operations.

What the panel has chosen to ignore in this case is the practical reality that the investigatory process does not deal with hard certainties. Law enforcement officers are entitled to draw inferences, make deductions, and arrive at common sense conclusions about human behavior based on available information and the behavioral patterns of law breakers. The accumulated information must be "seen and weighed not in terms of (judicial post mortems), but as understood by those versed in the field of law enforcement."⁷⁹

Judge Fagg's concerns are important and well considered. However, they should not lead to a rejection of cases such as *Luttrell*. While it is certainly true that reasonable people can and do differ in interpreting facts to determine whether reasonable suspicion exists,⁸⁰ it is equally true that in some cases there will be little question that the government lacked reasonable suspicion and there will be serious concern about government abuses. Indeed, *Jacobson* and *Luttrell* are two such cases.

In *Jacobson* the government made the defendant the target of five undercover sting operations over a period of less than three years.⁸¹ Government agents surreptitiously contacted him more than eleven times before he bought obscene written materials and was arrested for possession of obscene materials.⁸² The operation was conducted because the defendant had previously ordered non-obscene materials from a business that had been searched by the government.⁸³ Prior to this operation, the defendant, a war hero, had no criminal record except for one drunk driving conviction.⁸⁴

The facts in *Luttrell* are just as striking. In *Luttrell* the government set up an undercover operation to investigate telemarketing illegalities.⁸⁵ The Secret Service hired an informant who was an acquaintance of Kegley, one of two defendants. The informant contacted Kegley and told him that an arrangement could be made to sell unauthorized credit card drafts. *Luttrell*, the second de-

79. *Id.* (citation omitted) (quoting *United States v. Cortez*, 449 U.S. 411, 418-19 (1982)).

80. Judge Fagg's real concern appears to be that the government actually did prove its case that the defendant had been engaged in criminal activity prior to the undercover operation.

Here, fact on fact and clue on clue afforded a basis for the deductions and inferences that brought the officers to focus on [Jacobson]. Simply stated, the panel is unwilling to acknowledge that it is looking at reasonable police work.

893 F.2d at 1004.

81. *United States v. Jacobson*, 893 F.2d at 1000.

82. *Id.*

83. *Id.*

84. *Id.* at 999-1000.

85. *United States v. Luttrell*, 889 F.2d at 808.

fendant, was present at a meeting between the informant and Kegley. Up until that point Kegley had been unknown to the government.⁸⁶ The moving force behind the meetings and the ultimate deal was clearly the government, not Kegley or Luttrell. Luttrell and Kegley both were convicted of conspiracy to possess illegal credit card drafts and attempt to traffic in counterfeit drafts.⁸⁷ The court made clear that no evidence was offered to demonstrate a prior suspicion about either of the defendants.

[T]here is absolutely no evidence on the trial record that the Secret Service possessed any information linking the appellants or their business with illegal activity. Nor is there even any testimony on the record that the police were aware of criminal activity involving unknown members of a discrete class or group of which appellants might be a part.⁸⁸

Given the facts, it is difficult to defend outcomes other than those rendered by the panels in *Luttrell* and *Jacobson*. To be sure, Judge Nelson made a telling comment in *Luttrell* when she expressed apparent amazement "that competent police investigators would pursue an operation that has no foundation . . . that at least some indeterminate members of a limited class are engaged in illegal activity."⁸⁹ Yet that is exactly what happened in both cases. Given the serious possibility that fundamental concepts of honesty and fair play will be obliterated if there is no factual basis for the undercover operation, application of the due process clause here is both appropriate and necessary as a matter of public policy.

V. CONCLUSION

Doubts about the use of due process principles in entrapment cases are subsiding. The panel holding in *Luttrell* should set the standard. Granted, *Luttrell* is limited. If the government can show a factual basis for establishing the undercover operation the prosecution will prevail.⁹⁰ Thus, the case says little about broad concepts of shocking behavior and the involvement of the due process clause generally in the entrapment area. *Luttrell* does, however, strike a significant blow on behalf of those who would encourage courts to take a tough look at intense undercover operations based on minimal information concerning particular individuals. The Ninth Circuit panel's use of the due

86. *Id.*

87. *Id.* at 809.

88. *Id.* at 812.

89. *Id.* at 813.

90. On remand in *Luttrell*, the government will be given an opportunity to demonstrate that it had "reasoned grounds for approaching appellants and offering them the opportunity to participate in a criminal scheme." *Id.* at 814. Moreover, there is some indication that the government will indeed be able to establish its proof because the "trial record contains hints that the Secret Service may in fact have had a factual basis for targeting appellants." *Id.* The government was not allowed to make its case because the district court's summary dismissal of the defendant's motion eliminated full development of the record on this point. *Id.*

process clause should be applauded, for it shows a much needed sensitivity to the view that "rooted in the Bill of Rights is a concept that the processes of criminal investigation move deliberately, purposefully and fairly."⁹¹

91. *Id.* at 813.