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Governmental Misconduct and the Right of Liberty

Michael A. Vaccari
Assistant Corporation Counsel, City of New York

GOVERNMENTAL MISCONDUCT AND THE RIGHT OF LIBERTY

*Michael A. Vaccari**

I. Introduction

The essence of the liberty interest guaranteed by the due process clauses of the fifth and fourteenth amendments to the United States Constitution is the protection of the individual from conduct by the government which is capricious, arbitrary or unreasonable.[1] When a defendant is brought to trial and convicted as a result of such conduct by law enforcement officials even though such conduct is not specifically proscribed by the fourth and fifth amendments,[2] that defendant's right to liberty has been violated. The remedy advocated to cure this constitutional violation is the recognition and application of an exclusionary rule which would suppress any evidence obtained by such means.[3]

A small but increasing number of cases have accepted the idea that law enforcement misconduct may violate a defendant's due process rights.[4] A recent New York case, *People v. Rao*,[5] exempli-

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* Assistant Corporation Counsel, City of New York. B.A. 1975, J.D. 1978, Fordham University.

1. "Due process of law is a summarized constitutional guarantee of respect for those personal immunities . . . 'implicit in the concept of ordered liberty.' " Rochin v. California, 342 U.S. 165, 169 (1952) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

2. *See* Monaghan, *Of "Liberty and Property,"* 62 CORNELL L. REV. 405, 411-14 (1977).

3. Although the exclusionary rule usually is associated with violations of the fourth amendment, *see* Weeks v. United States, 232 U.S. 383 (1914) (evidence seized in violation of fourth amendment inadmissible at trial), the rule is generally available as a remedy for violations of constitutional rights. *See* Brewer v. Williams, 430 U.S. 387 (1977) (sixth amendment); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment); Rochin v. California, 342 U.S. 165 (1952) (fourteenth amendment). *See also* Note, *The Briefcase Caper, Standing and Due Process Exclusion: United States v. Payner*, 10 CONN. L. REV. 210, 217-22 (1977); Note, *Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power*, 62 CORNELL L. REV. 364 (1977). *See generally* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255 (1961).

4. United States v. Russell, 411 U.S. 423, 431-32 (1973) (dicta); Rochin v. California, 342 U.S. 165, 172-73 (1952); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978); People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980). *See* Olmstead v. United States, 277 U.S. 438, 471 (1927) (Brandeis, J., dissenting); United States v. Archer, 486 F.2d 670 (2d Cir. 1973);

fies the willingness of certain courts to look to the due process clause as a means of striking down indictments or suppressing evidence obtained through egregious governmental misconduct. In *Rao,* members of the office of the Special Prosecutor appointed to ferret out corruption in the criminal justice system committed numerous illegalities while obtaining indictments against a judge, his attorney-son and the son's law partner. In obtaining these indictments, which were later dismissed, the Special Prosecutor may well have been guilty of committing or aiding in the commission of various felonies and misdemeanors under the New York Penal Law including perjury (swearing falsely before a grand jury), forgery (falsifying public records), making an apparently sworn false statement (intending to mislead a public servant in the performance of his official functions), perjury (offering a false statement for filing) and falsely reporting an incident (reporting to a law enforcement agency information known by him to be false).[6] Although all three defendants sought and eventually obtained dismissals of their indictments, one dismissal was based squarely on the ground of prosecutorial misconduct.[7]

Rao raises the question whether a defendant who has been indicted and brought to trial as a result of illegal conduct perpetrated by law enforcement officials is entitled to constitutional protection from that misconduct. Such protection is necessary to 1) provide a remedy for this type of conduct and 2) prevent similar and more egregious acts in the future. The extremes to which such conduct can extend are illustrated by the attempted burglary of Daniel Ellsberg's psychiatrist's office by the White House Plumbers[8] and by a recent case in which it was argued before the United

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Nigrone v. Murtaugh, 46 A.D.2d 343, 362 N.Y.S.2d 513 (2d Dep't 1974), *aff'd on other grounds,* 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

5. 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980).

6. 46 A.D.2d 343, 350, 362 N.Y.S.2d 513, 521-22 (2d Dep't 1974) (Shapiro, J., dissenting).

7. People v. Rao, 73 A.D.2d 88, 95, 425 N.Y.S.2d 122, 129 (2d Dep't 1980) (court found law enforcement misconduct so "calculated, insidious and pervasive" as to require dismissal of the indictment on due process grounds).

8. *See* Final Report of the Select Committee on Presidential Campaign Activities of the United States Senate, 93d Cong., 2d Sess. Report No. 93-981, June 1974, at 119-130; REPORT OF THE WATERGATE SPECIAL PROSECUTION FORCE 60-62 (1975). *See also* G. LIDDY, WILL (1980); Jaworski, *The Most Lustrous Branch: Watergate and the Judiciary,* 45 FORDHAM L. REV. 1267 (1977); N.Y. Times, Oct. 30, 1980 at A17, col. 1 (in testimony at the trial of former FBI agents accused of unlawful entries, former President Richard Nixon stated that

States Supreme Court that the commission of murder to further governmental interests could be justified, under certain circumstances by the Constitution.[9]

Although there is no specific constitutional provision which proscribes law enforcement misconduct other than the specific instances described in the fourth and fifth amendments, courts, when faced with egregious behavior, have looked to the due process clauses of the fifth and fourteenth amendments as general protectors of fairness in governmental actions toward individuals.[10] Furthermore, at least two courts have reversed, on due process grounds, convictions obtained as a result of law enforcement illegality.[11]

The fourth and fifth amendments of the Constitution place specific limitations on the actions of government officials in the investigation of criminal conduct. These proscriptions, the defense of entrapment and the use of the due process clause as a general limitation on egregious actions by law enforcement agents will be discussed in section II. Section III will offer an analysis of the nature and scope of the due process right of liberty. This analysis includes a philosophical discussion of the function of law as it relates to the protection of the liberty interest. It is asserted than an interpreta-

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when a president authorizes burglaries "for good cause, what would otherwise be unlawful or illegal becomes legal.").

9. In McSurly v. McClellan, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. granted*, 434 U.S. 868 (1977), *writ of cert. dismissed as improvidently granted sub nom.* McAdams v. McSurly, 438 U.S. 189 (1978), attorneys for defendant congressman argued that the commission of murder, for the purpose of obtaining information relevant to legislation, was within the immunity granted to members of congressional staffs under the Speech or Debate Clause of the Constitution. The *New York Times* reported part of the oral argument:

> Associate Justice Potter Stewart asked Mr. Easterbrook whether a Senate investigator who committed burglary to obtain a document relevant to legislation would be immune from a damage suit.
>
> "Yes, probably he is protected," the Deputy Solicitor General replied.
>
> "Would that include murder?" asked the justice.
>
> "Yes, probably," Mr. Easterbrook responded.

N.Y. Times, Mar. 2, 1978, at A8, col. 1.

10. *See* note 4 *supra* and accompanying text. *See also* O'Connor, *Entrapment Versus Due Process: A Solution to the Problem of the Criminal Conviction Obtained by Law Enforcement Misconduct*, 7 FORDHAM URB. L.J. 35, 48-53 (1978); Note, *Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power*, 62 CORNELL L. REV. 364, 370-72 (1977).

11. People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978); People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980).

tion of the due process clause which includes protection from law enforcement illegality is consistent with the views of the major contemporary political philosophers on the source and function of the liberty interest.[12]

Section IV posits the legal basis for recognizing constitutional protection of the liberty interest from law enforcement illegality. The legal basis for this right will be developed through an analysis of the principles underlying particular constitutional provisions seeking to secure the liberty of individuals and the application of such principles to the area of law enforcement illegality.

II. The Law of Governmental Misconduct

The parameters of proper conduct of law enforcement officials toward criminal suspects and defendants has been intensively analyzed by the courts. Certain types of governmental misconduct are proscribed by specific provisions of the Bill of Rights. Among these are the fourth amendment prohibition against unreasonable searches and seizures and the fifth amendment prohibition against compulsory self-incrimination.

A. The Fourth Amendment

The Supreme Court first discussed the effect of the fourth amendment's[13] proscription against unreasonable search and seizure in *Boyd v. United States*.[14] Since *Boyd*, the court has struggled with both the underlying theory and the practical consequences of the amendment. Because no remedy for violations of the amendment exists in the Constitution, much of the discussion has centered on proposed remedies. Recently, the question of standing, or who has the capacity to assert a violation of fourth

12. *See* notes 140-53 *infra* and accompanying text.

13. The fourth amendment provides in part 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. . . ." U.S. CONST. amend. IV.

14. 116 U.S. 616 (1886). In *Boyd*, government officials relied upon a federal statute requiring a defendant to produce certain books and records. Under the statute, if the materials were not produced, the allegations sought to be proved by the material would be taken as admitted. *Id.* at 621. For a discussion of the historical development of the fourth amendment, see Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Search and Seizure*, 40 MO. L. REV. 1, 3-14 (1975); Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 13-15 in 55 JOHNS HOPKINS U. STUDIES IN HIST. & POL. SCI. No. 2 (1937).

amendment rights, has occupied the attention of the Court.

The early decisions construing the fourth amendment focused on the conduct of the government officials. Justice Bradley, writing in *Boyd,* recalled the abhorrence that general writs of assistance (issued by the Crown to allow British officials to enter and search the homes of suspected colonial smugglers) created in eighteenth century Americans.[15] He also noted the rights of privacy and property were violated by an illegal search. "It is not the breaking of his doors, and the rummaging in his drawers, that constitutes the essence of the offense, — it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . ."[16] The Court held that the fourth amendment protected an individual from the compulsory production of papers to be used against him, even if, as in *Boyd*, those papers had not been seized.

After *Boyd*, the question remained whether evidence could be used at trial even though it had been seized illegally. The common law rule stated that a court would not inquire into the source of competent evidence.[17] In *Weeks v. United States,*[18] however, the Supreme Court declared that if the common law rule were adhered to "the protection of the Fourth Amendment . . . might as well be stricken from the Constitution."[19] The Court, therefore, prohibited the use at federal trials of even competent evidence, if it had been illegally obtained.[20] Justice Day defended this exclusionary rule in two ways: first, the rule was necessary to give force to the specific proscriptions of the fourth amendment, and second, that a under clean-hands theory, judicial integrity should be preserved by ex-

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15. According to Justice Bradley, in 1761 James Otis described the general writs as " 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law that ever was found in an English law book.' " 116 U.S. at 625.

16. 116 U.S. at 630.

17. *See* 1 GREENLEAF ON EVIDENCE § 254*a* (1866). *See also* Adams v. New York, 192 U.S. 585, 595 (1904); Commonwealth v. Dana, 2 Met. 329, 337 (Mass. 1841).

18. 232 U.S. 383 (1914).

19. *Id.* at 393.

20. The scope of the exclusionary rule was extended in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1925), where the Supreme Court prohibited the government from using not only the illegally seized evidence itself, but also any knowledge the government had gained therefrom. *Id.* at 390-91. The Supreme Court applied the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961). For a thorough analysis of the development of the exclusionary rule, see Comment, *Reason and the Fourth Amendment — The Burger Court and the Exclusionary Rule,* 46 FORDHAM L. REV. 139 (1977).

cluding evidence illegally obtained.[21]

During the tenure of Chief Justice Warren, the Supreme Court added another rationale for the exclusionary rule. Justice Stewart, writing for the Court in *Elkins v. United States*,[22] stated that "the [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."[23] Whether the constable on patrol does in fact alter his practices based on Supreme Court dictates and is thereby deterred from illegal intrusions continues to be the subject debate. Skepticism regarding the deterrence value of the exclusionary rule has been a hallmark of the Burger Court, which has actively engaged in limiting the application of the rule wherever possible.[24]

Another aspect of the law of search and seizure that has been modified since *Boyd* is the reliance on property concepts to define a search.[25] The invention of the radio heralded a revolution in communications that irreversibly altered the ways in which a government could intrude upon its citizens. Although the Court heard its first wiretapping and electronic surveillance cases in the 1920's, it was not until 1967 that the Court recognized a wiretap as a search deserving of constitutional protection. In *Katz v. United States*,[26] a listening device was planted in the telephone booth regularly used by a known gambler. Although there had been no physical intrusion, the Court found a violation of the fourth amendment, holding that the Constitution protects "people, not places."[27] In later cases, the Court refined the concept so that the fourth amendment is now recognized to protect only a "legitimate

21. Weeks v. United States, 232 U.S. at 392.

22. 364 U.S. 206 (1960).

23. *Id.* at 217.

24. *See* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1040-41 (1973). *See generally* Comment, *Possession and Presumptions: The Plight of the Passenger Under the Fourth Amendment*, 48 FORDHAM L. REV. 1027, 1061-62 (1980) [hereinafter cited as *Possession*]; Comment, *The Exclusionary Rule, Standing and Expectation of Privacy for Car Passengers: A Confusion of Concepts*, 31 BAYLOR L. REV. 227, 228 (1979); Comment, *Reason and the Fourth Amendment — The Burger Court and the Exclusionary Rule*, 46 FORDHAM L. REV. 139, 158-73 (1977).

25. *See* Rakas v. Illinois, 439 U.S. 128, 133 n.4 (1978).

26. 389 U.S. 347 (1967).

27. *Id.* at 351.

expectation of privacy."[28]

A third area where the Court has limited fourth amendment protection is the question of standing. The Supreme Court has stated that fourth amendment rights are personal and may not be asserted vicariously.[29] Therefore, only those whose "legitimate expectation of privacy" is violated may assert a violation of the fourth amendment.[30] The Supreme Court has further limited the availability of standing to challenge "unreasonable searches and seizures" and circumscribed the protective scope of the fourth amendment in three recent decisions. In *Rakas v. Illinois*,[31] the Court denied standing to passengers in an automobile because they lacked the requisite expectation of privacy in a car they neither possessed nor were driving. The automatic standing rule, which the Court created in *Jones v. United States*[32] to deliver a defendant charged with a possessory crime from the dilemma of having to assert a property interest in contraband in order to challenge an illegal search, was overruled by the Court in *United States v. Salvucci*.[33] Finally, in *United States v. Payner*,[34] the Court found that an illegal search of a party other than the defendant could not form the basis of a defendant's fourth amendment claim because the defendant's own legitimate expectation of privacy had not been violated.[35]

B. Fifth Amendment

The history of the fifth amendment prohibition against compulsory self-incrimination is similar to the history of the exclusionary rule under the fourth amendment. In *Bram v. United States*,[36] the Supreme Court established the basic principle that in criminal tri-

28. *Id.* at 353.

29. Alderman v. United States, 394 U.S. 165, 171-72 (1969).

30. It has been suggested that the court's limiting of standing is an aspect of its unapologetic dislike of the exclusionary rule. *See Possession, supra* note 24, at 1032. In *Rakas*, the court stated "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights." 439 U.S. at 137 (1978).

31. 439 U.S. 128, 148-49 (1978). *See also* Rawlings v. Kentucky, 100 S. Ct. 2556, 2561-62 (1980).

32. 362 U.S. 257, 263-65 (1960).

33. 100 S. Ct. 2547, 2553 (1980).

34. 100 S. Ct. 2439 (1980).

35. *Id.* at 2444.

36. 168 U.S. 532 (1897).

als, confessions must be free and voluntary.[37] In the years following *Bram*, the determination of the requisites for a free and voluntary confession occupied most of the court's attention.[38] The Court characterized as involuntary those confessions which resulted from extreme brutality[39] as well as those resulting from milder forms of coercion.[40] The Court held this provision of the fifth amendment applicable to the states through the due process clause of the fourteenth amendment in *Malloy v. Hogan*.[41] The effort by the Supreme Court to define a truly voluntary confession culminated in *Miranda v. Arizona*,[42] where the Court held that a formal explanation of rights must be given a suspect before a confession can be considered voluntary for the purposes of the fifth amendment.[43]

C. Entrapment

The defense of entrapment[44] received formal recognition in *Sor-*

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37. *Id.* at 542.

38. *See* Haynes v. Washington, 373 U.S. 503 (1963); Spano v. New York, 360 U.S. 315 (1959); Lisenba v. California, 314 U.S. 219, 241 (1941); Ziang Sung Wan v. United States, 266 U.S. 1, 14-15 (1924).

39. *See* Brown v. Mississippi, 297 U.S. 278 (1936) (confessions were obtained from four black defendants through extended sessions of whipping and in one case by hanging).

40. The defendant, in Haynes v. Washington, 373 U.S. 503 (1963), was denied permission to call his laywer or his wife until he "cooperated." Justice Goldberg writing for the majority stated, "Whether there is involved the brutal 'third degree,' or the more subtle, but no less offensive, methods of obtaining, official misconduct cannot but breed disrespect for law, as well as for those charged with its enforcement." *Id.* at 519.

41. 378 U.S. 1, 2, (1964). Before this provision of the fifth amendment was made applicable to the states, the Court excluded coerced confessions in state trials as violative of the fourteenth amendment's due process clause. *See* Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944); Chambers v. Florida, 309 U.S. 227, 228 (1940).

42. 354 U.S. 436 (1966).

43. *Id.* at 467-79. Chief Justice Warren observed that underlying the fifth amendment privilege against self-incrimination is "the respect a government — state or federal — must accord to the dignity and integrity of its citizens." *Id.* at 460. For the history of the privilege, see Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 1-23 (1949).

The Burger Court has systematically limited the effect of the *Miranda* decision to testimony given at a criminal trial for the purposes of proving guilt. *See* Beckwith v. United States, 425 U.S. 341 (1976) (*Miranda* warnings not required if a suspect is not in police custody); Harris v. New York, 401 U.S. 222 (1971) (testimony given without *Miranda* safeguards admissible to impeach defendant's credibility). *But see* Rhode Island v. Innis, 100 S. Ct. 1682 (1980) (interrogation for *Miranda* purposes includes any words or action by police reasonably likely to elicit an incriminating response).

44. For articles analyzing the defense of entrapment, see Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 MISS. L.J. 573 (1976); Murchison, *The Entrapment Defense in Federal Courts: Evidence of a Legal Doctrine*, 47 MISS. L.J.

rells v. United States.[45] In *Sorrells,* a government agent repeatedly and persistently asked the defendant to obtain some whiskey for him. Despite refusing these repeated supplications, the defendant finally procured a half-gallon of whiskey as a favor for the agent, who had ingratiated himself with the defendant by claiming that they were veterans of the same World War I army unit.[46]

The Supreme Court established that the defense of entrapment is available "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[47] The Court distinguished this situation from the situation in which government officials "merely afford[ed] opportunities or facilities for the commission of the offense."[48] Justice Roberts, concurring, believed that the creation of an entrapment defense based on a defendant's predisposition was inappropriate because the true issue was the involvement of the court in sanctioning official misconduct.[49] An entrapment defense according to Justice Roberts should place "the true foundation of the doctrine in the public policy which protects the purity of government and its processes."[50]

In *Sherman v. United States,*[51] a police informant met the defendant at a doctor's office while both were being treated for drug

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211 (1976). *See also* Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution,* 28 FORDHAM L. REV. 399 (1959); Note, *Entrapment by Federal Officers,* 33 N.Y.U. L. REV. 1033 (1958); Comment, *Entrapment in the Federal Courts,* 1 U.S.F. L. REV. 177 (1966). *But see* DeFeo, *Entrapment As A Defense to Criminal Responsibility: Its History, Theory and Application,* 1 U.S.F. L. REV. 243 (1967). Additionally, several authors have argued that a constitutional foundation existed for the entrapment defense. *See* Comment, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons,* 49 CRIM. L.C. & P.S. 447 (1959); Note, *The Defense of Entrapment: A Plea For Constitutional Standards,* 20 U. FLA. L. REV. 63 (1967); Comment, *Elevation of Entrapment To A Constitutional Defense,* 7 U. MICH. J.L. REF. 361 (1974); Note, *The Serpent Beguiled Me And I Did Eat: The Constitutional Status of the Entrapment Defense,* 74 YALE L.J. 942 (1965).

45. 287 U.S. 435 (1932).

46. *Id.* at 439.

47. *Id.* at 442.

48. *Id.* at 441.

49. *Id.* at 454-55 (Roberts, J., concurring).

50. *Id.* at 455. Justice Roberts added, "It is the province of the court and of the court alone to protect itself and the government from such prostitutions of the criminal law." *Id.* at 457.

51. 356 U.S. 369 (1958).

addiction. A friendship developed and soon thereafter the informant asked the defendant to obtain drugs for him. Only after repeated urgings did the defendant obtain the drugs, which he then sold to the informant at cost. Defendant was arrested by federal agents and convicted despite his asserted defense of entrapment.[52]

The Supreme Court reaffirmed the principles underlying *Sorrells* but stated that in determining whether evidence established entrapment "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[53] The Court was particularly outraged that the police provocateur had led the defendant back into the life of drug addiction from which he was trying to escape.[54]

Four justices concurred in the result,[55] but would have had the Court adopt the rationale of Justice Roberts' concurrence in *Sorrells*.[56] Justice Frankfurter concurring again emphasized that "public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."[57]

Fifteen years passed before the Supreme Court had another opportunity to examine the entrapment doctrine.[58] In *United States*

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52. *Id.* at 371-72.

53. *Id.* at 372.

54. *Id.* at 373.

55. *Id.* at 378 (Frankfurter, J., concurring). *See* notes 50-51 *supra* and accompanying text.

56. 356 U.S. at 380 (Frankfurter, J., concurring).

57. *Id.* at 382 (Frankfurter, J., concurring). The majority dealt briefly with the questions raised by Justices Roberts and Frankfurter, but refused to base its decision on the objective grounds advocated in the concurrences. The Court stated that it was neither prepared to overrule *Sorrells* nor to run the risk of creating greater problems which an approach focusing on the conduct of government officials might entail. *Id.* at 376-78.

58. Between 1958 and 1973, the entrapment defense received increasing review by federal courts and in the literature. While most courts treated entrapment as a factual issue focusing on the predisposition of the defendant (the subjective test), *see* cases cited in Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 MISS. L.J. 573, 588 n.97 (1976), three circuit courts and one district court rejected the use of the subjective test alone and reversed convictions by finding that, as a matter of law, improper conduct by government officials established entrapment (the objective test). *See* United States v. McGrath, 468 F.2d 1027 (7th Cir. 1972), *vacated*, 412 U.S. 936, *rehearing denied*, 414 U.S. 883 (1973), *opinion on remand*, 494 F.2d 562 (7th Cir. 1974); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); 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); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970).

v. Russell,[59] a federal undercover agent supplied a manufacturer of methamphetamine ("speed") with a crucial ingredient, otherwise extremely difficult, though not impossible, to obtain. A month after the illegal drug had been produced, the agent returned with a warrant and arrested the defendant. The defendant was convicted in a trial in which his sole defense was entrapment. The Ninth Circuit reversed concluding as a matter of law "a defense to a criminal charge may be formed upon an intolerable degree of governmental participation in the criminal enterprise."[60]

The Supreme Court reversed the Ninth Circuit and reaffirmed the subjective rationale of *Sorrells*, which looked to the defendant's predisposition.[61] The Court dismissed the argument that the defense of entrapment had a constitutional basis in the fundamental concepts of due process,[62] and rejected the analogy of the entrapment defense to the exclusionary rule. While noting that the exclusionary rule has been recognized where defendants could point to the violation of specific fourth or fifth amendment rights, those defendants alleging entrapment could point to no independent constitutional right interfered with by improper governmental activity. Despite rejecting an approach to entrapment which would focus on the conduct of governmental officials, Justice Rehnquist, writing for the majority, observed, "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 involving judicial processes to obtain a conviction. . . ."[63] Nevertheless, Justice Rehnquist criticized the Ninth Circuit for trying to enlarge the scope of entrapment to include

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59. 411 U.S. 423 (1973).

60. Russell v. United States, 459 F.2d 671, 673 (9th Cir. 1972).

61. 411 U.S. at 425. Justice Stewart, in dissent, argued that it was incorrect to focus on a defendant's criminal disposition as the basis for entrapment. The defendant could have the same predisposition and may well have committed the same crime whether he was entrapped by law enforcement agents or by a private party. Since he can only cry "entrapment" if a law enforcement agent is the entrapper, the focus must be on the conduct of the law enforcement agent. *Id.* at 442 (Stewart, J., dissenting). "The purpose of the entrapment defense," wrote Justice Stewart, "[is] to prohibit unlawful governmental activity in instigating crime." *Id.* (Stewart, J., dissenting).

62. *See* Comment, *Entrapment — A Due Process Defense — What Process is Due*, 11 S.W.U. L. REV. 663 (1979); Comment, *Elevation of Entrapment to a Constitutional Defense*, 7 U. MICH. L. REV. 361 (1974).

63. *Id.* at 431.

incidents of "overzealous law enforcement."[64] Entrapment, according to Justice Rehnquist, is a relatively limited defense and was not intended to give the federal judiciary a " 'chancellor's foot' veto over law enforcement practices of which it did not approve."[65]

In its latest entrapment decision, *Hampton v. United States*,[66] the Supreme Court held that the defense was not available to a defendant who was convicted of selling heroin after a government agent had supplied both the narcotic and the buyers.[67] Although a majority of the Court reaffirmed *Russell*, only three justices would have gone so far as to state that "the defense of entrapment could [never] be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established."[68]

D. Due Process

The due process clause arguably is the constitutional provision that would provide a citizen protection from governmental misconduct which falls outside the specific confines of the fourth or fifth amendments or the defense of entrapment. Yet, courts have only grudgingly accepted the due process clause in this manner. This section will explore the various areas in which the due process clause has been put forward, successfully and unsuccessfully, as protection against law enforcement misconduct.

If a single thread weaves throughout the cases that look to the

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64. *Id.* at 435.

65. *Id.*

66. 425 U.S. 484 (1976).

67. *Id.* at 486-89.

68. *Id.* at 488-89. Justices Powell and Blackmun concurred in the plurality opinion insofar as it applied *Russell* to the instant facts and made no legal distinction between the crucial ingredient supplied in *Russell* and the contraband supplied to Hampton. *Id.* at 491 (Powell, J., concurring). The concurring justices disagreed with the plurality on the question whether a due process defense would be available to one who had shown a predisposition to commit a crime. While the plurality would find this defense unavailable, the concurring justices stated that since this question was left open in *Russell* and *Russell* is dispositive of the instant case, the question is still unanswered. *Id.* at 491, 492-93 (Powell, J., concurring).

The dissenting justices (Justice Stevens did not participate) adhered to the use of the objective test. Moreover, they would find any instance where law enforcement agents supplied an individual with contraband followed by an arrest for the possession or sale of that contraband, to be entrapment as a matter of law. *Id.* at 499 (Brennan, J., dissenting). *See* United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973); United States v. West, 511 F.2d 1083 (3d Cir. 1975).

due process clause as the constitutional element that protects citizens against illegal conduct perpetrated by their government, it is embodied in the eloquent words of Justice Brandeis, dissenting in *Olmstead v. United States.*[69]

> 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 example. Crime is contagious. If the government becomes the lawbreaker, it breathes contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law — the end justifies the means — to declare that government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against this pernicious doctrine this court should resolutely set its face.[70]

The Supreme Court's recognition of this view of the due process clause was established in *Rochin v. California.*[71] In *Rochin,* police officers acting on a tip, broke into defendant's home. Forcibly opening the door to defendant's bedroom, they observed him swallow two capsules. The officers unsuccessfully attempted to extract the capsules from his mouth. The defendant was then taken to a hospital where the officers directed a doctor to force an emetic solution through a tube into Rochin's stomach, thereby causing the vomiting of the two capsules which proved to contain morphine.[72]

Justice Frankfurter, writing for the Court, found that the due process clause imposed on the Supreme Court a duty to ascertain whether the entire course of a proceedings including the actions of law enforcement agents which lead to an indictment "offend those canons of decency and fairness which express the notion of justice of English-speaking peoples. . . ."[73] Acknowledging the elusive nature of due process, Justice Frankfurter maintained that the standards of due process are "deeply rooted in reason and in the com-

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69. 277 U.S. 438 (1928). The holding in *Olmstead* that a wiretap did not constitute a search or seizure proscribed by the fourth amendment was overruled in Katz v. United States, 389 U.S. 347 (1961).

70. *Id.* at 485.

71. 342 U.S. 165 (1952).

72. *Id.* at 166.

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

pelling tradition of the legal profession and are thus not beyond judicial capability to ascertain.[74] Applying those standards, the Court found the action of the California police to be "conduct that shocks the conscience" and therefore, violative of the defendant's right of due process.[75]

The Supreme Court has repeatedly held that a defendant's due process rights are not violated when the defendant is brought within the court's jurisdiction by reason of a "forcible abduction."[76] In *Ker v. Illinois*,[77] an American citizen residing in Peru, was indicted in Illinois for larceny and embezzlement. A warrant for Ker's arrest was issued, although never served. Ker was forcibly abducted in Peru by an agent of the State of Illinois and returned to Illinois where he was tried and convicted. The Supreme Court upheld the conviction, dismissing the events of the kidnapping as "mere irregularities" in the manner in which custody was obtained, and construed the due process clause of the fourteenth amendment as requiring only a fair indictment and trial.[78]

In *Frisbie v. Collins*,[79] a Michigan prisoner petitioned for habeas corpus alleging that he had been brought to trial in Michigan after being kidnapped, handcuffed, and blackjacked in Illinois by Michigan police. The Court affirmed the conviction in the face of a due process challenge holding that

> the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of a crime after being fairly appraised of the charges against him and after a fair trial in accor-

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74. *Id.* at 171. Specifically, due process 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 [and] 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." *Id.* at 172.

75. *Id.* at 172. The Court found the forced stomach pumping "methods too close to the rack and the screw to permit of constitutional differentiation." *Id.*

76. Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 119 U.S. 436, 440 (1886). *See* Comment, *The Greening of a Poisonous Tree: The Exclusionary Rule and Federal Jurisdiction over Foreign Suspects Abducted by Government Agents*, 50 N.Y.U. L. REV. 181 (1975) [hereinafter cited as *The Greening of a Poisonous Tree*].

77. 119 U.S. 436 (1886).

78. *Id.* at 444.

79. 342 U.S. 519 (1952).

dance with constitutional procedural safeguards.[80]

The majority of courts have adhered to the *Ker-Frisbie* doctrine.[81] The major case departing from the *Ker-Frisbie* rule is *United States v. Toscanino.*[82] In *Toscanino,* the defendant alleged he was kidnapped unlawfully in Uruguay by United States government agents who brutally tortured him and forcibly returned him to the United States where he was tried and convicted for conspiracy to import narcotics. Toscanino argued that the judicial proceedings against him in New York were void because his presence in the jurisdiction was obtained illegally.

The Second Circuit held that if Toscanino's allegations were substantiated at an evidentiary hearing, the court would lack jurisdiction to prosecute him. The court arrived at this conclusion through a three-step analysis.[83] First, the court reviewed the *Ker-Frisbie* doctrine, pointing out that expansion of the concept of due process postdated the creation of the *Ker-Frisbie* rule:

> Since *Frisbie* the Supreme Court . . . has expanded the interpretation of 'due process.' . . . In an effort to deter police misconduct, the term has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial.[84]

Second, the court quoted extensively from Justice Brandeis' dissent in *Olmstead v. United States.*[85] Finally, the court relied on *Rochin* and *Russell,*[86] concluding that outrageous non-violent conduct by government agents could reach constitutional due process dimensions.[87]

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80. *Id.* at 522.

81. *See* Brown v. Fogel, 387 F.2d 692, 696 n.7 (4th Cir. 1967). *See also* United States v. Herrera, 504 F.2d 859 (5th Cir. 1974); United States ex rel. Calhoun v. Toumey, 454 F.2d 326 (7th Cir. 1971); United States v. Sherwood, 435 F.2d 867 (10th Cir.), *cert. denied,* 402 U.S. 909 (1970); Sewell v. United States, 406 F.2d 1289, 1292-93 (8th Cir. 1969); Tynan v. Eyman, 371 F.2d 764, 765-66 (9th Cir.), *cert. denied,* 393 U.S. 954 (1968).

82. 500 F.2d 267 (2d Cir. 1974).

83. *Id.* at 275.

84. *Id.* at 272.

85. *See* notes 71-75 *supra* and accompanying text.

86. *See* note 63 *supra* and accompanying text.

87. *See* Breithaupt v. Abram, 352 U.S. 432, 435 (1957) (no violation of due process when police make repeated illegal entries into home to install hidden microphone); Irvine v. California, 347 U.S. 128 (1954) (removal of blood from unconscious defendant not a due process violation).

By these references to *Olmstead* and *Rochin,* the *Toscanino* court espoused the proposition that due process would bar a prosecution where it resulted "from flagrantly illegal law enforcement practices."[88] The Second Circuit concluded:

> [T]he "Ker-Frisbie" rule cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part. . . . Accordingly, we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.[89]

Toscanino presented a singular departure from the *Ker-Frisbie* rule, but the decision must now be read in conjunction with two subsequent Second Circuit decisions limiting its scope to circumstances involving brutality. Both *United States ex rel Lujan v. Gengler*[90] and *United States v. Lira*[91] involved the illegal abduction by government agents of fugitives outside the jurisdiction of the trial court. Neither case, however, involved the occurrence of brutality by government agents of the United States, although the defendants in *Lira* were brutalized by officials of a foreign government.[92]

In *Lujan,*[93] the court viewed the basis for the decision in *Toscanino* as relying on the brutal nature of the conduct as in *Rochin* and on the suggestion in *Russell* that conduct by law enforcement agents might one day be so outrageous as to violate due process.[94] According to the *Lujan* court, the significant factor in *Toscanino* was not the occurrence of the illegal acts, but the degree of their brutality.[95] The Second Circuit distinguishing *Toscanino* reasoned:

> In sum, but for the charge that the law was violated during the process of transporting him to the United States, Lujan charges no deprivation greater than that which he would have endured through lawful extradition. We

88. 500 F.2d at 274.
89. *Id.* at 275.
90. 510 F.2d 62 (2d Cir.), *cert. denied,* 421 U.S. 1001 (1975).
91. 515 F.2d 68 (2d Cir. 1975).
92. *Id.* at 71.
93. 510 F.2d at 65.
94. *Id. See* Comment, *The Greening of a Poisonous Tree, supra* note 76.
95. 510 F.2d at 66.

> scarcely intend to convey approval of illegal government conduct. But we are forced to recognize that, absent a set of incidents like that in *Toscanino*, not every violation by prosecution or police is so egregious that *Rochin* and its progeny requires nullification of the indictment.[96]

Lira further explained the holding in *Toscanino*.[97] The Second Circuit in *Lira* stated that, *Toscanino* did not overrule the *Ker-Frisbie* doctrine, but rather, subjected it to the overriding principle announced in *Rochin* that

> where the Government itself secures the defendant's presence in the jurisdiction through use of cruel and inhuman conduct amounting to a patent violation of due process principles, it may not take advantage of its own denial of the defendant's constitutional rights.[98]

A small number of courts have begun to recognize that due process violations may occur in instances where elaborate law enforcement schemes, occasionally involving even the judicial system, are designed to catch government officials thought to be involved in illegal activities. In *United States v. Archer*,[99] the Second Circuit discussed whether a due process violation resulted from an intricate ruse in which a federal law enforcement official was falsely charged with unlawful possession of a loaded pistol, thereby hoping to infiltrate the criminal justice system and to expose corruption.[100] After suggesting that he would be interested in getting the charges dropped, the undercover agent became involved with a bail bondsman, an attorney and an assistant district attorney who for $15,000 arranged for the grand jury to return no true bill.[101]

The Second Circuit expressed its distinct disapproval of the government's scheme, particularly because it involved lying to police officers and perjury before judges and grand jurors.[102] Acknowledging that "mere recital" of the facts brought to mind Justice Brandeis' celebrated passage in *Olmstead*,[103] the Second Circuit also noted that the doctrine subjecting government officials to the same

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96. *Id.* at 70.

97. 515 F.2d 68 (2d Cir. 1975).

98. *Id.* at 70. The Supreme Court has recently reaffirmed the *Ker-Frisbie* doctrine. *See* Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

99. 486 F.2d 670 (2d Cir. 1973).

100. *Id.* at 672-73.

101. *Id.* at 674.

102. *Id.* at 672.

103. *See* text accompanying note 70 *supra*.

rules of conduct as a citizen, had never commanded a majority of the Supreme Court. Although the *Archer* court considered the applicability of a due process defense to the commission of illegality by the government agent,[104] it declined to resolve the case on that basis. Rather, it chose the narrower ground of lack of federal jurisdiction to overturn the conviction.[105] The Second Circuit acknowledged the difficulties that a due process defense for law enforcement illegality would create for courts.

> We are not sure how we would decide this question if decision were required. Our intuition inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in Olmstead. . . . [T]here is certainly a limit to allowing government involvement in crime.
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> . . . .
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> Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government induced criminality.[106]

A number of recent New York cases have considered the possibility of a due process defense to law enforcement illegality. In *People v. Isaacson,*[107] the New York Court of Appeals dismissed an indictment on the ground that the police conduct was so "reprehensible" that due process compelled the dismissal. The police scheme commenced when an inveterate drug user and seller named Breniman was arrested. About a month prior to the arrest of the defendant in *Isaacson,* the police arrested Breniman for possession of drugs and improperly induced from him an agreement to assist them in setting up drug sales.[108] Breniman contacted the defen-

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104. Much of the discussion centered on *Russell* which had been decided two months earlier. The court noted that the government relied on the *Russell* Court's reaffirmance of the subjective theory of entrapment, while the defendant pointed to Justice Rehnquist's admission that a situation could occur in which law enforcement misconduct might trigger a due process violation. *Id.* at 676.

105. The federal agents had tried to create a violation of federal law by inducing the defendants to make interstate phone calls. The court found that the three interstate phone calls made by defendants did not violate the Travel Act, 18 U.S.C. § 1952 (1976), which makes illegal foreign or interstate travel in aid of racketeering.

106. 486 F.2d at 674.

107. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

108. *Id.* at 515, 378 N.E.2d at 79, 406 N.Y.S.2d at 715. To enlist Breniman's aid as an informant, the New York state police not only beat him but implied that they could be of

dant, who lived in Pennsylvania, to arrange a sale of cocaine. Fearful of New York's severe drug laws, the defendant declined to make the sale. Only after seven phone calls and an appeal to the defendant's sympathies, did the defendant agree to the sale. Aware of the defendant's desire to avoid New York jurisdiction, Breniman and the police managed to lure him into the state by moving the location of the meeting place progressively northward until it was to be held at a bar a few hundred yards into New York State.[109]

In analyzing the case, the court of appeals recognized that the defendant was predisposed to commit the crime and, thus, the defense of entrapment was unavailable to him.[110] The court, therefore, discussed whether there had been a violation of the defendant's right of due process of law. Due process of law, the court found, "guarantees respect for personal immunities 'so rooted in the traditions and conscience of our people to be ranked as fundamental,' "[111] and that the use of the term is "but another way of saying that every person's right to life, liberty and property is to be accorded the shield of inherent and fundamental principles of justice."[112]

Recognizing that due process is a flexible doctrine, the court pro-

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assistance in his own case. At that time, however, the police were in possession of a lab report informing them that the "amphetamines" found on Breniman were nothing more than caffeine. Breniman was not informed of this development until after he had been of service to the police. *Id.*

109. *Id.* at 517, 378 N.E.2d at 81, 406 N.Y.S.2d at 717. Although the court of appeals in *Isaacson* condemned "the ugliness of police brutality," and "the police thirst for a conviction," *id.* at 523, 378 N.E.2d at 84, 406 N.Y.S.2d at 720, other New York courts have taken a different view of police schemes. In a New York State Supreme Court decision, People v. Sims, N.Y.L.J., Apr. 26, 1979, at 6, col. 4 (Sup. Ct. Apr. 25, 1979), the court complimented the police in the use of a ruse to arrest the defendant. In *Sims*, the police, having reasonable cause to arrest the defendant, induced him by a lie to come voluntarily to the police station for questioning about a robbery. The police did not inform the defendant that he was suspected of murder until after he had arrived at the station house. While at the station, the police arrested the defendant for illegal possession of a firearm. The court commended the police conduct because at the time the police approached the defendant they believed he was armed and dangerous and there were a large number of innocent bystanders in the area. *Id.*

110. 44 N.Y.2d at 523-24, 378 N.E.2d at 84-85, 406 N.Y.S.2d at 721. There was no doubt that defendant had sold drugs before and was therefore predisposed to commit the crime. *Id.*

111. *Id.* at 520, 378 N.E.2d at 82, 406 N.Y.S.2d at 718 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (Cardozo, J.)).

112. *Id.* at 520, 378 N.E.2d at 82, 406 N.Y.S.2d at 718.

posed four factors "illustrative" of when police conduct manifests a violation of due process: 1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; 2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; 3) whether the defendant's reluctance is overcome by appeals to humanitarian instincts such as sympathy or past friendship by temptation of exorbitant gain or by persistent solicitation in the face of unwillingness; and 4) whether the record reveals simply a desire to obtain a conviction with no motive to prevent further crime or protect the populace.[113] Judge Cooke, writing for the court, stressed that none of the factors were singly dispositive of a due process violation, but rather "each should be viewed in combination with all pertinent aspects and in the context of proper law enforcement objectives. . . ." Furthermore, the court refused to limit the barring of prosecutions to conduct involving brutality,[114] stating that "[t]o prevent improper and unwarranted police solicitation of crime, there is a need for courts to recognize and to uphold principles of due process."[115]

Isaacson places New York in the vanguard of states recognizing the existence of a due process defense to non-violent law enforcement illegality. Significantly, the court held that the defense was available to the defendant even though the illegal conduct was directed at a third party.[116] Moreover, the court of appeals re-

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113. *Id.* at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719 (citations omitted). The court rejected the argument of the dissenters that consideration of the four factors was irrelevant because the improper conduct involved was directed at Breniman, not at the defendant. *Id.* at 527, 378 N.E.2d at 87, 406 N.Y.S.2d at 723. The court stated:

> While this harm was visited upon a third party, it cannot be overlooked, for to do so would be to accept police brutality as long as it was not pointed directly at defendant himself. Not only does the end not justify the means, but one shall not be permitted to accomplish by indirection that which is not prohibited by direction.

Id. at 522, 378 N.E.2d at 84, 406 N.Y.S.2d at 720. The court noted further that the deception of Breniman, in addition to the physical brutality inflicted upon him, constituted improper conduct which was sufficiently disruptive of justice so as to afford the defendant the benefit of this defense. *Id.* at 524, 378 N.E.2d at 85, 406 N.Y.S.2d at 721.

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

115. 44 N.Y.2d at 520-21, 378 N.E.2d at 83, 406 N.Y.S.2d at 719.

116. The court of appeals based its decision on the due process clause of the New York State Constitution. *Id.* at 519-20, 378 N.E.2d at 82, 406 N.Y.S.2d at 718. This is an example of a position advocated by Justice Brennan. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498-502 (1977), which looks to the vari-

sponded to Justice Rehnquist's concern that a due process defense would amount to a "chancellor's foot" veto of state criminal procedure by noting first, that courts exist to make judgments and have the expertise to do so, and second, that courts do not have free rein, but are rather, "circumscribed by a sizeable body of constitutional and common law" construing the meaning of due process.[117]

Another attempt to ferret out corruption in the criminal justice system ultimately resulted in the reversal of a conviction by the Appellate Division of the New York Supreme Court partially on the ground of prosecutorial misconduct. In *People v. Rao*,[118] the special prosecutor appointed to uncover corruption, purported to arrest an undercover agent (using the name 'Vitale') on a false criminal charge and fabricated a prior criminal record for the arrested agent. For the false felony charge of armed robbery, bail was set at $10,000 by a judge unaware of the ruse. A second undercover agent, also unaware that the arrest was a hoax, sought the help of a federal judge in the name of Vitale. The judge referred the agent to his attorney-son who agreed to represent the arrested agent. A grand jury indicted Vitale for robbery and larceny. Neither the grand jurors nor the assistant district attorney who presented the case knew of the ruse. Even though Vitale failed to appear and forfeited his bail, the attorney-son was able to effect the return of the $10,000 bail and a reduction of bail to $1,000.[119] Five months later, the judge, his son and the son's law partner were requested to appear before an Extraordinary Special Grand Jury (who were aware of the Vitale hoax) regarding their part in attempting to influence the Vitale robbery case. Within a few weeks, all three were indicted on counts of perjury for their denials of participation in the Vitale affair.[120]

When the Appellate Division first heard the matter in 1974, all five justices condemned the conduct of the special prosecutor[121]

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ous state constitutions as the primary protectors of civil rights.

117. 44 N.Y.2d at 524-25, 378 N.E.2d at 85, 406 N.Y.S.2d at 721.

118. 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980).

119. *Id.* at 91, 425 N.Y.S.2d at 125.

120. Nigrone v. Murtaugh, 46 A.D.2d 343, 344-45, 362 N.Y.S.2d 513, 515-16 (1974).

121. Justice Christ, writing for the majority, noted:

> The deception of grand jurors, Judges and Assistant District Attorneys and the filing of false official documents are absolutely intolerable. . . . When, as here, the criminal justice system is made an unwitting accomplice of an overzealous prosecutor, before

but a majority of three held that such misconduct did not taint the proceedings against the defendants.[122] The court went on to state that this case did not involve a situation, as described in *United States v. Russell,* which was so outrageous as to violate due process.[123]

Justice Shapiro, joined by Justice Benjamin, dissented. The dissent contended that this case was well within the category outlined in *Russell* regarding non-entrapment due process violations and stated, without specifying which constitutional rights he had in mind, that the conduct evidenced a total disregard for "basic constitutional rights." Justice Shapiro, citing *Rochin, Archer* and *Toscanino* as applicable, implicitly called for the overruling of the *Ker-Frisbie* rule.[124]

Two years later, the Second Department reviewed the case a second time and, in a memorandum decision, reinstated the indictments after they had been dismissed by a lower court.[125] Justice Titone, in a lengthy dissent, argued that the dismissal of the indictments should be affirmed because abuses of the grand jury system which had occurred were so egregious as to violate due process.[126]

In 1980, the Second Department was afforded a third opportunity to review the case which now involved the attorney-son as the only remaining defendant.[127] The indictments against the judge and the son's law partner had been dismissed in 1977. Justice Titone, now writing for the majority, dismissed the indictment as

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the fact, its impartiality is destroyed and contempt for the law encouraged.

Id. at 347, 362 N.Y.S.2d at 516-17.

122. 46 A.D.2d at 346, 362 N.Y.S.2d at 518.

123. *Id.* at 350, 362 N.Y.S.2d at 519.

124. *Id.* at 357, 362 N.Y.S.2d at 526. Justice Shapiro wrote:

> To sanction the result of the prosecutor's conduct here while plaintively denying what he did would deprive the words "due process" of any real meaning, and would justify the cynicism about our judicial system now too widely and unjustifiably held and would leave little incentive for this or other prosecutors to act within the bounds of legal propriety.

Id. at 365, 312 N.Y.S.2d at 528 (Shapiro, J., dissenting).

125. People v. Rao, 53 A.D.2d 904, 386 N.Y.S.2d 441 (2d Dep't 1976).

126. *Id.* at 96, 386 N.Y.S.2d at 445 (Titone, J., dissenting).

127. People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980). The indictment against the judge and the son's law partner had been dismissed in 1977. *Id.* at 93, 425 N.Y.S.2d at 126.

violative of due process.[128]

In his earlier dissent, Justice Titone would have been content to dismiss the indictment solely on the basis of the abuse of the grand jury system, developments, however, provided support for dismissal of the indictment on the grounds of prosecutorial misconduct. Justice Titone noted dicta in the New York Court of Appeals' procedural affirmance of the Second Department's 1974 decision regarding the possible invalidity of a prosecution designed to produce a crime.[129] In conclusion, he characterized the conduct by the members of the Special Prosecutor's office in obtaining the indictment:

> The prosecutors concocted fictitious crimes, falsified records, duped Supreme Court Justices properly engaged in their judicial duties and orchestrated the introduction before a grand jury of perjurious testimony of a criminal activity which never occurred.[130]

As to this conduct, Justice Titone stated that "[n]one of these monstrous and patently illegal actions are or should be tolerated in a free society, particularly when practiced by those sworn to enforce the law and ferret out crime."[131] The occurrence of these abuses was "so calculated, insidious and pervasive"[132] that it satisfied the "outrageous" scenario hypothesized by Justice Rehnquist

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128. *Id.* at 97, 425 N.Y.S.2d at 128.

129. In 1978, the New York Court of Appeals in People v. Tyler, 46 N.Y.2d 251, 385 N.E.2d 1224, 413 N.Y.S.2d 295 (1978), a case involving allegations of misconduct in public office and the giving of false testimony before a grand jury, made the following statement:

> It is not properly a principal aim of the Grand Jury, however, to "create" new crimes in the course of its proceedings. Thus, where a prosecutor exhibits no palpable interest in eliciting facts material to a substantive investigation of crime or official misconduct and substantially tailors his questioning to extract a false answer, a valid perjury prosecution should not lie. . . . Since no legitimate investigatory function is discernable in questioning designed primarily or solely to support a perjury prosecution against the witness, it cannot be said that the responsive testimony, albeit false, frustrates any authorized purpose of the Grand Jury.

Id. at 259, 385 N.E.2d at 1228, 413 N.Y.S.2d at 299.

In addition, at appellant's trial in *Rao* it was revealed for the first time that the Special Prosecutor withheld evidence in his possession which was favorable to the defendant and failed to disclose to the grand jury certain pertinent background information concerning the credibility of one of the Special Prosecutor's witnesses. 73 A.D.2d at 95, 425 N.Y.S.2d at 126-27.

130. 73 A.D.2d at 96, 425 N.Y.S.2d at 127-28.

131. *Id.*

132. *Id.* at 97, 425 N.Y.S.2d at 128.

in *Russell*[133] and thus constituted a violation of the defendant's due process rights.[134]

III. The Due Process Right of Liberty and Law Enforcement Illegality

In this section, an argument is advanced that the liberty interest is the value which is offended by law enforcement illegality.[135] Vio-

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133. 411 U.S. 421, 431-32 (1973).

134. 73 A.D.2d at 98, 425 N.Y.S.2d at 129. The court noted:

> It is clear that the requirements of due process in a given case may extend to pretrial conduct of law enforcement authorities, and may also be invoked to bar prosecution altogether where it resulted from illegal law enforcement practices *(see* United States v. Toscanino (2d Cir.), 500 F.2d 267, 273) *[sic]*. Due process is now viewed as requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. (citation omitted).

Id.

135. Analysis of the liberty interest has been one of the chief concerns of many political philosophers. The essence of these explanations is contained in the discussion of liberty in the text. *See* notes 136-48 *infra* and accompanying text. According to John Rawls, "[a] person's good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances." J. RAWLS, A THEORY OF JUSTICE 92-93 (1971). The ability to be free to pursue one's plan of life, however, requires the ability to be free to pursue particular liberties:

> Thus persons are at liberty to do something when they are free from certain constraints either to do it or not to do it and when their doing it or not doing it is protected from interference by other persons. . . .

Id. at 202-03.

A clear example of the liberty interest is found in the first amendment's protection of freedom of speech: "freedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970). But freedom of speech also can serve to illustrate the "intricate complex of rights and duties" which constitutes liberty. At first blush the rules of debate restrain and inhibit the participants in the debate from fully expressing their position. However, in actuality, the rules protect and enhance the right to speak. If there were no such rules, all the participants would be exercising their right simultaneously. The effect of such activity is to nullify the right. By violating these rules, that is, by speaking out of turn, even if the motive is to protect the right to speech, violates the rights of the other participants. The very purpose of the rules are contradicted when one violates the rules in order to enforce their more adequate effectuation. By imposing restraints each participant is afforded the opportunity to speak in an effective manner. *See generally* J. RAWLS, A THEORY OF JUSTICE 203 (1971) (from which this example is adopted).

John Locke, in THE SECOND TREATISE OF GOVERNMENT, describes the relationship between law and the liberty interest as follows:

> For law, in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest. . . . [T]he end of law is not to abolish or

lating the law in the course of attempting to enforce the law, does not make the violation any less repugnant. This offense occurs both when the violation has been condemned by a specific provision of the Constitution, such as the fourth and fifth amendments, or, when the violation clearly offends the general principles of liberty and justice which are embodied in the due process clauses of the fifth and fourteenth amendments.[136] This interest, is the right of liberty, embodied specifically in the fourth and fifth amendments and generally in the due process clauses of the fifth and fourteenth amendments. These amendments prohibit the federal and state governments from depriving "any person of life, liberty, or property, without due process of law."[137]

In order to understand the applicability of the due process right of liberty to the context of law enforcement illegality, a philosophical foundation for the liberty interest must be provided. The understanding of the liberty interest which is set forth in this Article is consistent with those legal philosophies which maintain, *inter alia*, that 1) there are certain characteristics of human beings which are attributable to all human beings; 2) these characteristics are intelligible; 3) the presence of these characteristics gives human beings a purpose in life; and 4) the existence of certain of

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> restrain, but to preserve and enlarge freedom; for in all the states of created beings capable of laws, where there is no law, there is no freedom. . . . Freedom is not as we are told: a liberty for every man to do what he lists . . . but a liberty to dispose, and order, as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is; and therein not to be subject to the arbitrary will of another, but freely follow his own.

J. LOCKE, THE SECOND TREATISE OF GOVERNMENT § 57, at 32-33 (Library of Liberal Arts ed. 1952).

136. U.S. CONST. amend. XIV. The due process clauses of the fifth and fourteenth amendments protect similar values. It should be noted that state constitutions may soon be playing a larger role in civil rights. The advantages of looking to the state constitutions to provide even more stringent standards than does the federal constitution have been noted by Justice Brennan. *See generally* Brennan, *supra* note 116, at 489. A concise expression of the liberty interest is found in G. GRISEZ & J. BOYLE, LIFE AND DEATH WITH LIBERTY AND JUSTICE 453 (1979): "Liberty means the absence of imposed constraints to pursuing one's own purposes in one's own way." *See also* Henkin, *Constitutional Rights and Human Rights*, 13 HARV. C.R.-C.L. L. REV. 593, 595-609 (1978).

137. *See* Olmstead v. United States, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting). *See also* Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); Rochin v. California, 342 U.S. 65, 72 (1952); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1971); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978); People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980).

these characteristics requires that some conduct be permitted and other conduct proscribed. The notion of the liberty interest as set forth in this Article is compatible with the writings of three of the most influential legal philosophers of our day as well as most of the writings in the tradition commonly referred to as natural law.[138]

This analysis is necessary due to the scarcity of case law on liberty interest as a basis for protection from governmental misconduct. Although in section IV the argument is made that the acceptance by the Supreme Court of the understanding of liberty proposed in this section would be consistent with the better reasoned decisions which have addressed the issue, the judicial reasoning in this area is in need of clear direction. This direction should be based upon a reasonable and consistent philosophical foundation compatible with the recognized understanding of liberty.

A. The Liberty Interest

The first characteristic of the liberty interest is that it is intrinsic to individuals and not conferred upon them by society.[139] The individual does not relinquish the interest when he or she enters society.[140] Individuals exercise the interest within society by choos-

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138. The three philosophers referred to in the text cover the spectrum of philosophical thinking today. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); J. RAWLS, A THEORY OF JUSTICE (1971). *See also* L. FULLER, THE MORALITY OF LAW (1964); Bodenheimer, *Seventy-Five Years of Evolution in Legal Philosophy*, 23 AM. J. JURIS. 181 (1978); Henkin, *Constitutional Rights and Human Rights*, 13 HARV. C.R.-C.L. L. REV. 593 (1978). In addition, this view of liberty is consistent with the natural law tradition whose proponents include: E. BODENHEIMER, POWER, LAW, AND SOCIETY (1973); J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); G. GRISEZ & J. BOYLE, LIFE AND DEATH WITH LIBERTY AND JUSTICE (1979); J. MARITAN, MAN AND THE STATE (1951); J. MURRAY, WE HOLD THESE TRUTHS (1960); H. ROMMEN, THE NATURAL LAW (1948); Corwin, *The "Higher Law" Background of American Constitutional Law* (parts 1-2), 42 HARV. L. REV. 149, 365 (1925). For a modified version of natural law theory see Blackstone, *The Relationship of Law and Morality*, 11 GA. L. REV. 1359, 1385-91 (1977). For a discussion of the application of the theory in another legal system see Rommen, *Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany*, 4 NAT. L.F. 1 (1959). For an example of a view of natural law theory which is not in accordance with the authors cited above see Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977).

139. While we may look to it as the memorialization of certain natural rights, the constitution is not the ultimate source of those rights. *See* Corwin, *The "Higher Law" Background of American Constitutional Law* (pts 1-2), 42 HARV. L. REV. 149, 365 (1925).

140. The discussions which follow concerning the establishment of the societal plan and

ing various component liberties or freedoms which together constitute the liberty interest.[141] Examples of these component liberties include the freedom to choose one's marriage partner, to travel interstate or to adopt a child.

The exercise of liberty contributes to the development of one's personhood or character and is the vehicle by which one's purposes in life may be fulfilled. This quest for self-determination can involve choices of two types: private or public. Society has no legitimate concern with private choices,[142] such as the freedom to believe in a religious creed. Other choices, such as decisions regarding police or fire protection are essentially public, and individuals must make such choices in conjunction with other members of society.[143]

Even though some decisions remain essentially private, they are made within the context of the society in which one lives. A primary example of this type of decision is the one to enter society in the first instance. In entering society, individuals agree to a plan, often described as a social compact or contract[144] because of the

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the operation of the original position, *see* note 147 *infra*, do not reflect an historical account of these matters. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 12, 17-22 (1971). Rather, these matters provide conceptual frameworks for determining what laws would be just regarding the protection and curtailment of liberty given the philosophical understanding of liberty advanced in the text.

141. Examples of these component liberties include the freedom to choose one's marriage partner, the right to travel and the right to procreate. Under the rubric of "privileges and immunities," Justice Washington, sitting alone on circuit, set out a list of those rights perceived to be "natural and fundamental." Corfield v. Coryell, 6 F. Cas. (C.C.E.D. Pa. 1823). *See also* Allgeyer v. Louisiana, 165 U.S. 578 (1897).

142. *See generally* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS ch. 8 (1980); Tribe, *The Supreme Court, 1972 Term—Forward: "Toward a Model of Roles in the Due Process of Life and Law,"* 87 HARV. L. REV. 1, 33-50 (1973).

143. Tribe, *supra* note 142, at 15 n.77 ("Even though the lines between the public and private spheres occasionally blur and are at times illusory, we operate within the frame of a constitutional scheme that treats the two differently." (citation omitted)).

144. *See, e.g.*, J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 4-11 (Library of Liberal Arts ed. 1952); J. RAWLS, A THEORY OF JUSTICE 17-22 (1971). *But see* J. ROUSSEAU, THE SOCIAL CONTRACT 14-16 (Hafner ed. 1947). Under Rousseau's social contract, the contract itself is the source of legitimacy; whatever man can agree to include in the social contract becomes part of the good. In contrast, the plan described in the text may contain nothing contrary to natural law.

The Declaration of Independence is an eloquent example of the interaction of natural rights, the state and the people:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life,

advantages societal existence offers for the liberty interest. By entering into society one does not relinquish or subordinate the quest for self-determination: if participation in society limited one's freedom, one would not enter society and participate in the establishment of a societal plan.[145] The concern of individuals in establishing this plan is twofold. They attempt, on the one hand, to provide the conditions under which individuals can fulfill their duty to preserve the liberty interest and, on the other hand, to create a political setting where the right of individuals to exercise all the component elements of liberty can be fostered. The concerns of the plan are mutually dependent. The individual must have the ability to pursue his quest for self-determination and his duty to do so must be protected from infringements occasioned by his participation in society.[146]

The quest for self-determination has two aspects: first, the duty of the individual to preserve his freedom and second, the right of the individual to preserve his liberty. The first aspect of the quest for self-determination involves the *duty* of the individual to preserve his freedom. The individual performs this duty through his participation in the formulation of society's plan. In the original position,[147] that is, at the time of the formulation of the plan, the

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liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men.

For a discussion of how the purposes set forth in the Declaration of Independence are incorporated in American constitutional theory, see Henkin, *Constitutional Fathers — Constitutional Sons*, 60 U. MINN. L. REV. 1113 (1976). *See also* B. BAILYN, THE IDEOLOGICAL ORIGIN OF THE AMERICAN REVOLUTION 55-93, 175-98 (1967); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 38-1 (1978).

145. *See* note 140 *supra*.

146. Although the Supreme Court never has recognized explicitly the quest for self-determination as a fundamental right, it is the *sine qua non* for the exercise of many rights which are recognized as fundamental. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (the right to marry); NAACP v. Alabama, 357 U.S. 449 (1958) (the freedom of association); Skinner v. Oklahoma, 316 U.S. 535 (1942) (the right to procreate).

147. The framework of the original position, as developed by John Rawls, is an extremely useful tool for analyzing the scope of fundamental rights. An analysis of how society should treat the quest for self-determination will benefit by considering how this right would be appraised in the original position. Rawls describes the original position as follows:

> [In the original position] no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles. It also seems widely agreed that it should be impossible to tailor principles to the circumstances of one's own case. We should insure further that particular inclinations and aspirations, and persons' conceptions of their good do not affect the principles adopted. The aim is to

individual, together with the other members of society, provide in the plan for the just exercise of society's right to limit the freedom of those members of society who may violate the rules set forth in the plan. An example of this is the formulation of a system of criminal law and procedure. Once agreed upon, the individual and all members of society acquire the right to be treated fairly in accordance with such provisions.

The intent of this is twofold. First, the plan is designed to protect an individual against the transgressions of other members of society. Second, it is designed to provide the individual with a fair procedure when he is the subject of law enforcement. This is crucial from the perspective of the original position, because individuals agree to the provision without the knowledge of whether they may one day violate the law. Thus, an individual would only agree to such a provision if he knew that in the event he should become a lawbreaker, his freedom can be limited only by means which are in conformity with fair and universal standards.

Individuals agree to the plan in order to safeguard liberty and to protect certain values and conduct from infringement. Within the plan, substantive criminal law and the law of criminal procedure are formulated. They represent an independent set of values which are deemed of such importance to the development of one's character, that society requires all of its members to respect such values and enforces them with the force of law. Whenever such independent values are violated, their violation always is repugnant to a sense of justice. The evil that occurs when an offense against such values is committed is not defined by the identity of the offender, but rather by the nature of the offense. Therefore, the

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rule out those principles that it would be rational to propose for acceptance, however little the chance of success, only if one knew certain things that are irrelevant from the standpoint of justice. For example, if a man knew that he was wealthy, he might find it rational to advance the principle that various taxes for welfare measures be counted unjust; if he knew that he was poor, he would most likely propose the contrary principle. To represent the desired restrictions one imagines a situation in which everyone is deprived of this sort of information. One excludes the knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices. . . . [T]hese conditions define the principles of justice as those which rational persons concerned to advance their interests would consent to as equals when none are known to be advantaged or disadvantaged by social and natural contingencies.

J. RAWLS, A THEORY OF JUSTICE 18-19 (1971).

breaking of the law by an individual representing the state, even though committed in the pursuit of one who has violated the law, is no less an offense against justice. Whenever such values are violated, their violation always is repugnant to a sense of justice.

The second aspect of the quest for self-determination follows closely from the first and involves the individual's *right* to preserve his liberty. When an individual commits a public transgression, society has the right to deprive the individual of the exercise of his freedom, thereby impairing his quest for self-determination.[148] From the point of view of the individual transgressor (or criminal), however, this deprivation would be against his best interest. Although his transgression subjects him to the just deprivation of his liberty and he has no legitimate objection assuming that the authorities have properly enforced the law, his quest for self-determination is not forfeited by his action. He has no obligation to "turn himself in" or, in any way, assist the authorities in the procedures which may lead to a limitation of his freedom.

The right to self-determination is inalienable and therefore cannot be forfeited even by committing acts violative of the freedom of others. The premise of the original position is that one does not know what place one will have in society. Any individual in society could turn out to be an offender. Thus, an individual would not agree to enter society unless reasonable safeguards were established to protect his liberty. The balance between the individual safeguarding his own liberty and the need of society to protect itself against transgressions of its laws is struck by affording the in-

148. Imprisonment, or other types of punishment, while not eliminating the ability of an individual to determine one's life, puts limitations on such freedom. The Supreme Court has recognized that imprisonment has a negative impact on the liberty interest or lifestyle of an individual because it can affect the ability to pursue certain goods and goals. Involuntary confinement, either criminal or civil, involves a deprivation of the right of liberty protected by the fifth and fourteenth amendments. Addington v. Texas, 441 U.S. 418 (1979); O'Connor v. Donaldson, 422 U.S. 563 (1975); Callan v. Wilson, 127 U.S. 540, 549 (1888).

In the context of prisoners' rights, the Supreme Court has also held that a criminal offender has a due process liberty interest in securing parole release, Morrissey v. Brewer, 408 U.S. 471 (1972), in the procedures involving the termination of probation, Gagnon v. Scarpelli, 411 U.S. 778 (1973), in the provision of good-time credits, Wolff v. McDonnell, 418 U.S. 539 (1974), and in the mechanism by which parole is determined, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979). However, a prisoner has no due process interest in the possibility of parole, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), or in avoiding transfers between penal institutions, Meachum v. Fano, 427 U.S. 215 (1976).

dividual the right not to contribute to the curtailment of his own liberty and by affording society the right to use certain designated means to apprehend those who violate its laws.

The fifth amendment right of a criminal defendant to plead not guilty is an example of a law which preserves the liberty interest. This right is afforded the criminal defendant even if the defendant has committed the crime with which he is charged. This right does not conflict with society's right to prosecute individuals suspected of criminal activity. Although society has a legitimate concern for the prevention of criminal activity, this concern can only be achieved within a context which respects the liberty interest. For this reason, society has determined that in furthering its legitimate interest in crime prevention, it is better for the guilty to go free than for the innocent to be convicted. Thus, the primary concern of the fifth amendment is not the conviction of all who are, in fact, guilty but rather, the enhancement of universal liberty by respecting the liberty interests of all.[149]

The recognition of the right against self-incrimination in the context of criminal proceedings illustrates the twofold concern of society's plan to protect the right of liberty. The fifth amendment recognizes both the right of the individual to remain silent, thereby not contributing to the deprivation of his liberty, and the right of society to exercise its duty to preserve the liberty of all of its members by prosecuting individuals in a manner consistent with fair and universal standards. Violating a criminal defendant's fifth amendment rights by coercing his confession infringes upon the defendant's right to have his liberty interest respected by others and inhibits his ability to preserve this interest. The criminal defendant's right of liberty can also be violated by infractions of law not directed immediately against the defendant. In the establishment of the societal plan, the need to protect one's liberty would be implemented by the probition of conduct impairing the freedom of the individual, either immediately or ultimately.

Although the fifth amendment provides protection against a specific type of infringement by law enforcement officials, the princi-

149. Granting immunity is another example of society placing a greater importance on protection of individual rights than in convicting those who are in fact guilty of the crime charged. *See* Kastigar v. United States, 406 U.S. 441 (1972). *See generally* Comment, *Immunity and Subsequent Informal Punishment*, 69 J. CRIM. L. 322 (1978).

ple upon which the amendment is based should be applied to any illegality which would have the effect of impairing the liberty interest. Although the commission of crime by an individual infringes upon the freedom of other members of society, such infringement, while it may limit certain freedoms of the individual, does not require the criminal defendant to forfeit his right to the just enforcement of the laws. The societal plan details the manner in which violations of law will be resolved. If this plan can be amended unilaterally by those with the authority to enforce the laws, then the only difference between the criminal and the law enforcement agent is that the agent has the solemn obligation to uphold the law. This difference renders the agent's unilateral amendment of the plan a violation of a far more grievous type.

IV. The Legal Basis for the Recognition of the Defense of Law Enforcement Illegality

The argument for the recognition of the defense of law enforcement illegality rests on two grounds. First, as suggested in section II, the due process clauses of the fifth and fourteenth amendments provide protection for individuals from intrusive conduct by officials, not found in the specific proscriptions of the fourth and fifth amendments. Second, government use of law enforcement methods not themselves legal, violates the standards of the social plan under which the individual agreed to the possible suspension of his freedom, by fair and universal means.[150]

A. Fourth and Fifth Amendments Are Only Components of Full Due Process Protection

The protections embodied in the fourth and fifth amendments are not complete expressions of the fundamental principle they represent, rather they are components of the overall due process lib-

150. The use of the defense would preclude the introduction into evidence of any information obtained by means of the illegal conduct. The practical effect of the defense will be to bar most prosecutions predicated on such evidence. *See, e.g.*, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978); People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980). In each of these cases the courts held that the effect of the police misconduct was to deprive the court of jurisdiction over the defendant rather than merely suppress the evidence obtained as a result of the illegality. It is the opinion of the author, however, that the application of the exclusionary rule would provide a sufficient remedy.

erty interest. Decisions by the Supreme Court in cases involving the fourth and fifth amendments illustrate that the specific protection afforded by those provisions represent only particular expressions of a more fundamental principle. In regard to the fourth amendment, in *Boyd v. United States*[151] the Court made two observations: first, that the protections of the fourth and fifth amendments were inextricably linked together;[152] and second, that the linkage of the amendments exists not simply in the protections afforded by them on their face, but more importantly, in their common purpose to protect the liberty of individuals.[153] Justice

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151. 116 U.S. at 633. *See* notes 14-17 *supra* and accompanying text.

152. The Court reasoned that protecting an individual from unreasonable search and seizure or from attempts to force him to relinquish papers was a form of self-incrimination. 116 U.S. at 634-35. The Court has more recently mentioned the "intimate relationship" between the fourth and fifth amendments in Brown v. Illinois, 422 U.S. 590 (1975).

153. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Tehan v. Shott, 382 U.S. 406 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Braun v. Mississippi, 297 U.S. 278 (1936). If only specific provisions of the Bill of Rights protect certain specific rights, then prior to the application of the fifth amendment to the states in Malloy v. Hogan, 378 U.S. 1 (1964), coerced confessions in state proceedings should have been unobjectionable. The Court, however, excluded coerced confessions in state trials before that time, as violative of the fourteenth amendment due process clause. *See* Ashcraft v. Tennessee, 322 U.S. 173 (1944); Chambers v. Florida, 309 U.S. 227 (1940). This is another example of the Supreme Court's looking to the due process clause as a residuary source of protection from government misconduct when no specific constitutional provision has been breached. *See* Escobedo v. Illinois, 378 U.S. 478 (1964); Lisenba v. California, 314 U.S. 219 (1941); Brown v. Mississippi, 297 U.S. 278 (1936). While the discovery of truth is a partial concern of the fifth amendment, *see* Williams v. Florida, 399 U.S. 78 (1970); Blackburn v. Alabama, 361 U.S. 199, 206 (1960), its primary concern is with the right of liberty of individuals. After *Malloy* made the fifth amendment applicable against the states, the Court declined to apply it retroactively, *see* Johnson v. New Jersey, 384 U.S. 719 (1966); Linkletter v. Walker, 381 U.S. 618, 620 (1965), stating that individuals convicted under such circumstances did not receive an unfair trial and that retroactivity was unnecessary because it would have no effect on the outcome of the trial. Rather the primary wrong which occured was the infringement upon the right of liberty of individuals brought to trial in violation of the fifth amendment.

> The Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values — values reflecting the concern of our society for the right of each individual to be let alone.

Tehan v. Shott, 382 U.S. 406, 416 (1966) (rule forbidding adverse comment regarding defendant's failure to testify in criminal case should not be applied retroactively). An example based on the sixth amendment provides further support for the proposition advanced in the text. In both Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972), the Court considered the constitutionality of a less than unanimous verdict in criminal trials. Since the trial in *Johnson* occurred prior to Duncan v. Louisiana, 391 U.S. 145 (1968), in which the Supreme Court held the sixth amendment applicable to the states, the

Bradley expressed this second point stating:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.[154]

Similarly, cases construing the fifth amendment's protection against self-incrimination embrace the proposition advanced by various members of the Court that government illegality offends more than a particular constitutional protection, that it offends the very essence of liberty.

Decisions analyzing the function of the fifth amendment, insofar as it relates to the goal of ascertaining truth at a criminal trial, indicate that its purpose transcends such a goal.[155] The recognition that a basic principle of justice is protected by the guarantees of the fourth and fifth amendments was clearly expressed in Justice Brandeis' prophetic dissent in *Olmstead v. United States*.[156] He observed, "[t]he protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."[157] Justice Brandeis warned future generations of the inevitable consequences of permitting governmental illegality, and argued that such conduct was fundamentally at odds

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issue was resolved under the due process clause of the fourteenth amendment. 406 U.S. at 363. In *Apodaca*, where the trial took place subsequent to *Duncan*, the issue was resolved on sixth amendment grounds. 406 U.S. at 411-12.

154. 116 U.S. at 630. *See* note 70 *supra* and accompanying text.

155. 277 U.S. at 478 (Brandeis, J., dissenting).

156. *Id.* at 485. Justice Brandeis' first argument in dissent in *Olmstead* was to analogize his refusal to sanction illegality by the government to the common law doctrine of unclean hands:

> The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.

Id. at 484.

157. *Id.* at 478.

with the very notion of a government designed to protect liberty.[158] The significance of the protections of the fourth and fifth amendments transcends the importance of the particular concerns these amendments address. Each amendment seeks to secure the freedom of the indvidual against a specific type of governmental intrusion. But, it is the protection of an individual's freedom against unjust governmental intrusion, regardless of the manner in which it may occur, that constitutes the primary purpose of the constitutional provisions protecting the liberty interest.

B. The Liberty Interest and Law Enforcement Illegality

Courts have made only limited use of the liberty interest to protect against illegal conduct by law enforcement officers. Although the Supreme Court has continually recognized that the liberty interest was at stake when violations of rights protected by the fourth and fifth amendments occurred,[159] the Court has never resolved the issues in these cases on the basis of the liberty interest because the language of the two amendments was considered sufficient to prohibit illegal searches and seizures and coerced confessions.[160] When an incident arose of such stunning brutality as the stomach-pumping in *Rochin*,[161] the Court refused to settle the matter on strict fourth or fifth amendment grounds. In order to find constitutional foundation for condemnation of conduct which

158. *See* note 57 *supra* and accompanying text.

159. *See* notes 71-75 *supra* and accompanying text.

160. Recent restrictions in the applicability of the fourth amendment, *see* United States v. Salvucci, 100 S. Ct. 2547 (1980); United States v. Payner, 100 S. Ct. 2439 (1980); Rakas v. Illinois, 439 U.S. 128 (1978), which is now based on a "legitimate expectation of privacy," may lead to a situation where a court faced with a reading of the fourth amendment which allows law enforcement agents wide latitude in conducting searches, may turn to the due process clause to protect a defendant against governmental intrusion. In *Payner*, the defendant was the victim of an IRS scheme to photograph the contents of a briefcase which involved breaking and entering and larceny. Because the briefcase did not belong to the defendant, the Court determined that despite the IRS's "possibly criminal behavior," lack of the legitimate expectation of privacy denied the defendant the protections of the fourth amendment. The district court had suppressed the evidence under the due process clause of the fifth amendment; the dissent in the Supreme Court looked to its supervisory powers over the federal judicial system to suppress evidence the government obtained through misconduct. 100 S. Ct. at 2451 (Marshall, J., dissenting). The dissent noted that the rationale for suppression of evidence under the supervisory powers is two-fold: first, to deter illegal conduct and second, to protect the integrity of the federal courts. *See* Mesarosh v. United States, 352 U.S. 1 (1956); McNabb v. United States, 318 U.S. 332 (1943).

161. Rochin v. California, 342 U.S. 165 (1952).

"shocked the conscience," the court resorted directly to the liberty interest, embodied in the due process clause.[162]

In the context of the entrapment defense,[163] a minority of the Court maintains that a consideration of the type of conduct engaged in by law enforcement officers is appropriate for determining the applicability of the defense.[164] The justices who adhere to this position do not indicate whether it has constitutional foundation.[165] Nevertheless, a majority of the Court has rejected the invitation to study the implications of law enforcement illegality and has held that the entrapment defense does not have a constitutional basis. Therefore, reliance on the entrapment defense as a basis for the defense of law enforcement illegality is precluded by the holdings in the entrapment cases.

Third, with regard to the *Ker-Frisbie* rule, the Supreme Court has expressly rejected the argument that illegal conduct by law enforcement agents intended to bring a defendant within the jurisdiction of the trial court is sufficent to deny jurisdiction to that court.[166] The Second Circuit, however, held in *United States v. Toscanino*[167] that the expansion of the Supreme Court's reading of the due process clause formed the basis for overruling the *Ker-Frisbie* rule.[168] Although *Toscanino* has not been expressly overruled, subsequent decisions have limited its scope to incidents involving brutality.

Nevertheless, the Second Circuit has continued to recognize that the due process clause does have a role in protecting individuals from law enforcement illegality. In *United States v. Archer*,[169] the

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162. *Id.* at 172.

163. The defense of entrapment has been codified in the proposed reform of the federal criminal laws. S 1722, 96th Cong., 1st Sess. § 501 (1979).

164. *See* O'Connor, *supra* note 10, at 39.

165. *See* notes 61, 68 *supra* and accompanying text.

166. *See* Gerstein v. Pugh, 420 U.S. 103, 119 (1975), where the Court held that even though assessment of probable cause by a prosecutor alone does not satisfy the fourth amendment, failure to obtain a judicial assessment of probable cause will not be grounds to vacate a conviction (citing Frisbie v. Collins, 342 U.S. 519 (1952) and Ker v. Illinois, 119 U.S. 436 (1886)).

167. 500 F.2d 267 (2d Cir. 1974).

168. *See* United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

169. 486 F.2d 670 (2d Cir. 1973).

Second Circuit, when confronted with a law enforcement scheme which brought into question the integrity of the judicial system, was tempted to find a due process violation but instead reversed the conviction on a narrower ground.[170] Judge Oakes, although concurring in *Lira*, expressed his concern that if the court condoned illegal conduct by law enforcement officials it might signal a failure to heed Justice Brandeis' admonition that a government that breaks its own laws "breeds contempt for law."[171]

The New York courts have also followed the trend which argues for an expanded reading of the due process clause. In *People v. Isaacson*,[172] the New York Court of Appeals decided that the concept of conduct repugnant to a sense of justice includes illegalities involving deceit and other misconduct, whether or not an element of physical brutality was present. According to the court, such conduct could become so repugnant to societal notions of fair play that it becomes illegal, thereby affording a defendant subject to such conduct a defense of law enforcement illegality.[173] Similarly, in *People v. Rao*,[174] the Appellate Division held that misconduct by law enforcement officials violated the defendant's due process interest thereby depriving the court of jurisdiction over the defendant.

The development of the law in these cases broadens the due process clause beyond the limited proposition of *Rochin* that law enforcement illegality in the form of physical brutality, violates a defendant's due process liberty interest.[175] The limitation of the liberty interest, however, to instances of gross physical brutality is inconsistent with the Supreme Court's interpretation of liberty in other instances.[176] The Supreme Court has resorted to the due pro-

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170. *See* note 105 *supra* and accompanying text.

171. United States v. Lira, 515 F.2d at 72 (citing Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

172. 44 N.Y.2d 511, 520, 378 N.E.2d 78, 84, 406 N.Y.S.2d 714, 720 (1978).

173. *Id.*

174. *See* notes 127-34 *supra* and accompanying text.

175. 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980). *See* notes 71-74 *supra* and accompanying text.

176. This inconsistency is highlighted by the following hypothetical guidelines which could be issued to police under the *Ker-Frisbie* rule:

1) You may illegally break into the suspect's residence in order to return him to the jurisdiction of the trial court but if, while there, you observe evidence of a crime, leave it behind because it would be inadmissible due to the illegal entry.

cess liberty interest in various contexts not involving physical brutality which had theretofore not been expressly considered, but which violated the essence of what the due process clause was designed to protect. For example, when an ordinance gave neither notice to the prospective criminal of what actions constitute a crime, nor standards to the police for determining who had violated the statute, the Court invalidated the statute as violative of the right of liberty.[177] The Court has held that the due process liberty interest is also violated when an individual is punished for a crime even though that individual lacked the element of *mens rea,*[178] or when an individual is convicted without any evidence.[179]

The concept of due process illustrated by the holdings in the three Supreme Court decisions discussed above demonstrates that an individual may not be deprived of his liberty except through lawful means. This principle is applicable whether the illegality takes the form of physical brutality or some other more sophisti-

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2) You may brutalize the suspect before leaving the residence but not to the point that he confesses to the crime. The confession would be inadmissible as unconstitutionally coerced. (Also, while you may brutalize him, you may not brutalize him too much because, then, the *Rochin* expectation may become applicable.)

3) As you return the suspect to the jurisdiction, impress upon him that he is being illegally kidnapped. If you arrest him he would be entitled to an attorney.

One writer, discussing the approach of the Second Circuit in *Lira* and *Lujan,* has pointed out the inconsistency as follows:

> Thus, because only corporeal brutality finds its way into the court's due process calculus, *Lujan* does not recognize that the defendant who faces long periods of imprisonment is "injured" by an illegal kidnapping as much as the person who is physically assaulted. Yet both forms of police conduct when tolerated by the courts debase the judicial process. If the *Lujan* rationale that legal injury is not a "deprivation" were to be applied consistently, courts would admit the fruits of an illegal search and seizure when the "deprivation" is no greater than that which the defendant would endure through a lawful search — an argument explicitly rejected by the Supreme Court in Silverthorne Lumber Co. v. United States.

Greening of a Poisonous Tree, supra note 76, at 706-07.

177. Papachristou v. City of Jacksonville, 405 U.S. 156, 162-64 (1972). The philosophical basis for the holding of the Court in *Papachristou* has been explained in the following manner:

> [I]f the precept of no crime without a law is violated, say by statutes, being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaires of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise.

J. RAWLS, A THEORY OF JUSTICE 239 (1971).

178. Pate v. Robinson, 383 U.S. 375 (1966). *Accord,* Lokos v. Capps, 569 F.2d 1362 (5th Cir. 1978).

179. Thompson v. City of Louisville, 362 U.S. 199 (1960).

cated means of infringing upon an individual's freedom. If the purpose of law is to protect liberty, then only by remaining faithful to that purpose can an individual's liberty be lawfully curtailed.

The Supreme Court has also applied the due process clause where illegal conduct has contributed to a denial of the liberty interest at trial. Case law demonstrates that the concept of a fair trial as a precondition to the curtailment of an individual's liberty interest (which is at the heart of a criminal trial) encompasses basic precepts not specifically enunciated in the Bill of Rights. The following cases illustrate that a trial is not a fair one when the commission of illegalities is instrumental in the presentation of evidence at trial.

In *Moore v. Dempsey*[180] the prosecution procured an indictment by whipping and torturing witnesses until they testified at defendants' trial as desired and then, conducted a trial in the midst of a mob. After deliberating for five minutes, the jury returned guilty verdicts. The Supreme Court made clear that in deciding the case it did not consider "petitioners' innocence or guilt but solely the question whether their constitutional rights [had] been preserved."[181]

In *Tunney v. Ohio*[182] a defendant arrested for violating the Prohibition Act was tried, convicted and fined by the mayor of the town. The mayor received a fee for his service as judge from a fund made up of fines from convicted defendants. The Court dismissed the conviction stating:

> [I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, *to subject his liberty* or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.[183]

Finally, in *Mooney v. Holohan*[184] the prosecution knowingly used perjured testimony to obtain defendant's conviction. The Supreme Court in overturning the conviction stated:

> [The requirements of due process], *in safeguarding the liberty of the citi-*

180. 261 U.S. 86 (1923).

181. *Id.* at 92. *See also* Estes v. Texas, 381 U.S. 532, 561 (1965) (Warren, C.J., concurring); Shepherd v. Florida, 341 U.S. 50 (1951).

182. 273 U.S. 510 (1927).

183. *Id.* at 523 (emphasis added).

184. 294 U.S. 103 (1935).

> *zen* against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. . . . It is a requirement that cannot be deemed to be satisfied by the mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of evidence known to be perjured.[185]

In these cases certain actions were deemed unconstitutional even though they were not expressly prohibited by the Constitution. The liberty interest clearly emerges in these cases as an independent constitutional right. Although criteria for judging whether safeguards are provided for the determination of guilt or innocence have not been fully delineated by the Court, due process requires, at a minimum, that a defendant whose liberty is subject to impairment has a right to expect that those seeking to enforce the laws of society will undertake such responsibility by lawful means.

The principle which underlies the fourth and fifth amendments and the right to a fair trial is designed to protect the individual's liberty against unwarranted governmental intrusion. This protection extends to the manner in which an individual is brought to trial for an alleged crime and the procedural and substantive aspects of that trial. The rationale for the principle enunciated in these constitutional provisions is that an individual, by entering society, agrees to the possible impairment of his liberty only in accordance with the laws of that society. The government's use of means not within the boundaries of the rule of law, which intrudes upon an individual's liberty, violates the standards under which the individual agreed to the possibility of suspending his freedom. Such violation voids the initial provisions of the societal plan thereby forfeiting the right of the government to utilize the fruits of that violation to proceed against those who violate the laws they have agreed not to violate.

The protection of the fourth amendment has been limited in recent Supreme Court decisions,[186] to those instances where a legitimate expectation of privacy has been intruded upon unreasonably.

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185. *Id.* at 112 (emphasis added). *See also* Napeu v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957).

186. United States v. Salvucci, 100 S. Ct. 2547 (1980); Payner v. United States, 100 S. Ct. 2439 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).

Indeed, the Court has justified these limitations stating "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights."[187] Therefore, the Court has held that the fourth amendment rights may not be asserted vicariously.

A defense of law enforcement illegality based on a violation of the liberty interest of the due process clause should not be defeated by such a standing requirement. Although the rationale behind the fourth amendment's exclusionary rule is deterrence of unconstitutional searches, the rationale behind the defense of law enforcement illegality is much more fundamental. What is at stake in the latter case are two things: 1) the liberty interest of the individual, unrestricted by the limitation of the fourth or fifth amendments and 2) the integrity of the legal system itself. Therefore, the law enforcement illegality defense should be available to anyone who is able to prove that he was injured by such a violation.[188]

In *People v. Isaacson*,[189] the New York Court of Appeals specifically recognized that an intrusion upon the liberty interest occurs even when the individual is the ultimate, rather than the immediate, target of the government illegality.[190] The court looked specifically to the nature of the conduct involved to determine whether the defendant's rights were violated. It was insignificant to the court that law enforcement officials had subjected an unindicted third party to beatings and intimidation, when such conduct ultimately resulted in violation of the defendant's liberty interest.[191]

The decisions finding trial-related conduct violative of a defen-

187. 439 U.S. at 133.

188. An analogy to the exclusionary rule in the context of the fourth and fifth amendments clarifies how this violation occurs. It is no less indirect to use the "fruit of the poisonous tree" to obtain evidence against a defendant than to commit illegalities to reach the same objective. The only distinction between the two would arise if the tree is poisonous in the first situation because a provision of the Constitution specifically prohibits such conduct, but not in the second situation because there is no specific constitutional prohibition. Yet, if in the second situation there is a provision of the Constitution which prohibits such conduct, then the question of directness no longer remains. The argument is made in section III of this Article that the due process liberty interest is an independent constitutional right which serves to prohibit such conduct. Therefore, when the governmental misconduct violates the due process liberty interest, the "fruit" of that misconduct should similarly be excluded at trial.

189. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

190. *Id.* at 527, 378 N.E.2d at 87, 406 N.Y.S.2d at 718.

191. *Id.*

dant's due process rights also demonstrate that one's liberty may be deprived even when the individual is the ultimate, rather than the immediate, target of such conduct.[192] The question of directness, however, can be formulated in a different manner. In the context of the fourth amendment exclusionary rule, the Supreme Court has held that evidence obtained from a third party in violation of the fourth amendment should not be excluded at defendant's trial if the unconstitutional search was directed at a third party.[193] In that event, the defendant would have no standing to object to the introduction of the evidence illegally acquired because no privacy interest had been violated.

This analysis, however, is inapplicable when violations of the due process liberty interest occur. The expectation of privacy protected by the due process liberty interest is the expectation that one's liberty will be curtailed only in accordance with law. The fourth amendment, and other specific protections of the Bill of Rights, are specific examples of the basic liberty interest. Arguably, the protections afforded by such amendments are limited to particular transgressions committed directly against the defendant. However, the expectation of the liberty interest must be viewed within the context of a system of law designed to protect that interest as a whole rather than in a piecemeal fashion. Thus, for purposes of the due process liberty interest, it is irrelevant whether one's liberty unjustly is curtailed by law enforcement illegalities aimed directly or indirectly at the defendant.[194]

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192. *See* notes 180-83 *supra* and accompanying text. These cases involved infliction of brutality on witnesses to insure procurement of desired testimony, a judge who received a fee only for guilty verdicts and the purposeful use of perjured testimony by the prosecution. Each of these cases involved illegalities perpetrated against or with third parties, but was ultimately aimed at the defendant; and in each instance the court found a violation of the defendant's right to liberty.

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

194. *See* notes 30-36 *supra* and accompanying text. In addition to the reasoning in the text, two other facts support the conclusion that *Payner* is not dispositive of the question of directness in the context of the due process clause. First, according to Justice Marshall, dissenting in *Payner*, the Court did not decide whether a defendant would have standing under the due process clauses to suppress evidence obtained through outrageous government conduct. *Id.* at 2450 (Marshall, J., dissenting). Second, the Court has accepted for review United States v. Morrison, 602 F.2d 529 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3845 (June 24, 1980), in which an indictment obtained through allegedly improper conduct by law enforcement agents was dismissed based on the sixth amendment right to counsel and the fourteenth amendment right to a fair trial.

V. Conclusion

At the heart of the liberty interest is the premise that rights are secured, first, by the enactment of laws, and second, by the establishment of a government subject to the laws. The government is subject to the laws because it exists not for its own benefit or self-aggrandizement, but rather, for the protection of rights.[195] When the government violates those laws which have been entrusted to it in a sacred covenant, then the liberty of the members of that society has been violated.

The content of this natural right of liberty is constant. Judicial recognition of the content, however, is continually developing. Its scope, therefore, cannot be considered to be confined to the particular components of liberty expressly provided for in the Bill of Rights. In the context of the fourth and fifth amendments, for example, the Supreme Court has stated that the essence of these protections is found in the implementation of the principle that "the police must obey the law while enforcing the law."[196] This protection cannot be relegated to obscurity because law enforcement officials are sophisticated enough to violate the liberty interest in ways other than those envisioned by the framers of the fourth and fifth amendments. The public should be guaranteed that those designated with the solemn authority to enforce the laws will exercise that authority within the bounds of the law. Absent such a guarantee, illegal conduct by law enforcement officials may invade "not only the rights of these defendants but that of every man, woman and child in the State."[197] To ensure the protection of the liberty interest against unjust governmental intrusion by means of law enforcement illegality, legislation is needed which would authorize the exclusion, based on a defense of law enforcement illegality, of any evidence obtained or results produced by means of such ille-

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195. St. Thomas More, in *Utopia*, eloquently expressed the principle stated in the text as follows:

> "Why do you suppose they made you king in the first place?" I ask him. "Not for your benefit, but for theirs. They meant you to devote your energies to making their lives more comfortable, and protecting them from injustice. So your job is to see that they're all right, not that you are."

T. More, Utopia Book I (1516).

196. Blackburn v. United States, 361 U.S. 199, 207 (1959) (quoting Spano v. New York, 360 U.S. 315, 320-21 (1959)).

197. 46 A.D.2d at 358, 362 N.Y.S.2d at 527.

gality. The following observation by the court in *Rao* summarizes the need for such a law:

> "Vigilante Justice" is abhorrent to our concept of jurisprudence whether the end product be a body dangling from the end of a rope, or a person charged with a crime as a result of lawless conduct on the part of an overzealous prosecutor. The latter indeed is reprehensible since both society and the accused are victimized by one sworn to uphold the law.[198]

The principle upon which the defense rests is basic to any system of jurisprudence which extols justice and liberty as its greatest virtues. No man, no king and no law enforcement agency, is above the law.

198. 73 A.D.2d at 100, 425 N.Y.S.2d at 130.