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# ENTRAPMENT VERSUS DUE PROCESS: A SOLUTION TO THE PROBLEM OF THE CRIMINAL CONVICTION OBTAINED BY LAW ENFORCEMENT MISCONDUCT

Peter J. O'Connor\*

## I. Introduction

Fifty years ago, in his dissenting opinion in *Olmstead v. United States*,<sup>1</sup> Justice Brandeis condemned criminal convictions obtained by means of law enforcement misconduct in strong and moving language. He stated:<sup>2</sup>

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself;

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1. 277 U.S. 438, 471 (1928).

2. *Id.* at 485 (Brandeis, J., dissenting). By a vote of five to four, the Court held that interception of telephone conversations does not contravene the fourth amendment guarantee against unlawful search and seizure. Justice Brandeis characterized wiretapping by government agents as a violation of the right of privacy protected by the government. *Olmstead* was specifically overruled by the United States Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967), which held that FBI interception of conversations in a telephone booth by means of a concealed microphone without a warrant violated the fourth amendment. See also *Berger v. New York*, 388 U.S. 41 (1967). The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Today, eavesdropping is subject not only to the constraints of the fourth amendment, but also to the stringent requirements of federal statute. New York State possesses an analogue of the federal statute. N.Y. CRIM. PROC. LAW art. 700 (McKinney 1971 & Supp. 1977).

it invites anarchy. To declare that in the administration of the criminal law the ends justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Several years after Justice Brandeis' condemnation of government lawlessness, the Supreme Court formulated the doctrine of entrapment in *Sorrells v. United States*.<sup>3</sup> Entrapment was calculated to overturn a criminal conviction obtained by a certain type of police misconduct. All members of the Court agreed that the doctrine involved government instigation of the commission of a crime by an accused.<sup>4</sup> The majority held that entrapment could only occur when the accused was not predisposed to commit the crime charged; the minority, although agreeing in the result, took the position that the accused's predisposition was irrelevant to the determination of the issue of entrapment.<sup>5</sup>

In the decades following *Sorrells*, the entrapment issue concerned the Court in three cases.<sup>6</sup> On each occasion, a majority of the Court reaffirmed the *Sorrells* majority formulation that entrapment is not available as a defense to an accused who was predisposed to commit the crime charged.<sup>7</sup> In 1973, a majority of the Court held that, although the accused may have been predisposed, if his conviction

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3. *Sorrells v. United States*, 287 U.S. 435 (1932). The Court has held the defense of entrapment does not rest on constitutional grounds. *United States v. Russell*, 411 U.S. 423 (1976). The basis of the defense is discussed in the text accompanying notes 18 and 20 *infra*. Entrapment is not the only doctrine used by the United States Supreme Court to reach law enforcement misconduct. For example, where the police obtain a confession from an accused in violation of his rights under the fifth amendment to the United States Constitution, the confession is inadmissible in a criminal trial of the accused. *Miranda v. Arizona*, 384 U.S. 436 (1966). The fifth amendment provides: "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Court has also utilized the fourth amendment of the Constitution as a vehicle to reach police misconduct. Specifically, evidence seized by the police in violation of the fourth amendment may not be used in a criminal trial against the accused whose rights have been violated. *Mapp v. Ohio*, 367 U.S. 643 (1961). Eavesdropping has been subjected to fourth amendment strictures by the Court. See note 1 *supra*. Under the due process clauses of the fifth and fourteenth amendments, the Court has ruled that evidence of pre-trial identification of the accused violative of due process may not be lawfully used in the subsequent criminal trial. *Stovall v. Denno*, 388 U.S. 293 (1967); U.S. CONST. amends. V & XIV.

4. *Sorrells v. United States*, 287 U.S. 435 (1932). See text accompanying notes 14-22 *infra*.

5. *Id.*

6. *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973); *Hampton v. United States*, 425 U.S. 484 (1976).

7. *Id.*

were obtained by fundamentally unfair police methods, due process would require reversal of the conviction.<sup>8</sup> However, in 1976, a plurality of the Court held that conviction of a predisposed accused would not be reversed on due process grounds unless police conduct violated some "protected right" of the accused.<sup>9</sup>

In contrast to the uncertain status of due process as an alternative to entrapment at the federal level, the New York Court of Appeals has recently held that due process is the rubric to be applied to law enforcement conduct and has defined the due process criteria to be applied.<sup>10</sup> In this article, the Supreme Court's formulation of the entrapment doctrine and its ambiguous enunciation of a due process alternative will be examined;<sup>11</sup> New York's entrapment doctrine and that State's formulation of a due process alternative will next be examined;<sup>12</sup> and, finally, critical comments as to the present and future state of the law in both jurisdictions will be offered.<sup>13</sup>

## II. The United States Supreme Court View of Entrapment and the Due Process Alternative

In 1932, *Sorrells v. United States*<sup>14</sup> presented the United States Supreme Court with its first opportunity to recognize entrapment as a defense to a criminal charge.<sup>15</sup> In a unanimous decision, the

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

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

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

11. See text accompanying notes 14-60 *infra*.

12. See text accompanying notes 61-84 *infra*.

13. See text accompanying notes 85-104 *infra*.

14. 287 U.S. 435 (1932).

15. The defense was recognized in England in 1754. *The King v. Macdaniel*, 168 Eng. Rep. 124 (Cent. Crim. Ct. 1754), held that no robbery occurred when several persons procured others to rob one of that number in order to collect a reward. In 1878, Michigan recognized the defense upon the following rationale:

If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation. Desire to commit crime and opportunity for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction.

*Michigan v. Saunders*, 38 Mich. 218, 222 (1878).

New York rejected entrapment as a defense in 1904, on the theory that "[t]he courts do not look to see who held out the bait, but to see who took it." *People v. Mills*, 178 N.Y. 274, 289, 70 N.E. 786, 791 (1904). Prior to 1967, New York was one of the few states which did not recognize entrapment as a defense. N.Y. PENAL LAW § 40.05 (McKinney 1975) (practice commentary). Since 1967, entrapment has been a statutory defense in New York. N.Y. PENAL LAW § 40.05 (McKinney 1975). See note 73 *infra*. For a general history of entrapment, see

Court reversed the defendant's conviction for possession and sale of illegal whiskey to an undercover government agent.<sup>16</sup> The agent persistently solicited the defendant to obtain whiskey for sale to the agent. Although unanimously agreeing that the conduct of the agent constituted entrapment, the members of the Court disagreed as to the basis for and definition of entrapment.<sup>17</sup>

Writing for the Court, Chief Justice Hughes defined entrapment as the instigation of crime by government agents through persuasion or fraud.<sup>18</sup> Under such circumstances, according to the Chief Justice, the government is estopped from prosecuting the accused for the crime.<sup>19</sup> The predisposition of the accused to commit the crime charged was critical to the doctrine as formulated by the Chief Justice.<sup>20</sup> If the accused were predisposed to commit the crime, he was not entrapped into its commission. Consequently, the Chief Justice's formulation of the doctrine involved a subjective standard.

Justice Roberts, in a concurring opinion, defined entrapment as the conception and planning of a crime by a government agent, and his procurement of its commission by a person who would not have committed the crime but for the trickery or fraud of the agent.<sup>21</sup> While the Chief Justice's formulation was based upon the

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DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. Rev. 243 (1967).

16. 287 U.S. at 452.

17. *Id.* The Court divided by a vote of 6-3 upon the definition and basis of entrapment.

18. *Id.* at 441, 445, 448 & 451. The Chief Justice stated:

It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused but is conceived, in the mind of government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

*Id.* at 445.

19. *Id.* at 445.

20. *Id.* at 451. The Chief Justice stated:

For the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises. . . . The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.

*Id.* at 451.

21. *Id.* at 454. Justice Roberts stated: "Entrapment is the conception and planning of an

accused's predisposition, Justice Roberts made no mention of it. In Justice Roberts' view, the predicate for the doctrine is not estoppel but rather the protection of the judicial process from abuse.<sup>22</sup> The disagreement between the Chief Justice and Justice Roberts was to surface in the next entrapment case before the Court.<sup>23</sup>

In 1958, entrapment was again an issue before the Court in *Sherman v. United States*.<sup>24</sup> *Sherman* involved the conviction of a defendant for three sales of drugs to an undercover agent who had persistently solicited the defendant to obtain drugs for sale to the agent. As in *Sorrells*,<sup>25</sup> the Court unanimously agreed that the conviction should be reversed based on entrapment but disagreed as to precisely what constituted entrapment.<sup>26</sup>

On behalf of a majority of the Court, Chief Justice Warren reiterated former Chief Justice Hughes' doctrine in *Sorrells* emphasizing the predisposition of the accused to commit the crime.<sup>27</sup> Citing Justice Roberts' opinion in *Sorrells*, Justice Frankfurter, in a concurring opinion, argued that the focus of entrapment should not be the accused's predisposition but rather the conduct of the police.<sup>28</sup> The standard would be an objective one: police conduct would not constitute entrapment where such conduct would influence only those ready and willing to commit crime.<sup>29</sup> While both Chief Justice Warren and Justice Frankfurter agreed that entrapment included

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offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." *Id.*

22. *Id.* at 457. Justice Roberts stated:

The doctrine rests . . . on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law.

*Id.*

23. See text accompanying note 28 *infra*.

24. 356 U.S. 369 (1958).

25. 287 U.S. 435 (1933).

26. 356 U.S. 369 (1958). The Court divided by a vote of five to four with respect to the definition and basis of entrapment.

27. *Id.* at 370, 372-73, 376-78.

28. *Id.* at 380, 384-85.

29. *Id.* For a criticism of Justice Frankfurter's view of entrapment, see DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243, 275-76 (1967). Mr. DeFeo argues that Mr. Justice Frankfurter's entrapment formulation would result in an increase in acquittals which "seems a luxury better not indulged in our present condition of social insecurity." *Id.* at 275.

police instigation of crime, the Chief Justice's test was a subjective one: the predisposition of the accused to commit the crime. Justice Frankfurter's test was an objective one, whether or not the police conduct was likely to induce only those of a criminal bent to commit the crime. In short, Justice Frankfurter expressly stated what had been implied in Justice Roberts' opinion that entrapment involves an objective appraisal of police conduct.<sup>30</sup>

In 1973, the United States Supreme Court again faced the doctrine of entrapment in *United States v. Russell*.<sup>31</sup> By a divided vote, the Court affirmed the defendant's conviction for manufacture and sale of an illegal drug to a government agent.<sup>32</sup> The agent had previously supplied the defendant with an essential element of the drug.<sup>33</sup> The trial judge, in submitting the case to the jury, had defined the entrapment defense in the manner delineated by the Court

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30. See text accompanying notes 20-21 *supra*. Between 1958 and 1973, the doctrine was not uniformly interpreted by the federal courts. See Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 Miss. L. J. 573, 580-90 (1976) [hereinafter cited as Murchison]. Most federal circuits treated the doctrine as focusing on the predisposition of the defendant. See Murchison, *supra* at 588 n.97. Three of the circuit courts and one district court rejected the use of the subjective test alone finding that entrapment had been established solely by the improper conduct of government officials. For example, in *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970) the defendant was acquitted where a federal agent supplied the accused with counterfeit money, the receipt of which was the charge against him. Similarly in *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), *appeal after remand*, 470 F.2d 154 (5th Cir. 1972), *cert. denied*, 411 U.S. 949 (1973), the charge failed where a government informer purchased heroin for the accused, who in turn sold it to a federal agent, the sale of which was the charge against him. In *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), a federal agent treated the accused "as partners," offered to supply them with a still, a still site, still equipment, an operator and sugar. The charge of selling illegal whiskey to the agent did not stand. *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), *vacated*, 412 U.S. 936 (1973), *rehearing denied*, 414 U.S. 883 (1973), *opinion on remand*, 494 F.2d 562 (7th Cir. 1974), held that where government agents infiltrated a counterfeiting operation, arranged for and supervised the actual printing of the counterfeit bills, determined how and when they would be delivered to defendant, and then immediately arrested him for unlawful possession of counterfeit money a conviction could not be maintained.

Between 1958 and 1973, almost all of legal literature on entrapment supported the objective test. Murchison, *supra* at 580. For example, one commentator favored the objective test because "the existing doctrine is inadequate to curb effectively disapproved practices." Comment, *Criminal Law-Entrapment by Federal Officers*, 33 N.Y. L. Rev. 1033, 1041 (1958). *But see* note 29 *supra*.

31. 411 U.S. 423 (1973).

32. *Id.* at 425-27.

33. *Id.*

in *Sorrells*<sup>34</sup> and *Sherman*,<sup>35</sup> thereby focusing on respondent's predisposition to commit the crime charged.<sup>36</sup> The Ninth Circuit reversed based upon "an intolerable degree of government participation in the criminal enterprise."<sup>37</sup> The court held that reversal was mandated relying upon fundamental concepts of due process and a "reluctance of the judiciary to countenance 'overzealous law enforcement.'"<sup>38</sup>

The Supreme Court reversed the Ninth Circuit.<sup>39</sup> Writing for the majority of the Court, Justice Rehnquist, after noting that the respondent had conceded on appeal that the jury "could have found him predisposed to commit the offenses . . . ."<sup>40</sup> reaffirmed the entrapment doctrine as formulated by the majority in *Sorrells* and *Sherman*,<sup>41</sup> and rejected the respondent's claim that the entrapment defense is a constitutional right.<sup>42</sup> The Court found that no "independent constitutional right" of the respondent had been violated, that the undercover agent had not violated any federal or state statute or rule, and that the agent had not committed any crime.<sup>43</sup>

Significantly, Justice Rehnquist then went on to state:<sup>44</sup>

While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a

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34. See text accompanying notes 14-23 *supra*.

35. See text accompanying notes 24-30 *supra*.

36. 411 U.S. 427 n.4.

37. *United States v. Russell*, 459 F.2d 671, 673 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973).

38. 459 F.2d at 674.

39. *United States v. Russell*, 411 U.S. 423 (1973). The vote was five to four.

40. 411 U.S. at 427.

41. *Id.* at 432-34. Justice Rehnquist criticized the lower federal courts which had focused on government conduct as the test of entrapment. The entrapment doctrine "was not intended to give the federal judiciary 'a chancellor's foot' veto over law enforcement practices which it did not approve." 411 U.S. at 435.

42. 411 U.S. at 430.

43. *Id.* In finding that no "independent constitutional right of the respondent had been violated," the Court referred specifically to *Mapp v. Ohio*, 367 U.S. 643 (1961), where evidence seized in violation of the fourth amendment was held not to be admissible in state criminal trials. In *Miranda v. Arizona*, 384 U.S. 436 (1966), statements obtained from an accused by custodial interrogation in violation of the fifth amendment were held inadmissible in criminal trials.

44. 411 U.S. at 431-32. The fifth amendment provides in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. V.



conviction, the instant case is distinctly not of that breed . . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.

Two of the dissenting Justices filed separate opinions based on the view of entrapment expressed by Justices Roberts<sup>45</sup> and Frankfurter.<sup>46</sup> Justice Douglas stated that the government agent's supplying an essential ingredient of an illegal drug "made the United States an active participant in the unlawful activity."<sup>47</sup> Mr. Justice Stewart flatly took the position that the entrapment doctrine prohibits "unlawful government activity in instigating crime."<sup>48</sup>

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45. See text accompanying notes 21-23 *supra*.

46. See text accompanying note 28 *supra*.

47. 411 U.S. at 436-38.

48. 411 U.S. at 442. Following the *Russell* decision, the federal courts of appeals adhered to the majority's reaffirmation of the *Sorrells-Sherman* formulation of the entrapment defense focusing on the predisposition of the accused. See note 30 *supra*.

The Second Circuit in one instance, although reversing a conviction based on lack of federal jurisdiction, condemned the government's misconduct in its investigation leading to the indictment. *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973). The *Archer* case involved falsely charging a government agent with unlawful possession of a weapon thereby providing an opportunity for the solicitation of a bribe from the agent by state law enforcement officials. As a consequence the state official was charged with bribery. In *Nigrone v. Murtagh*, 46 A.D.2d 343, 362 N.Y.S.2d 513 (1974), *aff'd on other grounds*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975), the court upheld similar conduct by a special state prosecutor. An undercover agent was arrested on a false criminal charge. A second undercover agent asked a federal judge to help the first agent to obtain a favorable result in the state criminal case. The federal judge then testified before a state grand jury. He was indicted for perjury with respect to his conversations with the second agent.

In *Russell*, Justice Rehnquist noted that law enforcement conduct might be so outrageous as to constitute a violation of due process. *United States v. Russell*, 411 U.S. 423, 431-32 (1973). In this context, he cited *Rochin v. California*, 342 U.S. 165 (1952), 411 U.S. at 432. In *Rochin*, the Court reversed a narcotics conviction on the ground that due process had been violated by police forceable entry into the room of the accused, the violent seizure of his person, and the forceable extraction of the narcotic from his stomach. 342 U.S. 165 (1952). *Rochin* was decided at a time when, although the fourth amendment was applicable to the states under *Wolf v. Colorado*, 338 U.S. 25 (1949), the rule excluding illegally seized evidence was not so applicable. The exclusionary rule was made applicable to the states by *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court later limited *Rochin* to circumstances involving coercion, violence or brutality. In *Irvine v. California*, 347 U.S. 128 (1954), although the police had made repeated illegal entries into the home of the accused to install and move a hidden microphone, and in *Breithaupt v. Abram*, 352 U.S. 432 (1957), despite the police removal of blood from the unconscious accused, the Court declined to find a violation of due process. As a consequence, it is arguable that only police misconduct which involves coercion, violence or brutality to the accused violates due process.

In 1976, *Hampton v. United States*<sup>49</sup> presented the United States Supreme Court with the issue of improper law enforcement conduct. No guidance was given regarding the due process standard to be applied to such conduct because the Court did not arrive at a majority opinion. In *Hampton*, petitioner was convicted of selling a drug to a government agent which had been supplied to him by another government agent. Hampton did not allege entrapment but claimed that government conduct violated due process thereby barring his conviction.<sup>50</sup> Justice Rehnquist, joined by Chief Justice Burger and Justice White, rejected Hampton's due process claim. Due process "come[s] into play only when the Government activity in question violates some protected right" of the accused, not when law enforcement officers merely act in concert with a defendant.<sup>51</sup> Justice Rehnquist did not explain what he meant by a "protected right."<sup>52</sup>

Justice Powell, joined by Justice Blackmun agreed that Hampton's conviction should be affirmed based on the principles enunciated in *Russell*,<sup>53</sup> but disagreed with what he viewed as the plurality's position. That is, a conviction obtained by fundamen-

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In a series of cases, the Second Circuit has interpreted *Russell* to mean that only law enforcement misconduct which involves brutality to the accused violates due process. In *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), the court held that the unlawful overseas seizure and return for trial of a fugitive under circumstances of torture and brutality violated due process. The court acknowledged that the United States Supreme Court had held in *Ker v. Illinois*, 119 U.S. 436 (1886) and *Frisbie v. Collins*, 342 U.S. 519 (1952), that to bring a defendant within the criminal court's jurisdiction by "forcible abduction" was not a violation of due process. 500 F.2d at 271-72. The Second Circuit theorized that the United States Supreme Court would probably overrule *Ker* and *Frisbie* as a result of the evolution of constitutional doctrine developed by the Supreme Court in the 1960's. 500 F.2d at 275.

In two decisions, *United States ex rel. Lujan v. Gangler*, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975), and *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975), the Second Circuit, again relying upon *Russell* and *Rochin*, held that, although the fugitive in each case had been unlawfully seized outside of the jurisdiction of the trial court and returned for trial by government agents, no due process violation had occurred in the absence of brutality by government agents. In the year that the Second Circuit decided *Lujan* and *Lira*, the Supreme Court in dicta, approved its prior holdings in *Ker* and *Frisbie* in *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

Significantly, in *Russell*, Justice Rehnquist's finding that due process was not violated rested not on the absence of police brutality but, rather, on the ground that the government conduct was not fundamentally unfair. 411 U.S. at 431-32.

49. 425 U.S. 484 (1976).

50. *Id.* at 489.

51. 425 U.S. at 490.

52. For the possible meanings of "protected right" see text accompanying notes 89-90 *infra*.

53. 411 U.S. 423 (1973).

tally unfair police conduct would never be reversed by the Court on due process grounds.<sup>54</sup> According to Justice Powell, the entrapment cases which the Court had considered did not involve law enforcement conduct which violated due process standards.<sup>55</sup> Therefore, the Court in the future may be confronted with government abuses violating due process standards.<sup>56</sup> Theoretically, the predisposition of the defendant could be outweighed by due process principles and cause a reversal of a conviction.

There was a dissenting opinion based on the view of entrapment expressed by Justice Roberts<sup>57</sup> and Frankfurter.<sup>58</sup> Justice Brennan, joined by Justices Stewart and Marshall, dissented, and urged that the conviction should be reversed because the conviction involved the sale of contraband provided to the defendant by a government agent.<sup>59</sup> Since there was an adequate ground for reversal, it was unnecessary to determine whether or not due process had been violated.<sup>60</sup>

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54. 425 U.S. at 491, 492-93 (Powell, J., concurring). Justice Powell stated:

The plurality . . . says that the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.

I do not understand *Russell* or earlier cases delineating the predisposition-focused defense of entrapment to have gone so far, and there was no need for them to do so. In those cases the Court was confronted with specific claims of police 'overinvolvement' in criminal activity involving contraband. Disposition of these claims did not require the court to consider whether overinvolvement of Government agents in contraband offenses could ever reach such proportions as to bar conviction of a predisposed defendant as a matter of due process law. Nor have we had occasion yet to confront Government overinvolvement in areas outside the realm of contraband offenses . . . . In these circumstances, I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles.

*Id.* at 492-93. In mentioning that the Court had not yet dealt with government "overinvolvement" in areas other than contraband crimes, Justice Powell cited *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973). 425 U.S. at 493. See note 48 *supra* & note 98 *infra*.

55. 425 at 492-93 (Powell, J., concurring).

56. *Id.* at 493 (Powell, J., concurring).

57. See text accompanying notes 21-23 *supra*.

58. See text accompanying note 28 *supra*.

59. 425 U.S. at 500 (Brennan, J., dissenting).

60. *Id.* (Brennan, J. dissenting). In a footnote to his dissent, Justice Brennan stated: "For present purposes it would be sufficient to adopt this rule under our supervisory power and leave to another day whether it ought to be made applicable to the States under the Due Process Clause." *Id.* at 500 n.4.

*Hampton* is the United States Supreme Court's latest word on entrapment. Despite decades of entrapment controversy, the Court has consistently reaffirmed the *Sorrells* focus on predisposition. By contrast, the availability of due process as an alternative to entrapment is unclear. In 1973, the majority view was that conviction of a predisposed defendant by fundamentally unfair police conduct violates due process. In 1976, this view disappeared and a plurality view emerged that due process is violated only by police conduct which infringes a protected right of the predisposed defendant.

### III. The New York View of Entrapment and the Due Process Alternative

The entrapment controversy in which the United States Supreme Court has been embroiled for several decades has had no analogue in New York. Entrapment was not a judicially recognized doctrine in New York<sup>61</sup> until 1967 when it became a statutorily defined defense to a criminal charge.<sup>62</sup> The statutory formulation of the doctrine<sup>63</sup> is based upon the definition laid down in *Sorrells* and *Sherman*,<sup>64</sup> focusing on the predisposition of the accused to commit the crime charged.

In *People v. Isaacson*,<sup>65</sup> the New York Court of Appeals reversed the conviction of a defendant, who was predisposed to commit the crime, on the ground that the conviction was obtained by law enforcement conduct violative of due process.<sup>66</sup> Defendant, a resident of Pennsylvania with no prior criminal record, was convicted of

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61. *People v. Mills*, 178 N.Y. 274 (1904); N.Y. PENAL LAW § 40.05 (McKinney 1975) (practice commentary).

62. 1965 N.Y. Laws, ch. 1030 (effective September 1, 1967); N.Y. PENAL LAW § 40.05 (McKinney 1975).

63. N.Y. PENAL LAW § 40.05 (McKinney 1975) provides:

In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, . . . seeking to obtain evidence against him for purpose of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

*Id.*

64. *People v. Laietta*, 30 N.Y.2d 68, 281 N.E.2d 157, 330 N.Y.S.2d 351, *cert. denied*, 407 U.S. 923 (1972); N.Y. PENAL LAW § 40.05 (McKinney 1975) (practice commentary).

65. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

66. The trial court rejected Isaacson's entrapment defense. *Id.* at 518, 378 N.E.2d at 81, 406 N.Y.S.2d at 717.

selling cocaine to a state police informant in New York State.<sup>67</sup> The informant, a drug user and seller, cooperated with the police only after his arrest on a felony drug charge and a brutal beating by a state police officer.<sup>68</sup> With police knowledge, the informant indiscriminately telephoned various persons for the purpose of arranging drug sales to them, thereby providing opportunities for arrests by the police.<sup>69</sup> One of the persons called was the defendant.<sup>70</sup> After several telephone calls and despite informant's pleas for sympathy and entreaties of friendship, the defendant refused to procure cocaine for the informant.<sup>71</sup> Eventually, the defendant agreed to supply the requested drug but only in Pennsylvania.<sup>72</sup> However, the proposed situs of the sale occurred in New York State as a result of the informant's misrepresentations.<sup>73</sup> When the defendant arrived at the agreed place, he was arrested by the New York State Police.<sup>74</sup>

Judge Cooke, writing for the majority, held that the conduct of the State Police violated the New York State Constitution's due process clause.<sup>75</sup> In his view, the Supreme Court in *United States v. Russell*<sup>76</sup> and *Hampton v. United States*<sup>77</sup> did not preclude such a result although the defendant in *Isaacson* was predisposed to commit the crime.<sup>78</sup> According to Judge Cooke, due process involves that

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

68. *Id.* at 515, 378 N.E.2d at 79, 406 N.Y.S.2d at 715-16.

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

70. *Id.*

71. *Id.*

72. *Id.* at 517, 378 N.E.2d at 80-81, 406 N.Y.S.2d at 717.

73. *Id.* at 517-18, 378 N.E.2d at 81, 406 N.Y.S.2d at 717.

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

75. *Id.* at 519-25, 378 N.E.2d at 82-85, 406 N.Y.S.2d at 718-22. Judge Cooke stated that "[o]f course, under our own State due process clause (N.Y. State Const. art. I, § 6), this court may impose higher standards than those held to be necessary by the Supreme Court under the corresponding Federal constitutional provision (see *Oregon v. Hass*, 420 U.S. 714, 719; see, generally, Brennan, State Constitutions and the Protections of Individual Rights, 90 Harv. L. Rev. 489)." 44 N.Y.2d at 519-20, 378 N.E.2d at 82, 406 N.Y.S.2d at 718. Significantly, in his due process analysis, Judge Cooke discussed both Supreme Court and New York decisions dealing with due process. 44 N.Y.2d at 519-23, 378 N.E.2d 82-83, 406 N.Y.S.2d at 719-20. It should be noted that the United States Supreme Court will not review a state court judgment based upon an adequate and independent nonfederal ground. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); see also A.L. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 230-32 (5th ed. 1978).

76. 411 U.S. 423 (1973).

77. 425 U.S. 484 (1976).

78. 44 N.Y.2d at 519, 378 N.E.2d at 81-82, 406 N.Y.S.2d at 718.

“‘fundamental fairness essential to the very concept of justice’” and, accordingly, due process requires the courts to prevent convictions based upon police conduct violative of “cherished principles of law and order.”<sup>79</sup>

Judge Cooke suggested four factors to determine police conduct violative of due process standards.<sup>80</sup> They were whether (1) the police manufactured a crime which would not otherwise have occurred or were merely involved in ongoing criminal activity; (2) the police engaged in criminal or improper conduct repugnant to a sense of justice; (3) the defendant was reluctant to commit the crime yet overcome by humanitarian appeals, or temptation to exorbitant gain or by persistent solicitation; and (4) the police were motivated solely by a desire to obtain a conviction with no thought of preventing further crime or protecting the public.<sup>81</sup> According to Judge Cooke, no one of the suggested factors should be determinative but each should be viewed “in the context of proper law enforcement objectives—the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness.”<sup>82</sup>

Judge Cooke applied the four criteria to the facts and concluded that due process had been violated.<sup>83</sup> He found that the defendant was not engaged in ongoing criminal activity; the crime would not have been committed but for the brutal state police treatment of the informant which motivated him to induce the defendant to commit the crime; and the sole police aim was conviction of anyone, and not regard for the protection of the New York public.<sup>84</sup>

Although New York is statutorily committed to the *Sorrells* definitional predisposition focus of entrapment, its highest court judicially declared that conviction of a predisposed defendant by fundamentally unfair conduct violates due process.

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79. *Id.* at 520-21, 378 N.E.2d at 82-83, 406 N.Y.S.2d at 718 (quoting *People v. Leyra*, 302 N.Y. 353, 364, 98 N.E.2d 553, 559 (1951)).

80. 44 N.Y.2d at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719.

81. *Id.*

82. *Id.*

83. 44 N.Y.2d at 522-23, 378 N.E.2d at 83-84, 406 N.Y.S.2d at 720. Judge Gabrielli, in dissent, argued that no due process violation was involved because no independent constitutional right of the defendant had been violated. 44 N.Y.2d at 527, 378 N.E.2d at 87, 406 N.Y.S.2d at 723 (Gabrielli, J., dissenting). The vote for reversal was five to two.

84. 44 N.Y.2d at 522-23, 378 N.E.2d at 83-84, 406 N.Y.S.2d at 720.

#### IV. Critique of the Two Views of Entrapment and the Due Process Alternative

For the United States Supreme Court<sup>85</sup> and the New York Court of Appeals,<sup>86</sup> entrapment is the governmental instigation of the commission of a crime by a person otherwise not predisposed to commit the crime. In both the federal and New York jurisdictions,<sup>87</sup> police conduct which does not constitute entrapment may, nevertheless, violate due process.

##### A. The Due Process Alternative in the United States Supreme Court

At present, the status of the due process alternative in the Supreme Court is not clear. In *Russell*, Justice Rehnquist held the government conduct not to be violative of an "independent constitutional right" of the defendant and therefore not violative of due process. As examples of an "independent constitutional right," the Justice mentioned the fourth amendment guarantee against unreasonable searches and seizures, and the fifth amendment guarantee against coerced confessions. He stated that due process focuses on government conduct which is fundamentally unfair or is shocking to a universal sense of justice.<sup>88</sup> As a consequence, government conduct might be violative of due process through neither the fourth nor fifth amendments were violated.

Under the *Hampton* analysis, a due process evaluation is required only when government conduct violates a "protected right" of the accused.<sup>89</sup> Justice Rehnquist, however, did not define the term. The term may be the equivalent to his "independent constitutional right" in *Russell*. If that is true, only government conduct which violates the fourth or fifth amendments or perhaps, other specific guarantees of the Bill of Rights,<sup>90</sup> offends due process. Thus, the *Russell* due process criterion of fundamental fairness has changed to the *Hampton* due process criterion requiring a violation of one of the first ten amendments.

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85. See text accompanying notes 18-19, 27 & 39-41 *supra*.

86. See text accompanying notes 63-64 *supra*.

87. See text accompanying notes 39-44, 49-51 & 66 *supra*.

88. See notes 43-44 *supra* and accompanying text.

89. See text accompanying note 51 *supra*.

90. U.S. CONST. amends. I-X.

The *Hampton* due process criterion does not correspond with the Court's traditional view that the test for due process is fundamental fairness.<sup>91</sup> Justice Rehnquist did not mention decisions of the Court declaring that due process is violated by fundamentally unfair police conduct of pre-arraignment identification procedures though no violation of the fourth or fifth amendment was involved in such procedures.<sup>92</sup> If due process were equivalent to fourth or fifth amendment rights, due process would be superfluous since such rights are already constitutionally protected.

In *Hampton*, only two other Justices agreed with Justice Rehnquist's due process analysis.<sup>93</sup> If presented with fundamentally unfair government conduct in the future, the Court would probably reverse on due process grounds. In such a case, the Court could well be guided by Judge Cooke's due process analysis in *Isaacson*.<sup>94</sup>

## B. The Due Process Alternative in New York

In *Isaacson*, Judge Cooke adopted the *Russell* fundamental fairness approach in his formulation of the due process alternative.<sup>95</sup> The Judge refused to limit due process to Justice Rehnquist's *Hampton* search for violation of an independent constitutional right. Judge Cooke, held that convictions predicated on police conduct offensive to principles of law and order violate due process.<sup>96</sup>

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91. See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

92. In *Stovall v. Denno*, 388 U.S. 293 (1967) and *Kirby v. Illinois*, 406 U.S. 682 (1972), the Supreme Court held that the police conduct of pre-arraignment identification procedures in each case did not violate due process because the procedures were not fundamentally unfair. In *Foster v. California*, 394 U.S. 440 (1969), the Court reversed the conviction because the identification procedures were fundamentally unfair and, accordingly, violated due process. In none of the three cases did the issue of due process violation turn on a violation of the fourth or fifth amendments or, for that matter, on a violation of any other right guaranteed by the first ten amendments. In fact, the Court in *Kirby* specifically held that pre-arraignment identification procedures do not involve the fifth amendment privilege against compulsory self-incrimination. 406 U.S. 687.

93. See text accompanying notes 53-61 *supra*.

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

95. See text accompanying note 79 *supra*. Judge Cooke rejected a *Rochin* brutality limitation of due process. 44 N.Y.2d at 519-22, 406 N.Y.S.2d at 718-20 (1978). See note 48 *supra*. Judge Cooke referred to *Raley v. Ohio*, 360 U.S. 423 (1959), and *Cox v. Louisiana*, 379 U.S. 559 (1965). In *Raley*, the Court found that due process had been violated by conviction of a defendant for exercising a constitutional privilege which the state had represented the defendant possessed. 360 U.S. 437-40. In *Cox*, the Court held that due process had been violated by conviction in a case where the state misrepresented the scope of the law to the defendant. 379 U.S. 569-71.

96. See text accompanying notes 77-79 *supra*.



This is a logical affirmation in due process terms of Justice Brandeis' condemnation, in *Olmstead*, of the government's committing crime to convict a private person.<sup>97</sup>

There are types of law enforcement conduct involving criminality which might not violate due process under the four criteria<sup>98</sup> set up by Judge Cooke in *Isaacson*. Such conduct would involve law enforcement use of criminal activity as a means of achieving a conviction. Conceivably, the defendant could be involved in ongoing criminal activity and might be amenable to commit the crime charged, and yet the police could be motivated in their criminal activity by a desire to protect the public. Under Judge Cooke's due process criteria, due process would not be violated where only one of the criteria, for example, police criminality would have been satisfied. In the Judge's formulation, all four would have to be taken into account.<sup>99</sup>

Such a conclusion would justify Justice Brandeis' fear that, in the administration of criminal justice, the end does justify a criminal means. Acceptance by the courts of government criminality would classify it as fundamentally fair and as part and parcel of

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97. See text accompanying note 2 *supra*.

98. Some examples are prosecution of the "boss" of a murder ring because of a murder committed by an undercover police officer at the boss' direction and with the knowledge or consent of the officer's superiors; prosecution of robbers as accomplices of an undercover police agent who robbed at the behest of his superiors; prosecution of a woman for engaging in sex for a fee with an undercover police officer who did so under orders of his superiors; or the federal government's instigation of the arrest and prosecution in state court of an undercover agent on a false charge thereby providing an opportunity for solicitation of a bribe from a state law enforcement official, and the prosecution of the state official for bribery. See note 48 *supra*.

The robbery example was suggested as a hypothetical in *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973). It is assumed that the prosecution would seek a conviction of the robbers on the basis of the testimony of the police agent who had participated in the robbery. Here, then, the prosecution would be relying on police criminality for purpose of conviction.

The last example constitutes the essential facts in *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973). The Second Circuit condemned the government's conduct but reversed for lack of federal jurisdiction. See note 48 *supra*. In *Nigrone v. Murtagh*, 46 A.D.2d 343, 362 N.Y.S.2d 513 (1974), *aff'd on other grounds*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975), the appellate division refused to dismiss an indictment based on facts similar to *Archer*. In *Nigrone*, the appellate division, by a vote of three to two, refused to dismiss the indictment for perjury on the ground that the indicting grand jury was aware of the special prosecutor's subordination of perjury before the first grand jury. The court of appeals affirmed on procedural grounds and therefore did not reach the issue of prosecutorial criminality. In the author's view the case was wrongly decided. The special prosecutor used criminal means to achieve the accused's prosecution and thereby violated due process. See text accompanying notes 104-05 *infra*.

99. See text accompanying notes 80-82 *supra*.

our principles of law and order. In short, convictions obtained by means of law enforcement criminality would be offensive to due process.<sup>100</sup>

Not every case in which police criminality is involved would warrant reversal on due process grounds. For example, assume that, in *Isaacson*,<sup>101</sup> the only police misconduct was the criminal assault upon the informant, and that the informant later cooperated with the police for reasons other than the assault. A resulting conviction of Isaacson would not have been achieved by means of police criminality. His conviction would not be predicated upon fundamentally unfair means and, consequently, due process would not be violated. On the other hand, if the state police had tortured the informant with the intention of causing him to induce Isaacson to commit a crime, and the informant's activity was instrumental to that end, there would be a violation of due process. Under such a test, police criminality would violate due process only if it were the means by which the conviction was achieved. Such a requirement would serve as clear warning to law enforcement officials that commission of crimes by the police for the purpose of achieving a conviction would not be tolerated by the courts.

Judge Cooke's four criteria should not apply where the conviction was obtained by law enforcement criminality. Where police misconduct does not involve criminality, the four criteria<sup>102</sup> should serve as a useful starting point for due process evaluation. However, use of the criteria should always be consonant with the principle that due process involves fundamental fairness and observance of law and order.

## V. Conclusion

Four decades ago, the United States Supreme Court held that entrapment was a defense available to a defendant in a criminal case. It is a doctrine of limited scope, available only to an accused

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100. *United States v. Archer*, 486 F.2d 670, 673 (2d Cir. 1973) (dicta).

101. *People v. Isaacson*, 44 N.Y.2d 511, 515, 378 N.E.2d 78, 79, 406 N.Y.S.2d 714, 715 (1978).

102. See text accompanying notes 80-81 *supra*. The third criteria, focusing on police instigation of the defendant to commit the crime, appears to be the Roberts-Frankfurter entrapment doctrine in modern due process dress. This was expressly recognized by Judge Cooke. 44 N.Y.2d at 524, 378 N.E.2d at 85, 406 N.Y.S.2d at 721. However, in Judge Cooke's due process formulation, it is not the sole criterion. See text accompanying note 82 *supra*.

not predisposed to commit the crime charged. Over the years certain members of the Court sought to broaden the scope of entrapment by a formulation focusing objectively on the conduct of the police. Such attempts have consistently failed.

In this decade, a majority of the Court held that conviction of a predisposed defendant by fundamentally unfair police methods violates due process. This majority due process formulation is now uncertain. In the last entrapment case before the Court, a plurality declared that due process is violated only by police conduct which infringes a fourth or fifth amendment right or, perhaps, some other guarantee of the first ten amendments to the Constitution.

Under the plurality's due process formulation, the *Isaacson* case would not have involved a due process violation. There is no evidence that Isaacson's rights under the Bill of Rights<sup>103</sup> were violated. Moreover, a conviction obtained by criminal means would not offend due process in the absence of a violation of such rights. Thus, the plurality due process formulation is dangerous because much government lawlessness would lie outside its ambit.

New York has refused to follow the Supreme Court's plurality due process definition. The New York Court of Appeals has firmly held that conviction of a predisposed accused by fundamentally unfair police methods violates due process. It has formulated due process criteria which focus on government lawlessness in obtaining convictions.

New York's due process emphasis on government lawlessness is preferable to the Supreme Court's plurality due process focus on a fourth or fifth amendment violation. Under the New York view, conviction of a predisposed defendant by fundamentally unfair government methods would offend due process though no fourth or fifth amendment was involved. The New York due process formulation has one possible defect: conviction of a predisposed defendant by criminal government means would not always violate due process. Government criminality for the purpose of obtaining convictions should be sufficient to constitute a violation of due process.

The *Hampton* plurality has caused uncertainty as to the status of due process as a remedy available to the predisposed defendant in the federal courts. Although Justice Powell concurred in the

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103. U.S. CONST. amends. I-X.

affirmance of Hampton's conviction, he disagreed with the plurality's due process formulation. Justice Brennan, in dissenting, disagreed with the plurality's definition of due process, but he also disagreed with the affirmance of Hampton's conviction. In view of this disagreement among the members of the Court, a majority of the Court would probably reverse the conviction of a predisposed defendant on due process grounds where the conviction was obtained by fundamentally unfair means. If these facts are presented to the Court, New York's *Isacson* decision may serve as a guidepost for setting due process standards.

