ABSCAM: Time for the United States Supreme Court to Clarify the Due Process Defense

I. INTRODUCTION

Although the government should not be in the business of manufacturing crime, most people agree that certain types of crime can be detected and eradicated only through government involvement and some degree of government participation in those crimes.[1] Victimless vice crimes like narcotic offenses are the most obvious examples of these types of crimes; however, it is clear that bribery and political corruption are also victimless crimes that are not easily detected without government involvement.[2] Because the criminals involved in these victimless crimes have no reason to notify the authorities once a crime has been committed, the government officer or agent must actively assume a criminal role in the illegal transaction in order to trap the unwary participants. As illustrated by the FBI's recent ABSCAM[3] operation that was used to uncover political corruption, the techniques used by government agents in assuming their criminal roles may be extensive and complex.

Traditionally, the defense of entrapment has been available to a defendant who was caught as a result of government involvement in the crime.[4] According to the United States Supreme Court in *Sorrells v. United States*,[5] the entrapment defense lies "[w]hen the criminal design originates, not with the accused, but is conceived in the mind of government officers and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act . . . ."[6] Subsequent Supreme Court decisions have affirmed the

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[1]*See* Livermore, *Enforcement Workshop: ABSCAM Entrapment*, 17 CRIM. L. BULL. 69 (1981).

[2]*See id.* Of course, no crime is truly victimless. Although some types of crime may appear to leave no specific victims, society does suffer some detriment. The degree of damage inflicted upon society may be speculative, but clearly the democratic process is circumvented when a bribe comes between an elected official and his or her electorate.

[3]"ABSCAM" is an acronym for the words "Abdul Enterprises Ltd." and "scam." Abdul Enterprises Ltd. was a fictitious Arabian corporation that FBI agents used to attract corrupt persons and to front the "scam."

[4]*See generally* Note, *The Need for a Dual Approach to Entrapment*, 59 WASH. U.L.Q. 199 (1981) (police activity that "creates" criminal conduct may be grounds for the affirmative defense of entrapment).

[5]287 U.S. 435 (1932).

[6]*Id.* at 445 (quoting Newman v. United States, 299 F. 128, 131 (4th Cir. 1929)). *Sorrells* was the Supreme Court's first in-depth examination of the entrapment defense. Sorrells was ultimately persuaded by a prohibition agent to acquire illegal whiskey;

majority's position in *Sorrells* that the defense of entrapment is focused on the defendant's predisposition to commit the crime.[7] Thus, for the entrapment defense to succeed, it must be shown that the criminal design did not originate in the defendant's mind.[8] This requirement makes the defense subjective because "[t]he predisposition and criminal design of the defendant are relevant."[9] In simpler terms, predisposition refers to the degree to which the defendant was willing to become involved in the culpable activity before he was approached by government agents. One way to prove this willingness is by the defendant's ready acquiescence to commit the crime once he is contacted by government agents.[10] A majority of the Supreme Court has consistently maintained that the entrapment defense is based on legislative intent.[11] In *Sorrells*, the Court explained that Congress could not have intended that its statutes were to be enforced by tempting innocent persons.[12] In this context, "innocent" plainly refers to a non-predisposed defendant, one who had little or no desire to become involved in the culpable activity before he was approached. The Court has viewed itself as being bound by public policy to interpret statutes reasonably and not "to do violence to the spirit and purpose of the statute."[13] By reading into the criminal statutes a congressional intent that entrapped defendants were to be excluded from their coverage, the Court implies that Congress, in its discretion, could expressly include such defendants.

More recently, a separate due process defense for a defendant who was caught as a result of government involvement in the crime has been recognized in the federal courts[14] and by some of the Supreme

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however, the agent's success was attained by the agent's persistence and by the agent's utilization of the fact that he and the defendant had been in the same army division. Furthermore, the government agent initiated contact with Sorrells even though there was substantial evidence that Sorrells enjoyed a good reputation. After recognizing the entrapment defense, the Court reversed Sorrell's conviction and remanded the case for the jury to consider the defense. 287 U.S. at 452.

[7]*See* Hampton v. United States, 425 U.S. 484, 488-90 (1976) (denying the defendant an entrapment defense due to defendant's predisposition); United States v. Russell, 411 U.S. 423, 433 (1973) (stating that the focus of the defense is on the predisposition of the defendant to commit the crime); Sherman v. United States, 356 U.S. 369, 376 (1958) (majority declining to reassess the subjective view of entrapment, thereby impliedly reaffirming it).

[8]*See* 21 AM. JUR. 2d *Criminal Law* § 202 (1981).

[9]Sorrells v. United States, 287 U.S. 435, 451 (1932); *see also*, Hampton v. United States, 425 U.S. 484, 492 n.2 (1976) (Powell, J., concurring).

[10]United States v. Jannotti, 501 F. Supp. 1182, 1200 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S.Ct. 2906 (1982).

[11]*See, e.g.*, United States v. Russell, 411 U.S. 423, 433-34 (1973); Sorrells v. United States, 287 U.S. 435, 449 (1932).

[12]*Id.* at 448.

[13]*Id.*

[14]*See, e.g.*, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); United States v. West, 511 F.2d 1083 (3d Cir. 1975); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Kelly, 539 F. Supp. 363 (D.D.C. 1982); United States v. Batres-

Court Justices.[15] This defense, based on a constitutional claim, is raised when entrapment is unavailable because the defendant was predisposed, but government participation in the crime had reached an extreme level.[16] In applying this defense, the courts have focused on the level of government involvement. The defendant's predisposition, or lack of predisposition, is not determinative; however, it may be weighed as one factor in assessing the appropriateness of the government conduct.[17] Most courts that have recognized the due process defense have repeated Justice Powell's assertion that "[d]ue process in essence means fundamental fairness."[18] The major obstacle between predisposed defendants and the use of this defense has been discerning at what point government involvement is no longer justified but is, instead, fundamentally unfair.

Both the traditional entrapment defense, which focuses on the defendant's predisposition, and the more novel due process defense, which focuses on whether the government's conduct was fundamentally unfair to the predisposed defendant, have been raised in various ABSCAM cases. Because the subjective test for entrapment continues to be the test adhered to by a majority of the Supreme Court,[19] the due process defense, if formally recognized as a defense at all, would be only a secondary defense limited to the most egregious govern-

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Santolino, 521 F. Supp. 744 (N.D. Cal. 1981); United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir. 1982), *cert. denied*, 102 S. Ct. 2906 (1982).

[15]United States v. Russell, 411 U.S. 423 (1973). Justice Rehnquist's opinion in *Russell* recognized that a new due process defense may be available as a nonentrapment defense when the government's conduct is sufficiently egregious. *Id.* at 431-32. Although in Hampton v. United States, 425 U.S. 484, 490 (1976), Justice Rehnquist repudiated the due process defense in the entrapment situation, the two concurring Justices continued to recognize it. 425 US. at 495 (Powell, J., concurring). The three dissenting Justices in *Hampton* also recognized the due process defense. 425 U.S. at 499 (Brennan, J., dissenting). *See infra* notes 29-35 and accompanying text.

[16]United States v. Russell, 411 U.S. 423, 431-32 (1973); United States v. Jannotti, 673 F.2d 578, 607 (3d Cir.), *cert. denied*, 102 S.Ct. 2906 (1982).

[17]*See, e.g.*, United States v. Batres-Santolino, 521 F. Supp. 744, 751 (N.D. Cal. 1981); People v. Isaacson, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

[18]Hampton v. United States, 425 U.S. 484, 494 n.6 (1976) (Powell, J., concurring).

[19]The dissenting and concurring Justices in *Sorrells, Sherman, Russell*, and *Hampton* argue for an objective theory of entrapment. The objective test for entrapment focuses primarily on the government's conduct; the defendant's predisposition is not controlling. The inquiry under this minority approach is directed at the effect of the government's conduct on a hypothetical, average person. *See* 21 AM. JUR. 2d *Criminal Law* § 206 (1981). The similarities between this theory and the due process defense are obvious; both focus on the government's conduct rather than on the defendant's predisposition. In fact, an argument could be made that if the objective theory of entrapment is adopted, the due process defense would be unnecessary. This is true because, almost by definition, any government misconduct serious enough to be called egregious and fundamentally unfair would certainly overcome a hypothetical, average person.

ment involvement. The remaining question is how does one determine when government conduct has reached the egregious level and therefore is fundamentally unfair.

This Note will focus on the entrapment and due process defenses raised by the defendants in the ABSCAM proceedings. This Note will focus primarily on the emergence of the new due process defense and will analyze its potential for ultimate success in the relevant ABSCAM proceedings. Finally, this Note will suggest that ABSCAM presents an opportunity for the United States Supreme Court to clarify the due process defense and to provide the federal courts with some guiding principles for future entrapment-type cases.

II. Development of the Due Process Defense in the Federal Courts

A. The Supreme Court Dicta

The due process defense, as it applies to entrapment-type cases, has never been the basis for a Supreme Court reversal and, in fact, its existence thus far has only been recognized by the Court in dicta.[20] Nevertheless, because of the way the Justices aligned themselves in *United States v. Russell*[21] and *Hampton v. United States*,[22] it appears safe to say that the due process defense, as distinct from the entrapment defense, may be recognized by a majority of the Court today in the event of exceedingly egregious government misconduct.[23]

In *Russell*, the Court considered whether the entrapment defense could lie when the defendant was clearly predisposed to criminal activity.[24] A government agent provided a rare chemical necessary

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[20]Justice Rehnquist, for the majority in *Russell*, spoke of a separate due process defense available to even a predisposed defendant when "conduct of law enforcement agents is so outrageous that due process principles" are violated. United States v. Russell, 411 U.S. 423, 431-32 (1973).

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

[22]425 U.S. 484 (1976) (plurality opinion).

[23]*Hampton* is the latest word from the Supreme Court concerning the due process defense within an entrapment setting. In *Hampton*, Justice Rehnquist, writing for the majority, retreated from his position in *Russell* which first espoused the defense. *See supra* note 20. Now Justice Rehnquist would not allow a due process defense in an entrapment situation but would only rely on prosecution of the police as the remedy for the government's "illegal activity in concert with a defendant . . . ." 425 U.S. at 490. This prompted a separate opinion by Justice Powell, joined by Justice Blackmun, concurring with the majority but leaving open the possibility that a case could arise in which "overinvolvement of Government agents" would justify the due process defense. *Id.* at 493. When the dissenting votes of Justices Brennan, Stewart, and Marshall, who encourage adoption of the due process defense and the objective view of entrapment, *id.* at 496-97, are added to those of Powell and Blackmun, a bare majority of the Court recognizes the existence of the due process defense when government conduct is deemed to be fundamentally unfair.

[24]411 U.S. at 427.

for the manufacturing of methamphetamine (commonly known as speed) to the defendant, who was already operating an illicit drug laboratory. Applying the subjective view of entrapment, the defendant's conviction was affirmed because the preexisting drug laboratory established the defendant's predisposition to engage in the manufacture and sale of illegal drugs.[25]

Because the Court in *Russell* rejected the defendant's entrapment defense, the Court was forced to rule on the defendant's due process defense, which had been successful in the court below.[26] The Court recognized that a predisposed defendant could succeed with a due process defense when the government's conduct was sufficiently outrageous, even though a traditional entrapment defense could not lie.[27] Because the government agent's actions in *Russell* were "distinctly not of that [outrageous] breed,"[28] the language espousing the due process defense was reduced to dictum.

The defendant in *Hampton v. United States*[29] was convicted for selling heroin that he had purchased from a government agent. The Supreme Court again used the subjective test for entrapment and affirmed the defendant's conviction because the defendant conceded his predisposition to sell drugs.[30] As in *Russell*, once the defendant's predisposition denied him the entrapment defense, the Court considered the due process defense. Justice Rehnquist, delivering the plurality opinion of the Court, joined by Chief Justice Burger and Justice White, retreated from the *Russell* dictum that recognized a due process defense.[31] Rather than serving as a defense for a predisposed defendant, Justice Rehnquist viewed the proper remedy for outrageous government involvement to be prosecution of the government agents for their "illegal activity in concert with a defendant."[32] The two concurring[33] and three dissenting[34] Justices in *Hampton* disagreed with Justice Rehnquist on this point, recognizing that in cases of extreme governmental misconduct, the due process defense may be asserted, regardless of the defendant's criminal predisposition. The due process defense failed in *Hampton* because, although the two

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[25]*Id.* at 436.

[26]United States v. Russell, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973). The Ninth Circuit held that "an intolerable degree of governmental participation" existed. 459 F.2d at 673.

[27]411 U.S. at 431-32.

[28]*Id.* at 432.

[29]425 U.S. 484 (1976) (plurality opinion).

[30]*Id.* at 490.

[31]*Id.* at 489-90.

[32]*Id.* at 490.

[33]*Id.* at 491 (Powell, J., concurring) (joined by Justice Blackmun).

[34]*Id.* at 495 (Brennan, J., dissenting) (joined by Justices Stewart and Marshall).

concurring Justices recognized the defense, they did not find the government's conduct in this case to be sufficiently outrageous.[35] However, in *Hampton*, five Justices recognized that a separate due process defense may be valid when the defendant is predisposed but the government's conduct is outrageous.

The dicta in *Russell* and *Hampton* reveal no clear standards to be used in assessing the merits of a due process defense. According to the majority in *Russell*, the government's misconduct must violate that " 'fundamental fairness, shocking to the universal sense of justice,' " standard mandated by the due process clause.[36] However, in *Hampton*, Justice Rehnquist maintained that a breach of the above standard would not serve as a defense but would support the prosecution of the government agents.[37] Justice Powell, concurring in *Hampton*, stated that a due process defense should lie when the defendant is not treated by the government with "fundamental fairness."[38] In *Rochin v. California*,[39] a nonentrapment case cited frequently as an example of government misconduct violative of due process, the Court stated that the rights at stake are those " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[40] According to *Rochin*, the standard for allowable government conduct was to be set by the "community sense of fair play and decency"[41] in order to determine what conduct may be said to "brutalize the temper of society."[42] These vague standards are of limited utility to a federal court trying to follow precedent.

Because of the lack of any useful Supreme Court guidelines in this area, the only real significance of *Russell* and *Hampton*, with regard to the due process defense, is that they illustrate a probable acceptance of the defense by a majority of the Supreme Court Justices. Because a majority of Justices in *Hampton* did not think that the government's involvement was outrageous, the nature of the due process defense was not fully explained. That responsibility has largely fallen on the lower federal courts. These courts have recognized the due process defense in numerous decisions; however, the decisions

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[35] *Id.* at 491 (Powell, J., concurring).

[36] 411 U.S. at 432 (quoting Kinsella v. United States, 361 U.S. 234, 246 (1960)). In pertinent part, the fifth amendment provides that "[n]o person shall be . . . deprived of life, liberty or property without due process of law . . . ." U.S. CONST. amend. V.

[37] 425 U.S. at 490.

[38] *Id.* at 494 n.6 (Powell, J., concurring).

[39] 342 U.S. 165 (1952) (the infamous stomach pumping case).

[40] *Id.* at 169 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[41] 342 U.S. at 173.

[42] *Id.* at 174.

in which the defense has been successful are few.[43] In order to obtain a better grasp on what standards are being used to evaluate the due process defense, the few cases that have based an acquittal or reversal on these grounds will be examined.

B. Due Process Defense in the Federal Courts

In *Greene v. United States*,[44] the Court of Appeals for the Ninth Circuit reversed the defendants' convictions for bootlegging because of extreme government involvement in the defendants' bootlegging ventures.[45] This extreme involvement consisted of a government agent who not only provided the defendants with the necessary sugar, but also located a site for the still and offered to provide a still operator. Although the defendants' predisposition, as evidenced by their past involvement in maintaining illegal stills, automatically denied them an entrapment defense,[46] their predisposition did not prevent the court from recognizing a due process defense without expressly labeling it as such.[47] The court emphasized that it was reversing the convictions because the "Government's conduct [rose] to a level of 'creative activity' . . . substantially more intense and aggressive than the level of such activity charged against the Government in numerous [other] entrapment cases . . . ."[48] Even the dissent recognized that "[t]here may some day be a case where . . . government control is so pervasive as to render the crime in its entirety a governmental enterprise and where, on grounds other than entrapment, immunity should be extended to the criminal participants."[49]

Although the Court of Appeals for the Second Circuit in *United States v. Archer*[50] balked at the opportunity to apply the due process defense, the court might have applied the due process defense had

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[43]The decisions in which the due process defense has been successful are United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); United States v. West, 511 F.2d 1083 (3d Cir. 1975); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Kelly, 539 F. Supp. 363 (D.D.C. 1982); United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981); United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

[44]454 F.2d 783 (9th Cir. 1971). Justice Powell cited *Greene* with approval in *Hampton*. 425 U.S. 484, 493 & n.3 (1976).

[45]454 F.2d at 787.

[46]*Id.* at 786.

[47]The court stated, "We do not believe the Government may involve itself so directly and continously over such a long period of time in the creation and maintenance of criminal operation, and yet prosecute its collaborators." *Id.* at 787.

[48]*Id.* (quoting Sherman v. United States, 356 U.S. 369, 372 (1958)).

[49]454 F.2d at 788. (Merrill, J., dissenting).

[50]486 F.2d 670 (2d Cir. 1973). Justice Powell cited *Archer* with approval in *Hampton*. 425 U.S. at 493 & n.4.

a jurisdictional escape hatch not allowed them to dodge the substantive issue.[51] The court was especially critical of the government's scheme which entailed a staged arrest and bribe offers in an effort to uncover corruption in New York's criminal justice system.[52] Adding to the court's condemnation of the government's conduct was the fact that the *Archer* scheme was directed at unknown corrupt officials rather than targeted suspects.[53]

In *United States v. West*,[54] the Court of Appeals for the Third Circuit reversed the defendant's conviction for unlawful distribution of heroin because government agents were on *both* sides of the drug transaction. In *West*, the informer supplied the defendant with the drugs, and the government agent, as prearranged with the informer, bought the drugs from the defendant after the defendant was persuaded to sell the drugs by the informer. Judge Hastie, writing for the majority, held that "the role of government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective."[55] Although the per se rule of *West*, stating that due process is violated when government agents are on both sides of a drug transaction, was impliedly rejected in *Hampton*,[56] *West* has never been expressly overruled and still stands for the proposition that a due process defense may be available to a defendant when the government engages in "intolerable conduct."[57] Although, as stated, there are no per se rules, it appears that when the government convicts a defendant for selling narcotics, the fact that government agents assisted in the sale by supplying the drugs and acting as the defendant's partner will place such assistance somewhere near the outrageous level.

United States v. Twigg[58] is the first case since *Hampton* in which a federal court of appeals reversed a defendant's conviction by applying the due process defense. In *Twigg*, the government initiated contact with the defendant and prompted him to set up a laboratory to

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[51]Judge Friendly stated, "We are not sure how we would decide this question if decision were required . . . . [T]here is certainly a limit to allowing governmental involvement in crime." 486 F.2d at 676 (footnote omitted).

[52]*Id.* at 672-73.

[53]*Id.*

[54]511 F.2d 1083 (3d Cir. 1975).

[55]*Id.* at 1085. *See also* United States v. Bueno, 447 F.2d 903, 905-06 (5th Cir. 1971) (entrapment as a matter of law exists when government supplies and then buys drugs from defendant), *cert. denied*, 411 U.S. 949 (1973).

[56]The Supreme Court affirmed the defendant's conviction even though the government occupied the roles of both seller and buyer, with defendant as the middleman. 425 U.S. at 484.

[57]511 F.2d at 1086.

[58]588 F.2d 373 (3d Cir. 1978).

manufacture drugs. The government's Drug Enforcement Agency (DEA) provided substantial assistance through a government informer. The court reversed the defendant's conviction because it found that the degree of DEA involvement with the criminal enterprise was so outrageous that due process principles foreclosed any prosecution.[59] Although *Twigg* seems to hold that the government violates due process when it instigates a crime without any probable cause to believe that the defendant is already involved in criminal activity, an overwhelming majority of federal courts reach a contrary result.[60] Therefore, *Twigg* remains valid authority only for the narrower holding that due process is violated when the government instigates a crime without probable cause *and* provides extensive assistance to the criminal to complete the crime.[61] Because the probable cause factor has been discounted in this area, the emphasis is obviously on whether the government's participation rose to the level of outrageous assistance.

A more recent case recognizing and applying the due process defense is *United States v. Batres-Santolino*.[62] Thomas, a government informer, succeeded in inducing the defendants to enter into a cocaine transaction even though the defendants had no prior history of dealing in drugs. Although these facts demonstrated the defendants' lack of predisposition to traffic in drugs and seemingly would support an entrapment defense, the defendants chose to rely only on the due process defense. Thus, the availability of the defendants' defense was determined by the judge because the due process defense, in contrast to the entrapment defense, raises a question of law for the court.[63]

The court in *Batres-Santolino* recognized that the due process defense is separate from any entrapment issue and that a defendant's predisposition will not foreclose the success of a due process defense.[64] Although the focus of the due process defense is on the government's conduct, the court held that a defendant's lack of prior

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[59]*Id.* at 377.

[60]*See, e.g.*, United States v. Swets, 563 F.2d 989, 991 (10th Cir. 1977) (no showing of probable cause necessary before government can instigate a crime); United States v. Martinez, 488 F.2d 1088, 1089 (9th Cir. 1973) (government need not establish that it had knowledge of defendant's propensity toward crime); United States v. Jenkins, 480 F.2d 1198, 1200 (5th Cir.) (willingness by defendant to participate in crime can establish predisposition and no probable cause necessary), *cert. denied*, 414 U.S. 913 (1973); United States v. Rodrigues, 433 F.2d 760, 762 (1st Cir. 1970) (police would be unable to trap the first offender if probable cause was required before defendant could be tested), *cert. denied*, 401 U.S. 943 (1971).

[61]588 F.2d at 377-78. *See generally* Comment, *Due Process Defense When Government Agents Instigate and Abet Crime*, 67 GEO. L.J. 1455 (1979).

[62]521 F. Supp. 744 (N.D. Cal. 1981).

[63]*Id.* at 750.

[64]*Id.*

criminal involvement was a relevant factor to weigh in determining whether the government conduct is outrageous.[65] In acquitting the defendants, the court held that this was a case "in which government agents 'manufactured' a crime that . . . could not and would not have been committed."[66] The court relied on the fact that defendant had no previous history of drug related crimes *and* on the fact that the government supplied all of the drugs.[67] This case stands for the proposition that if a crime would not have occurred, or would not have been likely to occur *but for* the government's prodding *and* aid, the due process defense may be successful. Because the due process defense is available also to predisposed defendants who fail to meet the "but for" test, the degree of government aid to the defendant is obviously a weightier concern.

What guiding principles can be discerned from these and other opinions to aid a federal court faced with a cognizable due process defense when a defendant's predisposition denies him the entrapment defense? Unfortunately, the only clear principle on which the courts seem to agree is that because covert crime demands extensive government infiltration into the ranks of criminals, situations where government conduct is sufficiently outrageous to violate due process will be extremely rare.[68] The reluctance of the federal courts to utilize the due process defense is furthered by the absence of any Supreme Court standards in this area. Beyond the bench mark case of *Rochin* and its subjective inquiries into "fair play and decency"[69] and "conduct that shocks the conscience,"[70] there have been only meager attempts to establish any concrete standards. Additionally, any extensive reliance on *Rochin* for guidance in this area would be precarious because that case did not arise in an entrapment-type setting.

Nevertheless, by surveying the major cases in this area, common factors emerge as being relevant to the due process defense. Some of these factors were set forth in a New York Court of Appeals decision overturning a conviction because of a successful due process defense.[71] The factors were: (1) whether the crime would not have oc-

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[65]*Id.* at 751.

[66]*Id.*

[67]*Id.* at 752 (citing *Twigg* as authority for an acquittal when these two factors exist).

[68]*See* Hampton v. United States, 425 U.S. 484, 495-96 n.7 (1976) (Powell, J., concurring); United States v. Russell, 411 U.S. 423, 432 (1973).

[69]342 U.S. at 173.

[70]*Id.* at 172.

[71]People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978) (defendant with no prior convictions was induced to sell cocaine by a government informant who only cooperated with police after he was threatened, beaten, and deceived). *See generally* 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 (1978) (suggesting the *Isaacson* approach to the due process defense is proper and should be adopted by the Supreme Court).

curred but for the government's assistance in manufacturing the crime or whether the defendants were already involved in ongoing criminal activity; (2) whether the government agents committed crimes or otherwise acted improperly; (3) whether the government agents persisted with their inducements to overcome the defendant's reluctance to commit the crime; and (4) whether the government agents' sole motive was to obtain a conviction or to protect the public by preventing further crime.[72]

The federal cases discussed above either impliedly or expressly recognized these factors as relevant to, if not dispositive of, the due process issue. If the more obvious factors of the need for the particular undercover work as determined by the type of crime being investigated[73] and the availability of other, less repugnant, means to combat the criminal activity are added to the factors espoused by the New York Court of Appeals, a hazy set of guidelines emerges to identify the circumstances where the Supreme Court's standard of "fundamental fairness" espoused in the *Russell* and *Hampton* dicta would be violated.[74] A resolution of the issues presented by all of these guidelines was made in favor of two ABSCAM defendants who raised the due process defense at the district court level.[75] The appropriateness of those decisions will be discussed below.

III. ABSCAM

A. Summary of FBI's Scheme

ABSCAM, short for "Abdul Enterprises" and "scam," is a code word used by the FBI to denote an elaborate undercover "sting" operation aimed, in part, at ferreting out corrupt public officials.[76] Although

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[72]People v. Isaacson, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

[73]For example, narcotic offenses and official corruption could hardly be detected without clandestine operations by the government.

[74]425 U.S. at 494 n.6 (Powell, J., concurring). Although the majority opinion in *Hampton* held that only a prosecution against the government could lie where a "protected right" of the defendant was violated, for example a specific provision of one of the Bill of Rights, *id.* at 490, a majority of the Supreme Court Justices would recognize the due process defense and probably apply it beyond specific constitutional violations to include the broader notion of infringements in violation of "fundamental fairness." *See supra* note 23 and accompanying text. This is the desirable approach because if the due process defense is only applicable to specific violations of the Constitution, it will amount to only a redundant overlap with the particular constitutional safeguards.

[75]United States v. Kelly, 539 F. Supp. 363 (D.D.C. 1982); United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

[76]See United States v. Myers, 527 F. Supp. 1206 (E.D.N.Y. 1981) for an in-depth factual description of ABSCAM.

the initial purpose of the scheme was to discover stolen and forged securities and stolen art work, the FBI agents ultimately developed a complex and extensive subpart aimed at exposing political corruption.

Through the services of Melvin Weinberg, a racketeer who received probation and a salary for his cooperation, the word was spread to the underworld that wealthy Arabs had large sums of cash to invest in American outlets. "He would pass the word of big money available for deals to other con men . . . . If criminal proposals appeared, appropriate action would be taken by the FBI."[77] Weinberg, together with several FBI agents, posed as representatives for the fictitious Arab corporation, establishing the business in Holbrook, Long Island. By way of unwary and corrupt middlemen who received commissions for providing the undercover agents with public officials interested in the Arab money, several public officials, including six members of the House of Representatives, one United States Senator, one immigration official, one mayor, and two members of the Philadelphia City Council were indicted.[78] Although the facts alleged in each indictment varied, each defendant was recorded and filmed accepting money at the insistence of the undercover agent in return for some political favor concerning investment activities and/or immigration difficulties. It should be noted that Weinberg, the racketeer who aided the government agents, was responsible for inventing this subpart of ABSCAM, which is commonly referred to as the "asylum scenario."[79]

B. Failure of the Entrapment and Due Process Defenses

1. United States v. Myers.—In *United States v. Myers*,[80] the defense of entrapment was unavailable to the eight defendants either because it had not been raised at trial and was therefore waived, or because the jury had sufficient evidence to find predisposition.[81] Thus,

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[77]*Id.* at 1210.

[78]*Id.* at 1210-11.

[79]*See* United States v. Kelly, 539 F. Supp. 363, 366 (D.D.C. 1982).

[80]510 F. Supp. 319 (E.D.N.Y.), *aff'd*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980), *motions denied*, 527 F. Supp. 1206 (E.D.N.Y. 1981), *aff'd*, 692 F.2d 823 (2d Cir. 1982).

[81]527 F. Supp. at 1224. It would be a difficult task to rebut a finding of predisposition when the defendants were all filmed voluntarily taking the cash. This is because evidence of a defendant's ready acquiescence to commit the crime can be used to show his predisposition. United States v. Jannotti, 501 F. Supp. 1182, 1200 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S.Ct. 2906 (1982). All of the defendants in *Myers* filed joint briefs in support of basically the same legal principles and were therefore treated as a group. Along with Michael Myers (United States Congressman), named defendants included Angelo Errichetti (Mayor of Camden, New Jersey and New Jersey State Senator), Howard Criden (Philadelphia attorney),

the defendants were left with only one viable defense: outrageous government conduct amounting to a violation of due process. The defendants based this defense on the following claims: (1) ABSCAM manufactured crimes that would never have occurred otherwise; (2) the entire scheme was filled with instances of misconduct ranging from inadequate documentation to a reward system; (3) the inducements offered were overwhelming; (4) the government had no probable cause before it began the scheme; (5) the government used high pressure tactics after a defendant expressed an unwillingness to take a bribe; and (6) the scheme violated principles emanating from the separation of powers doctrine.[82]

Although the District Court for the Eastern District of New York recognized that a due process defense may be available to even a predisposed defendant, it did not find the government's conduct to be sufficiently outrageous.[83] The court held that the "mere instigation of crime does not render law enforcement activity 'outrageous.' "[84] The court emphasized that the government's conduct was less outrageous than in *Hampton* and that the defendants could simply have said "no" to the bribes.[85] The court rejected each basis put forth by the defendants in support of their due process defense in spite of the almost certain fact that no crime would have been committed *but for* the government's instigation of the crime. It was undisputed that none of the defendants were under suspicion prior to their meetings with the undercover agents and that there was no evidence of criminal inclinations or a predisposition to accept bribes except for the filmed ABSCAM payoffs.[86]

In light of the facts which have supported a successful due process defense in the few available cases,[87] the decision reached in *Myers* was appropriate. The defense has only been successful in rare in-

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Louis Johanson (Philadelphia attorney and city council member), Frank Thompson, Jr. (United States Congressman), John Murphy (United States Congressman), Joseph Silvetri (New Jersey businessman), and Raymond Lederer (United States Congressman).

[82]527 F. Supp. at 1217-19.

[83]*Id.* at 1225.

[84]*Id.*

[85]*Id.* Three other legislators, faced with similar offers, rejected the offers and refused to accept the money.

[86]The Court of Appeals for the Second Circuit recently affirmed the defendants' convictions in spite of the alleged due process violations. United States v. Myers, 692 F.2d 823 (2d Cir. 1982). The court recognized that the government had no probable cause to believe the defendants were corrupt; the purpose of the scheme was simply to "see who showed up to take the bribes and videotape them in the act of doing so." *Id.* at 837. The court noted that the defendants "enjoy no special constitutional rule that requires prior suspicion of criminal activity before they may be confronted with a governmentally created opportunity to commit a crime." *Id.* at 835.

[87]*See, e.g.*, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).

stances in which the courts found it necessary to "restrain law enforcement activities that involve coercion or outrageous violation of physical integrity."[88] Narcotic crimes, by their nature, offer the potential for much greater police coercion than do crimes of official corruption. The defense has been successful almost exclusively in narcotic cases[89] where police officers went beyond making mere offers and actually assisted the defendant in committing the crime. Because the due process defense is a function of the *level* of government conduct, any distinction between government involvement in crimes of narcotics and crimes of corruption will be only a matter of degree. Nevertheless, a material distinction exists between waving money in the face of a public official and providing knowledge, materials, assistance, purchasers, and drugs for the drug trafficker. In both cases the government is involved; however, only in the latter case has this involvement turned to what might be called outrageous assistance. Another distinction between crimes involving bribery and contraband may be that the courts simply set higher standards for elected officials and demand that they not give in to temptations that may affect their governmental duties.

2. United States v. Alexandro.—In *United States v. Alexandro*,[90] an immigration official was convicted for accepting a bribe from undercover agents in exchange for the immigration official's assistance in obtaining an immigration pass. The evidence indicated that Alexandro constructed the scheme and presented it to the undercover agents.[91] Alexandro did not raise the entrapment defense but instead relied on the due process defense.[92] The court rejected the defense under this factual setting but proffered the following test: "The line between lawful subterfuge and excessive Government involvement in violation of the due process clause of the Constitution is drawn when the end sought cannot be justified by the means used."[93] Using its own formula, the court weighed the importance of ferreting out corrupt public officials (the end) and the impotence of conventional police tactics to accomplish the same, with the tactics utilized in the elaborate

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[88]692 F.2d at 837 (2d Cir. 1982) (citations omitted).

[89]*See supra* notes 44-49, 54-67 and accompanying text.

[90]675 F.2d 34 (2d Cir. 1982).

[91]In a separate trial, Alfred Carpentier, a Long Island businessman, was also convicted for his role in initiating contact with the government agents and assuring them that an immigration pass could easily, and illegally, be obtained. On appeal, Carpentier raised the due process defense; however, the Second Circuit found the claim to be meritless. United States v. Carpentier, 689 F.2d 21 (2d Cir. 1982).

[92]Alexandro argued that the government's fictitious immigration ploy was "so repugnant and excessive that due process principles should have prohibited his criminal prosecution." 675 F.2d at 39.

[93]*Id.* at 34-35.

government scheme (the means). The court concluded that the defendant had not been treated unfairly.[94]

Alexandro represents the easy case where a due process defense has almost no chance for success. In that case, Alexandro created the plot and presented it to the undercover agents. To assure the agents of his ability to obtain a fraudulent passport, Alexandro boasted of his past success in securing passports. The few cases that have upheld acquittals based on the due process defense involved government schemes presented to the defendants.[95] The defendants in *Greene* and *Twigg*, for example, would not have succeeded with the due process defense had they approached undercover agents and proposed plans to sell contraband.

3. United States v. Williams.—In *United States v. Williams*,[96] Senator Harrison A. Williams was found guilty of bribery, criminal gratuity, conflict of interest, interstate travel for unlawful activity, and conspiracy.[97] Although the defendants, Williams and Feinberg, relied on the defense of entrapment, the jury found that they were both predisposed to commit acts of corruption.[98] After their convictions for taking bribes, the defendants moved to have the jury verdicts set aside based on the government's outrageous conduct amounting to violations of due process. As a basis for this defense, the defendants pointed to the pressure applied by the agents,[99] the selectivity of the prosecutions, the size of the inducements, and other miscellaneous instances of claimed outrageousness.[100] In spite of these allegations of government misconduct, the court found that the defendants knowingly and voluntarily entered into an illegal course of conduct aimed at using Senator Williams' political influence and power to obtain

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[94]*Id.* at 42.

[95]*See, e.g.*, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (government initiated contact and proposed that defendant set up drug laboratory); Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (government proposed illegal still operation).

[96]529 F. Supp. 1085 (E.D.N.Y. 1981).

[97]Senator Williams held a secret interest in a titanium mine and was interested in acquiring financial investments from the Arabs to support the venture. It was conceded that this, on its face, would have been a perfectly legitimate relationship. However, "[c]riminality arose out of the promise requested by the undercover agent as a condition for the financing, which was that defendant Williams would promise to use his power and influence as a United States Senator to obtain government contracts for purchasing the titanium to be produced by the mine . . . ." *Id.* at 1090-91.

[98]*Id.* at 1088. Various pieces of circumstantial evidence, such as Williams' contacts with corrupt politicians, allowed the jury to find predisposition.

[99]This refers to the episode now referred to as the "coaching incident" in which government agents "coached" Williams on how to conduct himself in front of the fictitious Arab sheik, who was also a government agent.

[100]The miscellaneous instances of allegedly outrageous conduct included various forgeries made to further the apparent legitimacy of "Abdul Enterprises" and the use of Weinberg, a reknowned hoodlum, as a government agent. 529 F. Supp. at 1102.

government contracts for the purchase of titanium.[101] The court considered the degree of sophistication expected from any United States Senator and concluded that the evidence of government misconduct was not sufficient to meet the outrageous conduct and fundamental fairness standards mentioned in the *Russell* and *Hampton* dicta.[102]

There is one fact that distinguishes *Williams* from the other ABSCAM cases. Senator Williams had an additional motive for taking a bribe: he owned an interest in the same mine which the bribes were intended to benefit. Although this fact alone does not necessarily suggest anything improper, the court obviously afforded due weight to it in considering Williams' entrapment and due process claims. To accept Williams' claim that the government's conduct was outrageous, the court would have had to believe that Williams thought it a mere coincidence that the agents wanted to buy his influence in securing titanium contracts for a mine which Williams partially owned. Given Williams' experience and sophistication, the inference is overwhelming that he either accepted the bribes to promote his vested interest in the mine or to profit from the money alone, or for both reasons.

Williams is unlike the federal cases previously discussed which involved narcotics and police officers who took advantage of the defendant's lack of sophistication and assisted in committing the crimes.[103] No government agent assisted Williams in taking the money; only opportunities were presented.

C. Success of the Due Process Defense

1. United States v. Jannotti.—United States v. Jannotti[104] grew out of the Philadelphia phase of ABSCAM that began in 1980 when Weinberg, through intermediaries, began spreading the word that Abdul Enterprises planned to invest 150 million dollars for a hotel in the city. The government agents, posing as representatives of the fictitious sheik, purported to be concerned that local laws and regulations might slow up the hotel project. To eliminate these concerns, the government agents, through unwary middlemen, sought to gain assurances from local politicians that any ensuing difficulties could be solved quickly and without resort to the slow processes of local government. Jannotti and Schwartz, who were members of Philadelphia's city council, were lured by the potential investments into meeting with the undercover agents. The money to be paid to Schwartz was characterized as a consulting fee for his expert advice on the intricacies of local government.

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[101] *Id.* at 1107.

[102] *Id.* at 1099.

[103] *See supra* notes 44-49, 54-67 and accompanying text.

[104] 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

Although Schwartz and Jannotti attended separate meetings with the fictitious investors, the government agents explained, in both meetings, that the hotel project would be completely legitimate but that the sheik's "way of doing business" was to acquire politicians as "friends."[105] In other words, the Arabs were accustomed to paying cash in exchange for political support even when the project would be legitimate. Both Schwartz and Jannotti initially refused to accept any money for their support of the project because, as both stated, they were always interested in legitimate projects that would improve their city, and because the new jobs and added tax dollars from such a project merited their support.

Nevertheless, the agents insisted on assurances from the defendants and stressed the fact that without the assurances "their principals would be unwilling to proceed with the project in Philadelphia."[106] Despite the foregoing evidence tending to establish that the defendants were prodded into accepting bribes, the filmed evidence of each accepting cash from the agents illustrated their ready acquiescence to partake in the crime and the jury found them both to be predisposed and therefore guilty.[107]

Judge Fullam of the District Court for the Eastern District of Pennsylvania granted the defendants' motions to set aside the jury verdict.[108] This decision was based on several alternative grounds, two of which were entrapment as a matter of law and governmental misconduct amounting to a due process violation.[109] Judge Fullam found that there was no evidence upon which a reasonable jury could conclude that the defendants were predisposed; therefore, given the government's inducements, Judge Fullam held that entrapment was established as a matter of law.[110]

This holding was not only unnecessary in light of the alternative grounds given for acquittal, but as was subsequently pointed out by the Court of Appeals for the Third Circuit, it was also improper.[111] The ABSCAM cases are unique in that nearly all of the incriminating evidence was displayed on film for the jury to witness the actual commission of the alleged criminal acts. A judge takes a bold step when he usurps the function of a jury, especially when the credibility of witnesses is an issue as in *Jannotti*.[112] Judge Fullam admitted that a defendant's ready acquiescence in the crime can be sufficient proof of his predisposition, but held that an acceptance of the money in

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[105]501 F. Supp. at 1194, 1196, 1199.

[106]*Id.* at 1200.

[107]*Id.* at 1198-99.

[108]*Id.* at 1205.

[109]*Id.*

[110]*Id.* at 1200.

[111]United States v. Jannotti, 673 F.2d 578, 580 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

[112]673 F.2d at 598-602.

this case did not constitute such ready acquiescence.[113] However, because entrapment is almost always a jury issue[114] and the jury in this case was actually able to witness the defendants' actions, the court erred in finding entrapment as a matter of law. Once the films were viewed and the defendants were seen taking the money, the primary issue became whether the defendants' testimony as to a lack of predisposition was believable. In its reversal, the majority opinion of the Third Circuit correctly pointed out that credibility determinations are classically within the province of the jury.[115]

In spite of the reversal by the Third Circuit, the district court opinion in *Jannotti* is important for its alternative holding that the tactics used in ABSCAM violated the due process rights of the defendants.[116] After recognizing that a majority of the Supreme Court has left open the possibility for a due process defense even when the defendant is predisposed, Judge Fullam went on to discuss his reasons for applying the defense. He correctly considered as relevant factors the nature of the crime and the available means necessary to thwart the crime. Relying on *United States v. Twigg*,[117] Judge Fullam held that "[w]hile municiple bribery may be 'fleeting' and 'elusive,' so that governmental subterfuge and even creative involvement may be necessary to combat it, the techniques involved here went far beyond the necessities of legitimate law enforcement."[118] Specifically, Judge Fullam held that the extremely generous bribes coupled with the threat that Philadelphia would lose the project unless the money were accepted amounted to such extreme misconduct by the government that due process was violated.[119]

Judge Fullam's opinion reads more like a legislative declaration of policy than a judicial inquiry into the available precedents. Specifically, Judge Fullam stated that "it is neither necessary nor appropriate" for government agents to engage in the tactics used in ABSCAM to ferret out corruption[120] and "it is surely not within the legitimate province of federal agents to embark upon a program of corrupting . . . officials, merely to demonstrate that it is possible."[121] While these policy considerations may be relevant to the due process

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[113]501 F. Supp. at 1201.

[114]*See* United States v. Lents, 624 F.2d 1280, 1286 (5th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981); United States v. Twigg, 588 F.2d 373, 376 (3d Cir. 1978).

[115]673 F.2d at 598 (citing United States v. Bocra, 623 F.2d 281, 289 (3d Cir. 1980)).

[116]501 F. Supp. at 1205.

[117]588 F.2d 373 (3d Cir. 1978).

[118]501 F. Supp. at 1204.

[119]*Id.* Judge Fullman was critical of the ABSCAM tactics directed at Jannotti and Schwartz which he believed were "neither necessary nor appropriate to the task of ferreting out crime . . . ." *Id.*

[120]*Id.*

[121]*Id.* at 1205.

defense, given the facts of *Jannotti*, they alone cannot, and ultimately did not, support a due process defense of constitutional magnitude.

The convictions of Jannotti and Schwartz were reinstated by the Court of Appeals for the Third Circuit.[122] In overturning the district court's finding of entrapment as a matter of law, the appellate court focused on the traditional role of the jury in entrapment cases and held that the function of the jury had been usurped.[123] The court not only concluded that the jury had sufficient evidence of the defendants' predisposition,[124] which was shown by their ready acquiescence to receive the money, but also attacked the district court's bases for finding government inducement.[125]

Because the district court based its entrapment *and* due process holdings largely on its view that the government's inducements were overwhelming,[126] the Third Circuit's contrary finding that the inducements could not even overcome the jury's finding of predisposition, with regard to the entrapment defense, made frivolous the claim that the same inducements could support a due process defense.[127] As the appellate court correctly observed, "the [Supreme] Court has manifestly reserved for the constitutional defense [of due process] only the most intolerable government conduct."[128] However, "[i]f the contours of the entrapment defense are imprecise . . . [a] similar delineation of the conduct circumscribed by the due process defense is, at best, elusive."[129] This statement by the court acknowledges that what amounts to fundamental fairness and outrageous conduct violative of due process is extremely fact sensitive and subject to individual interpretation. What may shock the conscience of some people as being obtrusive government misconduct may be viewed as excellent police work by others. Of course, ambiguities and divergent views exist and will continue to exist in many areas of the law; however, this is no

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[122]673 F.2d 578 (3d Cir. 1982). This is the same circuit which reversed the defendant's conviction in *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), because of a successful due process defense. *Twigg* was interpreted by Judge Fullam of the district court as requiring an acquittal in *Jannotti*. 501 F. Supp. at 1204.

[123]673 F.2d at 608.

[124]*Id.* at 607-08.

[125]*Id.* at 599-604. The district court based its finding that the defendants were induced on the three following factors: (1) the amount of the bribes ($30,000 for Schwartz and $10,000 for Jannotti); (2) the court's opinion that the defendants were not being asked to do anything improper; and (3) the threats that the project's location in Philadelphia was contingent upon the defendants accepting the payoffs.

[126]*See supra* note 125 and accompanying text.

[127]The Third Circuit stated that "it is plain from the Court's opinion in *Russell* and the separate opinions in *Hampton*, however, that a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense." 673 F.2d at 607.

[128]*Id.* at 608.

[129]*Id.* at 606.

reason to relent in the search for predictability and common principles with respect to the application of the due process defense.

Unlike the district court, which seemingly was willing to invoke mere policy grounds for its due process acquittal, the Third Circuit expressly left this function to the executive branch.[130] The Third Circuit took judicial notice of the fact that the crime of bribery, by its nature, requires that the government be allowed to use a wide range of weaponry to combat it. A judicial distaste for the government's conduct, although certainly the starting point for a successful due process defense, is simply insufficient in itself to sustain an application of the due process defense. Unless the government's behavior shocks the conscience and violates that elusive concept embodied in the term fundamental fairness, the issue of government misconduct is for the policy makers who must answer to the public.

The dissenting opinion, written by Judge Aldisert, and joined by Judge Weis, primarily criticized the majority's disposition of the entrapment issue.[131] Rather than perceiving the filmed evidence as creating an ideal jury situation, Judge Aldisert argued that, in effect, the films nullified the need for a jury because the films largely eliminated any possibility for controverted facts.[132] When films of the alleged criminal activity are available, and therefore few credibility issues are presented, the dissent submitted that it should be the judge's responsibility, not the jury's, to decide the issue of entrapment.[133] One suspects, however, that Judge Aldisert's real reason for finding no jury issue was his distrust of laymen in deciding issues that he perceived as having great social significance. Judge Aldisert stated that "we are confronting an extremely sensitive intersection between morals and positive law, which demands that the judiciary assume rather than shirk responsibility."[134] Once Judge Aldisert assumed such judicial responsibility, he emphasized that the strength and nature of the government's inducements are very relevant to the

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[130] *Id.* at 609. The court stated that:

> Official corruption, in the form of bribery and extortion involving public officials, can, like the narcotics sales involved in *Hampton*, easily elude detection, since both parties to the transaction have an interest in concealment. Indeed, bribery may be even more difficult to uncover than drug deals. A determination of what undercover operations are necessary . . . must be left, in the first instance, to [the executive branch] . . . . Unless the behavior of the F.B.I. agents rose to that level of outrageousness which would bar conviction, the conduct of agents . . . is more appropriately considered through the political process where divergent views can be expressed in the ballot box.

Id. (citations omitted).

[131] 673 F.2d at 612-23 (Aldisert, J., dissenting).

[132] *Id.* at 614.

[133] *Id.* at 623.

[134] *Id.* at 616.

predisposition issue.[135] The stronger the inducements, the more difficult it will be for the government to prove a defendant's predisposition; thus, Judge Aldisert concluded that "[i]t is difficult to conceive of a stronger case of inducement by the government."[136]

That issue—the strength of the inducements—was the reason for the split between the majority and dissent. The majority viewed the offered inducements as relatively insignificant in light of the status enjoyed by the defendants[137] and considered the acceptance of money as consumating a bribe. The dissent agreed with Judge Fullam of the district court, viewing the inducements as being overwhelming and the acceptance of money as only a sign of friendship.[138]

Whether the majority correctly construed the due process defense in *Jannotti* turns largely on whether the due process defense should be expanded beyond the traditional narcotic cases to include crimes of corruption.[139] This expansion would be necessary because the differing nature of the narcotic cases, in terms of the type of criminals involved and the government assistance provided, may render them insufficient as precedents to support the acquittal of defendants like Jannotti.

United States v. Twigg[140] is representative of the precedents in this area. Although *Twigg* was relied upon by the district court in *Jannotti*, the court of appeals properly distinguished *Twigg*. In *Twigg*, the agent went beyond passive inducements; the agent actually assisted the defendant by providing him with knowledge, money, materials, and a production site for the manufacture of narcotics.[141] In *Jannotti*, the only government involvement was the offering of inducements. *Jannotti* would be more like *Twigg* and the other narcotic cases had the government agents somehow assisted Jannotti in receiving the bribes after they were offered. The difficulty in conceptualizing a factual situation in which government agents are able to both induce and help a politician take the bribe makes it doubtful that the

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[135]*Id.* at 617.

[136]*Id.*

[137]*See supra* note 125 and accompanying text (listing the inducements considered by the majority as being insufficient to establish entrapment as a matter of law or a due process defense). *See also* United States v. Myers, 527 F. Supp. 1206, 1245 (E.D.N.Y. 1981) (discussing the district court's disposition of *Jannotti* and criticizing the weight afforded to the various inducements).

[138]673 F.2d at 619.

[139]The issue also turns on one's perception of the roles to be occupied by the judge and jury. While the majority concluded that the jury's function had been usurped, *id.* at 602, the dissent believed that when dealing in areas of the law where "minimal legal thresholds" are absent, "the jury, untrained in the law, should never be called upon to design and construct [those thresholds]." *Id.* at 614 (Aldisert, J., dissenting).

[140]588 F.2d 373 (3d Cir. 1978).

[141]*Id.* at 380-81.

due process defense will ever be extended successfully to crimes of political corruption.[142]

2. United States v. Kelly.—United States v. Kelly,[143] a 1982 decision, is the only other ABSCAM case in which a district court overturned the jury's conviction and acquitted the defendant. *Kelly* is especially significant because the defendant was acquitted exclusively because of government misconduct resulting in a denial of due process.[144]

The factual setting of *Kelly* is quite similar to that described in the *Jannotti* case. The word was out that rich Arab sheiks had millions of dollars to invest and were interested in meeting public officials who were willing and able to assist with investment and immigration difficulties. Commissions were offered to middlemen for producing government officials whom the Arabs could successfully bribe. Various middlemen[145] notified Kelly of the Arab investment opportunities. One middleman, Eugene Ciuzio, boasted to the undercover agents that he had virtual control over Kelly;[146] consequently, Ciuzio was designated to "feed the program" to the Congressman.[147] It was undisputed that when payments were first suggested, Kelly rejected the idea and expressed interest only in the legitimate aspects of the Arab ventures.[148] At another meeting with the agents, and after Ciuzio had warned the government agents to be very discreet about the subject of payoffs, Kelly refused a second bribe offer. The agents persisted even after Kelly rejected a third bribe offer, and Kelly openly insisted that he was only interested in legitimate projects that could benefit his district.[149] Further persistence and the display of $25,000 spread out

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[142]The Third Circuit, in *Jannotti*, distinguished *Twigg, Hampton*, and other drug-related cases on the grounds that the drug-related cases typically involve situations in which the government participates in both the buying and the selling of the drugs. 673 F.2d at 608.

[143]539 F. Supp. 363 (D.D.C. 1982).

[144]*Id.*

[145]The middlemen involved were Eugene Ciuzio, Stanley Weisz, and William Rosenberg.

[146]There was no evidence to substantiate Ciuzio's assertion that he "controlled" Kelly; consequently, the court refused to permit the jury. to consider Ciuzio's assertion. 539 F. Supp. at 367.

[147]*Id.* Part of the "program" consisted of a $25,000 incentive offer for Kelly that was later increased to $250,000 by Ciuzio. *Id.* at 366-67.

[148]The legitimate aspects were, of course, the purported investments to be made in Kelly's district that would benefit Kelly's constituents. The requests for help in obtaining immigration passes for the Arabs, and the Arabs' insistence that Kelly be paid for his support of the project are examples of the illegitimate aspects of the proffered arrangement.

[149]The agents later explained that it was their feeling that Kelly was just "being cute" when he rejected the initial bribe offers.

on a table in stacks of one hundred dollar bills finally persuaded Kelly to take the bribe.[150]

Judge Bryant, in overturning the jury's guilty verdict, displayed his own personal bias and repulsion towards the ABSCAM scheme as it affected Kelly.[151] He recognized, however, that personal bias was insufficient as a basis upon which to rest a due process defense and sought to "identify some discernible line between that conduct which arouses my personal resentment, and that which falls short of minimal standards of fairness."[152]

To locate that discernible line and thus arrive at the proper meaning of fundamental fairness, Judge Bryant, citing no authority, stated that the government may not tempt an individual beyond that which he "is likely to encounter in the ordinary course."[153] According to Judge Bryant, it is so unrealistic for a Congressman to receive further bribe offers once the first one has been refused that the agent's persistence in *Kelly* amounted to fundamentally unfair tactics in violation of Kelly's due process rights.[154] Judge Bryant reached this conclusion by determining that, because the bribery statute under which Kelly was convicted also imposes sanctions upon the party offering the bribe,[155] no one besides a government agent who is immune from prosecution would reasonably have made three bribe attempts to Kelly.[156]

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[150]This was the first payment of a $100,000 bribe.

[151]539 F. Supp. at 373. At an earlier bench conference, Judge Bryant stated that this case "has an odor to it that is going to be cleared away before anybody gets convicted. It has an odor to it that is absolutely repulsive. Let's get along with the trial . . . . But it stinks." *Id.* at 373 n.45.

[152]*Id.* at 373. The fear of this personal bias in the judiciary may be what led Justice Rehnquist to reject the due process defense. He stated in *Hampton* that "[t]he execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judically fashioned rules to enforce those limitations." Hampton v. United States, 425 U.S. 484, 490 (1976) (quoting United States v. Russell, 411 U.S. 423, 435 (1973)).

[153]539 F. Supp. at 374. Judge Bryant explained that "[t]o offer any other type of temptation does not serve the function of preventing crime by apprehending those who, when faced with actual opportunity, would become criminals." *Id.*

[154]*Id.* at 373, 376-77.

[155]18 U.S.C. § 201 (1976) provides in pertinent part that:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . or offers or promises any public official . . . to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act; or
>
> (2) to influence such public official . . . to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) to induce such public official . . . to do or omit to do any act in violation of his lawful duty . . . [shall be punished in accordance with this statute].

[156]539 F. Supp. at 376.

Judge Bryant reasoned that no one in "real life" would have persisted in offering the bribes because offering bribes is illegal by statute; therefore, to persist in making bribe offers after repeated rejections was fundamentally unfair and violative of Kelly's due process rights.[157] Because only the government would and could persist in such a scheme, so the theory goes, the bribery could never have been committed *but for* the government's involvement.[158] Viewed in this perspective, the government manufactured a crime that never would have otherwise occurred. Judge Bryant explained that when the repeated urgings are likely to be repeated in real life, the issue is for the jury and is only one of inducement and of predisposition within an entrapment context.[159] In contrast, Judge Bryant believed that inducements which are illegal and made repeatedly by government officers whose behavior, therefore, fails to mirror real life, constitutes outrageous conduct, which triggers the due process defense. In support of this proposition, the court cited *United States v. Russell*[160] noting that the actions of the government agent in *Russell* did not violate any federal statute.[161]

Although this area of the law would be simplified if courts adopted Judge Bryant's test for fundamental fairness in deciding the due process issue, his analysis is not likely to receive much judicial support. There are three essential flaws in Judge Bryant's analysis. First, it is erroneous to assume that in real life a person would not persist in offering a bribe because that person has already committed the crime after the first offer is made. It would be a more logical response for a criminal, faced with an uncooperative official, to persist in his bribery attempts because the criminal has potentially nothing more to lose; one bribery attempt is enough to break the law. Judge Bryant supported his position that repeated bribery attempts would be unrealistic by saying that any individual would quit after one bribery attempt "for fear that the Congressman would notify the FBI."[162] The fallacy in this conclusion is made evident by the fact that neither Kelly nor any other official indicted as a result of ABSCAM notified the FBI.

A more serious flaw in Judge Bryant's opinion is his emphasis on the fact that the agents themselves were violating the bribery statute and his apparent reliance on *Russell* for the proposition that this is fundamentally unfair conduct.[163] It is well settled that govern-

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[157]*Id.* at 374, 376.

[158]*Id.* at 377.

[159]*Id.* at 376.

[160]411 U.S. 423 (1973).

[161]539 F. Supp. at 377. *See* 18 U.S.C. § 201(a)-(c) (1976).

[162]539 F. Supp. at 376.

[163]*Id.* at 377 (citing United States v. Russell, 411 U.S. 423, 430 (1973)). Whether the government agents committed crimes themselves in their efforts to trap the

ment agents may participate to a limited degree in criminal conduct to trap unwary criminals.[164] The various narcotic offenses serve as prime examples of situations where government agents, either by selling or by buying drugs, participate in the commission of crimes. Technically, however, the government agents have not committed crimes because the agents act without the requisite mens rea. Because the bribery statute under which Kelly was originally convicted requires an "intent to influence,"[165] which the FBI agents obviously did not have, it is clear that the government agents did not technically violate the statute. The agents were not motivated by a desire to secure political favors for themselves when they offered the bribes. It is that evil which the statute was created to attack and which the agents were trying to expose.

Even if it is agreed, arguendo, that the ABSCAM tactics would not occur in real life situations and that the agents did violate the bribery statute, it is doubtful that this conduct alone violated the due process rights of Congressman Kelly. A defendant's predisposition not only automatically denies him the entrapment defense, but it also weighs against him when relying on the due process defense.[166] Judge Bryant apparently conceded that Kelly was predisposed or, at least, Judge Bryant implied that such a finding would not change his decision.[167] However, in addressing the dispositive role of predisposition in an entrapment defense with such strong language that is suggestive of its influence even on the due process defense, Justice Powell noted in *Hampton* that:

> [T]he cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult

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criminals is only one factor to be considered when a due process defense is raised; it alone is not dispositive. *See supra* notes 71-75 and accompanying text. As Justice Rehnquist noted in *Russell*, "law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a *limited participation in their unlawful present practices.* Such infiltration is a recognized and permissable means of investigation . . . ." 411 U.S. at 432 (emphasis added).

[164]411 U.S. at 432. *See also* Hampton v. United States, 425 U.S. 484 (1976) (government "crimes" of selling and buying drugs from the defendant held not sufficient to warrant a reversal of defendant's conviction).

[165]*See* 18 U.S.C. § 201 (1976).

[166]*See, e.g.*, United States v. Batres-Santolino, 521 F. Supp. 744, 751 (N.D. Cal. 1981); People v. Isaacson, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

[167]539 F. Supp. at 376-77. Judge Bryant admitted that he was "disappointed and chagrined, . . . at the sight of Kelly stuffing $100 bills into his pockets." *Id.* at 375.

> to detect in the absence of undercover Government involvement.[168]

It would be even more difficult to sustain a due process defense when the defendant is charged with bribery, a crime patently less susceptible to discovery than crimes involving contraband. The federal court decisions sustaining the due process defense[169] and the Supreme Court dicta in *Hampton* and *Russell* recognizing a potential due process defense involved contraband offenses and more direct government involvement in the form of assistance than any of the ABSCAM defendants experienced. Unlike narcotic offenses, crimes of corruption leave behind little concrete evidence; a handshake or facial expression may consummate the crime. Like narcotic offenses, however, undercover operations are necessary to fight against corruption because of the inability to otherwise detect such crimes.

IV. ABSCAM'S FUTURE AFTER *JANNOTTI* AND *KELLY*

The critical issue to future litigants is whether the district courts in *Jannotti* and *Kelly* were correct in finding that the actions of the government agents in the ABSCAM operations rendered the crimes, in their entirety, a governmental enterprise where immunity should be extended to the criminal participants on the ground of due process violations. It is submitted that ABSCAM does not represent the "situation in which the conduct of law enforcement agents [was] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[170] It would be difficult to justify an expansive use of the due process defense to include the ABSCAM cases unless, or until, the Supreme Court chooses to expand the limited success of this defense and clarify the defense within its fundamental fairness parameters. Those parameters are presently so vague as to defy accurate description and predictability except in the most extreme case.[171]

The ABSCAM cases are simply not instances of extreme governmental misconduct. Unlike the federal precedents in this area, the ABSCAM cases all involved sophisticated politicians, not street

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[168]425 U.S. at 495 n.7 (Powell, J., concurring).

[169]United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); United States v. West, 511 F.2d 1083 (3d Cir. 1975); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981). This list of federal district and appellate court decisions lists non-ABSCAM entrapment-type cases where the government's conduct was deemed to be outrageous. All four involved contraband offenses in which the government assumed a criminal role and provided substantial assistance to the defendant.

[170]United States v. Russell, 411 U.S. 423, 431-32 (1973).

[171]*See, e.g.*, Rochin v. California, 342 U.S. 165 (1952) (the infamous stomach pumping case).

criminals. Far from actually *aiding* the ABSCAM defendants in the commission of crimes, the government agents' participation never exceeded providing opportunities and inducements. This is to be contrasted with the narcotic cases where the government agents assumed the roles of something resembling accomplices.[172] Of course, the mere payment of the money could be construed as aiding the ABSCAM defendants. This however, as a matter of degree, does not approach the level of assistance given in the narcotic cases. The ABSCAM cases would be more like the narcotic cases in which the due process defense has succeeded, if the government agents had assisted the politicians in *receiving* the bribes. Even involvement to this degree, however, may not satisfy the Supreme Court as being "outrageous" enough.[173]

The ABSCAM defendants do have several factors weighing in their favor, which would tend to support a due process defense. Considering the elements held to be relevant in the cases previously discussed,[174] a viable argument may be presented to show that no bribes would have occurred *but for* the government's scheme and that there was some reluctance, at least initially by some of the defendants, in accepting the bribes.[175] It is also largely undisputed that the government had no probable cause for suspecting a particular official of corruption until he was already drawn into the government's scheme.[176] Finally, the inducements offered to the defendants to overcome their reluctance were concededly strong. However, in light of the sophistication of most of the ABSCAM defendants, this factor may be of little persuasive value.[177]

Unfortunately for the ABSCAM defendants, other relevant factors weigh against them. It is undisputed that crimes of corruption require, for their detection, undercover operations run by the government. There are no other less repugnant means to combat this type of criminal activity.[178] Although the wisdom of conducting such an

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[172]*See supra* notes 44-49, 54-67 and accompanying text.

[173]*See* Hampton v. United States, 425 U.S. 484 (1976) (holding that the government's involvement in the crime was not outrageous even though the agent was technically an accomplice).

[174]*See supra* notes 69-75 and accompanying text for the major factors relevant to the due process defense.

[175]*Id.*

[176]*Id. But see supra* note 60 and accompanying text.

[177]*See supra* notes 69-75 and accompanying text.

[178]One critic of ABSCAM vented his feelings by stating that, "I think it is bad, evil, illegal, vicious and unconstitutional for officers of the United States to engage in the deliberate manufacture of crimes in the hope that their synthetic crimes will ensnare the bad guys." Gould, *A Defeat for Law and Order*, N.Y.L.J., Feb. 15, 1980, at 3. However, another critic added that:

For many crimes . . . [discovery of the criminals without lures and under-

elaborate scheme may be questioned in terms of a cost-benefit analysis, it is too much to say that the government engaged in improper conduct that is repugnant to a sense of justice and shocking to the conscience.[179] What is shocking to the conscience is the success of ABSCAM in uncovering officials who were willing to accept bribes.

Because the lower courts are in dispute as to what a successful due process defense requires, the Supreme Court should clarify this issue. Since *Hampton*, it appears that several of the Supreme Court Justices would deny the ABSCAM defendant a due process defense.[180] If the Justices who recognize outrageous government misconduct as giving rise to a *defense* limit the defense to specific, constitutional violations, the due process defense certainly would be clarified; however, such a requirement would considerably restrict the scope of the due process defense, making it a redundant defense which would overlap with existing constitutional safeguards.[181] If the defense is given a broader interpretation constrained only by those elusive parameters which connote "fundamental fairness" and "outrageous conduct", little or no guiding principles will exist.

It would seem that the line between government conduct that merely offends our sense of what constitutes efficient police work and government misconduct that is so outrageous that it violates an individual's due process rights should be drawn where the government agents actually assist the defendant in committing the crime. Under this analysis, so long as the government's participation does not exceed passively offering inducements, regardless of how often or strong, the defendant could rely only on the entrapment defense. Of course, the political processes also would be available if the government's tactics were deemed obtrusive or wasteful.

The due process defense should not be available until the government agents go further than passively offering inducements and

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> cover activities] is not possible, and bribery of public officials is one such crime. Unlike crimes directed at individual victims . . . crimes of official corruption have no victim save society at large . . . . Both briber and bribee are happy with the outcome. If subversion of governmental processes is to be discovered, it must be by undercover activity.

Livermore, *Enforcement Workshop: ABSCAM Entrapment*, 17 CRIM. L. BULL. 69, 72 (1981).

[179]*See supra* notes 69-75 and accompanying text for the major factors relevant to the due process defense.

[180]This is the view adhered to by Justices Rehnquist, White, and Chief Justice Burger. *See* Hampton v. United States, 425 U.S. at 490-91.

[181]For example, "if due process were equivalent to fourth or fifth amendment rights, due process would be superflous since such rights are already constitutionally protected." 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, 49 (1978).

actually assist the defendant to an outrageous degree. It is only at that point that one could argue that the government has directly invaded an individual's right to privacy and violated his liberty. Until this point is reached, the government has merely played the latent role of tempter. Where exactly this line should be drawn must be determined on a case-by-case basis. It should include government participation which does more than merely tempt a defendant; the participation would at least entail active assistance by the government agents in consummating the crime. In most cases, this would require that the defendant be given some sort of positive help in the form of materials, knowledge, or physical assistance in committing the crime. This is to be contrasted with government involvement that does no more than entice, lure, tempt, or induce the defendant into committing the crime by *himself.*

The protection from mere temptations, as we have seen, has been relegated exclusively to the entrapment defense which turns on the defendant's predisposition. The due process defense is not intended to protect the predisposed defendant who was subjected to temptation; rather, the defense is intended to protect the predisposed defendant who was subjected to outrageous government misconduct. Because the ABSCAM defendants were only exposed to temptations, they only could have availed themselves of the entrapment defense. Their predisposition, however, prohibited this.

It is true that one's right to due process encompasses more than just the rights enumerated in the Constitution.[182] The right should include the general "ability of individuals to engage in freedom of action within a society and free choice as regards their personal lives."[183] This right may be violated when the government wrongfully and physically restrains a person's freedom of movement or invades his body.[184] Due process also may be violated by government agents directly assisting the defendant in the commission of a crime.[185] In the latter situation, it can be argued that the defendant's "freedom of action" has been restricted because the agent's interference is more direct and determinative. The defendant's freedom to make choices is much less impaired when the agents merely *offer* inducements.

V. Conclusion

Even after taking a broader view of the scope of the due process defense, by only employing notions of fundamental fairness, it is

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[182]J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 487 (1978).

[183]*Id.* at 490.

[184]*See, e.g.*, Rochin v. California, 342 U.S. 165 (1952).

[185]*See supra* notes 44-49, 54-67 and accompanying text.

reasonable to assume that the Supreme Court would not sustain such a defense if it is presented by one of the ABSCAM defendants. Nevertheless, the resolution of this issue is not certain and the decisions of *Jannotti* and especially *Kelly* make it likely that the Supreme Court ultimately will have to pass judgment on ABSCAM. Beyond this particular factual setting, ABSCAM presents an ideal opportunity for the Court to clarify the defense it left dangling in *Russell* and *Hampton.* Of course, if the Court should take this writer's view that ABSCAM does not present a valid due process issue, any clarification would be dicta; nevertheless, the Court has the opportunity to clear up much confusion in this area.

If the Court decides that some or all of the ABSCAM defendants have a valid due process claim, it will be breaking new ground. Despite any similarities between the ABSCAM cases and the precedents which have recognized the defense, the latter can be easily distinguished on two grounds: they involved contraband and government agents who provided outrageous assistance.[186] To the extent that it is possible to help someone *receive* a bribe, a due process defense based on these precedents might be cognizable. Because the government agents in ABSCAM did not provide outrageous assistance, but only assumed the roles of tempters, a successful due process defense would depend upon the Court's finding that an individual has a due process right not to be *tempted* in a way that is fundamentally unfair.

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[186] *Id.*