Beyond 1984: Undercover in America—Serpico to Abscam

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BEYOND 1984: UNDERCOVER IN AMERICA—
SERPICO TO ABSCAM

ROBERT I. BLECKER

PART ONE

PROLOGUE .......................................................... 824
Serpico To Archer .................................................. 840


Abscam .............................................................. 872

The Undercover Background—Guccione and Williams—The Coaching Incident—Meyers’ Payoff—Kelly—Schwartz and Jannotti.

Trials And Hearings ............................................... 899

PART TWO

Predicate Suspicion ............................................. 966

Double Standards ............................................... 971
Opposition to—Necessity of—Public/Private Distinction.

Entrapment ....................................................... 983
Subjective Entrapment Defended—Objective Entrapment.

Garden Parties Taped ............................................. 1002

Jurisdiction: A Right To Determine .......................... 1003

Government’s Jurisdiction Over Private Lives: 1984 And Beyond .................................................. 1018
But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

James Madison, The 51st Federalist

PROLOGUE

The Lord made it tempting: commanding Adam not to eat from the tree in the very center of the garden, and then creating Eve. The Serpent, "more subtle than any other wild Creature that the Lord God had made," approached Eve, an unsuspecting innocent, and questioned her willingness to disobey their Sovereign's command. Deterred by the prospect of punishment, Eve showed no predisposition to crime. Thereupon the Sovereign's snake promised enormous gains from criminal violation: "God knows that when you eat of it your eyes will be opened, and you will be like God, knowing good and evil."

Acknowledgements

Several participants in the events described, most notably Robert Leuci, shared their perspectives. Professor William L. Bruce, Justice Ernst H. Rosenberger, and Professor Marcia Zaroff offered helpful insight and suggestions. This account also benefited from the efforts of the staff of the New York Law School Law Review, especially Mitchell G. Williams, who not only criticized earlier drafts but helped structure this article from a larger whole, and Jonathan M. Soroko, a very helpful antagonist who also spent countless hours verifying accuracy. All of them disagreed with some of my conclusions.

I believe that "s/he"—a neuter pronoun—is better than "he" in all appropriate contexts, but have been persuaded that its use would distract the reader. Under protest, therefore, public officials and citizens are referred to as "he." Someday soon, perhaps, an expanded consciousness of sexual equality will offer us a smooth, neutral grammar, which will render this essay a stylistic anachronism. Also, I hope that someday a changing ethic in government will render this essay and the undercover techniques it discusses similarly out of date.

Eve yielded to the inducement, “took of the fruit and ate; and she also gave some to her husband and he ate.”

But of course the garden was wired. The all-monitoring Sovereign soon confronted the transgressors: “Have you eaten of the tree of which I commanded you not to eat?” Unheroic, Adam instantly cooperated—implicating his supplier, sacrificing his wife, and raising a defense of sorts: “The woman who Thou gavest to be with me, she gave me fruit of the tree, and I ate.”

God asked Eve, “What is this that you have done?” and Eve, too, took the route of confession and avoidance. Her response became a classic legal defense of entrapment: “The Serpent beguiled me, and I did eat.”

The entrapment defense failed here. Eve was condemned to pain in childbirth, Adam to toil the fields, and both to die. By also punishing the Serpent, God perhaps disavowed responsibility for the inducement. Or perhaps the entrapment defense failed because Adam and Eve had freely chosen to disobey. Whatever the reason, there remains an ambiguous moral residue in our mortality.

The Garden story also leaves us queasy because the crime that occasioned our expulsion and certain death was non-violent, consensual, unlike robbery or murder, where the victim (or family or friends) will ordinarily protest their loss, so that the Sovereign may apprehend and punish those responsible. But whom did Adam and Eve hurt? Did it warrant such punishment? Their crime was victimless: they merely possessed forbidden fruit. The purchase, sale, and consumption of contraband, forbidden consensual pleasures, leave no complainants. No one involved wants an investigation; detection is difficult. It may be necessary to monitor the garden and send in the snake.

We were expelled from our garden into a jungle, where the greedy grasp for more ways to satisfy their desires, which multiply without limit. On occasion, we are moved to act for a stranger’s benefit, and sometimes in nobler moments we care to do what is abstractly right, but by and large, as individuals, we the people are selfishly driven to gratify our desires.

Perhaps the greatest of all desires is the desire for power. In 1787 and 1788, when the people of the United States believed themselves the first in history to deliberate freely on their constitutional plan, fear of a lust for total power permeated their debates:

The pleasure of controul is palatable to all mankind without a single exception from the cradle to the throne. Let our peculiar situations be what they may, our proportion of happiness great, our domestic circles pleasing, our love of money unbounded, . . . still we are ready to risque the sacrifice of them
all for a share in the exercise of power over our fellow creatures. . . .

"History exhibits this melancholy truth" said Centinel during the founding of our republic, "that lust of dominion that is inherent in every mind, in a greater or less degree."3 Widely understood by Americans of all persuasions who designed, discussed, and ratified the Constitution, was that "when possessed of power [any governor] will be constantly struggling for more, disturbing the government, and encroaching on the rights of others."4

The American founders were not the first to realize that human nature impelled the powerful to increase their power. Aristotle, a fervent advocate of limited constitutional government, portrayed the horror of all-pervasive totalitarianism, describing tyranny's "administrative principle," for eliminating independence and self confidence, two things which a tyrant must guard against. . . . Generally ensure that people do not get to know each other well, for that establishes mutual confidence. Another piece of traditional advice to a tyrant tells him to keep the city dweller always within his view. . . . Their activities then will not be kept secret and by constantly performing servile obligation they will become used to having no minds of their own. . . . Similarly a tyrant should endeavor to keep himself aware of everything that is said or done among his subjects; he should have spies [at] any place where there [is] a meeting or gathering of people.5

2. THE COMPLETE ANTI-FEDERALIST 30 (John De Witt) (H. Storing ed. 1981) [hereinafter cited as THE ANTI-FEDERALIST]. The Complete Anti-Federalist is an exhaustive collection and analysis of letters and essays written in 1787-88 by those who opposed the ratification of the Constitution. According to Herbert Storing, the editor, although the Federalists and Anti-Federalists were divided among themselves, they were, at a deeper level, united with one another. Their disagreements were not based on different premises about the nature of man or the ends of political life. They were not the deep cleavages of contending regimes. They were much less sharp and clear-cut differences . . . of men agreed that the purpose of government is the regulation and thereby the protection of individual rights and that the best instrument for this purpose is some form of limited, republican government. . . . The nation was born in consensus but it lives in controversy, and the main lines of that controversy are well-worn paths leading back to the founding debate.

1 THE ANTI-FEDERALIST, supra, at 5-6 (footnote omitted).
3. 2 id. at 172 (Centinel) (pseudonym of Judge George Bryan and his son Samuel, both of Pennsylvania, id. at 130).
4. Id. at 310 (Federal Farmer) (pseudonym of Richard Henry Lee of Virginia, although this is subject to dispute, id. at 215-16).
Twenty-three centuries later, with the benefit of more modern technology like two-way telescreens and implanted microphones, and with the brutality of Nazi Germany and Stalinist Russia as recent examples, George Orwell's 1984 updated Aristotle's vision. If in Eden God monitors everything, in Oceania, Big Brother is everywhere, and a person lives from birth to death under the eye of the Thought Police. Even when he is alone he can never be sure that he is alone. Wherever he may be, asleep or awake, working or resting, in his bath or in bed, he can be inspected without warning and without knowing that he is being inspected. Nothing that he does is indifferent. His friendships, his relations, his behaviour toward his wife and children, the expression of his face when he is alone, the words he mutters in sleep, even the characteristic movements of his body, are all jealously scrutinized. Not only any actual misdemeanor, but any eccentricity, however small, any change of habits, any nervous mannerism that could possibly be the symptom of an inner struggle, is certain to be detected. He has no freedom of choice in any direction whatever.6

We retreated from brutal anarchy into consensual society and gave our governors amplified but limited public power to command us in common defense against violent threats, only to discover after checking our enemies' designs and desires, that often the enemy are us. Our own peaceful selfishness can be self-destructive: Our commons are tragic as we all starve because each strives in isolation to better his or her diminishing lot.7 Without government, prudent and peaceful individuals

7. See Hardin, The Tragedy of the Commons, 162 Science 1243 (1968). In an article discussing possible solutions to the world's population growth problem, Hardin described a scenario which he called "the tragedy of the commons": Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. . . .

As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd?" This utility has one negative and one positive component.

1) The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1.

2) The negative component is a function of the additional overgrazing created by one more animal.

Since, however, the effects of overgrazing are shared by all the herdsman, the negative utility for any particular decision-making herdsman is only a fraction of -1.
deplete and pollute the commonwealth, destroying it for all.

Offsetting the ever-pressing threat that governors will not only co-ordinate but dominate our lives, seize control and destroy liberty, is the tendency of an uncoordinated selfish society to self-destructive anarchy.

Our goal is liberty: freedom to develop our talents, to reach the personality our constitutional inheritance allows us, to become ourselves most fully. This has always been the promise of America. Standard school text in the United States: Desiring freedom to live our lives according to our own plan, we restrict the choices of each to ensure the remainder for all. To survive and improve our inheritance, we impose restraints upon ourselves, however reluctantly. Restricting power and liberty for the sake of liberty, limited government is delicately suspended forever between twin threats—absolutism and anarchy—extremes to which encroaching power and ungoverned liberty respectively incline it.

So, expelled from the Garden, and fearing both an anarchistic jungle and a totalitarian state, We the People of the United States have consciously set a standard for the world. We would establish for ourselves and “millions yet unborn” our own Garden-like Constitutional Republic where the People's elected representatives use the public power for the good of the community. Government polices the game—enforcing contracts, punishing crimes—so we can all cooperate and compete within limits, striving for scarce rewards according to posted rules.

We foresaw from our infancy that governors would violate their compact with the governed, not only from a hunger for power but also from material greed. Rulers would not only seize power, they would sell it. Arguing against the ratification of the Constitution, Melancton

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

Id. at 1244.

8. During the constitutional debates, Philadelphiensis proclaimed that “the energy and national strength of America are concomitant with her freedom. . . . If America is to be great she must be free; freedom is her heart, her very lifeblood.” 3 The Anti-Federalist, supra note 2, at 120 (Philadelphiensis) (pseudonym of Benjamin Workman, a mathematics instructor at the University of Pennsylvania, id. at 99). The Federal Farmer declared that “liberty, in its genuine sense, is security to enjoy the effects of our honest industry and labours, in a free and mild government, and personal security from all illegal restraints.” 2 Id. at 261.
Smith declared: "I will not say all men are dishonest; but I think that, forming a constitution, if we presume this, we shall be on the safest side." 9 Strong promoters of the Constitution like James Wilson also saw it "in the nature of man to pursue his own interest in preference to the public good." 10

Totalitarian tyrants would openly destroy our constitutional rule of law by substituting abstract ideology, naked power, and individual whim for laws enacted by the people's representatives. So, too, powerful public cheaters corrode the constitutional core. "A free republic . . . must rest for its support upon the confidence and respect which the people have for their government and laws," 11 declared Brutus in 1787. Most citizens must believe that legal commands mostly translate into facts of life, that by and large public officials honestly enforce laws and carry out orders. The People lose this faith when we come to believe that really two systems of rules operate—one set on the books for ordinary citizens at the mercy of bureaucrats, and another more favorable code for the powerful. Sooner or later the people catch on that cheating pays because cheats pay off public officials with impunity. Corruption, a cancer on the body politic, aggressively spreads, as the public good becomes routinely sacrificed to private greed; our common allegiance quickly dissolves into cynical calculating selfishness.

As private individuals, in principle we support government as long as it protects us against foreign and domestic violence and secures us from common temptations whose widespread fulfillment injures us. We force all our public officials to swear an oath of allegiance to the United States Constitution. We publicly proclaim law and order, while privately we approach the world with double standards. "[D]eclamations on the advantages and necessity of public and private virtue fall from the lips of every one, while their lives are stained with the most sordid and selfish practices." 12

Clawing in a world of hypocrites and cheats, doing whatever pays, we too do what we know we can with impunity. Sometimes we risk punishment: we cheat at taxes, buy cheap stolen goods, drive under the influence, use cocaine, commit adultery, and run red lights. To the outer world, we properly defer to government's commands, but convinced that money and connections substitute for a rule of law among the elite, we privately fulfill our forbidden desires.

9. 6 THE ANTI-FEDERALIST, supra note 2, at 154 (Melancton Smith).
11. 2 THE ANTI-FEDERALIST, supra note 2, at 370 (Brutus) (pseudonym of Robert Yates, a justice of the New York Supreme Court, id. at 358).
Still we decry public corruption and governmental overreach for their serious threat to our constitutional liberties. Ever since Odysseus had his subordinates bind him to the mast and turn a deaf ear to his entreaties, we have understood that public safety requires the governed to restrain their governors from sacrificing the general good to their private passions, and that safety also requires the governors to restrain themselves. We need government officials who take their oaths seriously. They are like us, so we know they lust for power.

We distrust placing power in their hands; yet we know we must place it somewhere. Liberty requires the power of government, but again, as the founders knew, history proves that government tends to encroach upon liberty, expanding toward totalitarian control. “It must be admitted,” the Federal Farmer observed,

that men, from the monarch down to the porter are constantly aiming at power and importance; and this propensity must be as constantly guarded against in the forms of government. Adequate powers must be delegated to those who govern, and our security must be in limiting, defining and guarding the exercise of them, so that those given shall not be abused.

Everyone saw the problem. How to harness the desire for power and constructively channel it by constitutional arrangements? How to make a limited constitutional republic real? Madison proposed the pragmatic solution in the 51st Federalist: “Ambition must be made to counteract ambition.”

The 1970’s shook and restored this nation’s faith in its rule of law. This past decade’s characteristic theme, the issue more than any other for which it seems to stand, is public reaction to corruption in government. A Vice President resigned, pleading “no contest” to bribery charges. The President of the United States, about to be impeached,

13. Homer, The Odyssey 138-39, 141-42 (W.H.D. Rouse trans. 1937). One of the obstacles along the path home was the island of the Sirens. Any man who heard the Sirens’ melodious song became bewitched to the point of forgetting all else in life save the beauty of their song. The enchanted listener, lured to the meadow of the Sirens, was rendered immobile by their song. There he would sit forever, his body decaying until death.

Odysseus yearned to hear the song of the Sirens, but understandably wished to forego the consequences of its charm. Ingeniously, Odysseus plugged the ears of each man in his crew with wax, but not before ordering them to bind him hand and foot and to fasten his body to the mast. He also commanded that should he signal his crew to untie him, they were to tie him even tighter. Thus secured, Odysseus safely led his crew past the enticements of the Sirens. Id.

14. 2 The Anti-Federalist supra note 2, at 310 (Federal Farmer).
15. The Federalist, supra note 1, No. 51, at 322 (J. Madison).
16. “Agnew Resigns the Vice Presidency,” N.Y. Times, Oct. 11, 1973, at 1, col. 1; “Agnew Plea Ends 65 Days of Insisting on Innocence,” id. at 1, col. 3. As the result of a
resigned and was pardoned from all criminal liability by his own chosen successor. The United States Attorney General, the Counsel to the President, and many other ranking public officials were indicted, convicted, and sent to prison. In the United States, the '70's were Watergate: corruption in government.

The experience was frightening when Nixon fired Special Prosecutor Cox for pushing too hard, and Attorney General Elliot Richardson resigned in protest. Could it be happening here, in this republic where no person, even the President, is above the law? We shuddered. Public officials, sworn to uphold the laws, could not themselves become successful lawbreakers. Our most cherished freedoms, protected by our

plea bargain agreement, Agnew was not tried and faced no jail term for the criminal charge.


abstract rule of constitutional law, suddenly hung by a thread, subject to the caprice of the powerful.

In the end, however, Watergate was more comforting than frightening. It confirmed our trust in ourselves and the enormous strength of a faceless constitutional republic. With fascination we witnessed a triumph of massive inexorable legal process. Journalists wrote their exposés, legal gears slowly turned and powerful men tumbled, tangled in an institutional lattice of countless lesser public officials doing their jobs.

Prison sentences were served and commuted, pardons were issued. Memos became memoirs with different casts of heroes and villains. Monuments were erected to this fight against corruption: Across the country mandatory ethics courses were instituted in law schools. Congress enacted legislation establishing regular procedures for appointing special prosecutors when necessary. Watergate was all neatly behind us, we thought. The good-guys were basically separable from the bad, and two decent law-abiding citizens—Gerald Ford and Jimmy Carter—successively occupied the White House. Attention began to shift from corruption to the economy.

But it wasn’t so simple. The '80's began and because of ill-timed leaks, corruption in government once again burst to front-page attention: Abscam, the code name for a massive federal undercover investigation of corruption, in which Federal agents posed as representatives of rich Arab sheiks trying to buy favors from federal, state, and local officials. Early reaction to Abscam raised concern. The American Civil Liberties Union and other groups cried "foul." They characterized the investigative technique employed as "unfair," "entrapment," a violation of due process of law. It was one thing to use Nixon’s own secret recordings of corrupt schemes against himself and his scheming subordinates; it was quite another to countenance the FBI and Justice Department setting in motion their own phony schemes, baiting unsuspecting public officials and secretly monitoring their reactions.

Did the end—exposing corruption—justify these means—manufacturing phony crimes and offering very attractive inducements to corruption? Clearly a basic question of the '70's remained: What techniques of investigation, what government-sponsored insinuations in intimate settings, what poisons were we willing to inject into the legal process in order to root out the festering rot of public corruption?

Those who greeted Abscam with an “oh no, not again” were making a big mistake. This controversy about official corruption involved

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an added dimension—the examination of necessary and proper techniques of investigation—and was therefore not merely a repetition of Watergate. To another group of secret agents, special prosecutors, and well-informed citizens who lived through the '70's not in Washington, D.C., but in New York City, it was not all happening again. It had never stopped.

New York had had its own great bout with official corruption, months of front-page headlines, televised hearings, and a Special Prosecutor appointed by the state's Chief Executive, who was later fired by a successor while investigating that successor's close political associates. New York had secret tapes which revealed a criminal justice system rotten to the core. Exposing official corruption in the 1970's was, then, a tale of at least two cities.

Unlike Watergate, both the New York experience and Abscam have failed to neatly separate in the public mind forces of good from forces of evil. Why? The technique of investigation became an independent issue. At times how to make a corruption case dwarfed the problem of who was corrupt. Essentially the identical technique was utilized in both investigations: In New York honest federal prosecutors simulated crimes and sent undercover agents fully monitored and carefully controlled into the criminal justice system to pose as criminals and "fix" their own cases in order to determine who within the system was corrupt.

Government undercover agents posed as criminals, fixed phony cases and penetrated the system—a strong and unpleasant remedy for a very serious illness. United States v. Archer, a prominent case pio-

22. Maurice H. Nadjari was appointed special prosecutor by New York Governor Nelson Rockefeller on September 19, 1972. N.Y. Times, Sept. 20, 1972, at 1, col. 6. Governor Hugh Carey attempted to dismiss Nadjari on December 23, 1975, noting "clashes in personalities [and] a recent series of adverse court decisions" which had allegedly caused "a perceptible decline in public confidence in Nadjari." Id., Dec. 24, 1975, at 1, col. 6. A Times article by Marcia Chambers noted:

It was also learned from three sources that in the last three months Mr. Nadjari's office had been investigating a number of high officials connected to the Carey administration, some of whom were based in the city. The inquiry, which is said to include politicians and judges, centers in part on the alleged fixing of cases.

Id. Because of strong public outcry, Nadjari was reinstated—only to be dismissed permanently by Governor Carey and Attorney General Lefkowitz on June 25, 1976. Id. June 26, 1976, at 1, col. 6. 

neering this technique against public officials, involved deception, not only of corrupt elements, but of other honest governmental officials. The technique's success required lies under oath. Under orders and in the name of rooting out corruption, undercover government agents committed acts which if done by citizens in their private capacity would have constituted serious crimes.

Parts of this story are well-known. Serpico and Prince of the City are two of many books and movies whose main characters and events figure here. But this history is not primarily about the characters and passions of the corrupt and corruption fighters. Left unasked by Watergate, at the center of public and court controversy in New York in the '70's and the real Abscam problem of the '80's, is the question of the investigative technique and who has authority to use it. The central question concerning corruption remains for New York and the nation: Is carefully monitored criminal simulation necessary and proper, in fact indispensable, for a real commitment to a rule of law, or is it an unfair intrusion into the liberties of the citizenry and a serious threat to our rule of law, as well as a violation of Constitutional due process? If sometimes the technique is necessary and proper and other times an unfair intrusion and serious threat, how can we distinguish the occasions and how can we use it properly?

There are many ways to put the question. Who guards the guardians? Whom should we fear more, zealous honest public officials who are willing to use trickery and deceit to cheat the cheats, or public officials, among them federal and state legislators, defense attorneys, prosecutors, and judges, who allow criminals to buy their way out of the rules? Are we threatened with 1984 in 1984 by "special prosecutors" who use special techniques to detect and prosecute this most resistant strain of "victimless" crime, public corruption? Specifically, what is entrapment? What are its moral and legal limits? What constitutes outrageous governmental conduct? Generally, what does it mean to be committed to a rule of "law" and not of "men"? When do the ends justify the means?

This essay addresses these questions in the context of a federal constitutional republic. The United States Constitution, the nation's higher law, establishes basic structures of government, dividing power among executive, legislative, and judicial branches. It also guarantees individual rights and fundamental liberties which override passions and policies even of the majority. Public opinion as to good public pol-

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icy, however strongly held at a given moment, yields to contrary constitutional rights guaranteed in our secular Bible. Freedom from unreasonable searches and seizures, coupled with other basic rights, amount to a fundamental promise that government will essentially leave us alone to go about our business and strive for success according to posted rules. Free, within limits.

By adopting our federal republic, we partitioned power between a single central government and several state governments. The basic purpose of our federal plan has been to promote the general welfare while we secure freedom, by delegating to the federal government adequate power to superintend all and only national concerns, while reserving to the state governments the power to superintend local concerns. It was unanimously agreed during our founding that not all boundaries between national and state power could be established in advance.

The federal government would provide for the common defense, make treaties, regulate interstate commerce, coin money, etc., and by its own explicit declaration the Constitution and all federal law made pursuant to it was the "supreme Law of the Land." Each state's primary sovereign function was its internal police power, which essentially included a power to define, detect, prosecute, and punish crime. The federal government would also define, investigate, and punish, but only those crimes which involved the nation as a whole: e.g., counterfeiting and treason. All public power not delegated to the federal government was reserved to the local government, or the people, in whom ultimate sovereignty rests. But the United States also explicitly guaranteed each state "a republican form of government." Each state constitu-

25. U.S. Const. art. VI, cl. 2.

26. The absence of such explicit declarations of state and individual rights was the Anti-Federalists' most telling criticism of the proposed Constitution. The Constitution was ratified without a Bill of Rights, but with an understanding at the time that the new Congress would immediately take up proposed guarantees of individual and states' rights. Accordingly, James Madison, leader in the House, introduced the first ten amendments which the states ratified as of November 3, 1791. I. Brant, 3 James Madison (1941); M. Farrand, The Framing of the Constitution 252 n.3 (1913). Beyond specifically enumerated individual rights guaranteed by the first eight amendments, the Bill of Rights included the "saving" provision of the ninth amendment for individual rights and the reserving provisions of the tenth amendment for state and popular powers not delegated to the federal government. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. Const. amend. X. The principal sources for the events that led to the adoption of the Bill of Rights are collected in J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution (1801) and M. Farrand, The Records of the Federal Convention of 1787 (1937).

27. Article IV, section four states in relevant part: "The United States shall guaran-
tion might differ radically from the next, but every citizen of the United States was assured that the people of every state would be represented by freely chosen delegates who would reflect their will and legislate for the common good.

If, as Hamilton asserted in the 71st Federalist, "the republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust their affairs,"28 and if the guarantee clause of the United States Constitution truly guarantees a republican state government to every citizen in every state, then federal jurisdiction may extend to defining, detecting and prosecuting official corruption in state government. This was not discussed in 1787.

Immediately thereafter, sharp disputes arose between the federal government and the states over the boundaries between federal and state power, resolved only by the Civil War.29 An aftermath of the


28. The Federalist, supra note 1, No. 71, at 432 (A. Hamilton).

29. In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), the United States Supreme Court exercised its jurisdiction to hear a suit brought by two citizens of South Carolina against the State of Georgia to collect a debt owed to an estate. The Georgia House of Representatives, considering the Court's exercise of jurisdiction in Chisholm an affront to state sovereignty, passed a bill that would make enforcement of the Court's judgment a felony punishable by death. See State Documents on Federal Relations 7-11 (H. Ames ed. 1970). The eleventh amendment, adopted in response to Chisholm, explicitly withdrew cases like Chisholm from the jurisdiction of the federal courts: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI (ratified 1798).

Not long after Chisholm, the United States Supreme Court asserted federal supremacy in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), in which the Court invalidated a Virginia statute that purported to confiscate the property of British subjects in violation of the provisions of the Treaty of Peace with Great Britain of 1783. Many of the Supreme Court's early decisions, especially under Chief Justice Marshall's leadership, adjudicated disputes over the extent of state and federal power. Among these boundary-setting decisions are some of the most familiar landmarks of constitutional jurisprudence. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (state grant of a steamship monopoly affecting interstate navigation held void as in conflict with federal law licensing such commerce); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (state criminal conviction reversed as violative of the supremacy clause); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Maryland law imposing tax on federally-chartered bank held void as violative of the supremacy clause); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (Supreme Court asserts appellate jurisdiction to reverse a judgment of Virginia's highest court held to be in conflict with a United States treaty).
Union victory, the fourteenth amendment, explicitly guaranteed every citizen "due process of law," now not only from the federal but also from their own state governments. The United States Supreme Court, to whom it had fallen to finally ascertain the constitutional boundaries between federal and state power, has held that this single clause im-

Probably the most important early instance of federal/state power rivalry was occasioned by the enactment of the odious Alien and Sedition Acts, Act of July 14, 1798, ch. 73, 1 Stat. 596; Act of June 25, 1798, ch. 58, 1 Stat. 570. These laws drew strong negative responses in the Kentucky and Virginia Resolutions of 1798, in which these states asserted, not only that the Alien and Sedition Acts were bad policy, but also that they were unconstitutional. Kentucky and Virginia Resolutions of 1798, reprinted in 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 540, 528 (J. Elliot, ed. 1901). The Virginia Resolution asserted that when the federal government acted beyond the powers allowed to it by the Constitution "the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties, appertaining to them." Id. at 528.

The state challenge to federal supremacy reached a new intensity during the Nullification Crisis of the early 1830's, when federal tariff legislation, Act of July 14, 1832, ch. 227, 4 Stat. 583, was met with the South Carolina Ordinance of Nullification, 1 S.C. Stat. 329 (1832), which declared the federal enactment to be "null, void and no law, [not] binding upon this State, its officers, or citizens . . . ." Id. President Andrew Jackson's reaction to South Carolina's defiance of federal authority is discussed infra note 749.

The final Constitutional crisis was the Civil War. While the outcome settled the question of a state's right to secede from the Union, and by implication, its right of nullification, the federal government's denial of "State Rights," in the sense of the power to nullify, was not the precipitating cause of the war. After 1832, it was Northern states, particularly Wisconsin and Massachusetts, which practiced nullification with a vengeance, refusing to enforce the Fugitive Slave Act and in some instances explicitly denying the federal government's right to enforce that Act. See, e.g., In re Booth, 3 Wisc. 157 (1854), rev'd sub nom Ableman v. Booth, 62 U.S. (21 How.) 506 (1858) (state court freed federal prisoner by writ of habeus corpus); see generally P. Paludan, A Covenant with Death (1975). The Northern abolitionist William Lloyd Garrison called the Constitution the "parent of all other atrocities . . . An agreement with Hell . . . a covenant with death." Id. at 3. Northern newspapers rejoiced at the use of the doctrines of the Virginia and Kentucky Resolution by Northern states to prevent the return of fugitive slaves, W. Robinson, Justice in Grey, 442 (1941), while the President pro tem of South Carolina's secession convention denounced Northern nullification as the cause of the war: "Has not [the Constitution] been trodden under their very feet by every Northern State, by placing on their books statutes nullifying the laws for the recovery of fugitive slaves?," quoted in E.M. Thomas, The Confederate Nation, 35 (1979). State Rights was a doctrine common to both North and South, and nullification was even attempted in the North during the war, see P. Paludan, supra, at 33-34 and cases cited therein. The Constitution adopted by the Confederacy, far from being a state rights document, was almost identical with that of the United States. See E.M. Thomas, supra, at 42. Despite the traditional view, it is incorrect to distinguish between the Southern and Northern states on the eve of the Civil War on the basis of State Rights. See P. Paludan, supra, at 225-26.

31. As discussed, supra note 29, the Supreme Court asserted very early that it was the final arbiter of the division of authority between the federal government and the
licitly incorporates other fundamental guarantees of the Bill of Rights

states under the Constitution. Chief Justice Marshall addressed the Supreme Court’s constitutional role in the opening paragraph of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819):

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

Id. at 400-01.

Chief Justice Marshall’s view has prevailed and shaped the succeeding history of the nation. The federal system established by the Constitution requires policing the boundaries between state and federal power. James Madison recommended “a negative, in all cases whatsoever, on the Legislative acts of the States, as the King of Great Britain heretofore had.” Letter from James Madison to Edmund Randolph (April 8, 1787), reprinted in 2 THE WRITINGS OF JAMES MADISON 336 (G. Hunt ed. 1904). Under Chief Justice Marshall’s leadership, the Supreme Court performed at least part of this negating function that Madison originally would have entrusted to the national legislature.

Leading proponents of states’ rights, such as Judge Spencer Roane of the Virginia Court of Appeals, denied that the Constitution authorized federal judicial review of state court decisions as had been provided by § 25 of the Judiciary Act of 1789, 1 Stat. 73. Thus, the Virginia Court of Appeals, refusing to follow the mandate of the United States Supreme Court in Fairfax’s Devisee v. Hunter’s Lessee, 11 U.S. (7 Cranch) 603 (1813), declared:

The Court is unanimously of the opinion, that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this case was improvidently allowed under the authority of that act that the proceedings thereon in the Supreme Court were coram non judice in relation to this court; and that obedience to its mandate be deemed by this court.

Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 320-21 (1816) (quoting the opinion below of the Virginia Court of Appeals, Hunter v. Martin, 18 Va. (4 Munf.) 1, 59 (1815)). Justice Story, writing for the unanimous Court in Martin, explained that the Supreme Court was the ultimate judge of the constitutionality of state actions, whether executive, legislative or judicial:

The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

14 U.S. (1 Wheat.) at 314. Thus, the Supreme Court’s role in defining the extent of
which had previously restrained only the central government. But however much the Civil War altered federal-state relations, each state’s sovereignty continued to consist essentially in defining, detecting, and punishing local crime, according to its own standards.

Just as limited government must withstand dual pressure to absolutism and anarchy, so too a working constitutional federalist republic must withstand tendencies toward consolidation and nullification. The constitutional plan breaks down when either the central government ignores constitutionally guaranteed state sovereignty and usurps prerogatives guaranteed the states, or when state governments go their own way, defying or evading legitimate central mandate. The federal plan also breaks down when government at either level ignores the people’s guaranteed constitutional rights and interferes with their privacy and liberty.

Just two weeks short of 1984, the Justice Department surfaced its three-and-a-half-year undercover Operation Greylord with bribery indictments of Chicago judges and prosecutors. To expose local corruption, the Federal Bureau of Investigation had bugged a judge’s chambers, sent agents posing as corrupt prosecutors and defense attorneys, and injected phony “crimes” into the local justice system. The day after the New York Times front-page headline announced Greylord, the newspaper headlined: “Questions about Methods Used in Chicago Court Investigation.” The attack and defense had begun. None of the techniques used in Chicago were new. “All of them were used in Abscam,” Professor G. Robert Blakey observed. “If it’s appropriate to use these techniques against Congressmen and Senators, why isn’t it appropriate to use them against judges?”

federal power over the states required the rejection of the states' rights concept of a state judiciary wholly independent of the central government.

32. The Supreme Court has said that in deciding which guarantees of the Bill of Rights are incorporated by the due process clause of the fourteenth amendment the proper search is for principles so fundamental as to be “implicit in the concept of ordered liberty.” Palko v. Connecticut, 302 U.S. 319, 325 (1937). Many of the guarantees of the first eight amendments have been held applicable to the states. See Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Malloy v. Hogan, 378 U.S. 1 (1964) (freedom from compelled self-incrimination); Wolf v. Colorado, 338 U.S. 25 (1949) (freedom from unreasonable search and seizure); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise of religion); DeJong v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press); Fiske v. Kansas, 274 U.S. 380 (1927) (freedom of speech).


35. Id. at A20, col. 5.
The debate continues beyond 1984 while undercover operations spread, occasionally to surface and splash corruption into view. Are we steadily but unwarily embracing totalitarianism to rid ourselves of anarchy? This essay argues that: 1) successfully maintaining limited government sometimes requires the use without abuse of simulated crimes—carefully monitored “stings” even in the very temples of justice; 2) the federal government has jurisdiction under the guarantee clause of the United States Constitution to initiate stings to uncover local corruption; and 3) a set of double standards is necessary and proper to allow for vigorous detection of the abuse of public power while ensuring the privacy of private citizens.

SERPICO TO ARCHER

After New York City police officer Frank Serpico successively failed to involve his own department, municipal investigative agencies, and the Mayor in combating police corruption, he went to The New York Times, whose front page exposé forced Mayor John V. Lindsay to appoint the Knapp Commission.48 Detective Robert Leuci, assigned to an elite narcotics unit whose members were known as “Princes of the City,” had come to resemble the criminals he was pursuing. He decided to turn his life around and described in detail to Knapp Commission attorney Nicholas Scoppetta a widely fixed local criminal justice system.

Many cases were sold out during the investigative stage prior to arrest; defendants were warned about wiretaps on their phones or their status as targets of an investigation. Assistant district attorneys as well as police officers would tip off defendants before executing judge-issued warrants, so they could get rid of evidence.

Other cases were fixed at the time of arrest; defendants would pay to be released at the scene. Sometimes evidence would be altered, especially in narcotics cases where non-narcotic substances were substituted for the drugs actually found. The confiscated contraband would then be resold by the police officers either through the defendant or through the informant who had led them to the dealer. Also at the time of arrest, an open-ended complaint would be drawn allowing an

48. See id., Apr. 25, 1970 at 1, col. 1. Popularly known as the Knapp Commission, the Commission to Investigate Allegations of Police Corruption was reluctantly appointed by Mayor John V. Lindsay on May 21, 1970; the Commission was eventually forced to solicit funds from private foundations and the federal Law Enforcement Assistance Administration in order to sustain itself. At its peak, the Commission consisted only of 26 investigators and attorneys excluding clerical staff. See id., Aug. 7, 1972 at 1, col. 5-6, for an account of the Commission’s history. See supra note 24 and sources cited therein. The discussion that follows draws in part upon unpublished materials and the author’s discussions with various participants in the events discussed.
arresting officer later to testify consistently with former facts alleged, yet making the arrest appear to have violated Constitutional guarantees. The case would be thrown out.

After arrest, awaiting trial, a defendant, often through his lawyer, would pay an Assistant District Attorney ("A.D.A.") to reduce bail, or to register the defendant as an informant and credit him with making cases he never made. His reported "cooperation" would result in charges reduced or dismissed. Sometimes a cop fixed it on his own, not informing the A.D.A.; other times the A.D.A. shared in it.

After indictment a case would be fixed through a court clerk by moving it before the right judge. During more than one of Leuci's recorded conversations it was alleged that judges would take payments to decide a motion improperly, or accept reduced pleas, or dispense light sentences.

Leuci agreed to spearhead an undercover probe into local corruption on two conditions: 1) It must be a federal investigation: Leuci feared local agencies would sabotage it and have him killed; and 2) the investigation must not be targeted only at police, but must extend to lawyers, prosecutors and, most importantly, to judges who "set the pace" in the criminal justice system.

As a demonstration on the spur of the moment, Leuci posed as a mob go-between, and made a deal with detectives in the Confidential Investigations Bureau to sell out all organized crime wiretaps. Hearing Leuci's secret recording, the Justice Department in Washington immediately authorized the United States Attorney's Office for the Southern District of New York to launch a federal investigation of corruption in New York City.

Newly-appointed police commissioner Patrick V. Murphy enthusiastically promised the department's full cooperation on one condition—like Leuci, he too demanded, and United States Attorney Whitney North Seymour, Jr. agreed, that the probe would target not only police but all other corrupt officials.

Risking his life to regain his sense of self (and also perhaps to avoid future prosecution for past crimes), Leuci became an undercover agent, wearing a concealed body recorder, documenting corruption under the daily supervision of Assistant United States Attorneys Nicholas Scoppetta and Edward "Mike" Shaw. Leuci's most significant success was the exposure of prominent defense attorney Edmund Rosner, who specialized in winning large narcotics cases which had appeared airtight until alibi witnesses appeared or prosecution witnesses disappeared. Through Nicholas DeStefano, a corrupt intermediary, Rosner paid Leuci for secret grand jury testimony.

37. Nicholas Scoppetta had been sworn in secretly as an Assistant United States Attorney.
Leuci thought of himself, and demanded that others treat him, as a government agent and not merely an informant trading information for leniency; but Andrew Tartaglino, who three years earlier had engineered a successful federal probe of corrupt federal narcotics agents in New York City and superintended worldwide narcotics enforcement for the United States, neither forgot nor forgave Leuci's corrupt past. Assigned to supervise the street and backup agents from Washington, Tartaglino considered Leuci merely an informant and sought to replace him at the first good opportunity. When Leuci's undercover status began leaking and his psyche shredding after he indirectly caused the suicides of friends, Tartaglino substituted his own agent, Sante Bario, to continue Leuci's efforts, as Leuci had continued Serpico's, to make cases against prosecutors and judges, none of whom were yet proven corrupt.

Several independent sources had indicated that in Queens, the "rottenest" borough in New York City, assistant district attorneys and judges routinely fixed cases. After some abortive attempts, at the urging of Tartaglino, the United States attorneys decided to force a fix beyond the police, inward toward the rotten core, by simulating a crime with a cooperating local arresting officer and processing through the system an arrested undercover agent posing as a defendant trying to buy his way out.

Concerned with the implications of a sting which he knew would inevitably involve local police filing false affidavits and federal agents lying to honest, unsuspecting state judges, United States Attorney Seymour consulted ranking state authorities. He met in chambers with the Chief Judge of the New York Court of Appeals, Stanley Fuld, and apprised him of both the unproven allegations, and the criminal simulations planned to prove them. Fuld could not, nor was he requested to, authorize the federal use of this intrusive technique; but the Chief Judge showed concern at possible judicial corruption, expressed his appreciation at being informed, and offered his best wishes for success. Seymour also consulted Police Commissioner Murphy, who was apprehensive that an arresting officer might later be prosecuted by a vindictive District Attorney's office which he had helped sting, but the Commissioner agreed to cooperate and supplied the arresting officer, Vincent Murano.

Agent Bario, posing as Salvatore "Sam" Barone, out-of-town mob killer in New York for the Gallo-Columbo gang wars, was arrested by Vincent Murano at the Omaha Diner in Queens. Barone was charged with the unlawful possession of two unlicensed handguns. Nicholas DeStefano, the corrupt middleman who had inadvertently discovered

Leuci's secret identity, and was trading his own temporary freedom for limited cooperation, introduced agent Bario—Sam Barone—to Leon Wasserberger, a bail bondsman. Wasserberger took Bario to Frank Klein, a prominent Queens defense attorney and past president of the Queens Criminal Bar Association, who instantly understood Barone's "I can not afford to appear at trial" as its corrupt equivalent—"I can afford not to appear at trial."

Hearing the details of Barone's arrest, and unhappy that the case was now before a grand jury, attorney Klein assured Barone that the only way to fix his case would be through the person who controlled the grand jury, the Assistant District Attorney in charge of the grand jury bureau. Bario made a downpayment and they scheduled a future meeting date.

Because the targeted Queens District Attorney's office was the only office with jurisdiction to prosecute local bribery, the United States Attorneys decided to create federal jurisdiction by having Bario call attorney Klein from New Jersey, thus committing the federal crime of using the telephone across state lines to promote the state crime of bribery. When they met again, Klein informed Barone that he had spoken to his friend, and that Barone should tell a sympathetic story to the grand jury which would then decide not to indict. The attorney and bail bondsman each assured Sam Barone that this was the only way, and that because he would be bribed, the district attorney could be relied upon not to ask any damaging questions.

Together the three of them created a phony story to tell the grand jury, making Barone a junket coordinator for a Las Vegas gambling casino with a Las Vegas gun permit he didn't realize wasn't valid in New York. Klein set the price for the fix at $15,000 and demanded full payment up front.

Again the United States Attorneys were concerned. If possible, they wished to avoid having a federal agent lie under oath to an unsuspecting state grand jury. But short of aborting the investigation, there seemed no other way. There were substantial allegations of corruption in Queens. The defense attorney who had taken a bribe might be falsely implicating an innocent prosecutor, looking to rip off his client, hoping the grand jury on its own would choose not to indict. Washington had refused to authorize a wiretap on Klein's phone, seeking to avoid the intrusion into the attorney-client relationship. Either a cloud of suspicion would forever hang over the presenting District Attorney, who was entitled to have his innocence shown, or else a grand jury was in the hands of a corrupt prosecutor. In that case, it seemed most appropriate to fight fire with fire.

So, the United States Attorney authorized Bario to testify falsely under oath to the New York grand jury, but urged him to lie as little as possible, and ordered him and arresting officer Murano not to record the grand jury proceedings, trusting instead an accurate stenographic record.

On May 9, 1972, Norman Archer, the Grand Jury Bureau Chief of the Queens County District Attorney's office, presented the "case" of People v. Salvatore Barone. Murano, the arresting officer, told his story straightforwardly, and then Barone himself waived immunity and told the phony story. When he mentioned the Las Vegas gun permit, although the stenographer failed to record it, a grand juror asked Archer if he had checked that Barone had such a valid Las Vegas permit. Archer was forced to lie on Barone's behalf. He had checked it out, he assured the grand jury: Barone did have a valid Las Vegas permit. Of course, Archer had never checked it out. If he had, he might have discovered that not only didn't a valid permit exist, but neither did Salvatore Barone.

Summing up, the District Attorney informed the grand jury that in similar circumstances a neighboring grand jury had recently given two Puerto Ricans a break who had valid Puerto Rican gun permits they didn't know were not valid in New York, and furthermore that there were potential constitutional problems with the search. The grand jury chose not to indict Barone.

Later that day, at a coffee shop, agents saw the defense attorney hand the prosecutor an envelope.

With a solid bribery case against bail bondsman Leon Wasserberger, attorney Frank Klein, and Grand Jury Bureau Chief Norman Archer, and with Barone's credibility established, the investigation was rapidly approaching its ultimate targets—judges. United States attorneys were processing other phony arrests through the courts in Brooklyn, Manhattan and Queens; fertile avenues into the heart of the system lay open—when suddenly, the whole highly confidential investigation became front-page news. The New York Times had begun it with headlines proclaiming: "Graft Paid to Police Here Said to Run into Millions."40 Two years and two months later, on June 15, 1972, a three-column New York Times story headlined: "U.S. Looking Into Heroin Bribery Here; Some Officials are Said to Be Implicated: Judges, Prosecutors and Police Held Involved" aborted the investigation.41

Early the next morning, federal agents executed a search warrant on Norman Archer's house and found an envelope in a pile of blankets in his basement storage closet which contained five one hundred dollar

41. Id. June 15, 1972, at 1, col. 1.
bills whose serial numbers matched the bribe money Barone had paid Klein.

Archer, Klein, and Wasserberger were indicted for conspiracy to violate the Travel Act in that they “use[d] . . . facilit[ies] in interstate and foreign commerce, that is, the telephone, with intent to carry on the unlawful activity of bribery.”

The evidence was overwhelming that Archer, Klein, and Wasserberger had accepted $15,000 to fix what they thought was a real case of illegal gun possession by a mobster. Tape recordings corroborated Special Agent Bario’s testimony that he only appeared with money and an inclination to spend it to bribe his way out of the system, that defendants set the price and terms and produced the grand jury appearance with a sympathetic District Attorney who lied. Furthermore, marked money had been found distributed among the three defendants. The defense could hardly argue that the fix never occurred, or that their clients were basically innocent.

Milton Gould, Klein’s experienced and skillful attorney, knew that the less the jury focused upon his client’s activities, the better. The defense sought to divert the jury’s attention from the defendants’ conduct to the Government’s. In their opening, they accused the Government of having used “every ingredient of a theatrical production.” The Government had created the case “the same way a Hollywood producer would make a film”; they selected the actors, costumes, script, and soundmen. “Before we are finished,” Gould assured the jury, “you will be ashamed of the United States government in this case.”

Surely the federal prosecutors had used an appropriate simulation on an appropriate occasion. But Gould’s prophecy that the United States Attorneys would be condemned proved not altogether false.

The trial defenses were two: 1) No federal jurisdiction—the foreign and interstate telephone calls were a pretext, and 2) Entrapment. Judge Tenney brushed aside the first defense. In a pretrial decision, he found that the Travel Act literally applied to this situation.

God had rejected Adam and Eve’s entrapment defense, although the case reporter does not make clear precisely why. Subsequent defendants had fared no better before the United States Supreme Court, which refused to read into the United States Bible—its Constitution—an entrapment defense. But in 1932 the Supreme Court in Sorrells v. United States excused Sorrells for unlawfully possessing fruits of the vine, by “firmly recognizing” a federal entrapment defense. A
federal prohibition agent posing as a tourist had visited an unsuspecting veteran, and reminisced about common war experiences. After gaining the target’s confidence, the agent asked for some liquor and was twice refused. At the third request, the defendant Sorrells produced some booze and was prosecuted. A unanimous United States Supreme Court found this to be entrapment, but divided as to why.46

At the time of the Archer trial the most recent Supreme Court entrapment case was Sherman v. United States.47 In Sherman an informant first met the defendant in a doctor’s office where both were being treated for narcotics addiction. After several conversations about problems with kicking the habit, the informant asked Sherman for a good source of junk, claiming the treatment was not working for him. Determined to rid himself of the addiction, Sherman avoided the issue at first. But the informant persisted and finally, out of pity, Sherman acquiesced, purchasing narcotics for both.

The jury convicted; Sherman was sentenced to ten years. The Second Circuit Court of Appeals affirmed, but the United States Supreme Court unanimously found entrapment, again splitting as to why.48

Chief Justice Warren declared common ground: “The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.”49 And still, almost certainly expressing unanimous sentiments of all realistic citizenry, he continued: “Criminal activity is such

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46. Id. at 451-52, 458-59. The Sorrells majority stated that entrapment is available to an accused person as a “defense” and is an issue properly presented before a jury. Id. at 452. For the Court the “controlling question” was “whether the defendant [was] a person otherwise innocent whom the Government [was] seeking to punish for an alleged offense which [was] the product of the creative activity of its own officials.” Id. at 451. Accordingly, for the majority, “predisposition and criminal design of the defendant [were] relevant.” Id.

Justice Roberts, in a separate opinion, differed with the Court’s characterization of the entrapment issue as a “defense.” Id. at 455-56. For Justice Roberts, the doctrine of entrapment “rest[ed], rather, on a fundamental rule of public policy” which mandated that “courts must be closed to the trial of a crime instigated by the government’s own agents.” Id. at 457, 459. The predisposition of the defendant was, therefore, not relevant to Justice Robert’s understanding of entrapment. He considered it to be appropriate for resolution by the court, rather than the jury. Id. at 457-58.


48. Id. For the majority, “the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.” Id. at 377; see infra notes 51-55 and accompanying text. In contrast, the concurrence stated that the “crucial question . . . to which the court [as opposed to the jury] must direct itself is whether the police conduct revealed in the particular case falls below the standards to which common feelings respond for the proper use of governmental powers.” 356 U.S. at 382 (Frankfurter, J., concurring); see infra notes 57-58 and accompanying text.

49. 356 U.S. at 372.
that stealth and strategy are necessary weapons in the arsenal of the police officer.”

The Chief Justice spoke only for a bare majority by using the “subjectivist” basis of entrapment:

“[W]hen the criminal design originates” with government investigators, 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,” . . . [t]hen stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.

The fact that government agents “merely afford opportunities or facilities for the commission of the offense” did not constitute entrapment, which occurred only when the criminal conduct was “the product of the creative activity” of law enforcement officials. The Chief Justice gave his oft-quoted test which focused on the subjective mental state of the particular defendant: “To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.”

Almost repudiating the Sovereign of Eden, Warren declared: “The case at bar illustrates an evil which the defense of entrapment is designed to overcome . . . . Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.”

Because five justices of the Supreme Court were convinced there was at least a reasonable possibility that defendant Sherman was a non-predisposed unwary innocent who had been beguiled by government into crime, they found entrapment as a matter of law, the jury having already rejected it as a matter of fact.

Defense attorney Gould knew that under this majority subjectivist view, Klein, Archer and Wasserberger had no entrapment defense. Of course Klein was predisposed to commit bribery. He had bragged on tape that nearly every case was a fix, and Wasserberger had talked of many businesslike years of bribery with Klein. Archer had not even

50. Id.
51. Id. at 372 (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)).
52. Id. (quoting Sorrells v. United States, 287 U.S. at 441, 451 (1932)) (emphasis added by the Sherman Court).
53. 356 U.S. at 372.
54. Id. at 376 (emphasis added).
55. Id. at 373.
been induced by a government agent at all, and the inescapable fact was that no defendant displayed any reluctance to fix the case.

Gould wanted the jury to ignore the defendants' predisposition and instead to focus on the Government's conduct, finding it outrageous, and worthy of condemnation. This was the view of four concurring Supreme Court justices in *Sherman*. In contrast to subjectivists who focus upon the particular defendant's mental state, objectivists see the entrapment defense as a way to keep government techniques of investigation within proper limits. From this objectivist perspective, the entrapment defense primarily protects the purity of the criminal justice process. The objectivist focuses not upon whether the particular defendant was predisposed, but rather, with a view toward preventing Government excess, upon whether the average law-abiding citizen would succumb to the type of pressure exerted.

Speaking for four justices, Frankfurter observed that entrapment had always been a means
to express the feeling of outrage at conduct of law enforcers...57

....

The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced.58

For the objectivists in 1958, as for defendants Archer, Klein, and Wasserberger in 1973,

[t]he crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the "intention" to commit the crime originated with the defendant or government officers...59

The *Archer* defense attorneys wanted the jury to feel revolted at Bario's portrayal of Barone, the phony arrest, lying to a grand jury under oath, etc., and therefore to acquit the defendants. The majority

57. 356 U.S. at 378 (Frankfurter, J., concurring in result).
58. Id. at 380.
59. Id. at 382.
rule, however, which bound United States District Judge Tenney at
trial, was subjective entrapment, and under it, whether lying to a grand
jury was independently reprehensible, the point remained that these
defendants without doubt had been predisposed to commit crimes of
conspiracy and bribery. Therefore they were not entrapped. Whether
they were similarly predisposed to telephone interstate to further their
corrupt scheme is a more difficult question. They were probably not
predisposed in either direction. Wasserberger often warned that crimi-
nal activity not be discussed over the phone, but the defendants were
quite willing to use the telephone to set up meetings, and they were
not particularly averse nor predisposed to call out-of-state. The cate-
gory just did not seem to apply to the interstate federal jurisdiction
element which was also part of the definition of the crime. Still, once
Judge Tenney ruled as a matter of law that the objections to federal
jurisdiction were unfounded, the issue of a government jurisdiction
trap almost disappeared from the trial.

Instead, the focus on entrapment at this federal trial was where it
would have been at a New York State trial: predisposition to commit
bribery.\textsuperscript{60} Furthermore, under the subjective view of entrapment, once
the defendant admitted committing the acts but raised the defense, it
was open season for the government to show the defendant’s predispo-
sition by introducing evidence not otherwise relevant: Klein’s other
corrupt acts and the defendants’ attitudes toward corruption in
general.

To counter this, the defense could only hope the jury would either
ignore or misunderstand Judge Tenney’s instructions on subjective en-
trapment—that notwithstanding overwhelming proof of the defen-
dants’ predisposition to fix Barone’s case, the jury would say “no” to
the government’s investigative technique.

The defendants had no case and called no witnesses. The docu-
mented bribe and subjectivist entrapment, which made the defendants’
predisposition dispositive and the government’s investigative tech-
niques irrelevant, combined to produce a jury verdict: guilty on all

\textsuperscript{60} N.Y. Penal Law § 40.05 (McKinney 1975). The statute provides in pertinent
part:

\begin{quote}
[I]t is an affirmative defense that the defendant engaged in the proscribed con-
duct because he was induced or encouraged to do so by a public servant, . . .
and when the methods used to obtain such evidence were such as to create a
substantial risk that the offense would be committed by a person not otherwise
disposed to commit it. . . . Conduct merely affording a person an opportunity to
commit an offense does not constitute entrapment.
\end{quote}

\textit{Id.}

\textit{See, e.g., United States v. Rubio, 709 F.2d 139 (2d Cir. 1983); United States v. Stein-
berg, 551 F.2d 510 (2d Cir. 1977); United States v. Toomey, 404 F. Supp. 1377 (S.D.N.Y.
1975).}
counts. Pronouncing sentence in March, 1973, Judge Tenney said that the defendants had been found guilty of a crime that "strikes at the heart of the criminal justice system." Six days later, Edmund Rosner, who had raised his own unsuccessful entrapment defense, was also sentenced.

While the United States Attorneys were trying and defending the Archer case on appeal to the Second Circuit, its Chief Judge, Henry Friendly, was delivering the Columbia Carpentier Lectures and preparing them for publication. Judge Friendly pointed out in his opening lecture that federal encroachment on state operations was probably unconstitutional, and certainly unwise. Overburdened federal courts should not act where they need not. "[W]hen the primary basis for federal criminal jurisdiction is the use of facilities crossing state lines," including the mail or telephone, or when the federal element was "interstate commerce," federal crimes cascaded endlessly. Essentially local fraud, burglary, and prostitution suddenly, like bank robberies, became federalized. The logical extreme was a complete federalization of all crime, a big mistake. "One might have thought the limit was reached in the so-called Travel Act of 1961," (the statute under which Archer et al. had just been successfully prosecuted). But no, complained Judge Friendly, Congress had exceeded that limit.

[It] has since enacted statutes which make certain activities criminal [if] they affect interstate commerce, even though the acts in the particular case were entirely local, and the Supreme Court has sustained this . . . . It is thus fair to say that today "there is practically no offense within the purview of local law that does not become a federal crime if some distinctive federal involvement happens to be present"—and the involvement may be exceedingly thin.

Whether federal criminal prosecutions have not greatly outreached any true federal interest thus deserved the most serious examination. For example, in interstate prostitution, "why is the United States interested because the girls have traveled over the George Washington

64. Id. at 56.
66. H. FRIENDLY, supra note 63, at 57.
Bridge and thence through New Jersey, although it would not be if they crossed the Hudson over the New York Thruway?\(^67\)

For Judge Friendly, the "larger problem" was "creating standards that will keep federal criminal jurisdiction within bounds and assure some uniformity."\(^68\) He strongly endorsed section 207 of the *Final Report of the National Commission on Reform of the Federal Criminal Laws*\(^69\) as a means to handle the "utter disarray" of federal jurisdiction.\(^70\) Section 207 proposed a key "discretionary restraint" on federal investigating and prosecuting authority:

[F]ederal law enforcement agencies are authorized to decline or discontinue federal enforcement efforts whenever the offense can effectively be prosecuted by nonfederal agencies and it appears that there is no substantial Federal interest in further prosecution or that the offense primarily affects state [or] local interests. A substantial federal interest exists [when] state or local law enforcement has been so corrupted as to undermine its effectiveness substantially.\(^71\)

Judge Friendly would have converted the authorization permitting federal officials to restrain themselves into a command "directing" them to restrain themselves, thereby matching the Commission's immediately following proposed command which he also embraced: "Where federal law enforcement efforts are discontinued in deference to state [or] local . . . prosecution, federal agencies are directed to cooperate with [those] agencies, by providing them with evidence already gathered . . . ."

Finally, said Judge Friendly:

I still have the uneasy feeling that, even with the salutary restraints proposed . . . federal criminal jurisdiction will be too frequently invoked. The Founding Fathers, I think, would have been surprised to find the federal courts trying cases of corruption in the New York City administration simply because one

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\(^67\) *Id.* at 58. Of course in *Archer* it was the federal agents, not the defendants, who had crossed the George Washington Bridge to create federal jurisdiction.

\(^68\) *Id.* at 59-60.


\(^70\) *H. Friendly, supra* note 63, at 58-60.

\(^71\) *Final Report, supra* note 69, at 207.

\(^72\) *Id.*
of the participants had rowed across the Hudson in the course of the criminal venture.\textsuperscript{73}

At this time, while Archer's appeal was pending, the United States Supreme Court decided \textit{United States v. Russell}, its third major entrapment case.\textsuperscript{74} In a 5-4 decision announced on April 24, 1973, Justice Rehnquist, writing for the majority, once again rejected objective entrapment: Government supplying a predisposed defendant a legal but difficult to obtain ingredient necessary for committing the offense was not entrapment.\textsuperscript{76} Entrapment would only succeed if the prosecution failed to prove the defendant's predisposition; entrapment would not prevent prosecution because a court found law enforcement conduct objectionable. Justice Rehnquist also rejected the defendant's claimed violation of Constitutional due process,\textsuperscript{76} in language which rung in every competent defense attorney's ears in cases of this sort:

\begin{quote}
While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction, cf. \textit{Rochin v. California} . . . , the instant case is distinctly not of that breed.\textsuperscript{77}
\end{quote}

Gould and other attorneys now claimed that day had come. Defendants' first ground of appeal was that "[t]he lawless conduct of government officials in this case is so offensive—to the administration of justice, to Federal-State relationships, and to prevailing standards of decent behavior that acquittal should have been ordered as a matter of due process of law."\textsuperscript{78}

\begin{footnotes}
73. H. \textsc{Friendly}, \textit{supra} note 63, at 61 (footnote omitted).
75. \textit{Id.} at 432, 436.
76. \textit{Id.} at 430-32.
77. \textit{Id.} at 431-32 (citing \textit{Rochin v. California}, 342 U.S. 165 (1952)). In \textit{Rochin}, petitioner successfully appealed a conviction for possession of two morphine capsules on the ground that the method used by arresting officers to confiscate the capsules violated the fourteenth amendment due process clause. \textit{Rochin}, 342 U.S. at 168. During arrest, Rochin swallowed the capsules to prevent confiscation. The officers rushed him to a hospital, where a tube was used to force an emetic solution into his stomach to induce vomiting. The morphine capsules were recovered. \textit{Id.} at 166.

The United States Supreme Court concluded that the method used to seize the evidence was "too close to the rack and the screw to permit of constitutional differentiation." \textit{Id.} at 172. The Court analogized such conduct to obtaining verbal evidence through forced confessions, which also "offend the community's sense of fair play and decency," \textit{id.} at 173, and had no difficulty finding the officers' conduct a "brutal" violation of the fourteenth amendment. \textit{Id.} at 173-74.
\end{footnotes}
With solemn mockery the appellants urged the federal appeals court to reverse their convictions in order to "see that the waters of justice are not polluted." 79 Their brief declared:

The government committed crimes in this case which are an affront to the integrity of the administration of justice in this State. The Government authorized its agents to tell deliberate lies, under oath, to courts and Grand Juries of the State of New York. We think no Government has that right. 80

Other points of appeal were the absence of federal jurisdiction—that there had been no essential violation of the Travel Act: Bario's interstate phone calls were wholly disconnected with the crimes charged—and a general misuse of federal investigatory power.

The United States Attorneys were certain that all convictions would be affirmed. The "governmental impropriety" claims were the desperate and vain hopes of corrupt public officials who sought to divert attention from the overwhelming evidence of their guilt. The investigation had been clearly warranted and undertaken with care and concern for constitutional rights. The jurisdictional claims were also not taken very seriously, as the Travel Act literally applied.

Overconfident, the United States Attorneys blundered. They failed to take into account that the combined effect of a broadly literal construction of the Travel Act, coupled with a subjectivist application of entrapment, had left the trial record bare of many important background facts. In their answering papers, Richard Ben-Veniste and the other United States Attorneys saw no need to go into minute detail of the investigation's basis and necessity.

They were probably unaware of Judge Friendly's lectures, and he was certainly unaware of the real background, the painstaking care and responsibility assumed by Scoppetta, Shaw, and Seymour: "As far as appears, the instigators of the scheme had only a generalized belief that something was rotten in the Queens County District Attorney's Office." 81 The Knapp Commission, appointed by New York's Mayor, had first sought a federal probe of the city's criminal justice system. New York City Police Commissioner Murphy had cooperated in the deception, and the state's chief judge, informed in advance, had given his informal approval of the simulated crime. Under-informed, what Judge Friendly and the Second Circuit saw was the federal executive unnecessarily manipulating a state's judicial and executive branches, manufacturing federal jurisdiction, and now prosecuting an essentially local bribery as a federal crime. Henry Friendly, a first rate scholar and

79. Id.
80. Id.
81. 486 F.2d at 675.
jurist with solid instincts and acute sensitivity to the federal/state balance, decided to act as he had lectured. As it appeared to him, the Archer appeal was the perfect vehicle to restrain the federal government and issue serious warnings against future overreaching. The federal "government agents displayed an arrogant disregard for the sanctity of the state judicial and police processes," and "dismay for all the participants in the system—including the police, the courts, and the members of the grand jury, all of whom were subject to the Government's fabrications." Unfortunately, Judge Friendly allowed his distaste for federal prosecution of artificially federalized local crime to merge with what he mistakenly saw as an unwarranted federal investigation of the state's corrupt criminal justice machinery, and he concluded that the investigative techniques utilized were also illegitimate.

On July 12, 1973, the Second Circuit per Judge Friendly unanimously reversed all the defendants' convictions, and blasted the United States Attorneys in an oft-quoted statement which seriously hampered the fight against corruption for a decade:

We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any proper prosecutorial role and needlessly injected the Federal Government into a matter of State concern.

The court had accused federal agents of committing "perjury." The opinion flatly stated as fact that "in this case, . . . the government 'authorized' Bario and Murano to engage in crimes under New York Law." This statement is certainly doubtful, and it is a central contention of this essay that it is false, i.e., no state crimes were either authorized or committed by any federal agent.

The United States Attorneys' brief was partly to blame for the Second Circuit's damaging and bald assertion of government-sponsored criminality. "The Government argue[d] that no one was hurt by the state crimes committed." Subsequently United States Attorney Seymour, defending the investigation, stated why, in his view, Bario had not committed perjury: "My judgment at that time was that the element of intent was absent and therefore the law enforcement officer who was acting under orders was not committing perjury. I don't think

82. Id. at 677.
83. Id. at 672 (footnote omitted).
84. Id. at 675 (emphasis added).
85. Id. at 675 & n.5.
that was criminal conduct then or now." Seymour later insisted that because Bario was well-motivated he did not intentionally lie, and therefore did not commit perjury. Seymour's conclusion was correct, but his analysis was incomplete.

The whole simulated crime was a "charade"—a favorite defense characterization—and Bario did intentionally lie under oath. According to the New York Penal Law, perjury requires false swearing. A person "swears falsely when he intentionally makes a false statement which he does not believe to be true" while giving testimony. Intent is defined as "conscious objective . . . to engage in such conduct." Bario and Murano unquestionably swore falsely. Although well-motivated, a lie is a lie. Bario's ultimate objective was to help clean up the Grand Jury so that in the future, fewer lies would be told to it, but he did intentionally lie to that Grand Jury under oath. It does the United States government and its citizens a disservice not to clearly acknowledge what happened.

Although Bario and Murano intentionally lied under oath, they did not commit the crime of perjury under New York law for a simple but significant reason. No crimes whatsoever were committed by Bario and Murano because, as Seymour alluded to but did not emphasize, there was legal justification. New York Penal Law declares that "conduct which would otherwise constitute an offense is justifiable and not criminal when . . . such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties and functions . . . ."

It bears repeating. Acts which would be criminal when done by a private citizen are justifiable and not criminal when done by a government agent in the reasonable exercise of law enforcement power. The question becomes whether the lies under oath to a grand jury were "reasonable exercises." A principal objective of this entire account is to show that such deception in the context of investigating official corruption is reasonably necessary. Concluding, as Judge Friendly did, that government acted improperly and unreasonably because agents committed crimes inverts, if it does not simply beg, the question. First it must be determined whether deceiving the grand jury was reasonable under the circumstances, and then criminality vel non follows necessarily. The Second Circuit had simply assumed the very ground in controversy.

Investigating narcotics, gambling, and other victimless crimes, gov-

86. Minutes of Investigative Technique Hearing, supra note 38, at 187.
87. See N.Y. PENAL LAW § 210.05-.15 (McKinney 1975).
88. Id., § 210.00(5).
89. Id., § 15.05(1).
90. Id., § 35.05(1) (emphasis added).
ernment agents routinely engage in generally forbidden transactions yet are held to commit no crimes. If simulated criminality is proper for street crimes, why is it improper in investigating governmental corruption?

Sometimes government agents really do commit crimes. While the New York anti-corruption effort was in full swing, White House operatives were committing "authorized" burglaries of the Watergate in the name of national security. Government agents can become criminals, falsely justifying their criminality as reasonably necessary. Government must be checked and restrained, foreclosed from using unreasonable and illegal means to achieve otherwise valid goals of law enforcement. Justice Brandeis had expressed this most eloquently in United States v. Olmstead, which Judge Friendly quoted in Archer:

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 imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.91

From the point of view of the federal appeals court, the federal government had committed state crimes in its unwarranted intrusion into New York's criminal justice system. Had the time come to apply Justice Rehnquist's recent caveat in Russell that someday a situation would be presented where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction"?92 No court had yet invoked that clause. Judge Friendly flirted with it and came very close to being the first:

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' obser-

92. 411 U.S. at 431-32. See supra note 74-77 and accompanying text.
There is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.

The Second Circuit, on the brink of dismissing the case because of governmental impropriety, did not take that final step. Instead, it issued a stern warning:

Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part. We take a similar view with respect to the question whether this prosecution should be dismissed because the initiation of the investigation was founded on a grossly inflated conception of the role of the federal criminal law.

Here Judge Friendly referred approvingly to Section 207 of the proposed reforms of federal jurisdiction already discussed. Finally, he reached the actual ground for reversing the convictions: the absence of true federal jurisdiction to prosecute. In detailed and scholarly fashion, he analyzed the legislative history and purposes of the Travel Act and concluded that in this case it should not be broadly, if literally, interpreted. It should not cover a situation where the interstate use of the telephone was incidental and essentially manufactured by the federal government. All the convictions were reversed.

Stunned, the United States Attorneys indignantly applied for a rehearing en banc, this time fully informing the federal appeals court about the investigation's background. Michael Armstrong, former Chief Counsel for the Knapp Commission and newly appointed District Attorney of Queens County, the newly formed State Special Prosecutor's Office, and the Manhattan District Attorney's Office each sub-

93. 486 F.2d at 676-77.
94. Id. at 677 (emphasis added).
95. Id. at 678. See supra notes 69-72 and accompanying text.
96. See 486 F.2d at 683.
mitted an amicus brief, urging the Second Circuit to revoke its damaging remarks.

The Special Prosecutor's brief was pointed:

Unfortunately, the Court in its decision went beyond its holding and criticized the United States Attorney's undercover operation in this case.

. . . . . [T]his dictum could have a serious deleterious effect on State and Federal law enforcement efforts throughout the country. . . . More particularly, the mission entrusted to this office—that of rooting out corruption in the State criminal justice system in this city—cannot possibly be pursued with any degree of effectiveness without the employment of techniques similar to those employed by the Government in this case. These techniques, which were devoid of oppressiveness and violated the constitutional rights of no one, accomplished what no other method could do. 87

In short, said the Special Prosecutor, the undercover operation conducted was "a reasonable, imaginative, and effective law enforcement effort."

The Manhattan District Attorney similarly protested:

This Court's dictum disapproving the investigative techniques in this case should be disavowed. . . . Because [the court's opinion] indicate[d] that methods that have been and may be used by [us] . . . are improper, . . . [u]nless disavowed on re-argument this dictum could seriously inhibit appropriate investigations of corruption in the system of justice.

The experience of this office in decades of investigating criminal schemes in the area of narcotics, gambling, official corruption and other crimes convinces us that on occasion, however rare, it is necessary for an undercover investigator to follow through his collaboration with criminal elements who are the targets of the investigation by causing himself to be "arrested" and "prosecuted." Further, when the investigation has disclosed corruption in the system of justice, it has been occasionally necessary to pursue the case by having a court proceeding against a "defendant" who is in fact an undercover policeman. 88

97. Brief for the Office of Special Prosecutor Amicus Curiae, petition for rehearing, United States v. Archer, 486 F.2d 670 (1973) [hereinafter cited as Special Prosecutor].

98. Brief of District Attorney of New York County Amicus Curiae, petition for rehearing, United States v. Archer, 486 F.2d 670 (1973) [hereinafter cited as District Attorney]. The Manhattan District Attorney's Office had already conducted a secret investiga-
The State Special Prosecutor also declared that "undercover investigations designed to penetrate and expose corruption in our criminal justice system are necessary and proper law enforcement efforts."\(^9\) Bribery prosecutions in general were difficult, but

[p]rosecutions of individuals in the Justice System are even more difficult because of the nature of the participants. The corrupt Judge, the crooked prosecutor and the dishonest lawyer are the most sophisticated type of criminal. Because they are intelligent, knowledgeable, and extremely cautious, they are almost impervious to prosecution.

The undercover investigation instituted by the United States Attorney in this case was a resourceful and imaginative attack on this exceedingly difficult problem.\(^{100}\)

"In short," concluded the Manhattan District Attorney, "to preserve the integrity of the system of justice, it may be necessary to prepare a fictional case, if that can be done without entrapping the targets or otherwise violating their constitutional rights."\(^{101}\)

On September 26, 1973, the Second Circuit replied.\(^{102}\) Mild irritation showed in the court's grudging concession:

Although the record does not contain proof of many of the facts now called to our attention by the Government for the first time as evidence of the background of its investigation, we do not question that the federal prosecutors had been given abundant information about the widespread fixing of cases in the Queens County District Attorney's Office.\(^{103}\)

The court went on to smooth some ruffled feathers:

We readily appreciate the justified indignation this aroused and can understand the consequent desire of federal law enforcement officials to clean these Augean stables of the State. That Archer has been dismissed from his post as a result of the Government's efforts is indeed a "good" result as the petition repeatedly emphasizes.\(^{104}\)
But good results sometimes emerge from improper acts. It was one thing to “appreciate” indignation and “understand” a desire to clean up New York; another to affirmatively endorse that effort.

Although the federal appeals court did “appreciate” and “understand” the federal prosecutors’ desire to clean up New York, and although the court no longer condemned the investigative techniques—“issues which we felt desirable to ventilate . . . but were at pains neither to decide nor to pronounce dicta”105—the court refused to endorse the investigation. It did not even renounce its earlier suggestion that federal power had been abused in initiating the investigation of New York’s corrupt criminal justice system. Instead, the court treated this issue as somehow subsumed in the question of whether federal prosecution was warranted.

It was not. In the end the court denied the government a rehearing because there was no federal jurisdiction:

While the Government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here. We adhere to that holding and leave the task of further line-drawing to the future.106

The Second Circuit per Judge Friendly could have denied the rehearing, insisting that with a newly formed State Special Prosecutor’s Office there was no longer a substantial federal interest to prosecute essentially local crimes of bribery. Judge Friendly might have used the occasion to announce that a more fully informed court was now persuaded that once federal prosecutors were reasonably convinced New York’s criminal justice system was saturated with corruption, the federal government properly investigated under the guarantee clause of the Constitution which promises all citizens that each state shall have a republican government. The Second Circuit also might have endorsed the government’s reasonable and necessary investigative techniques. If the Judge had brought his insight and scholarship to bear on the problem in this way, Archer would stand as the leading analytical tool for handling the essential investigative and jurisdictional problems which Abscam raised ten years later.

Few read lukewarm retractions, fewer still quote them. The important residue of Archer was Judge Friendly’s first blast at the federal
government and its techniques. Archer hung like a cloud, often cited by corrupt defendants, and still cited by courts as a leading judicial condemnation of prosecutorial overreach. Perhaps worse than whatever precedential value Archer officially possessed, for a time it effectively restrained prosecutors from vigorously and imaginatively investigating corruption with the only tools that really work.

The State Special Prosecutor's Office presented the case against Archer, Klein, and Wasserberger to a state grand jury which indicted them in November 1973 for the state crimes of bribery and conspiracy. After Justice Murtagh refused to dismiss their indictments, defendants appealed, claiming double jeopardy and governmental misconduct.

On May 20, 1974, a divided Appellate Division (3-2), refused to dismiss the Archer indictments on double jeopardy grounds, since a federal court had reversed their convictions solely for lack of federal jurisdiction, not an element of the New York crimes for which the three were now being prosecuted. Although a bare majority rejected the double jeopardy claim, all five judges condemned the investigative techniques. Justice Shapiro expressed a "general agreement with the disapproval voiced by Judge Friendly in United States v. Archer of the prosecutorial conduct of the government (both State and Federal)."

He went on to say, however, that the question of whether such conduct constituted government-induced criminality, violating principles of fundamental fairness, sufficient to preclude the prosecution of the petitioners should be decided at the trial level on a full record of the events leading to the prosecution.

Oddly, Justice Shapiro did not feel constrained in this context

107. 485 F.2d 1213 (2nd Cir. 1973). Worse, the same day the Second Circuit per Judge Friendly denied the Archer rehearing, a different panel of three judges decided Rosner's appeal, rejecting his claims of government impropriety. Rosner's was not a suitable case for a "sanction against the Government," the court said. Id. at 1227. There was no illegal wiretapping which may be so far beyond the bounds of governmental propriety that it is offensive to a rule of liberty under law. The use of a dummy defendant, the ultimate in the chicanery of unlawful intrusion, is cut from the same cloth. See United States v. Archer. . . . In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the government.

Id.
110. Id. at 473, 355 N.Y.S.2d at 630-31 (Shapiro, J., concurring).
111. Id.
even to mention Judge Friendly's retraction. Nor did the two dissenters, who went further in using the earlier opinion:

To permit this second prosecution to proceed would be totally unjust, especially as, to use the words of the Second Circuit Court of Appeals, the Federal Government, itself, "set up" this crime "... by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors."112

Once again prosecutors were on the defensive in their fight against official corruption. The task had passed from the United States Attorneys to the State Special Prosecutors.

On September 18, 1974, without opinion, New York's highest court unanimously affirmed the Appellate Division's Archer decision, thus sending the case back down for a full blown pre-trial due process hearing on the background of the investigation and the investigative techniques.113 Finally, it seemed, the technique itself would become the focus of inquiry and decision.114

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112. Id. at 475, 555 N.Y.S.2d at 632 (Christ, J., dissenting).
113. Klein v. Murtagh, 34 N.Y.2d 988, 318 N.E.2d 606, 360 N.Y.S. 2d 416 (1974). As a newly appointed Assistant Special Prosecutor attached to the Queens Bureau, the author was assigned to prepare for that hearing.
114. At this time, Paul Rao, Chief Judge of the Federal Customs Court, was indicted for perjury. See People v. Rao, 53 A.D.2d 904, 386 N.Y.S.2d 441 (2d Dep't 1976). See also People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980). The Special Prosecutor's office used a simulated robbery case against the targets: Judge Rao, his son Paul Rao, Jr., and his son's law associate, Salvatore Nigrone. 73 A.D.2d at 91-93, 425 N.Y.S.2d at 125. One unsuspecting grand jury was misused as a forum to trap the targets into committing perjury. That perjury case was later presented to a special grand jury, which indicted the defendants but expressed misgivings at their own role. Id. at 91-93, 425 N.Y.S.2d at 125-26. Unlike Archer, in Rao the technique had not been used out of necessity, nor carefully controlled to produce a case against a major violator involved in significant corruption. Rather, the 74-year-old Rao was approached by a supposed longtime acquaintance he had not seen in 40 years, and was asked to help a friend's son who was in trouble. Id. at 91-92, 425 N.Y.S.2d at 125. Rao advised the agent to see "a lawyer [who] knew the judge" and recommended his son. 53 A.D.2d at 908, 386 N.Y.S.2d at 447 (Titone, J., dissenting). A year later, Rao was called before a grand jury so he would deny that statement and be indicted for perjury. 73 A.D.2d at 91-93, 425 N.Y.S.2d at 125-26.

The Rao case was badly managed, and the grand jury trap was inappropriate under a decision rendered in the interim by the New York Court of Appeals. 73 A.D.2d at 91, 98-99, 425 N.Y.S.2d at 124, 129 (citing People v. Tyler, 46 N.Y.2d 251, 385 N.E.2d 1224, 413 N.Y.S.2d 255 (1978)). In Tyler, the Court of Appeals held that "where a prosecutor exhibits no palpable interest in eliciting facts material to a substantive investigation of a crime or official misconduct and substantially tailors his questioning [of a witness before a grand jury] to extract a false answer, a valid perjury prosecution should not lie." Tyler, 46 N.Y.2d at 259, 385 N.E.2d at 1228, 413 N.Y.S. 2d 299 (citation omitted). Eventually the Rao case withered, dying the death it probably deserved. See 73 A.D.2d 88, 425 N.Y.S.2d 122 (App. Div. 1980).
On April 27, 1976, the United States Supreme Court issued its fourth and, as of 1984, its latest major opinion on entrapment. Federal appeals courts had split over how to apply Russell to cases where the government had supplied contraband to a predisposed defendant. Hampton, the defendant, claimed that the government both supplied and purchased the very heroin which it then convicted him for selling. Hampton requested a special instruction, previously adopted by the Fifth Circuit, that when the government buys contraband from itself through an intermediary, that intermediary has been entrapped as a matter of law. The trial court refused this instruction and the Eighth Circuit affirmed.

The Supreme Court affirmed in *Hampton v. United States*, but sharply divided 3-2-3. Writing for Chief Justice Burger and Justice White, Justice Rehnquist reiterated a subjective view of entrapment which had commanded a bare majority in *Sorrells, Sherman, and Russell*: “We ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.” Justice Rehnquist went further. He seemingly retracted his Russell caveat that due process might void a conviction of a predisposed defendant where the government had acted outrageously:

The remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment.

The limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the defendant. . . . If the police en-

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116. Compare, e.g., United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (due process precluded conviction where undercover agents suggested setting up drug lab, provided location, supplies and expertise) and Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (conspiracy and bootlegging convictions reversed where government undercover agents helped to reestablish, and sustain, criminal bootlegging operations that had been shut down by prior criminal convictions) with United States v. Khatib, 706 F.2d 213 (7th Cir. 1983) (sale of contraband weapons to one predisposed is not the outrageous conduct contemplated by Russell) and United States v. Norton, 700 F.2d 1072 (6th Cir.) (undercover agent's infiltration of the KKK and his participation in the planning and execution of a bombing operation is not conduct sufficiently outrageous for court to overturn convictions), cert. denied, 103 S. Ct. 1885 (1983).
119. Id. at 488-89.
gage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.\textsuperscript{120}

Justices Brennan, Stewart, and Marshall dissented, calling for an objective entrapment approach which focused not on the particular defendant's predisposition but upon the government's activity.

Where the Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser, the Government's role has passed the point of toleration. ... The Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary. ... That the accused is "predisposed" cannot possibly justify the action of government officials in purposefully creating the crime.\textsuperscript{121}

Three justices, then, would have eliminated a due process defense for a predisposed defendant who, by a subjective definition of entrapment, was not entrapped. Three other justices would have adopted an objective definition of entrapment whereby the defendant's predisposition would be irrelevant and the government being on both sides of the contraband transaction would automatically have constituted entrapment.

The key opinion in \textit{Hampton} was the concurrence of Justice Powell, joined by Justice Blackmun. Justice Powell supported the subjectivists' view of entrapment. Hampton, like Russell, was predisposed to deal drugs and, therefore, regardless of who supplied them, Hampton, like Russell, was not entrapped.\textsuperscript{122} But the concurring justices joined the dissenters in rejecting Justice Rehnquist's plurality opinion that "fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances."\textsuperscript{123} A due process defense would be available to a predisposed defendant where the government had sufficiently overreached. "Nor have we had occasion yet to confront Government overinvolvement in areas outside the realm of contraband offenses. Cf. \textit{United States v. Archer}. ... In these circumstances, I am unwilling to conclude that an analysis other than one limited to predisposition would

\begin{itemize}
\item \textsuperscript{120} Id. at 490 (first and second emphasis added).
\item \textsuperscript{121} Id. at 498-99 (Brennan, J., dissenting) (citations omitted).
\item \textsuperscript{122} Id. at 492-95 (Powell, J., concurring).
\item \textsuperscript{123} Id. at 492.
\end{itemize}
never be appropriate under due process principles."124 In the decisive opinion on entrapment, the Supreme Court invoked Archer to warn the legal community that outrageous undercover techniques used to investigate political corruption might yet lead the nation’s high court to dismiss prosecutions of provably predisposed, corrupt officials. As a result of Hampton, a subjective entrapment defense continued as the majority rule, but due process remained a viable possibility even to predisposed and therefore non-entrapped defendants.

What circumstances, what investigative techniques would enable a defendant successfully to invoke the due process clause? The Court did not say. The closest it came was in a footnote which quoted Judge Friendly in Archer: “there is certainly a [constitutional] limit to allowing government involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings . . . .”125 The nation awaited further word. Because of the 3-2-3 split, a due process defense remained only a possibility, and the Archer case which Justice Powell had cited gained even greater importance.

Archer was now a state bribery case, sitting on the back burner, awaiting a mandated pretrial determination by Justice Leonard Sandler as to whether the government’s techniques had been proper or were so outrageous as to violate due process.126 In January, 1977, the long-delayed Archer “investigative techniques” hearing was conducted before Justice Sandler. Nicholas Scoppetta, Whitney North Seymour, and Patrick V. Murphy testified for the People. The defense called only Vincent Murano, the arresting officer. The facts and circumstances of the entire investigation were elicited in several days’ testimony, after which Justice Sandler announced his decision.127

This essay seeks to demonstrate that any well-informed citizen would decide in the technique’s favor. Sandler was the first judge to have been fully informed. If he had ruled against simulated crimes and dismissed the indictments against Archer, he might well have dealt the technique its death blow in New York. He had every reason to expect support from the Appellate Division, which had already denounced the technique while rejecting Archer’s earlier appeal.128 But Justice Leonard Sandler was above all fair-minded and responsible. He not only bucked the tide, he reversed it.

Finally, after years of continuous vilification from the Federal and

124. Id. at 493 (citation omitted).
125. Id. at 493 n.4 (quoting United States v. Archer, 486 F.2d at 676-77 (footnote omitted)).
127. Id.
State judiciary, law enforcement officials who had operated in a responsible professional manner and, more important, the investigative technique they had used, received their judicial vindication.

Justice Sandler’s “Decision on ‘Investigative Technique’ Hearing,” dated March 9, 1977, read in part:

Clearly it was not practical under those circumstances to inform either the prosecutor or the Grand Jury of the contrived character of the case. Moreover, those responsible for the strategy of the investigation could have concluded reasonably that there was no possible way of confirming the accuracy of the important information received other than by proceeding with the presentation of the matter in the Grand Jury in the manner that had been indicated by one of the alleged conspirators.

This highly significant decision concluded:

There is no doubt that the method used here and in Rao involving deception of the court, the county prosecutor and the Grand Jury, and governmental participation in what would otherwise be clearly criminal acts, presents important and troublesome issues. . . .

I share the deep disquiet expressed by appellate judges with the deception of the court system inherent in the technique used here and in Rao. On the other hand, no one could have served for over a year in my present assignment without becoming acutely aware of how difficult it is to develop corruption cases on the prosecutorial and judicial levels. . . . Of course, no single investigative tool is wholly indispensable but I am persuaded that the carefully selective use of the contrived crime under appropriately compelling circumstances comes close to being indispensable in the investigation of corruption at levels that touch intimately the basic integrity of the criminal justice system. It may be that, as has been eloquently argued, the wrongs implicit in the method are so pervasive and unacceptable that no end, however important, can justify its continued use. Before that conclusion is finally reached, however, I would think it critically important that a serious effort be made to determine whether the method may not be reconciled with basic principles of fairness and justice by accompanying it with safeguards of judicial supervision and

130. See supra note 114.
disclosure to the responsible heads of the institutions under investigation.\textsuperscript{131}

The next day a *New York Times* front-page article headlined: “A Court Upholds Staged Arrests,” called Justice Sandler’s decision “the first clear signal to local prosecutors that they can use contrived crimes to detect official corruption.” The decision was “certain to ignite further controversy in local, judicial and legal circles.”\textsuperscript{132}

In June 1979, the Appellate Division unanimously affirmed Archer’s state conviction, declaring that because of the earlier technique hearing, the “issue of alleged prosecutorial misconduct . . . is now properly before us on a full factual record.”\textsuperscript{133} Judge Friendly’s federal *Archer* condemnation was placed in proper context. Having been apprised more fully, “the Second Circuit muted its criticism . . . . The record presently before us is far more complete . . . . Based upon such record, we hold that the conduct of the law enforcement agents in this case does not offend due process and that appellant’s prosecution, was, therefore, proper.”\textsuperscript{134}

As far as Archer’s claims of due process violations, the Appellate Division applied the test enunciated by the New York Court of Appeals in *People v. Isaacson*\textsuperscript{135} and found that “while the government created the predicate for appellant’s crime by contriving a criminal

\textsuperscript{131} N.Y.L.J., Mar. 10, 1977, at 13, col. 4-5, (footnote and emphasis added).

\textsuperscript{132} N.Y. Times, Mar. 10, 1977, at 1, col. 2.

\textsuperscript{133} *People v. Archer*, 68 A.D.2d 441, 442, 417 N.Y.S.2d 507, 508 (1979) (citation omitted).

\textsuperscript{134} *Id.* at 446, 417 N.Y.S.2d at 510-11.

\textsuperscript{135} *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S. 2d 714 (1978). The Court of Appeals went further than the Second Circuit had gone in *Archer*. It found the police conduct, when tested by due process standards, so egregious as to dismiss. Although the court reviewed the Supreme Court’s entrapment decisions which suggested that a due process defense might be available under the United States Constitution, *id.* at 519, 378 N.E.2d at 81-82, 406 N.Y.S.2d at 718, the court barred the prosecution because the police behavior violated the due process clause of the New York Constitution. *Isaacson’s* significance is the court’s due process analysis of the boundaries of permissible police conduct. Although there is no precise line of demarcation or calibrated measuring rod to determine whether due process principles have been transgressed in a particular case, the court listed several factors to be considered:

[W]hether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; whether the defendant’s reluctance to commit the crime 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; whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.

*Id.* at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719.
case which could then be 'fixed,' it did not manufacture a crime which otherwise would not likely have occurred.” Furthermore “we hold that the government itself did not engage in criminal or improper conduct repugnant to a sense of justice.”

The court observed that the so-called government “offenses” under New York law were “performed by a public servant in the reasonable exercise of his official powers, and were therefore justified and not criminal.”

This Archer opinion closed with a warning:

We would again caution law enforcement officials, when dealing with corruption within the criminal justice system, that they may no more engage in flagrant misuse of such system than the individuals they seek to prosecute. However, we are persuaded that the conduct of law enforcement officials in this case was not improper. Although for the future such deception might more wisely be circumscribed by the development of judicial guidelines, we hold, to use the words of [Justice Sandler], that “the carefully selected use of the contrived crime under appropriately compelling circumstances,” which is this case, is not repugnant to a sense of justice, . . . [and] due process does not mandate dismissal of appellant’s indictment.

It was more than six years in coming, and the major actors had gone on to play other parts, e.g. Archer prosecutor Ben-Veniste, after a stint as Watergate Special Prosecutor, was about to become an Abscam defense attorney, but Archer and its technique—the use of carefully monitored criminal simulation, even involving lies under oath to an unsuspecting state grand jury—had received its first appellate judicial vindication. With little prospect of success, but in order to stay out of jail, Archer appealed.

On April 24, 1980, the New York Court of Appeals affirmed Archer’s conviction, and on October 6, 1980, the United States Supreme Court denied certiorari. Norman Archer was imprisoned. He filed for habeas corpus in federal court claiming among other things, outrageous government conduct in the investigation. Judge Duffy denied the petition without opinion, but permitted an appeal to the Second Circuit.

The Archer case had come full circle. Judge Friendly now had a
rare opportunity to decide Archer's due process claims for a second time. He could have used the occasion to remove the taint he had imposed, to insure that Archer would no longer mistakenly stand as a judicial condemnation of government overreach, but he did not.

Instead, Judge Friendly merely pointed out that his earlier Archer opinion had nothing to do with state due process. Echoing the dissent in Isaacson, he noted that in federal cases like Rochin, Russell, and Hampton, "unlike Archer's, the impermissible police conduct was inflicted directly upon the defendant." So, not closing the account, but "[l]eaving open the question whether a case might arise where conduct of law enforcement officers not thus directly inflicted was so outrageous as to constitute a denial of due process," Judge Friendly joined the New York courts at least in concluding that "the

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142. Judge Gabrielli wrote in Isaacson: "Had defendant been a direct victim of police malfeasance, the situation would be quite different." 44 N.Y.2d 511, 527, 378 N.E.2d 78, 87, 406 N.Y.S.2d 714, 723 (Gabrielli, J., dissenting).


146. Archer v. Commissioner of Correction, 646 F.2d 44, 47 (2d Cir.) (emphasis added), cert. denied, 454 U.S. 851 (1981). In People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978), the New York Court of Appeals sustained a due process defense in a case in which police had threatened, kicked and beaten a third party, who then acted as an informant against the defendant, luring him across the state line to be arrested for selling drugs. Id. at 514-18, 378 N.E.2d at 79-81, 406 N.Y.S.2d at 715-17. The court took note of Justice Rehnquist's plurality opinion in Hampton v. United States, 425 U.S. 484 (1976), in which three Justices agreed that a due process defense was not available to a predisposed defendant and never available in a case where the complained-of police conduct was inflicted on a third party. Nevertheless, the Isaacson court upheld the due process defense of the concededly predisposed defendant, basing its decision on the due process provision of N.Y. Const. art. I, § 6. 44 N.Y.2d at 519-20, 378 N.E.2d at 82-84, 406 N.Y.S.2d at 718-19. The two dissenting judges took the view that the beating of the informant, though "inexcusable, . . . had no significant connection with defendant, and in no way violated any of defendant's constitutional rights." Id. at 527, 378 N.E.2d at 87, 406 N.Y.S.2d at 723 (Gabrielli and Jansen, JJ., dissenting) (citations omitted). In addition, the dissenters indicated that they would endorse Justice Rehnquist's view that a predisposed defendant may not assert a due process defense. Id. at 529, 378 N.E.2d at 88, 406 N.Y.S.2d at 724. See supra note 135. As discussed infra note 699, a majority of the Court has not up to this point adopted Justice Rehnquist's view as to the predisposed defendant's being barred from asserting a due process defense based on police conduct in inducing his acts.

The Supreme Court has, however, apparently adopted Justice Rehnquist's view on third-party due process claims. See United States v. Payner, 447 U.S. 727 (1980). In Payner, the Supreme Court, in a six-Justice majority opinion by Justice Powell, held that the defendant had no standing to assert a due process defense when IRS agents hired a private detective firm to steal a briefcase from a third party and surreptitiously photograph documents which led to evidence used to convict the defendant. Id. at 737 n.9.
conduct here at issue did not reach that level. We thus still need not and do not decide the non-constitutional question whether the conduct in this case would have barred a federal prosecution of Archer.\textsuperscript{147} It was a second rate opinion from a first rate mind.

On October 5, 1981, the United States Supreme Court denied certiorari, thus ending the Archer saga.\textsuperscript{148} Few people noticed. Attention concerning undercover techniques of investigation and governmental misconduct had long since focused elsewhere. No longer was it a phony mob hit man; now it was a phony Arab sheik.

Somewhat free of Archer's basic complication of federal-state relations, but with its own added refinements of enormous bribes pressed on public officials for acts not clearly detrimental to their constituency, Abscam has generated an inquiry among well disposed officials in all three branches of the Federal government into the proper limits to government sponsored scams and phony worlds constructed to reveal criminality.

In Abscam, two agencies of the federal executive, the FBI and Justice Department, simulated a world of easy money inducing federal and state legislators to exploit corrupt opportunities which the Executive had created, videotaped, and would then prosecute. Individual congressmen were indicted for bribery, but in the public eye, the integrity of Congress itself was impugned. By raising entrapment and due process as defenses, the defendants also placed the Executive police methods on trial. The people's grand juries would decide to indict, and their petit juries would decide whether the defendants were guilty or whether they were not predisposed to commit those crimes and thereby entrapped. Judges would decide whether the Executive's techniques of investigation were outrageous and warranted dismissing the prosecutions as violations of constitutionally guaranteed due process.

Although congressmen were the defending targets of the investigation, Congress also had a vital affirmative role to play in the national debate. The people's chosen representatives continued to oversee the national police which had stung them, and continued to supervise the Justice Department which would prosecute its members. Congress controlled the FBI budget, and it had long been drafting an FBI charter.

Congress also had enormous power over the federal judiciary which would hear the Abscam cases. All the federal courts except the United States Supreme Court were ultimately creatures of congressional will.\textsuperscript{149} Of course Congress would not consider abolishing the

\textsuperscript{147} 646 F.2d at 47.

\textsuperscript{148} 454 U.S. 85 (1981).

\textsuperscript{149} The Constitution created the Supreme Court and granted Congress the power to establish lower federal courts. U.S. Const. art. III, § 1. Congress exercised its power in 1789 and created the lower federal courts. Act of Sept. 24, 1789, ch. XX, §§ 3, 4, 1 Stat. 73, 74 (codified at 28 U.S.C. §§ 43, 132 (1982)).
lower federal courts, nor even restricting their jurisdiction to try Abscam cases, but Congress could enact standards which those courts must use to determine entrapment. A narrow majority of the Supreme Court, barely but consistently retaining a subjective entrapment defense, had also located it not in the Constitution, but in congressional choice. The Supreme Court had read into federal criminal laws legislative intent that innocent, i.e. non predisposed, persons should not be punished. The High Court had long invited the Legislature to legislate, and explicitly adopt whatever entrapment defense it saw fit. Abscam, therefore, has provided an impetus for Congress to consider and adopt an entrapment defense, either subjectively focusing upon the defendants’ predisposition, or objectively focusing upon the threat the government’s methods of investigation posed to average law abiding citizens. Congress could make entrapment a jury question or a question for the judges, and Congress could impose the burden upon the government to disprove beyond a reasonable doubt the defendant was entrapped, or it could impose upon the defendant a burden of establishing entrapment by a preponderance of the evidence.


151. In Sorrells v. United States, 287 U.S. 435 (1932), although the Court did not say explicitly that it was applying a subjective entrapment theory, it did hold that the defendant should have been allowed to have the jury consider that the government agent had placed in the “mind of an innocent person the disposition to commit the alleged offense.” Id. at 442. In Sherman v. United States, 356 U.S. 369 (1958), five Justices of the majority applied a subjective test, but Justice Frankfurter, joined by three other Justices in his concurring opinion, advocated an objective test. In United States v. Russell, 411 U.S. 423 (1973), subjective entrapment prevailed over objective entrapment by another five-to-four vote. In Hampton v. United States, 424 U.S. 484 (1976), the three Justices of the plurality and the two concurring Justices agreed that subjective entrapment continued as the federal rule, but the three dissenters urged adoption of objective entrapment. Id. at 496. As discussed infra note 152, the theoretical basis for the subjective entrapment defense is the Court’s determination that Congress, in enacting a penal law, would not intend that non-predisposed persons induced into committing acts by agents of the government should be subjected to the statute’s sanction.

152. Thus, for example, the Court in United States v. Russell, 411 U.S. 423 (1973), based the subjective theory on “the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense, but was induced to commit them by the Government.” Id. at 435. The Court pointed out in Russell that “[s]ince the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable.” Id. at 433. Because Congress has not legislated otherwise, the judicially fashioned subjective theory, with its focus on the defendant’s predisposition, continues to be the law in federal prosecutions. See, e.g., Hampton v. United States, 425 U.S. 484 (1976).
Beyond defining entrapment, Congress had a vital role to play in limiting future undercover investigations. The courts were only to decide the legality of techniques in cases before them. An investigation may be constitutional but sufficiently immoral, unwise, intrusive, or threatening to be outlawed by statute. Congress was to decide the nation's general policy. Perhaps the Executive should be allowed to initiate undercover stings only where there was already reasonable suspicion or probable cause to believe that a particular individual was corrupt. Whatever Congress legislated would bind the courts' legal decision. Perhaps the Legislature would prohibit Executive undercover investigations except by Judicial warrant.

Although bloodied from public disgust as Abscam indictments issued and cases went to trial, Congress has engaged in dispassionate oversight, full inquiry, honest analysis, and has issued recommendations for the good of the republic. The stakes are enormous: the quality of life in the United States, the level of privacy and corruption, police intrusion and police effectiveness. However one may disagree with their particular recommendations, any fair reading of the record convincingly demonstrates that since February 1980, when Abscam broke, in its inquiry and oversight, Congress has shouldered its responsibility fully, and fairly.153

ABSCAM

Having shied away from undercover investigations under J. Edgar Hoover, in 1976 the FBI was prepared to conduct them, asking Congress for $1,000,000.154 Melvin Weinberg, a former FBI informant, had been convicted for a front-end scam in which his company, London Investors, pretending to represent wealthy Arabs seeking business op-


154. Select Comm., supra note 153, at 1. This request was the first one since the FBI was created in 1908 that expressly asked for funds for "undercover activities." Id.
opportunities in the United States, swindled local real estate investors out of "processing fees" to advance the Arabs' loans.  

Sentenced to prison at the end of 1977, Weinberg traded probation for cooperation with the FBI, establishing a similar scam under the name Abdul Enterprises, to penetrate the world of stolen and forged securities, and stolen art work. During the first nine months of 1978, Weinberg helped the FBI recover almost $2,000,000,000 in phony gold futures and certificates of deposit.

In October, a middleman named John Stowe contacted Weinberg and said he might be able to get bank documents from Switzerland with help from a congressman friend who Stowe said was "as big a

155. Id. at 400. Department of Justice files show that the FBI first formally opened Weinberg as an informant on June 3, 1969. Weinberg testified that he believed that he had begun acting as an informant as early as 1965. Weinberg probably participated in and profited from criminal activities while he acted as an FBI informant. Id. at 399. When the FBI became aware of this in 1976 his official file as an informant was closed. Id. at 399-400.

156. Id. at 400-01.

157. Id. at 401-06. The FBI also initiated other undercover operations. "Frontload" focused on organized crime in construction projects in New York and New Jersey financed by the Department of Housing and Urban Development. Id. at 325. Two undercover FBI agents operated an insurance bonding agency, issuing bonds for construction projects while investigating fraud and labor racketeering violations. Although plagued by a double-dealing informant who used the investigation to bilk innocent people, Frontload did result in the conviction of twelve public officials and organized crime figures, including the mayor, deputy chief of police, and school president of Union City, New Jersey. Id. at 327.

In another operation, code-named "Labou," agents formed a "corrupt" construction company in order to investigate possible construction fraud in the Washington, D.C. area. Id. at 329. Funds were budgeted for a complex and expensive operation which included maintaining offices and renovating two houses. Id. at 330. The FBI's lack of administrative experience in running such a large project resulted in an uncontrollable overhead and wasted money. Id. at 329. See also Senate Hearings, supra note 153, Sept. 21, 1982, at 9-11, 30 (testimony of Oliver B. Revel, Ass't Dir., FBI).

In July, 1978, at the request of its Seattle field office, FBI Headquarters also approved an undercover operation codenamed "Buyin." SELECT COMM., supra note 153, at 336. A Washington state police officer had complained that the mayor was taking bribes, allowing illegal gambling, and promising to support state legislation legalizing gambling. The FBI sent an undercover agent to invest in a cardroom in Washington. Soon the agent met a lobbyist who denied the mayor's clout, but offered to introduce the agent to the Speaker and Majority Leader of the Washington state legislature, who, for bribes, would support gambling legislation.

The Seattle field office shifted its focus from local to state political corruption. But before Headquarters would approve the bribe, it instructed Seattle to corroborate the lobbyist-middleman's assertions of corruption. A few months later, the Speaker of the House showed himself willing to sell his influence: "You don't buy people anymore," he told undercover agents, "you just rent them." Senate Hearings, supra note 153 Sept. 21, 1982, at 19 (testimony of J. Harper Wilson). By insisting on corroboration of an untested middleman's allegations before authorizing a bribe offer, FBI procedure in Buyin sharply contrasted with its contemporaneous practice in Abscam.
crook as I am." In November, another corrupt middleman described to Weinberg several recent dealings involving Angelo Errichetti, Mayor of Camden, New Jersey as well as a state senator. The middleman claimed to have paid several kickbacks directly or indirectly to New Jersey public officials. Mayor Errichetti had several more projects including a hotel in Atlantic City where he had "a tremendous amount of juice."

On December 1, 1978 Errichetti met Weinberg and Abdul Enterprises Chairman McCloud (Agent McCarthy) to discuss opening a hotel in Atlantic City; Errichetti refused to answer Weinberg's question, "how much we are talking dollars and cents its gonna cost for you to take care of all of this," referring them to middlemen. When Errichetti left the room, the middlemen told Weinberg and McCloud that the mayor must be paid $350,000 to $400,000 for his help in Atlantic City. Errichetti would distribute that money as he saw fit.

1979 was the year of the Abscam undercover investigation. In January, FBI undercover agent Anthony Amoroso joined the Abscam team posing as Tony DeVito. On January 8, Weinberg and Errichetti met in Atlantic City, to discuss payoffs to the New Jersey Casino Control Commission for Abdul Enterprises' gambling license. The next day Errichetti introduced Tony Torcasio, manager of the Atlantic City Holiday Inn, to Abdul chairman McCloud (agent McCarthy) and Tony DeVito (Agent Amoroso). Torcasio was to manage a Penthouse casino when publisher Bob Guccione obtained financing. After Torcasio left, Errichetti demanded $25,000 up front and a total of $400,000 to guarantee a license. He promised a full refund if the license were not granted, claiming that three of the five Casino Control Commissioners—including the chairman, and vice-chairman were his nominees.

Two days later Errichetti introduced Alexander Feinberg and businessman Sandy Williams to McCloud to discuss funding a proposed titanium mining project in Virginia. Feinberg described himself as a very close friend and political ally of United States Senator Harrison Williams; Errichetti had described Feinberg as the Senator's "bagman."

The next week the FBI Undercover Operations Review Committee approved $25,000 to bribe Errichetti. At the Abdul Enterprises Long Island Office, Errichetti reassured the Abdul Chairman of his influence

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159. Id. at 406.
160. Id.
161. Id.
162. Id. at 408.
163. Id. at 243-246, 410.
164. Id. at 410.
with Kenneth MacDonald, Vice Chairman of the Casino Control Commission, who Errichetti said had close relatives “attached to organized crime.” They also discussed the titanium mine venture; and Errichetti received $25,000, the first Abscam payoff to a public official.168

Agent Amoroso had been spending most of his time living aboard and repairing The Left Hand, a sixty-five-foot oceangoing yacht previously seized by U.S. Customs agents in a drug raid, now captained and crewed by FBI agents.168 The FBI accepted Weinberg’s suggestion to throw an Abscam yacht party honoring Errichetti; the Mayor actively participated in compiling the guest list. At a March 20 meeting in Quantico, Virginia to plan the party, all FBI agents and informants who would attend were briefed on entrapment and due process issues. Approximately thirty-five non-FBI guests, including an assortment of confidence men, fences and swindlers, one of whom called himself Count Martforte, showed up at the testimonial. Special Agent Richard Farhart, who spoke Arabic, made a brief appearance as Sheik Yassir Habib, and presented Errichetti with a “ceremonial dagger,” a souvenir knife Weinberg had bought in Greece. Errichetti in return promised to present the sheik a gold key to the city of Camden.167 Senator Williams, who was photographed with the sheik, told Weinberg that McCloud could use his name as a reference for the mining project.168 The yacht was not wired, nor was Weinberg.

Errichetti and McCloud continued to negotiate over how Casino Control Commissioner MacDonald would receive his bribe. McCloud wanted to pay MacDonald directly; Errichetti refused, proposing that McCloud give him $100,000 which Errichetti would give to MacDonald in a parking lot, McCloud observing the transfer from afar. Subsequently Weinberg and DeVito modified this plan, insisting to Errichetti that MacDonald physically be present when the money was passed to Errichetti.169 On March 26, the New York FBI Field Office requested $100,000 to pay MacDonald, stating that Errichetti would accept the money “and turn it over to MacDonald in the presence of undercover special agents.”170 Headquarters approved, stating, “The Director has instructed that the $100,000 should be delivered only to

165. Id. at 411.
166. Id. at 417.
167. Id. at 418.
168. Id. at 418-419. In a conversation that Weinberg had with Senator Williams and Alex Feinberg, Weinberg asked whether the Senator would permit McCloud to use his name as a reference and whether he would endorse the Piney River Mine project. Senator Williams assented. Feinberg cautioned, however, that the Senator would not publicize his support and all agreed that the Senator could not say that he was financially involved in the mine project. Id.
169. Id. at 419.
170. Id.
Kenneth MacDonald, New Jersey Gaming Commission Control Vice Chairman. Insure that statements from MacDonald are elicited regarding assurance of casino license prior to providing payment.\textsuperscript{171} In addition, FBI Director Webster had written "Deliver money only to MacDonald."\textsuperscript{172}

MacDonald's situation was somewhat ambiguous. Whereas Errichetti was unabashedly corrupt, aggressively pursuing opportunities and bragging of corrupt contacts, he repeatedly stated that MacDonald expected no money for his favorable vote and would receive none from Errichetti. He had shielded MacDonald, insisting there must be no mention of casino licenses or money. The government could discount these protestations as the actions of a clever bagman, effectively insulating his principal from direct dirty contact. On the other hand, Errichetti might be using an unwitting, innocent MacDonald to give the appearance of corruptibility, so that he, Errichetti, could charge an enormous bribe which he would pocket while an unsuspecting Casino Control Commission decided favorably the Abdul license application on its merits.

The government, on balance, was correct to offer MacDonald a bribe. The Senate Select Committee's Final Report,\textsuperscript{173} from which much of this Abscam chronology is drawn, meticulously established "numerous articulable facts to support a reasonable suspicion that MacDonald was corrupt and that he would take a bribe."\textsuperscript{174} But the investigators were properly cautious, and sought to remove ambiguities and make the corruption obvious: a bribe to MacDonald for the Commission's license approval.

Headquarters' instructions authorizing payment only after explicit assurances of favorable action, however, made the meeting more difficult for McCloud when, the next day, as planned, Errichetti and MacDonald arrived at Abdul Enterprises with its hidden videotape camera. The three were chatting amiably about Long Island when suddenly MacDonald dashed to the window and peered out through the venetian blinds, his back to McCloud and Errichetti, both of whom were standing near the desk on which lay a briefcase containing $100,000. Errichetti announced: "I've come up for the money for the future, my

\textsuperscript{171} Id. at 420. However, all of the Director's instructions proved fruitless. The money was delivered to MacDonald and no assurance from MacDonald was obtained. For a complete discussion of the ambiguities in the events leading up to the March 31, 1979, transaction, see id. at 253-261.

\textsuperscript{172} Id. at 420.

\textsuperscript{173} SELECT COMM., supra note 153.

\textsuperscript{174} Id. at 243. For a complete discussion of the investigation of MacDonald and the basis of the reasonable suspicion justifying an offer to him to commit a crime, see id. at 241-261.
McCloud responded he had a “big investment in Atlantic City.” As they talked, McCloud opened the briefcase. MacDonald, still peering out the window and avoiding the transaction behind him, inquired about ongoing construction outside. Standing by the briefcase, McCloud forced the issue, as per instructions, calling on MacDonald to concede the quid pro quo: “I hope that, Ken, I hope there won’t be any problems with our . . . licensing or anything else in Atlantic City.” MacDonald did not reply. Closing the briefcase, McCloud reiterated that without a casino license he would be left with “a piece of dirt . . . because that’s where the money is to be made and that’s why we’re all here.” Errichetti took the briefcase, and all three walked out. The Director’s instructions that money be handed directly to MacDonald only after explicit assurances of favorable official action had not been followed.

After leaving Abdul Enterprises, an irritated Errichetti and MacDonald joined Weinberg and DeVito in the coffee shop of the Hauppauge Holiday Inn. Weinberg informed them that fortunately McCloud had been demoted and DeVito was now in charge of Abdul Enterprises. MacDonald complained that McCloud’s performance during the just completed meeting had “seemed like entrapment.” Errichetti retrieved from his car an index of New Jersey state legislators and checked off those he considered corrupt. This was the second list the Mayor had given Weinberg. The day before, March 30, although neither tape-recorded nor noted in any FBI memo, Errichetti had given Weinberg a handwritten list of eight politicians who he claimed were corrupt or corruptible. Among those were two United States Congressmen, including Michael Myers.

Meanwhile, Weinberg was stalling businessmen pressing to be paid and loaned money by Abdul, while he in turn was pressing Penthouse publisher Guccione to pay a bribe. Weinberg initially targeted Guccione without any basis to believe that he was corrupt or corruptible. No middleman had identified him as such, but Weinberg applied pressure on others to reveal the Penthouse publisher’s mob contacts. He sought to instill distrust in the publisher’s background and financial prospects, strongly hinting to Guccione’s hotel manager and construction contractor that Penthouse would never obtain the necessary casino license. Finally, on April 5, 1979, having failed, with Errichetti, to determine Guccione’s mob connections, Weinberg met the publisher at

175. Id. at 420
176. Id.
177. Id.
178. Id. at 421. For a complete discussion of the MacDonald transaction, see id. at 241-262.
179. Id. at 421.
Abdul Enterprises' office. Weinberg assured Guccione "As long as I can explain to the Board of Directors, they don't give a damn who you're in bed with, believe me. They also realize ... being in the gambling business, you're not stupid, that you gotta have the right people behind ya, or forget it. You're not gonna make it. They can rip you off too fast."

"Mel I don't want to disappoint you. I hate to disappoint you. I know what you're getting at," Guccione replied, "No way, Mel ... . This is on the heads and the eyes of my children. I have five children, alright? On the eyes of my children I am not connected with anybody. I am totally my own man. I am 100 percent owner of all of my companies, I owe nothing to nobody, nobody sits on my back, nobody has any pull with me. No one and least of all anybody like that, who is likely to cause me problems in getting licenses and that sort of thing."

Weinberg continued to insist Guccione was connected with organized crime, and Guccione steadfastly denied it, expressing confidence that he would obtain a casino license on the merits. Weinberg said he'd heard the Casino Control Commission would deny it. "Mel, believe me" Guccione answered, "it is not possible for them to deny me a license." Finally, Weinberg explicitly conditioned Abdul financing upon Guccione's agreement to offer a casino commissioner a bribe: "I'm even authorized to even go further and I'm telling you it's between me and you, and if you want it, we'll do it. We'll pay it ... . I don't care what it costs, to guarantee your license, we'll give you the money." In the end Guccione held fast. He would not authorize a bribe. If he somehow were denied the license and financing he knew he merited, Abdul Enterprises would have first option on his casino site.

In retrospect, the pressure brought to bear on this private citizen by FBI informant Weinberg was unconscionable. Guccione's continued resistance in the face of that repeated pressure and serious threat to his livelihood put to shame many public officials who were to succumb to much less. In the end, Bob Guccione, Penthouse publisher, withstood it all. The honest citizen simply but steadfastly said "no."

Weinberg's main focus in Abscam was Senator Williams' titanium venture. When Weinberg raised the issue of government contracts with Sandy Williams, the Senator's close business associate, Williams was reluctant to discuss the subject over the telephone until Weinberg reassured him that the phone was "clean." Sandy Williams assured Weinside the Commerce Commission would deny it. "Mel, believe me" Guccione answered, "it is not possible for them to deny me a license." Finally, Weinberg explicitly conditioned Abdul financing upon Guccione's agreement to offer a casino commissioner a bribe: "I'm even authorized to even go further and I'm telling you it's between me and you, and if you want it, we'll do it. We'll pay it ... . I don't care what it costs, to guarantee your license, we'll give you the money." In the end Guccione held fast. He would not authorize a bribe. If he somehow were denied the license and financing he knew he merited, Abdul Enterprises would have first option on his casino site.

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berg they would obtain all necessary permits. But when Weinberg pushed "there's a lot of government contracts that's, you know, on the chemicals," Sandy Williams replied, "Right."

"Now, can [Senator] Williams get us the bid on them?" Sandy Williams answered, "Well I don't know about that." 182

Weinberg's question was proper. He was attempting to learn what Senator Williams was willing to do for his undisclosed interest in the venture. A sheik might well want valuable assurances before he loaned $100,000,000 and the FBI legitimately wants to know what a United States Senator will promise a foreign potentate for a hidden interest in a valuable defense-related project.

News reports that the United States Government needed titanium for sheathing submarines gave Weinberg an excuse to determine whether Senator Williams would use his influence corruptly. On May 30, Weinberg asked attorney Feinberg, the Senator's reputed "bag-man," whether the Senator would solicit government titanium contracts on their behalf. Feinberg said Williams would try. 183

The Senator, Feinberg, and others met with DeVito (Agent Amoroso) and Weinberg at the Hotel Pierre in New York on May 31 to discuss the Senator's aid in obtaining titanium contracts. Senator Williams did very little talking at the meeting, but vaguely indicated he would try to use his influence. The FBI sought more explicit assurances. Weinberg emphasized the importance of the Senator's influence. Recognizing that Williams' reticence was putting off the Abdul investors, the Senator's associates subsequently assured Weinberg that although he was quiet, the Senator could be depended upon to assist the venture. 184

On June 14, 1979, Weinberg attempted to get Feinberg to put in writing that the Senator would obtain government contracts by requesting "resumés" for the sheik, specifying what each participant in the venture would contribute. 185 Weinberg had urged Feinberg to be very explicit, promising to destroy the documents, but he complained the resumés Feinberg presented to DeVito "don't tell him [the sheik] a damn thing," about what the Senator would do for his share of the loan. 186 Feinberg steadfastly refused to put in writing that Senator Williams would guarantee contracts. DeVito suggested the Senator and sheik meet face to face. Everyone agreed, particularly Errichetti, that the Senator would have to "come on strong." 187 Feinberg promised to

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182. Id.
183. Id.
184. Id. at 220.
185. Id. at 230.
186. Id.
187. Id. at 231.
tell the Senator what he had to do. On June 19 Feinberg reported to Weinberg the results of a meeting between himself, Errichetti and the Senator: "No problem whatsoever. . . . He understands the whole goddamn smear."188

The next day, June 28, only minutes before Senator Williams met the sheik, in what became perhaps the single most controversial and criticized incident of the Abscam investigation, Weinberg and Errichetti briefed the Senator on what to say to the sheik.189 In this, the famous "coaching incident" which Weinberg recorded, Weinberg told the Senator to "forget the mine" and instead "stress how important you are."190 The Senator was to say, "Without me there is no deal. I'm the man. I'm the man who's gonna open the doors."191 As he offered the very words the Senator should speak, Weinberg urged Williams to view his impending speech as "all bullshit" and "all talk."192

A few minutes after his improper coaching session, on June 28, 1979, Senator Williams met the sheik and, as instructed by Weinberg, bragged on camera about his influence, stressing the importance of titanium to the government.

July 1979 saw the sudden development of the famous "asylum scenario," the principal mechanism for offering bribes to congressmen. The precise origin of the asylum scenario is unclear. During the March yacht party a middleman named Carpentier had mentioned that he could obtain immigration cards through corrupt INS contacts, a father and son named Alexandro. At the end of May, DeVito reminded Carpentier of his claim, explaining that the sheik owed a debt to a friend which he could discharge by bringing his colleague's son into the United States from Ireland as a permanent resident alien. On July 14, in a meeting with a middleman, Weinberg raised the possibility that the sheiks might have to suddenly flee their country, and feared diffi-

188. Id. In response, Weinberg explicitly asked if the Senator knew that he had to come on strong. Feinberg answered, "Yeah, that's right. Eric made it very clear. So did I." Id.

189. In conversations in mid-May with middleman John Stowe, who, FBI records showed, had been linked years earlier with Representative Jenrette in an alleged bank fraud and embezzlement scheme, Weinberg began to develop what became Abscam's principal theme: Arabs "always like to have friends in high office." Id. at 423. By "doing something for the Congressman," the sheik would know "he has got a friend in high office." Id. Money was no object. The FBI knew that both Stowe and Representative Jenrette were at this time in financial difficulty.

190. Id. at 232.

191. Id.

192. Id. Thus, there seem to be two important elements to the June 28 coaching session: (1) the importuning to "come on strong"; and (2) the assurance that the words to be used were mere talk and "bullshit."
cully getting into the United States. The sheiks were looking for every political friend they could get.\textsuperscript{193}

One of Errichetti's neighbors told his golfing partner, Philadelphia lawyer and city councilman Louis Johanson, that Errichetti had connections with wealthy Arab investors. Johanson passed this information to his law partner Howard Criden, one of whose clients was seeking financing and a buyer for a hotel in Atlantic City. If Abdul Enterprises financed his clients in this apparently legitimate deal, his law firm stood to earn up to five million dollars. On July 26, DeVito and Weinberg met with Criden, Johanson and Errichetti aboard \textit{The Left Hand}. Criden and Johanson presented their casino prospectus.\textsuperscript{194}

At the close of the meeting, DeVito suggested a cruise north along the Intracoastal Waterway. The conversation was not recorded, but skipper Rusty Allen (Agent George Allen) pointed out a yacht he said belonged to Anastasio Somoza, the recently deposed Nicaraguan dictator. Spontaneously referring to the previous day's \textit{Miami Herald} article about Somoza's problems in obtaining political asylum in the United States, DeVito confided to Errichetti and Criden that his employers, Sheiks Habib and Rahman, were convinced that, like the Shah of Iran, they too would be forced to leave. When they sought asylum in the United States, the sheiks were anxious to ensure they would not face Somoza's problems. Agent Amoroso had not cleared this asylum scenario beforehand, and he might have been following up on Errichetti's earlier list of corrupt politicians which included congressmen, or Weinberg's representation of the Irish immigration favor desired by the sheik. But, in any event, suddenly the asylum scenario was fully developed. Errichetti said he had the right political connections. DeVito said money was no object. Criden and Johanson knew the sheik would appreciate their help in contacting congressmen.\textsuperscript{195}

Errichetti via Criden and Johanson told Weinberg and DeVito he would be able to produce helpful congressmen at $100,000 each. "How many can you handle?" asked Errichetti. "As many as you can give me, I can handle" replied Weinberg.\textsuperscript{196} It was the sheik's "number one priority." Errichetti said he might be able to produce five or six.\textsuperscript{197}

Slowly but surely, perhaps unconsciously, the emphasis of Abscam had shifted. Begun to recover stolen property, the investigation had moved via Errichetti into municipal corruption, and the involvement of Senator Williams. With the asylum scenario now out front, Abscam

\begin{footnotes}
\item 193. \textit{Id.} at 79.
\item 194. \textit{Id.} at 427.
\item 195. \textit{Id.} at 427-428.
\item 196. \textit{Id.} at 428.
\item 197. \textit{Id.} at 429.
\end{footnotes}
would take off as a political corruption case targeted at congressmen and INS employees.

Meanwhile, the titanium venture moved forward. At a meeting at the Kennedy Airport Hilton on July 11, Feinberg, Sandy Williams, Errichetti, Weinberg, DeVito et al. established three separate corporations, adopted bylaws, and elected directors and officers. Feinberg endorsed Senator Williams’ shares in blank. Abdul Enterprises had promised a $100,000,000 loan which the FBI would never deliver. Not yet ready to close down Abscam, the agents had to stall for time. Thus, shortly after forming the corporations, on July 25 Weinberg informed Errichetti that another group of Arab investors might buy the titanium mine and processing plant, producing a $70,000,000 profit, but only if Senator Williams guaranteed his continued support of the venture.

In retrospect, this “unquestionably huge” inducement is very troubling if only for its size. Whereas the Williamses and Feinberg had originally requested a $100,000,000 loan, this new scenario promised Senator Williams alone an instant $12,600,000 profit, his 18% share of $70,000,000. Whether or not every person has a price, few of us inside or outside the United States Senate are likely to find out whether we would succumb to such enormous rewards in return for vague assurances we might never fulfill, which in any event were not clearly to the nation’s injury. The instant profit was 1,500 percent larger than the next highest bribe given any congressman in Abscam. Did the FBI have a responsibility to replicate what they knew or suspected as real corrupt marketplace conditions? These questions ultimately troubled the courts and Congress, and should trouble all citizens.

On August 5, Brooklyn Organized Crime Strike Force attorneys John Jacobs and Lawrence Sharf, who had reviewed the audio tape of the Senator Williams “coaching session,” told Weinberg not to “push

198. Id. at 426.
199. Id. at 236, 429.
200. In United States v. Williams, 529 F. Supp. 1085 (E.D.N.Y. 1981), aff’d 705 F.2d 603 (2d Cir.), cert. denied, 104 S. Ct. 524 (1983), Judge Pratt held that, given his position and background, the $12.6 million in profit to Senator Williams was not so large as to constitute entrapment or due process outrageousness. Id. at 1102. In United States v. Myers, 527 F. Supp. 1206 (E.D.N.Y. 1981), aff’d in part, rev’d in part, 692 F.2d 823 (2d Cir. 1982), cert. denied, 103 S. Ct. 2438 (1983), Judge Pratt said:

No matter how much money is offered to a government official as a bribe or gratuity, he should be punished if he accepts. It may be true, as has been suggested to the court, that “every man has his price”; but when the price is money only, the public official should be required to pay the penalty when he gets caught.

Id. at 1228.

The Select Committee felt that the amount of money offered to Senator Williams was astonishing. Nonetheless the Committee agreed with Judge Pratt that “the office of a Senator should not be for sale at any price.” SELECT COMM., supra note 153, at 237.
“Let events take their natural flow,” Jacobs told Weinberg; coaching was “not a good idea.” Later that day, Senator Williams, along with his wife and two aides, arrived at the Kennedy International Airport lounge, on their way to Europe. DeVito gave the Senator his stock certificates, which Feinberg had endorsed in blank. Also that day, from a hotel at the airport, DeVito called INS employee Alexandro at his home. The next day Alexandro told DeVito that his client should come to the United States and promised to arrange a phony marriage to allow him to stay.

On August 8, Errichetti told DeVito and Weinberg that Representative Myers was ready at any time. DeVito said that Myers would “have to introduce some kind of legislation, some kind of bill or something.” Errichetti replied, “Whatever you say.” Abdul Enterprises cut the bribe in half to $50,000.

The next day, assistant United States Attorneys Edward Plaza and Robert Weir, whom United States Attorney Robert Del Tufo had assigned to investigate and prosecute New Jersey’s Abscam cases, confronted FBI agents and Weinberg with their discovery that the Abscam investigation lacked adequate controls. Key meetings had not been taped, nor memorialized. The United States Attorneys had read the transcript of the Williams coaching incident. Plaza argued that Weinberg was “putting words into peoples’ mouths. And you can’t tell somebody what it is you’re going to say and afterwards prosecute him for it.” Weinberg protested that unless they told people what to say, they would not have any cases. One of the FBI agents expressed regret not that the coaching incident had taken place, but that it had been recorded.

To the United States Attorneys, this coaching incident constituted outrageous governmental behavior. At the very least the coaching was unfortunate, but the Senate Report, characterizing it as “shoddy investigative work” which “provide[d] a glaring example of the FBI’s failure to control and supervise Weinberg,” also concluded that this incident did not overbear Senator Williams’ will.

As the Senate committee analyzed it, the coaching incident contained two elements: (1) importuning the Senator to “come on strong” and (2) “assuring him that his words were mere talk and bullshit.” Up to a point the first aspect was positive; we want a public official’s corrupt intent made as clear and unambiguous as possible, especially

201. SELECT COMM., supra note 153, at 429.
202. Id.
203. Id. at 430.
204. Id.
205. Id. at 234.
206. Id. at 232.
because bribery’s essence may be “mere words: the promise to perform an official act in return for something else of value.”

Contraband is tangible but bribery often requires inference and interpretation. “The crucial evidence, therefore, consists of the words actually used and the circumstances evincing the speaker’s intent.” Weinberg’s telling the Senator that his words were “mere bullshit,” however, was especially objectionable. As the Senate report states it, “if Weinberg meant to convince the Senator to lie to the sheik about his willingness to use his senatorial office corruptly, Weinberg was attempting to induce the Senator to engage in conduct other than the classic form of bribery that the FBI was seeking to establish. A lie of that nature would still evince a willingness to commit fraud, but fraud was not the FBI’s goal.”

Bribery was.

Looking back on this coaching incident, virtually everyone now agrees with Plaza and Weir that the FBI had blundered by allowing its untrustworthy informant to meet with its principal target unaccompanied by an agent, moments before a crucial bribery event, and put words in the target’s mouth.

Many critics of Abscam and the undercover technique point to the coaching incident and flaws like it to prove that whenever the government creates fictitious worlds, the true intentions of targets are impossible to determine. But the Archer investigation shows that with a trained undercover agent as the primary actor, corrupt intentions of corrupt public officials may be clearly revealed, even as those corrupt officials describe falsely events which they do not truly believe.

On August 21, FBI headquarters approved $50,000 to bribe Congressman Myers. The next day, Myers described his role in the House of Representatives to DeVito and hidden videotape cameras. After DeVito repeated the asylum scenario, Myers responded: “Where I could be of assistance in this type of matter, first of all, is private bills that can be introduced. . . . With me in his corner his chances are one hundred percent better than they would be without somebody like me in his corner.”

“Well, that’s why we’re putting up this kind of money.”

“I’m gonna tell you something real simple and short,” said the Congressman. “Money talks in this business and bullshit walks. And it works the same way down in Washington.”

The sheiks, Myers suggested, should invest in his congressional
district to provide a cover for his immigration support. DeVito agreed they would protect Myers, and gave the Congressman an envelope containing $50,000: “Spend it well.” “Pleasure,” said Myers, accepting it. The meeting ended, and as Errichetti escorted Myers to the lobby, the Congressman handed him the envelope and drove with Johanson to Philadelphia. Errichetti returned to the hotel room, complained the bribe had been halved, but agreed to introduce other congressmen whose support would cost $50,000 each. Errichetti also promised to produce a powerful State Department official.

Errichetti then met Criden at Kennedy Airport, removed $15,000 and gave him the envelope with the balance. Criden returned to his law firm, and consulting with his partner, decided to take $10,000 and tell Myers there had only been $25,000. Myers and Johanson arrived and divided the remaining money with Criden. The Congressman took $15,000.

Lederer, the next Representative to accept a videotaped $50,000 bribe, on September 11 assured DeVito “we’re on the same vibes.” Weinberg and DeVito presented the asylum scenario and asked the Congressman about private legislation. “Private bill, sure.” Lederer repeated Myers’ theme and urged the sheik to invest in Philadelphia to justify his introduction of a private immigration bill. DeVito handed him a brown paper bag containing $50,000.

A week later Errichetti said he could produce 10 more congressmen from different parts of the country. When Weinberg asked Criden who he had lined up, Criden answered “Who do you want? Within reason I can produce almost anybody you want. Would you like some Governors? Congressmen, Senators, Governors, what else?” He knew a dozen public officials. Did Weinberg want California politicians, a Texas politician, a State Department official? “Let’s run with it until it stops,” said Weinberg.

Through the help of another middleman, Criden arranged to deliver Congressman Thompson, complaining to Weinberg that “to convince these guys [members of Congress] to do this number is not as easy as you think it is. . . . I got to talk to eighty guys before you grab two or three that are even interested in doing something.” It was encouraging, if true.

On October 20, Representative Murphy, with Criden, met DeVito

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213. Id.
214. Id.
215. Id. at 432.
216. Id. at 433.
217. Id.
218. Id. at 434.
219. Id.
220. Id. at 435-36.
and Weinberg at the JFK Hilton. The Abdul representatives outlined the asylum scenario, and DeVito suggested Abdul investments in Murphy's congressional district would give him the cover for his support. "I don't think there will be any problem," said Murphy, and requested they invest in a shipping company. DeVito offered Murphy and Criden a briefcase containing $50,000. Murphy declined to take possession, turning to Criden: "Howard why don't you take that."

Not every public official proved corrupt. Congressman Hughes, for example, declined to come to a meeting, and at the last moment Senator Pressler was substituted by a middleman without having been briefed in advance as to the meeting's corrupt purpose. When confronted with DeVito's explicit statement: "we've got the money, okay, and we're willing to put out the money . . . $50,000 is no problem," the Senator explained: "We do seek contributions, but we can't make any promises or any . . . other than to listen and to be educated, but then to make a judgment, you know. . . . I can't promise that I would introduce 'X' bill for 'X' person if something happens." It is a fine line between legitimately accepting substantial campaign contributions from individuals and organizations and selling your office, a fine but crucial line in our political system. Senator Pressler stayed clearly on the legitimate side of it, and in a textbook example of shrewd politeness, he did credit to himself and his office:

It would not be proper for me to promise to do anything in return for a campaign contribution, so I would not make any promises or any—I mean you can judge, you can hear my general philosophy and then you'll make a judgment, but I can't, you know, you can't make a commitment to do anything in these campaigns. Indeed, I would not feel intellectually honest doing that, you know, until I'm faced with the situation.

On December 4, DeVito and Weinberg met Congressman Jenrette at Abscam's Washington townhouse. Jenrette agreed to introduce a private bill for the sheiks; and DeVito stated the terms: $50,000 up front and $50,000 more when the act was done. The Congressman preferred that his law partner receive the bribe as a legal fee. Jenrette told DeVito he was under federal investigation and so he would wait to accept money until he could better assess his prospects. "There's nothing I'd rather do than walk out with it [the money]," the Congressman

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221. Id. at 438. For a complete discussion of the October 20, 1979, meeting with Representative Murphy, see id. at 277-85.
222. Id. at 438.
223. Id. at 440.
224. Id. at 441.
225. Id.
said. “I got larceny in my blood. I’d take it in a goddamn minute.”226

After some vacillation over whether Jenrette must accept the money personally, DeVito gave middleman Stowe $50,000. Stowe returned to Jenrette who telephoned DeVito to confirm Stowe had arrived with the money. On January 7, 1980, Jenrette and Stowe met DeVito and Weinberg at the Washington townhouse.227 Jenrette raised the asylum scenario and stated that he thought Senator Strom Thurmond would assist with private legislation in the Senate, but that the Senator would not meet them at Abdul’s townhouse and would only accept money through an intermediary.

The next day, Congressman Kelly met DeVito and Weinberg at the Washington townhouse. Weinberg had been told that Kelly would not take money personally, and DeVito should not offer it to him. Weinberg proposed that DeVito hand middleman Ciuzio the money in Kelly’s presence. Ciuzio answered, “That’s okay. But don’t say, ‘Hey, Congressman.’ You know what I mean? You can’t make him a . . . hood, you know.”228 Weinberg repeated that DeVito would insist on knowing that Kelly was receiving the money. Alone with Kelly, DeVito outlined the asylum scenario and the money he was offering. Kelly responded, “This thing . . . will be helpful to me and . . . maybe . . . down the road sometime, you can do me a favor. But in the meantime, whatever those guys are doing is all right, but I got no part in that . . . your arrangement with these people is all fine . . . you have my assurance that . . . I’ll stick by these people.”229

In the end, Kelly told DeVito to give the money to Ciuzio in his presence, stating “It’s a very complicated thing . . . for me to start dealing in money.”230 The Congressman would be most protected, DeVito suggested, if he took money directly from DeVito in private. Kelly agreed and accepted $25,000, promising to do whatever it took to assist the sheik.

On January 14, a suspicious Congressman Murphy, who was being stalled on his shipping venture, hired a private investigator to determine whether Abdul representatives were really con artists or, worse, government agents. After examining telephone and street directories and questioning neighbors of Abdul Enterprises’ Washington and Long Island offices, the investigator informed Murphy four days later that Abdul was a government front.231

In a last attempt to strengthen their case against Senator Harrison

226. Id. at 444.
227. Id. at 446.
228. Id. at 446-47.
229. Id. at 447.
230. Id.
231. Id. at 447 n.115.
Williams, DeVito and Weinberg urged Feinberg to set up a meeting with the Senator and the sheik. On January 15, Feinberg and the Senator met DeVito, Weinberg, and Sheik Yassir Habib at the Plaza Hotel in New York. After introductions, all withdrew, leaving the Senator and sheik alone with the hidden videotape cameras. DeVito commented as he left that a call the sheik had been expecting had not yet come. The sheik said he wished to be interrupted.

The sheik assured the Senator about financing the titanium deal, and asked him as a personal favor to assist in immigration legislation. Such private legislation was possible, but very difficult to enact, said the Senator, but he “welcome[d] the chance to know you better and to support this effort.” Eventually the sheik raised the issue of money: “I, will for your help and assistance—I would like to give you, some money for, for permanent—”

“No.”
“Residence.”
“No, no, no. This is . . . When I work in that area, that kind of activity, it is purely a public not, no.”

At this crucial moment, while the Senator was refusing to accept money in return for legislation, he was interrupted by DeVito who walked into the room, informing the sheik of a phone call in the process of being transferred. The Senator forced the conversation back to the money he was refusing: “You are most gracious. Within our, my position, when I deal with law and legislation, it is, it is, it is not on, it’s it’s, er not with, within—.”

At this moment the phone rang, and the sheik left the room. The prearranged call was from Agent Farhart’s (Sheik Habib’s) supervisor and Prosecutor Puccio who were monitoring the meeting as it took place. They instructed Farhart to get more specific commitments from Senator Williams.

When the sheik re-entered, the Senator again returned the conversation to his refusing money for legislation, and vaguely linking his immigration support with the titanium venture: “I find it a desirable thing, to do, for you, personally, and it’s part of creating something of value, bringing in that ore.”

The sheik asked the Senator for more details about the legislative process; the Senator began to ask personal questions; the sheik shifted the conversation back to the mine, and the Senator pressed the sheik
on the timing of the deal. Again the phone rang, and the sheik left the room. His supervisor told agent Farhart to try to get the Senator explicitly to link his assistance on immigration to the titanium venture.

When the sheik returned, the Senator announced he was leaving. Agent Farhart boldly sought the connection by saying a deal would be closed by the end of the month, if he were assured permanent residence.

Senator Williams responded, “You can leave with my assurance that I will do those things that will bring you on for the consideration of permanency. Quite frankly, I can’t issue that . . . I cannot personally. It, is a law. And it has to be, goes through the whole dignified process of passing a law. I can give you my pledge. I will do all that is necessary to get that to the proper decision.” After Senator Williams once more gave his “absolute pledge” to “do everything in my power to advance [the sheik’s] permanency,” the sheik and the Senator rejoined the others.

Their conversation had been interrupted at unfortunate and unplanned moments. Senator Williams should have been allowed to pursue his clear rejection of the bribe. The government failed to achieve what it sought: an unambiguous promise to introduce legislation in return for something of value—the titanium venture. But, however flawed, the FBI had a case against the Senator.

With Abscam leaking and scheduled for shut down by the end of the month, a Philadelphia offshoot was authorized to run only for ten days. On January 11, 1980, the final phase was rushed into being when Weinberg called Criden, and told him the sheik was looking to build a hotel in Philadelphia. Criden suggested that rather than use congressmen to facilitate the hotel project, “we may be able to give you more help” in Philadelphia. “Who do you know there?” asked Weinberg. “Everybody!” replied Criden. “Remember, I got a partner who’s a city councilman.”

The next week Criden met with the sheik’s representatives, Michael Cohen (Agent Michael Wald) and Ernie Polos (Agent Ernest Haridopolos), at the Barclay Hotel in Philadelphia, where the FBI had set up its videotape facility. Cohen reiterated the sheik’s interest in building a hotel in south Philadelphia. The sheik had sent them to

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237. Id. at 238.
238. Id. A Justice Department memorandum dated November 27, 1979, states that it would be necessary to recontact Senator Williams to obtain an overt act for a prosecutable case of bribery and conspiracy. Williams later argued that the government’s case against him should fail by their own admission. Judge Pratt rejected this. 529 F.Supp. at 1100-01.
239. Select Comm., supra note 153, at 447.
handle possible problems such as zoning, condemnations, and variances. To Criden’s reassurance that “you don’t have any problem. You got two of the strongest guys”\textsuperscript{241} in Congressmen Myers and Lederer, Cohen suggested the sheik was aware of the difference between national and local government: “He wants to be assured that the municipal government and he can coexist.”\textsuperscript{242}

“How do you want me to satisfy you?”\textsuperscript{243} asked Criden.

Cohen replied, “I’m sure the easiest way is for me to deal with someone in municipal government and I can go back. . . . Titles impress the man, as you know, from past experience. . . . If he receives those assurances from someone with a title sounds appropriate, eh, I buy it, he buys it.”\textsuperscript{244}

As requested, Criden explained the structure of municipal government and mentioned that George Schwartz, the City Council President was “a powerful guy.”\textsuperscript{245}

“Can I deal with him while I’m here in town?” asked undercover agent Wald, truly in a hurry.

“I don’t know. I gotta get hold of my partner.”

“Can I deal with your partner?”

“Oh, sure” replied Criden.\textsuperscript{246} After further discussion, Criden continued “[a]s far as Johanson is concerned, you can talk as candidly as you want.” However, said Criden, Schwartz might want “to handle it indirectly.”\textsuperscript{247}

Cohen asked what the “tariff” would be for Johanson and Schwartz, and Criden answered “twenty-five” for Johanson and “another fifty” for Schwartz. Cohen balked at $50,000.\textsuperscript{248}

“You want to go thirty on this guy?”

“Will he bite at thirty?” Cohen asked, “I mean does that take care of him?”

Criden suggested, “let me try it. . . . I’ll run it up the flagpole.”\textsuperscript{249}

Several hours later attorney Criden returned with his partner, Councilman Johanson. Cohen (Agent Wald) again discussed the proposed hotel construction, explaining he wanted to avoid delays in obtaining variances and permits. Johanson assured him that inspectors from Licenses and Inspections, building inspectors, plumbing inspectors, and electrical inspectors were “not gonna monkey with you for a

\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id. at 582-83.
\textsuperscript{249} Id. at 583.
BEYOND 1984: UNDERCOVER IN AMERICA

... because the word's gonna come down, that this is a vital project.\textsuperscript{250}

Discussing the political situation in Philadelphia and the city council in particular, Councilman Johanson bragged of his own and Schwartz's importance, stating that he, Schwartz and majority leader Jannotti "run the city council."\textsuperscript{251} Cohen asked about Jannotti, and Johanson agreed that because of his seniority, Jannotti might well be included. Agent Polos made sure Johanson acknowledged the money before handing it to him: "How much is it?"

"Twenty-five," replied Johanson.

"Okay," said the sheik's representative, "we have to have these proper assurances. You do us a favor, we're doin [sic] you a favor."

"Obviously," said Criden.

"Sure," said Johanson. Johanson received the $25,000.

Cohen reiterated the exchange: "And for 25 we've got a friend."

"Right," said Johanson.\textsuperscript{252}

Polos gave Criden $5,000 for Johanson's appearance and promised him another "five for the next delivery."\textsuperscript{253} Criden did not know Council President Schwartz personally, and used as an intermediary Judge Thomas Shiomos of the Philadelphia County Court who advised Schwartz of Criden's wealthy Arab clients looking to invest $150 million in a hotel. There would be a "fee" for Schwartz's "advice" in building the complex. Judge Shiomos said he didn't think there was anything "improper," but that Schwartz could judge for himself. Schwartz stated that he "would be interested in anyone willing to invest $150 million."\textsuperscript{254}

On January 23, 1980, Criden and Schwartz met Cohen (Agent Wald) at the Barclay suite. Cohen explained "the purpose" for his visits to Philadelphia [was] to firm up... what we consider to be a major investment here... [T]he gentleman cares to make a major investment here because he seems to like Philadelphia, and he has been told that it would... be in his best interest to have an investment... in an area where he... would like to take up rather permanent residence and Philadelphia is it.\textsuperscript{255}

\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} Id. at 584.
\textsuperscript{255} Id.
"Philadelphia is a nice city," said the city council president. "Philadelphia has been on the move since 1952. And, business climate in Philadelphia is good."

So far it all seemed legitimate. Now Cohen became more explicit:

We want to put [a hotel] up. Now we know that there are problems inherent in any major construction, in this city and any other city. What I am trying to do is take care of any potential problems long before they exist. . . . We can foresee certain problems such as . . . zoning and variances and this type of thing. . . . municipal government, how it effects those various things, but we don't want to be faced with problems down the road.

Schwartz "responded to this overture with a soliloquy on his own power." Agent Wald became specific: "Is it fair to say that by doing business with you, uh . . . my zoning problems become . . . ."

"Right."

"You don't have any," added Criden.

Asked again whether he could control the various factions of the city council, Schwartz for the first time adopted a corrupt mode of speech: "We got five or six [new] members that came in. Uh, you tell me your birth date. I'll give them to you for your birthday."

But after reiterating his control, Schwartz declared that although he could not promise that the hotel project would not have any problems, those problems would not be "insurmountable" as long as the project "is a proper project."

"I am not putting up a cathouse," said Cohen.

"It's going to be legitimate," assured Criden.

"That I take for granted, or I wouldn't be here," said Schwartz.

Was this window dressing, or was it a city council president truly representing Philadelphia's best interests by guaranteeing that there would be no insurmountable petty problems to bog down a large legitimate construction project?

Schwartz gave assurances: If the project violated "some minor . . . type statute or ordinance or . . . something. . . ." If it isn't something that is outlandish, if it is something that should and can be han-
dled, and I can, I can’t think of anything that couldn’t be handled ... through a variance procedure of some kind.”

As long as the project wasn’t too idiosyncratic and eccentric, various boards and commissions as well as the city council, all “part of the organization” were in his effective control.

Eventually Cohen spoke of money: “We’ve talked to Howard [Crider], you know, the figures, the dollars we’re talking are in the right ballpark. We’re . . .”

Schwartz interrupted: “That’s not my prime concern. I’m interested in a good project. I’m interested in tax rateables. I want to see Center City develop . . . anything else that’s going to add to the tax rateables of the city, that’s going to create jobs.”

“I am again quick to say that I’m not really interested in the City of Philadelphia, to be candid,” the undercover agent replied.

“Well, I have to be. I have to be,” the city council president countered.

Reviewing Schwartz’s assurances, Cohen concluded: “I can go back and say I met a gentleman. We had a business deal, uh, I’ve made a friend in Philadelphia.”

“Yes” said the City Council President.

“And things are taken care of . . .”

“Right.”

“Okay, and the sum’s appropriate and we’re in good shape.”

Shortly thereafter, Cohen opened his briefcase and, without discussion, handed Schwartz an envelope containing $30,000 which Schwartz placed in his jacket without counting. Then Cohen repeated the quid pro quo: “The legislative problems we’ve taken care of?”

“No problem,” said Criden.

“No” said Schwartz and the council president left while Criden remained to receive his $5,000.

Presidents of city councils do not “give” their new members away as “birthday presents,” nor should they accept $30,000 to guarantee that otherwise legitimate major projects will not run into typical bureaucratic hassles. But had Schwartz really “sold” his office? He had neither demanded money, nor promised to do anything illegal, or contrary to Philadelphia’s best interests.

The next day, January 24, 1980, the FBI paid its last Abscam

263. Id.
264. Id. at 586.
265. Id.
266. Id.
267. Id.
268. Id. at 587.
bribe, to perhaps its most innocent target. 269 Harry P. Jannotti, majority leader of the Philadelphia City Council, was briefed by Cohen (Agent Wald):

We are prepared to make a major investment in this city, alright, and, ah, we have incredible funding but it's still a major investment even for the people that I represent at this time. Ah, it's not a drop in the bucket even for them. It's a fair amount of money and ah, the way these people do business, is somewhat different than the way we do business in this country, they don't think. They just can't tolerate nor can they put up with psychologically any problems that arise. Now these types of problems do arise but they can be handled, but the type of problems that would get back to my employer. He can't deal with them, and he turns to me and says I thought we had all this settled in Philadelphia. So, that's why I'm here, simply to take care of any problems now.270

“Far in advance,” said Jannotti. Cohen replied:

It’s really not that far I don’t think . . . 271 But at least enough in advance that when the time comes, it's over and done with, everything is nice . . . problems I can foresee . . . zoning, any variances that we have to obtain any, ah, committee type things we'd have to, ah, deal with, with City Council ah, inspections licensing the whole gamut . . . well you were in that type of business in an allied situation and I'm sure you can appreciate the petty things that arise, that have to be handled.272

Jannotti replied to these representatives of a fabulously wealthy sheik whose Arab “way of doing business and psychology” differed radically from his own, a sheik who absolutely insisted that all problems be ironed out in advance before initiating the hotel project:

First of all, you're going to invest a substantial amount of money and, ah, what you'll be doing is bringing into the City of Philadelphia a substantial amount of money, and this will create jobs, will create a tax base and from ah what I gather everything that you want to do will be strictly, ah on board. I mean there's nothing phony about it.273

269. For a complete discussion of the bribe paid to Harry Jannotti, see id. at 587-89.
270. Id. at 587.
271. Id.
272. Id.
273. Id.
The sheik’s representative assured him: “It’s a legitimate operation.”

Jannotti continued:

As long as it’s, long as it’s a legitimate, legitimate operation, ya know, any legitimate operation we will fight for because, ah, ya know why shouldn’t we fight for a legitimate operation? If the operation is legitimate, it’s going to bring a tax base into the City of Philadelphia, its going to bring employment into the City of Philadelphia, ah, this is, this is basically our job, George [Schwartz]’s job and my job, ah, to try to get as much money into the City of Philadelphia and as many jobs into the City of Philadelphia as we possibly can.274

Jannotti’s conversation doesn’t sound corrupt. Nor did it become more so, although Agent Wald dutifully tried to make explicit a corrupt quid pro quo. “[B]y dealing with you here this evening and, and, the gentleman I, I spoke with last evening, can I go back with those assurances?”275

“I don’t see why not, as you say, ya know, its a legitimate project and you have your financing, there’s nothing, ah, there’s nothing that you’re doing illegal.”276

Criden must have sensed that Jannotti sounded too innocent to be paid; he interjected, “Michael [Cohen] wants to be sure that he has a friend if he has a problem.”

“Oh certainly,” assured Jannotti.

“If something arises, if something arises that needs a city council vote to be very specific, a city council vote is needed on the thing, can I count on your vote?”

“Why sure,” said Jannotti. “First of all we’ll go over it again, you have a legitimate project, you’re going to invest thirty-six million dollars in the City of Philadelphia, which is going to create a tax base and going to create employment.”

“Right but—”

“A lot of legitimate, ah, things get bogged down,” interjected agent Polos, “we don’t want to be bogged down.”

“No, I can’t see this being bogged down,” assured Jannotti.277

Jannotti had made it clear; there was no reason to fear nor cause for corruption. The Arabs had a legitimate project that would bring jobs and tax revenue to Philadelphia. That was all the reason he needed to support it and make sure the project sailed smoothly.

274. Id. at 587-88.
275. Id. at 588.
276. Id.
277. Id.
Cohen then explicitly reintroduced perhaps the least proper government scenario in Abscam—the Arab mind:

Let me give you a short insight into the Arab mind. . . . [I]t’s at times difficult to understand now ah, I can appreciate it because I’ve had both worlds and I can relate ah, you know, you folks are here, right, they think differently, they deal differently, their psychological process are alien to the way. . . . I understand exactly what you’re saying. O.K. I’m coming up with something that’s going to help the City of Philadelphia. It would help, as it would help any city. Ah, he [the sheik] does not look on it that way. They do business, differently. They pay the freight up front. They make friends, right, and then where there, there is a potential problem that I don’t mean, I don’t mean a problem that would necessarily close down construction and throw the project out of Philadelphia.278

After more discussion about city council politics, Cohen said “I would just as soon save the money, but I can’t go back.”279 Had not Criden interjected “I understand,” the entire sentence might have read:

I would just as soon save the money, but I can’t go back and tell my Arab sheik with his Arab mind and Arab way of doing business that I am sure we will have no problems although I did not pay off municipal officials because those officials assured me that our legitimate project was in their city’s best interests, and therefore they support it. He will not hear that; he would not understand it.

Imaginary dialogue is not necessary to show Jannotti’s morally ambiguous situation. Cohen assured Jannotti:

[Y]ou’ve been in business all your life. . . . I was sent to Philadelphia to pay for certain things because that is the psychology and that is the method of business that these people are use[d] to, and that is how they conduct business, they conduct with everybody they do. That’s why I’m here. I understand their psychology. I’ve been involved with them long enough, ah to make it a major part of my life, a majority of my life.280

The Councilman replied:

Well, you know, just on the basics of what you said and what

278. Id.
279. Id.
280. Id. at 588-89.
they want to do, it's enough for me to get on the floor and argue. I don't have to, even care what else they want to come up with. My basic point is, the fact that, ah what's coming in here, and this has been our job, to bring as much business, and ah tax base and employment to the City of Philadelphia. If that's the way they want to do business that's all right too.\textsuperscript{281}

Agent Wald pressed for assurances:

Can I go back, ah, ah, to my employer, the Sheik and tell him that I dealt with a man, . . . with you, Thursday night, explain who you were, what your position is and say, "he and I conducted a cash business transaction and he guaranteed me, we don't have a problem in Philadelphia. We ah, ah City Council's on our side, the man has the influence with the Finance Committee, he has influence."\textsuperscript{282}

Jannotti replied, "[y]ou wouldn't be able to say we don't have a problem. Problems might arise, but problems ah, you might say problems can be solved."\textsuperscript{283}

"OK, you can handle those problems we presume," said the agent.

"I don't see why not if it's a legitimate, if it's a, if it's a legitimate if its a, if its a legitimate enterprise, it's a legitimate piece of business," stammered Jannotti.\textsuperscript{284}

Again and again Cohen (Agent Wald) tried to get Jannotti to concede he was taking a bribe to do something corrupt, or at least something he otherwise would not have done. And each time, the undercover agent failed.

"By making friends with you this evening, if we have to go to City Council and say look, ya know, give us a break, right, get us some legislation that this is OK. That it's in the right neighborhood, that the time—"

Criden interrupted: "If you want a street for example let's say changed from a two way to a one way OK, maybe that will help you." Wald interjected, "OK," and Criden continued, "handle your traffic pattern."

"We handle that everyday," said Jannotti.\textsuperscript{285}

The most agent Wald could get from Jannotti was, "We'll go in there and battle, we'll go in and battle."

"You're with us?" asked agent Wald.

\textsuperscript{281} \textit{Id.} at 589.
\textsuperscript{282} \textit{Id.}
\textsuperscript{283} \textit{Id.}
\textsuperscript{284} \textit{Id.}
\textsuperscript{285} \textit{Id.}
“Certainly, we’ll go in and battle,” Jannotti replied.288
Wald then took from his briefcase an envelope containing $10,000, handed it to Jannotti, and asked if “that amount is sufficient.” Accepting the envelope, Jannotti answered, “We’ve discussed it.”
“You know how much it is?” asked Polos.
Criden urged, “Tell him, you can tell him.”
“How much is it?”
“Tell him?”
“We won’t even discuss it,” insisted Jannotti, obviously uncomfortable.
“OK, but you did discuss it with Howard?”
“OK we won’t even discuss it.”
“Is this arrangement please, pleasing to you?”
“As I say, we won’t even discuss it.”
“OK, well, we’ve done our business,” said Criden.
And so they had. Jannotti departed, a future convicted criminal, a corrupt(ed) public official.287

That same day, Myers was told he might have to start introducing immigration legislation soon. The Congressman complained he had been shortchanged in August. Cohen agreed to give Myers $35,000 extra for the August meeting and $50,000 to handle hotel problems with local government. On January 27, Congressman Jenrette told DeVito he had spoken to Senator Thurmond “in a very vague way,” and he could not produce the Senator for a meeting.288 The Senator would not accept money or give assurances in advance, said Jenrette. But on January 29 middleman Stowe told Weinberg that although the Senator would not make assurances in return for money, he would accept money after he introduced the legislation.289 This claim was never tested.

Meanwhile, inquiries from NBC, The New York Times, and Newsday revealed increasing awareness of Abscam. Criminal Division Chief Philip Heymann agreed with FBI Director Webster that all significant leads had been followed. The investigation was surfacing quickly, the agents were tired, and while an investigation like this could go on endlessly, increasingly middlemen were reaching out to politicians beyond their immediate “string of associates.”290 The FBI had turned away no one, following every significant lead evenhandedly. As Webster later testified: “You do not try to keep going on and on and on. The point gets made. The deterrent effect gets made at some reasonable

286. Id.
287. Id.
288. SELECT COMM., supra note 153, at 450.
289. Id.
290. Operations Hearings, supra note 153, at 413.
point." The Philadelphia phase, the primary reason for the extension, had netted the President and majority leader of its city council. Enough was enough.

**TRIALS AND HEARINGS**

Once Abscam went public, Justice Department officials were under pressure to prepare and present cases as quickly as possible, lest the November 1980 elections occur while the government possessed substantial evidence of candidates' criminal conduct. Party primaries would take place even sooner.

Abscam's last phase produced its first, and perhaps most morally troubling indictment: In May, along with Philadelphia City Council President Schwartz and Councilman Johanson, majority leader Harry P. Jannotti was indicted for accepting money pressed upon him by representatives of foreign businessmen. The next day a Brooklyn grand jury indicted Johanson, his law partner Criden, along with Congressman Ozzie Myers and the most corrupt official in Abscam, Camden Mayor Errichetti.

Congressman Lederer's indictment immediately followed, and within weeks, Representatives Jenrette, Murphy, Thompson, and Kelly were also indicted, leaving U.S. Senator Harrison Williams as the subject of intense speculation but no formal action.

Videotapes showing Congressman Myers taking an envelope containing $50,000 from an undercover FBI agent, boasting of his congressional influence, and similar evidence easily convinced a jury which at the end of August, 1980, convicted Myers and his three codefendants in the first Abscam trial.

Mayor Errichetti returned to Camden convicted of bribery, exposed as a thoroughly corrupt organized crime connected facilitator of the fix. Large segments of the city he had sold out embraced him tumultuously, and the Camden City Council rejected a resolution calling for Errichetti's voluntary resignation. The United States House of Representatives, on the other hand, for the first time since the Civil

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291. Id.
293. Id. May 28, 1980, at 1, col. 1.
War, voted 376-30 to expel one of its own, Myers, who personally urged his colleagues to recognize that he’d been “set up.”

Jannotti and his cohort were convicted next. So, too, Congressman Jenrette. Senator Williams was indicted, and Representative Murphy, who had been renominated while under indictment, was unseated in the November elections.

The Abscam legal process, an inexorable series of indictments, trials, and convictions, was quickly gathering steam, well on its way to a clean sweep of all involved, when it struck its first major judicial obstacle: On November 26, 1980, Federal District Court Judge John Fullam, who had presided at Jannotti’s trial, set aside the jury’s guilty verdict, and granted the defendant’s motion of acquittal. This opinion, the first of many Abscam judicial pronouncements, was a strong but responsible denunciation of the government’s investigation. Fullam’s opinion was designed to withstand executive counterattack on appeal by encompassing a set of independent grounds for dismissing the convictions.

The first ground—lack of federal jurisdiction—was on a different plane from all the others. In considering his court’s jurisdiction to have tried the case in the first place, Judge Fullam was deciding his own right to decide. Whether or not a court has jurisdiction is prior to, and independent of, whether it finds the investigative techniques acceptable or the defendants guilty. Judge Friendly had seized upon this in Archer when he held there had been no violation of the Travel Act by the interstate telephone calls and therefore, no federal case at all.

Jannotti had been indicted under the “Hobbs Act,” which prohibited “in any way or degree . . . affect[ing interstate] commerce . . . by . . . extortion.” For Judge Fullam “the issue to be decided” was whether the government had proved “the necessary nexus” between Jannotti’s actions and interstate commerce.

Jannotti, of course, was unconcerned with interstate commerce when he accepted $10,000 from the sheik’s representative. He had no intent, so legally there was no attempt or conspiracy to affect commerce. On the other hand, if Jannotti had thought about it, the hotel

300. N.Y. Times, October 8, 1980, at 1, col. 1.
303. See supra note 95 and accompanying text.
305. 501 F. Supp. at 1184.
construction project apparently would involve materials moving in commerce. Judge Fullam held, however, that not appearances but reality governed: the federal jurisdictional element could not be established by "purely hypothetical potential impacts on commerce." A fictitious hotel could never involve any actual movement of materials. Additionally, the extortion component was defined broadly to include "obtaining property . . . induced . . . under color of official right." Jannotti had not requested the bribe and had even "made it very clear that the payments would not be necessary." Therefore, concluded Judge Fullam, he could not have "extorted" the payment. Citing and applying Judge Friendly's Archer warning that "federal courts should not sanction the artificial federalization of purely state crimes," Judge Fullam held that to permit a federal criminal conviction here would substantially stretch the definition of extortion, and expand federal jurisdiction in "derogation of the criminal jurisdiction of state courts. In my judgment, it is impermissible to treat federal jurisdiction thus doubly expansively: first by extending it to passive acceptance of gratuities by public officials, and second by extending it to purely hypothetical situations." This bribery was essentially a state crime punishable under state law. "To permit this kind of artificial federalization would effectively remove virtually all of the limitations upon the criminal jurisdiction of federal courts, and would be utterly contrary to accepted notions of federalism."

This essay has already emphasized that a state's police powers, its essential sovereignty, include defining, investigating, prosecuting and punishing crime. And it is certainly true, as both Judges observed, that there has been a "stretching" of federal jurisdiction beyond the intention of the framers, and beyond what most of the people who ratified the United States Constitution anticipated. Although the Hobbs Act perhaps should not have reached this situation, i.e., there should be no federal jurisdiction over local bribery based on interstate commerce, Judge Fullam is unconvincing in maintaining that the crucial difference is the scam. The Hobbs Act should not reach essentially local crimes but if it does reach real situations, it may also reach simulations. If there are adequate grounds, state or federal, to investigate, the scam should not preclude jurisdiction.

Lest a federal appeals court disagree, reverse his decision, and recognize his jurisdiction, Judge Fullam also attacked the convictions on two other levels. Considering the actual conduct of the government and the mental state of the defendants, the Judge held that as a matter of

306. Id. at 1185.
307. Id. (quoting 18 U.S.C. § 1951(b)(2) (1976)).
308. 501 F. Supp. at 1185.
309. Id. at 1204.
constitutional right (due process) and also congressional policy against entrapment, the convictions could not stand. 310

The judge reviewed a divided Supreme Court’s decisions in Sorrells, 311 Sherman, 312 Russell, 313 and Hampton. 314 Hampton’s 3-2-3 split had left the doctrinal principles of entrapment and due process splintered, but Judge Fullam discerned certain “guiding principles” which emerged with clarity from these pronouncements:

1. It is perfectly proper for law enforcement officials to engage in undercover activities, including deception and trickery, where both the purpose and effect of their activities is to enforce the law by ferreting out and exposing criminal activities. Entrapment issues arise only where the government induces or persuades a person to commit a crime, or actually participates in the commission of the crime. 315

It is not clear that government’s “participation” automatically substitutes for inducement so as to raise entrapment. If, for example, a judge were convinced that some participants in a criminal enterprise were really undercover agents, but the agents were wholly passive, only acting on the suggestions or commands of the defendants, it is not certain that an entrapment issue has arisen. The thrust of the first principle, however, is noncontroversial: entrapment requires government inducement.

2. Under no circumstances is it permissible to convict of crime a non-predisposed defendant who was induced by government agents to commit the crime charged. No member of the Supreme Court has ever expressed any doubt as to the correctness of this principle, although varying reasons have been put forth from time to time for its justification. 316

This proposition is not obviously true. Those Supreme Court Justices who had dissented from defendants’ convictions because they

310. Id. at 1187-1205.
316. Id.
urged an objective standard of entrapment might well affirm a conviction of an extremely weak-willed, mildly induced, non-predisposed defendant. For the subjectivist majority, however, the non-predisposed governmentally-induced defendants are the core of the entrapped.

3. A predisposed defendant may properly be convicted notwithstanding that he was induced by government agents to commit the particular crime charged, so long as the inducement is not such as would be likely to cause a person of reasonably firm moral convictions to stray into criminality.317

While it is true that the properly induced predisposed defendant is the core of the manifestly corrupt, the Court has split on why this person is not entrapped. For the subjectivist majority, a predisposed defendant by definition can never be entrapped.318 For the objectivists, a defendant could only be entrapped if the government's inducement were improper.319

4. A predisposed defendant may properly be convicted notwithstanding governmental inducement or creative involvement, unless the conduct of the government agents was so outrageous as to . . . be deemed a violation of due process. The converse of this statement, namely, that even a predisposed defendant cannot be convicted if the Government's conduct amounted to a violation of due process, probably also represents the view of a majority of the members of the Court, although some may regard it as still an open question. . . .320

This last sentence is not the converse but the strict logical equivalent of the statement immediately preceding. If the one is true so is the other true: Both statements amount to the proposition that among the governmentally induced, only those predisposed may be convicted whose due process rights have not been violated by governmental outrageousness.

Justice Rehnquist's plurality opinion in Hampton rejected this proposition. For those three justices, by definition a predisposed defendant could never have had his own constitutional rights violated by governmental overreach.321 The other five Justices, however, agreed

317. Id.
318. Id.
319. Id.
320. Id.
321. 425 U.S. at 490. See supra note 146.
that sometimes due process violations could prevent convicting even a predisposed defendant.\textsuperscript{322}

Under Judge Fullam’s fourth principle, espoused by a Supreme Court majority, what was sufficient governmental overreach to violate due process? Most entrapment claims, Judge Fullam observed, arose in narcotics cases and “because of the extreme danger to the public inherent in narcotics trafficking, it [was] plainly necessary to avoid placing undue restrictions upon the scope of permissible police activities. . . .”\textsuperscript{323} Of course, this essay principally argues that official corruption directly threatens the republic, and therefore the public interest also demands no undue restrictions upon honest government’s investigation of corrupt government. Obviously the question in both contexts is what is “undue”?

Any government undercover operation produces a particular crime at a particular time and place that would not have occurred but for government involvement. This is no less true with the single agent posing as a helpless elderly victim on a park bench preyed upon by a mugger than it is with an elaborate scam. All the Justices in \textit{Russell} and \textit{Hampton} agreed at least that a defendant who was “ready and willing to commit crimes of that type” was predisposed although the government supplied the necessary opportunity, not in itself an extraordinary inducement.\textsuperscript{324} Critics often complain that the government may never “create a crime which would never have otherwise occurred.” Taken literally, this would outlaw all undercover opportunities. Judge Fullam seemed to lose sight of this momentarily when, after analyzing \textit{Hampton} and \textit{Russell} he observed in \textit{Jannotti}, “[t]he question still is, did the Government induce the defendant to commit a crime he would not otherwise have been likely to commit?”\textsuperscript{325} More precisely he ought to have said, “The question still is, did the government induce the defendant to commit a crime of the type which he would not otherwise have been likely to commit?”

Those who blur the distinction between a particular crime and type of crime often complement that confusion by talking of government “illegality” as if it were per se improper for a government investigating agent to engage in an act which if done by a private person for private motives would constitute a crime.

Judge Fullam rejected this:

As a practical matter, however, the fact that the actions of the government agents were themselves illegal will often have very

\begin{thebibliography}{9}
\bibitem{322} 425 U.S. at 491-95 (Powell, J., concurring); \textit{id.} at 499 (Brennan, J., dissenting).
\bibitem{323} 501 F. Supp. at 1190.
\bibitem{324} \textit{Hampton}, 425 U.S. at 489-90; \textit{id.} at 493 (Powell, J., concurring); \textit{id.} at 497 (Brennan, J., dissenting); \textit{Russell}, 411 U.S. at 433-36; \textit{id.} at 437 (Douglas, J., dissenting); \textit{id.} at 442 (Stewart, J., dissenting).
\bibitem{325} 501 F. Supp. at 1190 (emphasis added).
\end{thebibliography}
little bearing upon their power to persuade. A non-predisposed defendant would ordinarily not be likely to be lured into crime merely by being made aware that others were willing to commit unlawful acts.\footnote{326}

Furthermore, "a rule precluding successful prosecution whenever the conduct of the government agents is shown to have been illegal would provide the sophisticated criminal with a ready means of determining whether a person he is about to deal with is or is not an undercover agent."\footnote{327}

In theory, the government's inducement was a question separable from the defendant's predisposition, but for Judge Fullam, subtle reality confounded apparently simple doctrine. "[I]t is not always possible to achieve complete compartmentalization in this context. That is, it is sometimes impossible to achieve a correct resolution of the predisposition question in total disregard of the nature of governmental inducement."\footnote{328}

The Supreme Court had not explored in depth what constitutes the mental state properly characterized as "predisposition." Each court therefore must undertake its own analysis without guidance from the top, focusing upon the defendant's state of mind and inclinations before an initial exposure to government agents. "But the distinction between a predisposed and a non-predisposed state of mind is not necessarily clearcut."\footnote{329} Like so many other life experiences which law classifies discretely, predisposition was a continuum:

At one extreme is the defendant who customarily engages in this type of criminal activity as a way of life, and who enthusiastically embraces any additional opportunities for such activities. At the other extreme is the resolute individual who would not commit a crime of this type under any circumstances. In between are many gradations: the person who occasionally commits crimes of this type, and would be willing to do so again only if a particularly favorable opportunity should present itself; the person who has previously succumbed to temptation, but is making a sincere and concerted effort to resist such temptations; the previously innocent person who is weak and easily influenced.\footnote{330}

Judge Fullam omitted another important type: the previously innocent person who would succumb only to a huge inducement which

\footnotesize{\begin{itemize}
\item \footnote{326}{\textit{Id.}}
\item \footnote{327}{\textit{Id.}}
\item \footnote{328}{\textit{Id.} at 1191.}
\item \footnote{329}{\textit{Id.}}
\item \footnote{330}{\textit{Id.}}
\end{itemize}}
realistically should never be offered. If, as cynics who claim to be real-ists contend, every person has a price, then the essence of incorrupti-bility might consist in pricing oneself out of the corrupt market. This works only if one's price is substantially above the going market rate, and if the government's inducement is within range of the market price for corruption.

Judge Fullam's conclusion that inducement and predisposition were inextricably linked was profoundly important, but, when he observed, "the stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition," the judge overlooked an important aspect of their relationship. The Third Circuit too had adopted a so-called "unitary approach" where "inducement . . . enters as an element of predisposition which the Government must dis-prove, rather than as an independent element which the defendant must prove."331

What Judge Fullam, and the Third Circuit, had overlooked was a fairly obvious fact of human nature connecting inducement and predis-position: The greater the inducement, the greater almost anyone's predisposition to accept it. It is not that with great inducement, the crime is not the result of predisposition. Just the opposite: the greater the inducement, the more likely that a defendant is actually predisposed to a crime of that type. And this is especially true of a previous innocent who would only accept an unrealistically large inducement.

A problem for those of us who advocate a subjective view of entrapment, who wish to ensure that only the predisposed are convicted, is that our concern would theoretically be met by a government that offered astronomical incentives, which we could be certain any defendant was predisposed to take.

This problematic relationship between predisposition and inducement was confirmed in a discussion I had recently with a close friend who is a scrupulously honest narcotics bureau chief in a local prosecutor's office. "The government should be able to offer any bait to every public official and if they take it, they deserve their punishment," he maintained.

When I asked "if a first time non-trafficking possessor of a small amount of marijuana offered you $10 million to falsely indicate his co-operation so as to justify dismissing the charges, and you could do it without being caught, are you certain you would refuse?," he paused, then admitted that he might be predisposed to take that bait, but he steadfastly maintained that if caught he too deserved severe punishment.

331. Id. at 1192 (quoting United States v. Watson, 489 F.2d 504, 511 (3d Cir. 1973)).
332. Id.
The bureau chief's response avoids the issue: since there are no perfect people, almost everyone is predisposed to criminality with a great enough inducement. If we limit our public offices to public officials who would never under any circumstances, real or imagined, commit any impropriety, then our public offices will go unfilled. What is largely overlooked is not that sometimes a great inducement rather than a predisposition is the cause of crime, but that a great inducement will actuate a pre-existing disposition which is not dangerous to the public precisely because it is fantastic.

So, unless otherwise suspicious, the sweeter the deal, the more likely we are predisposed to accept it. Therefore, inducements should not be too alluring, precisely because and not in spite of the fact that they will thereby attract the predisposed. There are predispositions which should not be punished.

The relationship between predisposition and inducement may be more complicated yet. Judge Fullam might be right; they may be interrelated. One can assume a preexisting predisposition actuated by an enormous inducement, but the inducement may create the disposition. We may desire certain ends, and strive to fulfill them only because we know they are impossible to achieve.

To whittle away the time during a losing softball game, a group of us sat with a mirror in our hands trying to reflect the sunlight and blind the pilot in a jet flying several miles above us. We adolescents tried mightily to make the speck go into a tailspin and crash. We felt free to try; we felt free to want to. Were we predisposed mass murderers? Only under impossible conditions. In some sense, being ethical means pricing oneself out of the market, and channelling corrupt urges into unrealizable fantasies.

What might be an Honest Politician's fantasy? An immensely rich potentate offers him a fortune to perform acts that are unquestionably in his constituents' best interest. He tells the Prince that it's not necessary, that he'll do it anyway, but in this fantasy the Prince insists he will feel better and will only create jobs and rebuild the slums if the politician accepts money: A fantasy, from a world not like ours. Here, people do not pay substantially for favors they know they can get for free on merit.

Law abiding citizens have a right to imagine themselves committing crimes, having illicit sex, etc. We may lust in our hearts. If the government hooks into our otherwise unrealizable fantasies and makes them a punishable reality, then it is the root of our evil.

What is disturbing about Jannotti as Judge Fullam detailed the facts is the "Arab mind." Despite Jannotti's protestations, "I would vote for a legitimate project regardless; our job, to bring as much business and employment to Philadelphia; if that's the way they want to do business, that's all right too," it was insisted that the "Arab mind"
required the payment of money to ensure "friendship." The federal government may have made an unrealistic ideal dream fantasy into apparent reality and then prosecuted Jannotti for his manifested predisposition. As it structured the situation, the government makes it difficult to conclude beyond a reasonable doubt that Harry Jannotti was predisposed to engage in corruption at market conditions. Jannotti may be no real threat; like almost anyone, however, he was at some level predisposed to corruption and foolish not to be suspicious when fantastic opportunity knocked.

While in some respects Jannotti is a sequel to Archer, as Judge Fullam presented the facts the two defendants were very different public officials. Jannotti did not ask for money; he made it clear no payment was necessary. Government agents first insisted that unless money passed their principals would not spend millions to revitalize Philadelphia, in contrast with the corrupt defense attorney Klein who set the price, demanded full payment up front, and assured the agent a fix was the only way. As Judge Fullam described the Jannotti situation, "it was clear that the defendants would not be asked or expected to do anything improper on behalf of the proposed hotel venture; and they agreed to do nothing inconsistent with their obligations as members of the City Council, working for the benefit of their constituents." On the other hand, Archer, and certainly Klein, took $15,000 in order to fix a gun possession case.

Guilt required proof of predisposition beyond a reasonable doubt; but the enormous inducement here precluded the government from relying solely on the fact that the defendants did accept the money as proof beyond a reasonable doubt that they were predisposed. Sometimes a defendant's ready acquiescence in the government's suggestion, or his displayed familiarity with criminal techniques has justified a finding of predisposition. For example, Klein had boasted of a shopping bag of cases to fix—"every case is a fix these days." But not Jannotti. "[I]n my judgment," said Judge Fullam, "there is no evidence whatever in this case tending to show that, when the Government's overtures first came to the attention of the defendants, they were already predisposed to accepting bribes." Therefore, since there was "no evidence whatever" of predisposition, the jury's factual conclusion beyond a reasonable doubt that there was predisposition and therefore not entrapment was not reasonable. The judge so ruled: "The evidence was, as a matter of law, insufficient

333. See supra notes 269-87, 317-20 and accompanying text.
334. See supra text accompanying note 39.
336. Id.
to establish the defendants' predisposition beyond a reasonable doubt.337

Judge Fullam acknowledged his “distress and disgust at the crass behavior the tapes reveal. The jury's verdict represents a natural human reaction to that evidence,” but the defendants were still entrapped.338 “Viewed in its entirety, the Philadelphia aspect of the Abscam investigation was plainly designed not to expose municipal corruption, not to determine which officials were corrupt, but merely to ascertain whether, given enough inducement, city officials could be corrupted.”339

This led him to one last reason for reversing defendants' convictions: Even if he were wrong and there were federal jurisdiction under the Hobbs Act, and if the jury's conclusion beyond a reasonable doubt that Jannotti was predisposed and not entrapped were sustainable, there remained a due process claim. A majority of the Supreme Court (although not Justice Rehnquist himself) had reaffirmed Justice Rehnquist's invitation in Russell that some day government agents' outrageous behavior would constitutionally mandate acquittal.340 Judge Fullam noted that so far the Supreme Court had not explicitly disposed of any case on this basis, but the Third Circuit had so decided one case: United States v. Twigg, a drug case where government agents established and ran a drug laboratory.341 Judge Fullam continued, “in U.S. v. Archer, cited with approval in the [key] concurring opinion in

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337. Id.
338. Id. at 1205.
339. Id. at 1200.
341. United States v. Jannotti, 501 F. Supp. at 1203-04 (discussing United States v. Twigg, 588 F.2d 373 (3d Cir. 1978)). In Twigg, the defendants were convicted, inter alia, of illegally manufacturing methamphetamine hydrochloride (speed), a controlled substance. The defendants became involved in the crime through an informant working for the Drug Enforcement Agency (DEA). At the request of DEA officials, the informant established a “speed” laboratory with the defendants. DEA agents supplied the informant with phenyl-2-propanone, the ingredient most difficult to obtain in the manufacture of “speed.” They provided twenty percent of the glassware and rented a farmhouse in which the informant and defendants could establish the laboratory. The agents selected a chemical supply outlet and arranged for the informant to purchase materials under a false business name. In addition, the informant was entirely in control of the laboratory and synthesis of the speed.

The jury found that the defendants were predisposed to the commission of the crimes charged, thus rejecting the defendants' entrapment defense. The Third Circuit reversed, holding that “the nature and extent of the police involvement in this crime was so overreaching as to bar prosecution of the defendants as a matter of due process of law.” United States v. Twigg, 588 F.2d at 377. The court added, “[a]lthough no Supreme Court decision has reversed a conviction on this basis, the police conduct in this case went far beyond the behavior found permissible in previous cases.” Id.
Hampton, the court expressed the view that dismissal on due process grounds would be appropriate where the undercover work of the government agents included the commission of several independent crimes, including perjury before a grand jury.\textsuperscript{342} (Remarkably, the original Archer misperception had lingered to affect Abscam.)

In determining whether government conduct was outrageous, “the court must consider the nature of the crime and the tools available to law enforcement agencies to combat it.”\textsuperscript{343} This essay argues what Judge Fullam did not admit; official corruption is a special problem and requires special techniques, but the judge did helpfully explore the issue:

While municipal bribery may be “fleeting” and “elusive,” so that governmental subterfuge and even creative involvement may be necessary to combat it, the techniques employed here went far beyond the necessities of legitimate law enforcement. It would undoubtedly be permissible for government agents to set up an undercover business entity, either real or imaginary, as an attractive target for corrupt overtures by city officials, and even to hint that such overtures would be welcome. It would also probably be permissible for the undercover agents to initiate bribe proposals, at least in connection with suspected ongoing corrupt activities on the part of the targeted officials.\textsuperscript{344}

Of course this essay argues more strongly that it is certainly necessary and proper for undercover agents to initiate such bribe proposals even to untargeted officials. “But,” continued Judge Fullam, “it is neither necessary nor appropriate to the task of ferreting out crime for the undercover agents to initiate bribe offers, provide extremely generous financial inducements, and add further incentives virtually amounting to an appeal to civic duty.”\textsuperscript{345}

So held the Judge—there was no jurisdiction, the defendants were entrapped and their due process rights were violated: “[W]hatever may be the appropriate role of federal law enforcement in detecting and punishing municipal corruption, it is surely not within the legitimate province of federal agents to embark upon a program of corrupting municipal officials, merely to demonstrate that it is possible.”\textsuperscript{346}

Offering public officials as birthday presents to the sheik’s repre-

\begin{itemize}
\item 342. 501 F. Supp. at 1203.
\item 343. United States v. Twigg, 588 F.2d 373, 378 n.6 (citing Hampton v. United States, 425 U.S. 484, 495 n.7 (Powell, J., concurring)), quoted in Jannotti, 501 F. Supp. at 1204.
\item 344. 501 F. Supp. at 1204.
\item 345. Id.
\item 346. Id. at 1204-05.
\end{itemize}
sentatives was “crass behavior” by the defendants, “[b]ut, in the long run, the rights of all citizens not to be led into criminal activity by government overreaching will remain secure only so long as the courts stand ready to vindicate those rights in every case.”

Judge Fullam’s decision was front page news. The first federal court to rule on Abscam convictions had judged the federal executive guilty of overreach and, therefore, the state legislators not guilty of any crime, even though, as the judge admitted, “the evidence permitted, although it did not compel, the inference that the payments represented bribes paid in exchange for the defendants’ assurances of using their official positions to pave the way for expeditious completion of the project.”

Although Representatives Thompson, Murphy and Lederer were convicted soon after, they, along with Jenrette and Myers, who were already seeking to have their Abscam convictions reversed, took heart from Jannotti. Judge Fullam’s opinion was not binding on other federal judges such as Judge George Pratt, who had presided over most of the other Abscam trials, but the defendants had scored first with their most sympathetic member. Newspapers reported that during the trial of Representative Richard Kelly of Florida, the only Republican charged in Abscam, Judge Bryant had privately told lawyers that the government’s undercover operation had an “odor to it that was absolutely repulsive.” Judicial Abscam was a long season and Jannotti was only the first phase of the first contest. Acquitted by Judge Fullam, Harry Jannotti resumed his seat on the Philadelphia City Council.

The New York Times ran editorials endorsing Judge Fullam’s caution in overturning Jannotti’s convictions, expressing hope that Judge Pratt would now examine Abscam as a whole. The newspaper also gratuitously urged Congress to hold hearings focusing not only on the “costs and benefits but also the investigative standards and prosecution policies of undercover operations.”

The House Judiciary Subcommittee on Constitutional and Civil Rights had been doing just this. Immediately after Abscam broke, on March 4, 1980 and before any indictments had been issued, the head of the Justice Department’s Criminal Division, Philip Heymann, and FBI Director William Webster had appeared before the committee charged with FBI oversight, and, without going into the particulars of Abscam,

347. Id. at 1205.
348. Id. at 1184.
had explored problems, dangers, and benefits inherent in undercover operations and safeguards which the FBI had incorporated.\(^{351}\)

In the waning days of the Carter Administration, Attorney General Civiletti, who defended Abscam despite Judge Fullam's ruling in \(Jannotti\), released the "Attorney General's Guidelines on FBI Undercover Operations." Eighteen months in the making, the Guidelines codified practices about which Heymann and Webster had testified before the House Subcommittee. They provided that FBI headquarters and an Undercover Operations Review Committee, composed of designated FBI officials and Justice Department lawyers, were to authorize and supervise all "sensitive" operations. The guidelines classified as "sensitive" all investigations involving a reasonable expectation of corrupt action by a public official, untrue representations by an undercover agent concerning innocent persons, and, except for the purchase of stolen or contraband goods, those investigations where agents or cooperating individuals engaged in any activity otherwise proscribed by federal, state, or local law as a felony or serious crime. Also "sensitive" were investigations where an undercover agent supplied an item or service unavailable to criminal actors but for the government's participation, and those in which an undercover agent ran significant risk of being arrested and continuing undercover, or giving false testimony in any proceeding in an undercover capacity.\(^{352}\)

The Review Committee would "carefully assess the contemplated benefits" of a proposed sensitive undercover operation and measure those against the "operating and other costs" including "the risk of harm to private individuals or undercover employees, the risk of harm to reputation, or privileged or confidential relationships, and the risk of invasion of privacy."\(^{353}\)

A sensitive operation had to be designed to "minimize the risks of harm and intrusion." Unless "justified to obtain information or evidence necessary for paramount prosecutive purposes," to "maintain credibility or cover" with criminals, or "avoid danger of death or serious bodily injury," no agent could engage in "any activity that would constitute a crime under state or federal law if engaged in by a private person acting without the approval or authorization of an appropriate government official."\(^{354}\) And except in an emergency, advance written approval was required before an agent engaged in an otherwise illegal activity which, in any event, the FBI must take "reasonable steps to

\(^{351}\) \textit{Oversight Hearings}, supra note 153, at 115.

\(^{352}\) \textit{UNITED STATES ATTORNEY GENERAL, GUIDELINES FOR FBI UNDERCOVER ACTIVITIES} § B (1980), reprinted in \textit{SELECT COMM.}, supra note 153, at 49.

\(^{353}\) \textit{Id.} § F, reprinted in \textit{SELECT COMM.}, supra note 153, at 54.

\(^{354}\) \textit{Id.} § F(4), reprinted in \textit{SELECT COMM.}, supra note 153, at 54.
minimize.” Agents were flatly prohibited from acts of violence, or obtaining evidence through illegal wiretapping, mail openings, breaking and entering, or trespass amounting to an illegal search.

A section entitled “Authorization of the creation of opportunities for illegal activity” began with the declaration: “Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in illegal activity in which he would otherwise not be disposed to engage.” This section codified the three safety features which Heymann and Webster emphasized in their testimony before Congress: Whoever approved an undercover operation

should be satisfied that a) the corrupt nature of the activity is reasonably clear to potential subjects; b) there is a reasonable indication that the undercover operation will reveal illegal activities; and c) the nature of any inducement is not unjustifiable in view of the character of the illegal transaction in which the individual is invited to engage.

The guidelines declared, “Under the law of entrapment, inducements may be offered to an individual even though there is no reasonable indication that that particular individual has engaged, or is engaging, in the illegal activity that is properly under investigation.” However, the Director must in writing find that either

there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or

The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity or brought to it, are predisposed to engage in the contemplated illegal activity.

By their own declaration these guidelines were for “Internal Department of Justice guidance” only and “not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.”

On February 19, 1981, almost a year after Heymann and Webster had appeared before it, the House Judiciary Subcommittee on Consti-
tutional and Civil Rights, chaired by Congressman Don Edwards, a former FBI agent and admitted critic of the undercover technique, continued its series of hearings concerning its ongoing task of FBI oversight. "Now, we are here today," said Congressman Edwards "to examine those [FBI] guidelines in light of constitutional principles, social utility, and public policy." The ranking minority member, Representative Henry Hyde, criticized these "midnight regulations and guidelines which appeared at the last moments of the Carter administration" as "unacceptable" in that they "restrict[ed] the flexibility of the FBI" and overcentralized control in Washington rather than leaving it with the local United States Attorneys:

The day's witnesses were two law professors, Geoffrey R. Stone of the University of Chicago, and Michael Seidman of Georgetown. At the outset, Professor Stone conceded that undercover operations were "extraordinarily effective" in proving consensual crimes such as corruption, and that tapes resulted in airtight cases. Furthermore, as Heymann had testified, widespread use of spies, secret agents, and informers could "effectively generate an atmosphere of distrust and suspicion among potential 'targets,'" thus having an enormous deterrent effect. But because of their extraordinary potency, the techniques also seriously threaten privacy. Stone's purpose that day was to explore the potential conflict between effective undercover operations and legitimate expectations of privacy.

Typically, an effective undercover agent must initiate and gradually create a relationship of trust; the agent must win the target's confidence through deception. This carefully manipulated false relationship was a very serious intrusion on privacy, "strikingly similar to and perhaps even greater than" intrusions of other investigative techniques. For Stone and other critics, monitored undercover activity without prior judicial authorization undermined conversational privacy no less than wiretaps, eavesdrops and bugs for which the Constitution required advance judicial authorization based upon probable cause.
Moreover, Stone pointed out, unlike wiretaps and bugs, spies and informers saw as well as heard. Whereas a warrant requirement to search a house for papers and personal effects checked the Executive acting openly as an antagonist, an undercover agent was often unwittingly invited into the target’s home. “The undercover operation, if not carefully controlled, would thus have the anomalous effect of enabling government to invade the individual’s privacy through deceit and stratagem when it could not otherwise lawfully do so.”

But, Stone acknowledged, the United States Supreme Court had consistently held that deceit by informers and secret agents to elicit information from unsuspecting targets did not amount to a “search” within the protection of the fourth amendment.

In its oft-cited decision regarding electronic eavesdropping, United States v. White, the Supreme Court majority, per Justice White, considered “what expectations of privacy are constitutionally justifiable,” and affirmed its earlier holding in Hoffa v. United States that “however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent.” The fourth amendment afforded “no protection to a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.” No warrant to ‘search and


To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court.

Id. § 801(d).

In the undercover context, governmental officials deceitfully participate in and overhear those very same conversations. The intrusion upon conversational privacy is functionally the same. As in the case of wiretapping and electronic bugging, the undercover operative will inevitably learn not only about the target individual’s criminal intentions, if any, but also about his personal, political, religious, and cultural attitudes and beliefs—matters which are, quite simply, none of the government’s business.

Oversight Hearings, supra note 153, at 3 (statement of Prof. Geoffrey Stone).

368. Oversight Hearings, supra note 153 at 3-4 (statement of Prof. Geoffrey Stone).


371. Id. at 752.


373. 401 U.S. at 749.
"seize" is required in such circumstances.\textsuperscript{374} White simply extended Hoffa's logic: if an agent or informant could report a conversation without a warrant, that agent could also record it or transmit it electronically without a warrant. "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police," the Court stated. "If he has no doubts or allays them, or risks what doubt he has, the risk is his.\textsuperscript{375}

Stone found this approach "unsatisfactory whether as a matter of constitutional law or as a matter of policy.\textsuperscript{376} So had the dissenters in White. Justice Douglas, in a moving opinion, observed that discussing it in "legalistic" terms "clouded and concealed" the issue.\textsuperscript{377} Electronic surveillance was not merely a modern form of what the ancients knew as eavesdropping: "To equate the two is to treat man's first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known.\textsuperscript{378}

The issue for dissenting Justices Douglas and Harlan was the quality of life of a free people: "The concepts of privacy which the Founders enshrined in the Fourth Amendment," said Douglas,

vanish completely when we slavishly allow an all-powerful government proclaiming law and order, efficiency and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them, and give them the health and strength to carry on. . . . Monitoring, if prevalent, certainly kills free discourse and

\begin{enumerate}
\item \textsuperscript{374} Id. (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)).
\item \textsuperscript{375} 401 U.S. at 762.
\item \textsuperscript{376} Oversight Hearings, supra note 153, at 4 (testimony of Prof. Geoffrey Stone).
\item \textsuperscript{377} 401 U.S. at 756 (Douglas, J., dissenting).
\item \textsuperscript{378} Id. Justice Douglas quoted Justice Brennan, recognizing a qualitative difference between electronic surveillance and traditional disguise:

The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. . . .

. . . Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny.\textsuperscript{Id. at 759-60 (quoting Lopez v. United States, 373 U.S. 427, 465-66 (1963) (Brennan, J., dissenting)). Justice Douglas warned of "the use of electronic surveillance which, uncontrolled, promises to lead us into a police state." 401 U.S. at 760 (Douglas, J., dissenting). "[E]xtensive intrusions into privacy made by electronic surveillance make self-restraint by law enforcement officials an inadequate protection . . . ." Id. at 761-62. Its advocates "should spend some time in totalitarian countries and learn first hand the kind of regime they are creating here." Id. at 765.
\end{enumerate}
spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance.\textsuperscript{379}

Professor Stone expressed much the same fears: "The unrestrained use of such operatives \ldots has at least the potential to undermine that sense of trust which is essential to the very existence of productive social, business, political, and personal—as well as criminal—relations."\textsuperscript{380}

Any citizen who appreciates the openness of American society and is horrified by a totalitarian police state must be cautioned by these statements. Nevertheless, this essay advocates widespread use of undercover techniques to uncover political corruption while vigorously opposing any transformation into Orwellian Big Brotherism. The key, again, is double standards—distinctions between "public" and "private" targets—between public officials and private citizens, acting in public or private capacities.\textsuperscript{381}

The Supreme Court had reasoned that because we necessarily assume the risk that our friends and associates will betray our confidences, the fourth amendment does not protect us against the simulations of government agents. Criticizing the Court's opinion in \textit{White}, Professor Stone acknowledged a public/private distinction but applied it only to the source and not the subject of intrusions:

\begin{quote}
Insofar as such persons act solely in their private capacities and not in cooperation with governmental officials, their betrayals undoubtedly fall beyond the scope of the amendment's
\end{quote}

\textsuperscript{379} 401 U.S. at 762 (Douglas, J., dissenting). Justice Harlan also expressed it powerfully: Third party bugging would undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society.

\ldots [W]ords would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

\textit{Id.} at 787-89 (Harlan, J., dissenting) (footnotes omitted).

\textsuperscript{380} \textit{Oversight Hearings}, supra note 153, at 4, (statement of Prof. Geoffrey Stone).

\textsuperscript{381} \textit{See infra} text accompanying notes 648-50.
concern. The analysis shifts markedly, however, once government enters the picture. The risk that the individual's confidant may be fickle or a gossip is of an entirely different order from the risk that he is in reality an undercover agent, commissioned in advance to report the individual's every utterance to the authorities. In the latter situation, we are no longer dealing with the risk of misplaced confidence inherent in the nature of human relationships; we are dealing instead with government action designed explicitly to invade our privacy and to end in deceit and betrayal. . . . The notion that our willingness to assume one risk means that we must necessarily assume the other is doubtful at best.382

The Court's logic, said Professor Stone, would commit us to the absurd conclusion that because we assume a risk that private citizens will invade our privacy by tapping our telephones, bugging our offices and ransacking our homes, we must assume the risk that government agents will tap our phones and search our houses.383 Furthermore, he pointed out that distinguishing between genuine friends and associates and "skilled professional dissemblers specially trained in the art of deception" was not a "particular skill" that "citizens of a free society should ordinarily have to acquire."384

In short, relying on the distinction between public and private, Professor Stone’s critical question—the question that must ultimately be answered by Congress—is whether and to what extent law-abiding citizens in a free society should be entitled confidently to assume that their supposed friends, confidants, lawyers, and other associates are [in fact what they appear to be, and are not] in reality clandestine agents of government secretly reporting their activities and conversations to the authorities.385

“Citizens in a free society” obscures again the very distinction among targets, which Professor Stone applied to agents. This essay argues that we should treat our targets differently if they are public officials. By talking of the importance of being able to go about our daily business not forced to wonder whether we are being monitored, Stone fails to distinguish the government official who perhaps should always act as if he were being monitored when (ab)using the public trust, from a private citizen who should be free to seek and assume genuinely private relationships.

383. Id. at 5.
384. Id.
385. Id.
Professor Stone urged that an undercover agent should be permitted, without probable cause, to explicitly propose a criminal transaction to a public official only “in the context of a non-trust relationship.” He would also “permit the essentially unrestrained use of some of the most common, most effective, and least intrusive techniques for the investigation of official corruption.” He would “allow, for example, an agent operating an undercover bar to offer a bribe to a municipal building inspector in return for a license. When such operations become more intrusive, however, probable cause should be required.”

Why? “This is not a matter of ‘double standards’ or ‘special treatment’ for government officials. Private citizens in essentially comparable settings—trust relationships and political associations and activities—are entitled to basically the same protections.” Here again, he had denied separate standards for private and public targets, as if double standards necessarily operated in favor of the public officials.

We, the people, want to feel free and secure in private action and conversation. But perhaps in a healthy republic public officials entrusted with public power always should feel some insecurity in the apparent privacy with which they act, ostensibly for the public benefit.

Professor Geoffrey Stone’s warnings were salutary, and his recommendations responsible. “[N]o one would sensibly suggest that the government be prohibited absolutely from engaging in undercover investigations.” Rather, he sought “a reasonable accommodation of competing investigative and privacy interests,” which demanded “a higher threshold standard for initiating undercover operations.” Since, for Stone, undercover intrusion upon privacy was equal to or greater than taps and bugs, he urged a probable cause standard whenever an undercover operation was likely to intrude significantly upon the privacy of a trust relationship. Adopting a personal/impersonal distinction, he exempted from this probable cause requirement all undercover operations in which the agent and target “interact essentially as strangers or mere casual acquaintances.”

Professor Louis Seidman followed Professor Stone and shifted the focus from privacy to entrapment. Although Seidman found the FBI guidelines a constructive first step toward controlling the obvious dangers posed by undercover operations, they “appear[ed] to authorize some conduct which was probably illegal, and other conduct, which . . . is surely unwise.” He traced the problem of entrapment back to

386. Id. at 7.
387. Id. (emphasis added).
388. Id. at 4.
389. Id. at 6.
390. Id. at 12 (testimony of Prof. Louis Seidman).
Eden and through the six major judicial opinions to date: the four United States Supreme Court opinions, Sorrells, Sherman, Russell and Hampton, and two federal appellate court decisions, Archer and Twigg. The guidelines could fill the void left by sketchy Supreme Court case law concerning government overreach. Furthermore,

one of the reasons why the case law is unclear is because the Court has said repeatedly that it's not our job to decide questions of policy about law enforcement, that's Congress' job, and it would be wrong, therefore, for Congress now to turn around and say “We're not going to do anything about this, because the Court has settled it.” The buck has to stop somewhere, and I think it’s Congress’ responsibility to make the hard judgment about what kind of law enforcement techniques are permissible and what kind are not.

Chairman Edwards cut the discussion short, reminding the law professors of political reality:

Thank you. That would be a most satisfactory solution, but it's not at all likely to take place. That's the real world. We have a kind of a definition of “entrapment” as enunciated in various court decisions; there has to be, there should be a predisposition, and when the government goes too far, when the conduct is outrageous, then it's entrapment. Is that about what it amounts to?

“That's about it, Congressman,” said Seidman. Edwards had merged entrapment and due process, but in effect he was correct. His

391. Id.
392. Id. at 12-13. For a discussion of Sorrells, see supra notes 45 & 46 and accompanying text. For a discussion of Sherman, see supra notes 47-55 and accompanying text. For a discussion of Russell, see supra notes 74-77 and accompanying text. For a discussion of Hampton, see supra notes 115-25 and accompanying text. For a discussion of Archer, see supra notes 81-107 and accompanying text. For a discussion of Twigg, see supra note 340 and accompanying text.

393. Oversight Hearings, supra note 153, at 26 (testimony of Prof. Louis Seidman). During questioning, Stone too had urged an independent role for Congress:

Especially in the entrapment area, it is terribly important that Congress understand that it's not in any way, shape, or form bound by the Court's formulation of entrapment. It's not a Constitutional concept. . . . Rather than attempting to unravel the entrapment doctrine as formulated by the Court, Congress should rethink the issue anew and devise its own formulation of entrapment. The Court's approach should be viewed as merely one form of the defense which might or might not be accepted by Congress.

Id. at 30 (testimony of Prof. Geoffrey Stone).

395. Id. (testimony of Prof. Louis Seidman).
political sense that Congress would refuse to legislatively alter the Supreme Court's subjective entrapment standard also may be correct.

Professor Seidman praised the guidelines' "important and commendable safeguards" for reducing risks of entrapment, i.e., making the corrupt nature of the deal "reasonably clear" to potential suspects and only offering the "going rate."\textsuperscript{396}

Congressman Hyde interrupted Seidman to consider the difficulty in distinguishing legitimate lobbying from corruption:

A fascinating poll might be taken of every Member of Congress as to whether or not they have ever been offered $500 to get someone in from India, to introduce a private bill. I daresay, most have. . . . If you're talking $500 or talking $25,000 or $200,000, I grant you it's a whole different circumstance. You don't get offered $200,000. But I think it would be fascinating to find out from a goodly representative number of Congressmen from all over the country . . . how many have been offered, and not necessarily in an overtly criminal way, but you know—a campaign contribution that is so closely tied in with helping to get this person in. . . . I have been made uncomfortable by people wanting to make a contribution, very close to a request for—and it was quite obvious, and of course I rejected it out of hand. But I daresay it's happened with a lot of Members.\textsuperscript{397}

Honestly admitting how it really works, Congressman Hyde suggested that sometimes offers of financial support are so subtly or contingently linked to future official action as to blur the distinction between legitimate campaign contribution and proffered bribe.

There is legal ambiguity arising from the offer of a bribe or a political contribution in return for a political act when the understandings are left unstated, but there is a meeting of the minds. Should the guidelines themselves create special precautions, special requirements, when dealing with a substantive crime which, by its nature, is ill-defined?

Professor Seidman reiterated that

one of the commendable aspects of the guidelines is that they do provide that the undercover agent should make unambiguous and clear the illegal nature of the conduct to the participant. I'm a little uncertain how one does that without blowing

\textsuperscript{396} Id. at 13.

\textsuperscript{397} Id. at 17-18 (statement of Rep. Henry Hyde).
one's cover. It seems to me it would require some skill. But I think that is a commendable safeguard.398

He also endorsed another safeguard: "Tempting a subject with an excessively attractive inducement really serves no public purpose, if it is unlikely the subject would ever be forced to face such a temptation but for the government's intervention."399 But although it limits inducements to the "going rate," government might still ensnare "harmless subjects" who otherwise would never have been approached with a criminal proposition. "There is an ironic inverse relationship between the potential harmfulness of a suspect and the risk of entrapment. The more innocent and naive a subject is, the less likely he is to know what the 'going rate' is" for criminal activity and, therefore, the smaller the inducement which may be necessary to entrap him.400

Professor Seidman's argument cuts both ways. Perhaps the more innocent and naive subject is more likely to be predisposed to corruption only at an unrealistically high price, unaware that others are willing to sell their offices for much less. Naive innocence might well price itself out of the corrupt marketplace.

For Professor Seidman, the critical weakness of the FBI guidelines was their failure "to limit the offering of inducements to those reasonably suspected of criminal activity."401 He urged that undercover operations be carefully targeted on subjects for whom there was already convincing evidence of predisposition. This requirement of predisposition overlapped Professor Stone's call for judicially warranted probable cause.

Seidman also urged that the guidelines flatly prohibit government agents from supplying a target with an item or service absolutely indispensable and not otherwise available. Although the Supreme Court has not directly ruled on this, "[t]here is good reason to think that such government conduct runs afoul of the due process limitations on undercover operations."402 Moreover, whether constitutional or not, it was bad public policy. A defendant caught by such a ploy might be predisposed to committing the crime if given an opportunity and, therefore, could not claim entrapment. But such a defendant was, "by definition, harmless since the unavailability of a crucial item makes it impossible for him to commit the crime. . . . When the Government supplies the item, it is therefore creating the crime which otherwise would not occur, for the sole purpose of prosecuting the perpetrator."403

Finally, Seidman urged Congress to "make these guidelines worth

398. Id. at 30 (testimony of Prof. Louis Seidman).
399. Id. at 17.
400. Id.
401. Id.
402. Id. at 14 (statement of Prof. Louis Seidman).
403. Id. at 20.
something more than the paper they’re written on,” by making their violation a defense to a criminal prosecution.404

Subcommittee Chairman Edwards declared that day’s testimony “very helpful.” The witnesses essentially had agreed in their criticism. As Chairman Edwards said, police,

whether they’re federal or state or local, [who] randomly just go around all our cities and stop people on the street and offer people bribes or offer them money or try to sell them drugs or anything . . . would produce serious damage to the fabric of our society if we approved that sort of thing.”405

Echoing Justice Douglas, Professor Seidman added, “I think that’s right. . . . There’s no legitimate purpose served by conducting little tests of the morality of people. It’s hard enough with the tests that people have to contend with in the real world without government making it harder still for people to walk the straight and narrow.”406

The next week, M.I.T. sociologist Professor Gary Marx, testifying before the committee, addressed

the broader social and policy issues raised by police undercover work. Questions of legality are of the utmost importance, but they should not be the only issues considered. The mere fact that a tactic is legal should not be sufficient grounds for its use. Its ethical, practical, economic, and social implications must also be considered.407

Admitting the well-publicized advantages of Abscam described by Webster and Heymann, Marx wanted to emphasize “possible disadvantages, abuses and costs,” and finally, to “speculate on what recent undercover work may imply about the changing nature of social control in America.”408

The sociologist presented a typology of undercover police work.409

Most public attention had focused on the targets who might be victims of government trickery and coercion rather than autonomous criminals. The key legal questions were: Did the person violate the criminal law and was he predisposed to do this? Coercion, trickery, or a highly seductive temptation made the determination of predisposition very difficult. Almost by definition and as a common fact of human nature, people tend to be more predisposed toward the more enticing. The real

404. Id. at 30.
406. Id. (testimony of Prof. Louis Seidman).
407. Id. at 33 (statement of Prof. Gary Marx).
408. Id. at 34.
409. Id.
difficulty for Professor Marx as for Judge Fullam apparently was that highly seductive inducements rather than predisposition cause the target's criminality.

Causation is a very difficult problem in law no less than in physics. If a match is struck in a room full of gas, the single cause of the resulting explosion might be seen as the gas or the match, depending upon ordinary expectations in that setting. An extraordinary inducement which triggers an otherwise harmless predisposition into a corrupt act may be said to have caused the crime there and then. The predisposition, however, no less clearly exists. In fact, by actuating crime, that extraordinary inducement makes the target's predisposition manifest, and therefore the predisposition's existence becomes more clear and certain. Again, this is a flaw with the subjective entrapment viewpoint. Marx's statement that if there is "a highly seductive temptation" then "the determination of predisposition is very difficult" does not make obvious sense.

Professor Marx identified three common forms of trickery. First, offering the illegal action as a minor part of a very attractive socially legitimate goal. The targets are lured into the activity on a pretext: the goal is legal and desirable and the illegality is secondary. Judge Fullam found this repulsive in Jannotti. A second trick was to hide or disguise the illegal nature of the action. "Ignorance of the law is no excuse for its violation. However, the situation seems different when one is led into illegal activities by government agents who claim that no wrongdoing is occurring. Here the agent may be both exploiting ignorance and generating a subterfuge." Marx claimed that Senator Williams had been so victimized. Defendants were apparently led to believe that they could make money without having to deliver on any promises. The Senator was coached and assured that although the Arab mind made it necessary for him to brag about his own connections and importance solely for appearances, he really made no commitment to be actually influenced by any payment.

A third type of trickery was to weaken a target's capacity to rationally distinguish right from wrong. People with diminished mental capacity, juveniles, addicts in a state of withdrawal or those in a weakened state or under extreme pressure, were more susceptible to persuasion and less able to distinguish right from wrong.

410. Id.
412. Oversight Hearings, supra note 153, at 34 (testimony of Prof. Gary Marx).
413. Id. at 35.
414. Id.
This last method is repulsive primarily because we do not want to be preyed upon by government in our own weak moments. Yet, here too, distinguishing (as Marx does not) private from public is helpful. We have a right to know in advance whether a public official, who wields significant public power and is constantly under pressure, will succumb to temptation. At the other extreme, private citizens in their private capacity should not be prey unless the government has probable cause. In between are the difficult cases: private citizens in their quasi-public capacity, e.g., builders who might be induced by high profits to erect unsafe buildings and pay off inspectors to overlook violations; and public officials in their private capacities, e.g., legislators who break laws prohibiting sexual misconduct, gambling, or drug possession.

Professor Marx pointed out a troubling situation in Abscam in which a target believed by the investigators to be an alcoholic was given liquor after he first refused a bribe attempt. Suppose, however, that this were a public official whose honesty could routinely be overcome by liquor? Since he might be making decisions which affect this nation's security, wouldn't the people's Executive properly test this official's strength under drink?\textsuperscript{415}

Participation in crime, said the sociologist, may emerge from fear of not participating rather than free choice. When coercion is mixed with temptation the incentive to participate can be too strong.\textsuperscript{416}

Furthermore, Professor Marx pointed out, in most complex activities, whether business, politics, or academia, there are legal grey areas where secret investigations also could routinely unearth violations:

Those who get ahead in organizations are often those who make things happen by breaking rules and cutting through red tape. Rules are often general, contradictory, and open to varied interpretations. As those in law enforcement bureaucracies know too well, organizations have a vast number of rules which are overlooked until a supervisor wants to nail someone.\textsuperscript{417}

Some of the new police undercover work has lost sight of the profound difference between carrying out an investigation to determine if a suspect is in fact breaking the law and carrying it out to determine if an individual can be induced to break the law. As with God testing Job, the question, "Is he corrupt?" was replaced with the question, "Is he corruptible?"\textsuperscript{418} Job was a perfectly righteous person whom God

\textsuperscript{415.} Id.
\textsuperscript{416.} Id.
\textsuperscript{417.} Id.
\textsuperscript{418.} Id. at 36.
permitted Satan to test beyond endurance without any prior suspicion of corruption.

Professor Marx made his plea for judicial warrants simply: "The creation of a tempting opportunity and the actions of the undercover person can affect conversation and behavior in ways that a hidden non-human recording device never can. It is surprising that the former is not regulated by the courts." 419

As he saw it, politicians, for whom public reputation is central, were particularly vulnerable to the unwarranted effects of undercover: Damaging their reputation destroys their professional calling.

Involvement as a suspect in the apparatus of covert government investigation cannot help but cast a shadow on a person's reputation. To be secretly video-taped or tape-recorded and then to have this made public will convey a presumption of guilt to the uncritical. For the unprincipled it offers a tool for character assassination. 420

But this essay argues that a public/private distinction points just the opposite way to justify more easily exposing public officials as targets. If random surveillance of public officials operating with the public power were accepted, when publicized in a single instance, it would connote nothing, much like an IRS audit today, by which we may be chagrined but not shamed or damaged in reputation. When public officials' behavior is frequently sampled, no politician need be ashamed by publicity of an integrity "audit." Heymann was moving in this direction when he suggested that one of Abscam's strengths was that the Justice Department had targeted no one; the unwitting middlemen did that. 421 This separation from political or other improper motivation is complete when targets are selected randomly. The opposite approach is advocated by those like Professors Stone, Seidman, and Marx, who demand a high predicate suspicion before initiating any such undercover investigation.

Marx warned that unregulated power to test integrity at will offered a means of slander, and opportunities for blackmail and coercion. Incriminating information could be filed away as long as those implicated continue to cooperate. Furthermore, employees required to report illegal activities face double testing. Having rejected an undercover bribe, they may then be suspended for failing to report it. 422

Informers, "whose professional lives routinely require deceit, lying, and covering up" were the "weakest link in undercover systems." They were "offered a hunting license to go after whomever they want" and

419. Id.
420. Id.
421. Id.
422. Id. at 36-37.
“whether out of self-interest or deeper psychological motives, some informers undergo a transformation and become zealous super-cops creating criminals, or sniffing them out, using prohibited methods.” Moreover, “the bridge to the truth is further weakened when informers draw brokers or middlemen into the operation.” In the end, “what police need to have done but cannot themselves do legally, may be delegated to others. The greater the restrictions on police, the greater the delegation.” Informers could be monitored, to some degree, observed the sociologist, “but the crucial and generally unknowable issue is what takes place off the tape recording.”

Furthermore, informers often commit their own crimes apart from their role in law enforcement.

The informer-controller relationship is usually seen to involve the latter exercising coercion over the former. Through a kind of institutionalized blackmail, the threat of jail, or public denunciation as an informer, is held in abeyance as long as cooperation is forthcoming. What is less frequently realized is the double-edged sword potential of such relationships. When not able to hide criminal behavior, the skilled, or fortunately situated informer may be able to manipulate or coerce the controller as well, with a kind of stand-off resulting.

The price of gaining informers’ cooperation may be to ignore their rule breaking. Beyond “this principled non-enforcement,” these situations lend themselves well to exploitation by informers for their own criminal ends. As Marx observed, “major cases may require the government to deal with master con artists operating in their natural habitat. They are likely to have a competitive edge over police.”

Professor Marx continued his penetrating look into the informant/agent relationship:

Even more troubling are cases where informers can essentially blackmail police into granting them permanent immunity. This happens when a trial and related publicity would reveal dirty tricks and illegality on the part of government agents, secret sources, techniques of operation, projects or classified information.

Undercover work offers greater risks and temptations to the police involved. Undercover situations tend to be more fluid and unpredictable than with routine patrol or investiga-
tive work. Undercover agents are removed from the usual controls of a uniform, a badge, a visible supervisor, a fixed place of work, radio or beeper calls and a delineated assignment. These have both a literal and symbolic significance in reminding the officer who he or she is.

Unlike conventional police work, the undercover agent tends to deal only with criminals and is always carrying out deception. A criminal environment and role models replace the more usual environment. The agent is encouraged to pose as a criminal. The ability to blend in and be liked and accepted, is central to effectiveness. It also serves as an indication to the agent that he or she is doing a good job. As positive personal relationships develop the agent may experience guilt and ambivalence may develop over the betrayal inherent in the deceptive role being played. The work is very intense. The agent is always “on.” For some operatives the work becomes almost addictive. The agent may come to enjoy the sense of power the role offers and its protected contact with illegal activity.

Isolation from other contacts and the need to be liked and accepted can have unintended consequences. “Playing the crook” may increase cynicism and ambivalence about the police role and make it easier to rationalize the use of illegal and immoral means, whether for the agency or corrupt goals. In his novel *Mother Night*, Kurt Vonnegut tells us that “we are what we pretend to be, so we must be careful about what we pretend to be!”

Bob Leuci’s experience confirmed this. Marx is correct. A frequently overlooked cost of undercover operations is the toll they take on undercover agents themselves.

Marx continued:

The financial rewards from police corruption, particularly in gambling and narcotics, can be great and chances for avoiding detection rather good. Ironically, effectiveness and opportunities for corruption may often go hand in hand. Police supervisors and lawbreakers may face equal difficulties in knowing what undercover police persons are really up to.

Professor Marx shifted his focus to innocent third persons. Sometimes undercover businesses became hurtful competitors of legitimate businesses. In other situations, “the most private and delicate of human emotions and relationships were violated under the mantle of

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427. *Id.* at 39.
428. *Id.*
government deceit." He cited a case where an undercover agent, penetrating the Weather Underground, got one of his targets pregnant and convinced her to get an abortion, after which he was reassigned. Police undercover also indirectly harms innocent third parties as non-uniformed police impersonators increasingly prey upon an unsuspecting public.

The sociologist offered a checklist of dimensions by which to contrast types of undercover operations:

1) **Public or police initiated?** Was an investigation launched in response to a citizen complaint or manifest crime pattern on the one hand or was it initiated by the police? “One of the liberty enhancing aspects of the Anglo-American legal system is its historic tendency for police to be mobilized in response to citizen complaints, rather than on their own initiative. This is a function of the historical distrust of government and concern over abuses.”

2) **Intelligent or random choice of targets?** Were targets or locations chosen on the basis of intelligence or by random integrity testing? Marx pointed out that traditionally, anti-crime decoy units were deployed in response to an informant’s tip or complaints of merchants, wives whose husbands lost money gambling, or parents concerned about temptation for minors. This “reactive” police behavior introduced a degree of citizen control and limited police discretion. For Professor Marx, “at one extreme and most troubling” were investigations undertaken entirely at police initiative without grounds for suspicion that crime was occurring: random integrity tests, or “trolling” for would-be offenders with no predicate suspicion. At the other extreme, targets or locations were carefully chosen on the basis of criminal intelligence: Here the goal was to gather evidence and apprehend a person thought to be criminally predisposed, rather than to see at what point people would break the law if given a contrived chance.

3) **Passive or active?** Was the crime initiated by a self-selection process where suspects came forward to seize available opportunities, or did the police set the crime in motion? Was the undercover role essentially passive or active? How active was it? Did the agent supply the idea and plans for the crime, or particular expertise? Of course, all

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429. *Id.* at 40.
430. *Id.*
431. *Id.* at 42. This essay argues that such a statement does not apply when the target is itself government already corruptly abusing its authority. Especially when the goal, as in Archer, is to uncover ongoing corruption in the criminal justice system it is appropriate for uncorrupt government to initiate probes into corrupt government. Here the distrust of government is extreme but points in favor of government-initiated investigations.
432. *Id.*
other things equal, the more passive the law enforcement role, the fewer the problems.

4) Victim or co-conspirator? Did the undercover agent play a victim or a co-conspirator? Illegal initiative may come from a suspect and the undercover agent plays a passive role; at the other extreme an agent plays the willing partner who conspires with a target to break the law. Examples of the former are the decoy park bench drunk waiting to be rolled, or a garbage collection business awaiting attempts at extortion. Assuming that the temptation offered by the decoy victim was consistent with what was going on in the natural environment, the use of a victim was less problematic.

Undercover opportunities structured so that those who criminally exploit them must be predisposed, and those that involved the targets' self-selection clearly were preferable to the government selecting who was to be tempted and taking aggressive actions. Where government agents pose as victims, self-selection is likely.

5) Natural or artificial? The more the undercover creation is a part of the natural world, the less problematic: the less deception the better. At the other extreme were the artificially contrived worlds of Archer and Abscam.

6) Informer or Agent? Finally, for Professor Marx, all other things equal, the undercover role should be played by police or informers rather than unwitting middlemen.433

Marx wondered whether the FBI guidelines would be applied seriously and rigorously, or, in typical bureaucratic fashion, come to be applied as mere ritual.434 Monday morning quarter-backing from the safety of the university or newsroom, far removed from responsibility or first hand experience, was dangerous, the sociologist admitted. But although the guidelines were a compromise between the needs of citizens in a democratic society and the needs of law enforcement, there was a decided tilt toward the latter.

Finally, in perhaps the most penetrating portion of his testimony, Professor Marx discussed how Abscam type operations portend a long-term "subtle and perhaps irreversible change in how social control in our society is carried out."435 Roughly a half century ago, Secretary of State Henry Stimson opposed changes in national security practices, observing that, "Gentlemen do not read each other's mail."436 Today, with routine surveillance and invasions of privacy, "his observation seems touchingly quaint."437

Today, "we are experiencing a general shift away from the ideas

433. Id. at 43.
434. Id.
435. Id. at 45.
436. Id. at 46.
437. Id.
central to the Anglo-American police tradition,” warned Marx.\(^{438}\) The modern English police system which America inherited was established in 1829 to prevent crime by using a uniformed, visible, twenty-four-hour presence.\(^{439}\) As social conditions changed and the deterrent effect of this visible force diminished, an alternative conception of the police function has gradually emerged.\(^{440}\)

Authorities operating under controlled conditions with non-uniformed police now seek selectively to increase crime opportunities. Anticipatory police strategies have become more prominent. Secretly facilitating crime under controlled conditions offers control over the “demand” for police services impossible with traditional reactive practices. Whenever a market is created rather than arising from a response to citizen demand, there are dangers of exploitation and misuse. Once undercover resources are provided and skills are developed, the tactics may be used indiscriminately. Given pressures on police to produce, and the power of such tactics, it is an easy move forward from targeted to indiscriminate use of integrity tests and from investigation to instigation.

Professor Marx continued:

The allure and the power of undercover tactics may make them irresistible. Just as any society that has discovered alcohol has seen its use rapidly spread, once undercover tactics become legitimate and resources are available for them, their use is likely to spread to new areas and illegitimate uses. To some observers the use of questionable or bad undercover means is nevertheless justified because it is used for good ends. Who after all cannot be indignant over violations of the public trust on the part of those sworn to uphold it. [But] there is no guarantee that bad means will be restricted to good ends.

From current practices we may not be far from activities such as the following. Rather than infiltrating on-going criminal enterprises, or starting up their own pretend ones, police agents (such as accounting specialists) might infiltrate legitimate businesses to be sure they are obeying the law, or would obey it if given a government engendered chance not to. In the private sector husbands or wives, or those considering marriage might hire attractive members of the opposite sex to test their partner’s fidelity. Businesses might create false fronts using undercover agents to involve their competitors in illegal actions

\(^{438}\) Id.

\(^{439}\) See id. at 46. See also 4 L. Radzinowicz, A History of English Criminal Law 158-67 (1968).

\(^{440}\) Oversight Hearings, supra note 153, at 46 (testimony of Prof. Gary Marx).
for which they would then be arrested. A rival business could be sabotaged by infiltrating disruptive workers . . . 441

Such techniques may be rationalized by a hope that they will have a general deterrent effect, but while the costs and risks of illegality may be increased, the committed criminals may simply become more clever, and raise their rates.

"Law enforcement," observed Professor Marx, "is very different from other forms of government service such as education, since we self-consciously limit its effectiveness by balancing it against rights and liberties. Simply put, we want law enforcement to be optimally, rather than maximally, effective and efficient." 442 The spread of ever more sophisticated ruses and elaborate surveillance damages trust in a society. "American society is fragmented enough without adding a new layer of suspiciousness and distrust. The greater the public's knowledge of such tactics the greater the distrust of individuals for one another." 443

Free and open speech protected by the Bill of Rights may be chilled for everyone. After Abscam, for example, people in government cannot help but wonder who it is they are dealing with. Communication may become more guarded and the free and open dialogue traditionally seen as necessary in high levels of government inhibited. Similar effects may occur in business and private life. 444

In totalitarian countries undergoing liberalization a major demand is the abolition of secret police and secret police tactics. "Fake documents, lies, subterfuge, infiltration, secret and intrusive surveillance, and reality creation are not generally associated with United States law enforcement. However, we may be taking small, but steady steps toward the paranoia and suspiciousness that characterize many totalitarian countries." 445 Once set in motion they become part of the culture, and are not easily undone.

The cry of wolf is easy to utter and hence to dismiss. Liberty is complex and multifaceted and in the context of democratic government there are forces and counter-forces. Double-edged swords are ever-present. Tactics which threaten liberties can also be used to protect them.

However, neither complexity, sophistry, nor the need for prudence in alarm sounding should blind us from seeing the

441. Id. at 46-47.
442. Id. at 47.
443. Id.
444. Id.
445. Id.
implications of recent undercover work for the redefinition and extension of government control. The issues raised by recent police undercover actions go far beyond whether a given congressman was predisposed to take a bribe or the development of effective guidelines.

Such police actions are part of a process of the rationalization of crime control that began in the 19th century. Social control has gradually become more specialized and technical, and in some ways more penetrating and intrusive. The state's power to punish and to gather information has been extended deeper into the social fabric, though not necessarily in a violent way. We are seeing a shift in social control from direct coercion used after the fact, to anticipatory actions involving deception, manipulation and planning. New technocratic agents of social control are replacing the rough and ready cowboys of an earlier era.446

Professor Marx's warning is powerful and plausible. Every freedom-loving citizen must take it seriously. There are, however, important distinctions which the sociologist refused to make, and his statement was by its own admission one-sided, emphasizing the costs of undercover and not its benefits.

Representative Hyde, the subcommittee's chief defender of the technique, led the counterattack: Did Professor Marx recognize benefits in testing people whose "vulnerability, susceptibility or accessibility" to criminal acts is high, e.g., a bank teller, a cashier at a racetrack. "Do you see some therapeutic value to having them know that they're being tested occasionally?"447

Professor Marx replied, "First, it makes a difference whether or not people are told that such tests will be a part of the conditions of employment. I think when they're not told it is inappropriate to use the tactic."448 Marx had made an enormous concession, especially if a distinction between public and private acts is adopted. It should be understood by every public official, all who swear an oath of allegiance to the United States Constitution, that as a condition of employment they consent to surveillance of every use of public power.

Representative Hyde pressed Marx on the value of undercover techniques. Would he outlaw them entirely because of their inherent danger? No, conceded the sociologist, but they must be carefully supervised and should really only be tactics of last resort. "I think before using them, one should ask the question: Is there an alternative way of

446. Id.
447. Id. at 62.
448. Id.
getting this information? Is getting this information worth the risks that, in fact, are there?"

Hyde respectfully characterized Marx's presentation as "fascinating and well worth studying," but he did not perceive as realistic the fear of an "omnipresent police presence . . . in this country." The next day Associate Deputy Attorney General Paul Michel, who had played a key role in drafting the FBI guidelines, defended them before the subcommittee. Michel labeled "impractical" critics who urged that government must have probable cause to believe a particular individual had engaged in similar past crimes before offering him a present opportunity. Investigations were "inherently and unavoidably evolutionary." They typically began with uncorroborated suspicions, and progressed through partially corroborated suspicion and ultimately to the point of probable cause to arrest and indict.

To require probable cause before we even take the investigative step of making an offer is to trap the FBI in a Catch 22. If we already had probable cause of the past crime, we could simply make an arrest and prosecute for that past crime. In fact, the very need for making the offer is to convert some reasonable indication of criminality into strong and clear evidence that would amount to probable cause.

Nor was "reasonable suspicion" an appropriate prior requirement if that denoted some degree of certitude that a particular individual was involved.

Michel emphasized the role of "judgment," which precluded rigid rules and guidelines in these investigations. For example, while it was advisable to record conversations between cooperating middlemen and targets, a per se rule would be defeating: "[A] wary criminal could then insist on face to face meetings and search the intermediary, knowing that if the suspected middleman is cooperating with the government he will be wearing recording equipment, and if he is not, he cannot possibly be cooperating with the FBI." In short, experience had led the designers of the guidelines to conclude that "unlike the domestic security context, in the undercover context, it was neither feasible, nor desirable or necessary, to have categorical prohibitions.

The sharpest questioning came from Subcommittee Chairman Ed-

449. Id. at 64.
450. Id. at 65.
452. Id.
453. Id. at 84.
454. Id.
455. Id. at 90.
456. Id. at 106.
wards and Assistant Counsel Cooper. To Edwards’ concern about controlling an unwitting middleman like Errichetti, Michel replied, “There is no way we can stop them. And we didn’t start them. He was already out there doing that. . . . We didn’t put him into that business, and we’re not in a position to put him out of that business.”

“Is it worth it?” asked Cooper, “Do undercover operations really produce results which justify all the intrusions and risks that the guidelines so well identify?”

“It’s not even a close question,” replied Michel, “they were clearly worthwhile.”

“Why do you think that our undercover operations are effective in controlling crime?” Cooper pressed.

Michel answered:

I don’t mean to be flip, but in a sense, the answer could be because they put people in jail, and they do it better than other techniques. They do it better because the odds of conviction are even higher. They do it better because the odds of pretrial motions resulting in the case never getting to an adjudication of guilt or innocence are vastly reduced. They do it better because they focus on major actors and criminal enterprises by stripping away the layers that ordinarily insulate those actors from effective investigative pursuit.

The Associate Deputy Attorney General noted here his disagreement with those who found undercover operations most intrusive. On the contrary, asserted Michel, “they are far less intrusive than most other significant techniques.” Wire tapping was far more intrusive. The wire tap gets everybody who uses the telephone. It gets every conversation. It’s inherently indiscriminate. An undercover operation doesn’t normally get into somebody’s political or religious beliefs. When people come to our sting operations, or other operations, they come to talk about crime. We don’t get involved . . . in peripheral aspects of their life.

“But,” conceded Michel, “crime fighting is inherently a little bit of a messy business,” and in the end crime fighters must take certain risks and engage in somewhat unsavory practices with unsavory middlemen and informants who will “exaggerate or fabricate or do crazy
things themselves," but "you try to hedge your bet."461

What was out of bounds for the government? Chairman Edwards focused upon section B(f) of the proposed guidelines which forbade a local supervising agent to initiate an undercover operation where an agent or informant will give sworn testimony in an undercover capacity.462 "Do you mean," demanded the Subcommittee Chairman, "that in some cases, the witness might be testifying under oath, without revealing his real identity?" The purpose of the section required that such a decision be made by headquarters, replied Michel. Chairman Edwards pressed: "Well, under any circumstances, could the witness be authorized to commit perjury?"463

Michel's reply revealed how significant and unfortunate was the stain of Judge Friendly's first Archer opinion and how ineffective as a stain remover was the subsequent state vindication of the technique: "I think that the answer to that, under the Archer cases and other cases, is basically no."464

Later Cooper returned to these "sensitive circumstances" listed in section B of the guidelines.

Sensitive circumstances are not prohibitions and therefore, it leaves the possibility that any one of these sensitive circumstances can be approved. . . . Now when the chairman asked you about the Archer situation, about the possibility of an undercover employee perjuring himself, you indicated that you thought that that could not, . . . that was against the principles of the case, and therefore, could not be approved. Are there any other circumstances listed here that you think fall into that category? . . . "465

Even among experts who argued against per se rules, Archer had been misperceived, and had come to stand as an absolute and proper prohibition of an undercover agent's making a false statement under oath.

The Associate Attorney General—representing the national Executive—emphasized, "successful crime fighting ultimately requires acceptance of our work by the courts, including the appellate courts which review convictions we obtain, and by the Congress which annually appropriates funds we need and affords us authority for our activities."466

461. Id.
462. Id. at 103.
463. Id.
464. Id.
465. Id. at 112.
466. Id. at 83.
Abscam was under attack by thoughtful experts testifying before Congress, by New Jersey's former federal prosecutors crying foul, and by Judge Fullam who had overturned Jannotti's convictions, holding the techniques entrapping and fundamentally unfair, outrageous governmental overreach. Those techniques aimed at corrupt public officials had been stained, perhaps permanently, by misapprehensions of Archer, which Judge Friendly did not remove with his second Archer opinion of April, 1981.

The technique's fate looked bleak when on July 24, Judge George C. Pratt, before whom most of the major Abscam defendants had been tried, issued his detailed opinion, United States v. Myers. At this critical moment, had Myers been another scathing denunciation of the investigation and its techniques, it might have spelled an end to effective federal anticorruption efforts for a long time to come. Instead, denying on every ground all the defendants' motions to have their convictions dismissed, Judge Pratt's unequivocal support for the investigative techniques reversed the momentum and evened the score.

In familiar fashion the judge reviewed the Supreme Court's quartet of decisions on due process/entrapment, that "difficult, conceptually slippery and philosophically controversial concept." He summarized Hampton: "three judges would make predisposition the only issue; three judges would eliminate predisposition entirely; and the decisive two concurring votes . . . indicate that predisposition is not only relevant but will be dispositive in all but the 'rare' case where police over-involvement in the crime reaches 'a demonstrable level of outrageousness.'"

Regardless of his personal preferences, Judge Pratt, like Judge Fullam, a lower federal court judge, was bound by honest analysis of doctrine:

Until further word from the Supreme Court, therefore, as a matter of strict legal precedent, this court must assume that while the subjective view of entrapment is the general guide, it is nevertheless subject to an overriding exception that under either the court's supervisory power or the due process clause, a predisposed defendant cannot be convicted if police over-involvement in his crime reaches "a demonstrable level of outrageousness."

But "[n]o clear standard had evolved" as to exactly what conduct

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468. Id. at 1220.
469. Id. at 1221.
470. Id. at 1222.
by law enforcement was "outrageous." Judge Pratt cited leading cases (including Archer) from various federal appeals courts revealing several important factors, twenty-two of which he listed. These included:

1. Did the government agents initiate or instigate the criminal activity? 2. Was the government's participation essential to the crime? . . . 4. Was the activity of the government agent, when viewed alone, criminal? 5. How easy or difficult is the job of law enforcement officers in combating the kind of criminal activity involved? 6. Do the police need to use the kinds of tactics utilized in order to effectively detect the crime? 7. Did the government provide the instruments or implements to commit the crime? . . . 14. Did the government's agents perjure themselves by false reports to the police, to a judge, or to a grand jury? . . . 19. How important was the crime and its detection in the overall social scheme? . . .

Applying these factors, Judge Pratt rejected the defendants' claims that their indictments should be dismissed because the undercover operation created crime rather than uncovered it. Government agents had created an opportunity, "[b]ut their involvement falls far short of being 'outrageous' for two reasons," observed the judge.

In the first place, each of the legislators could simply have said "no" to the offer. Second, the extent of governmental involvement here is far less than that in Hampton. . . . [W]here the government was active on both sides of a narcotics sale, the Supreme Court did not consider the agents' conduct to be "outrageous"; a fortiori, here where the agents acted only on one side, by offering money to congressmen in return for favors, the involvement of the undercover agents was not "outrageous."

In a footnote Judge Pratt suggested that "[a] closer analogy to Hampton would be if the FBI, in order to prosecute the middlemen Criden and Errichetti, had not only offered the bribe money, but also supplied to them 'undercover' congressmen to accept the bribe." As to target selection, "the constitution does not require reasonable suspicion before a congressman may be made the subject of an undercover sting." Judge Pratt here supported Heymann's view that passive selection was a strength:

471. Id.
472. Id. at 1223.
473. Id. at 1225.
474. Id. at 1225 n.15.
475. Id. at 1226.
The agents did not set out to offer bribes to any particular congressman. They set no standards, established no criteria. Instead, the middlemen . . . carried the word that money was there for the taking by any congressman who would promise to give legislative aid to the sheik's need for asylum in the United States.

Weinberg had accurately characterized it: "We put out the word that money was available, we had a honey pot and the flies came." Nor did Judge Pratt find the inducements which the government offered the defendants overwhelming, designed to overpower their otherwise adequate resistance and to induce honest and innocent people to commit a crime they would normally avoid. . . . Certainly none of these defendants were in the position Judge Fullam found Jannotti and Schwartz to be in: "either take the bribe or lose the investment for your community."

He further analyzed the nature of improper inducements:

While there may be "inducements" that are "overwhelming," such as a threat against the life of a loved one, when the inducement is nothing but money or other personal gain, this court does not believe that the size of the inducement should be a determinative factor in whether a public official can be prosecuted for accepting it. No matter how much money is offered to a government official as a bribe or gratuity, he should be punished if he accepts. It may be true, as has been suggested to the court, that "every man has his price"; but when that price is money only, the public official should be required to pay the penalty when he gets caught. In short, as a matter of law, the amount of the financial inducements here could not render the agents' conduct outrageous or unconstitutional.

In Jannotti Judge Fullam had rejected any such per se approach, but Judge Pratt was correct at least in finding that "in these inflationary times, $50,000 is simply not an overpowering sum of money. The agents sought to keep the bribes reasonable and realistic in light of all the circumstances." Although Myers' inducement in these circum-

476. Id.
477. Id. at 1227.
478. Id. at 1227-28 (emphasis added).
479. Id. at 1228.
stances was not outrageous, some financial inducements may be outrageous by virtue of their size.

Perhaps Judge Pratt's most significant contribution in *Myers* was his support for the investigative tactics, because bribery was serious and difficult to detect.

"Although discovered and prosecuted less frequently than drug trafficking, political corruption through bribery is regrettably found among public officials, not only in this country but abroad. . . . [C]learly it is not simply a 'sporadic, isolated criminal incident.'"  

Like drug offenses, bribery is difficult to detect. Both are "victimless crimes" in the sense that no one with knowledge of the usual transactions has a motive to report the illegality to law enforcement officials.

Moreover, with bribery, nothing more is required than the quick passing of money in return for a promise of performance by the public official of an act that appears to be an appropriate part of his public duties. With drug deals, at least one part of the transaction is clearly illegal—the contraband. With bribery both parts of the transaction are apparently legitimate: 1) money; and 2) actions by public officials. Detecting bribery, therefore, is probably even more difficult than detecting drug offenses.

Some would say, however, that mere difficulty of detection does not create a need for undercover, infiltrating tactics such as were used in Abscam. More is needed, specifically a serious harm to society, and there are those who would argue that bribery and corruption in our public officials should be viewed with a tolerant "boys will be boys" attitude. This argument the court rejects categorically. Honesty, integrity, truthfulness and sincerity are essential qualities for effective leadership in our society. Tolerance of corruption has no place here. The cynicism and hypocrisy displayed by corrupt officials, pretending to serve the public good, but in fact furthering their own private gain, probably pose a greater danger to this country than all of the drug traffickers combined. Corrupt leaders not only betray their constituents, but also contribute to a moral decay in American society that many view as the forerunner of economic, political and social disaster.

This court believes that the great majority of government officials, including those in Congress, are honest, hard-working, dedicated and sincere. However, the government needs to have available the weapons of undercover operations, infiltration of bribery schemes, and "sting" operations such as Abscam in or-

480. *Id.* at 1229 (quoting United States v. Russell, 411 U.S. 423, 432 (1973)).
der to expose those officials who are corrupt, to deter others who might be tempted to be corrupt, and perhaps most importantly to praise by negative example those who are honest and square-dealing. Without the availability of such tactics, only rarely would the government be able to expose and prosecute bribery and other forms of political corruption.  

Near the end of his lengthy opinion Judge Pratt attacked the New Jersey Federal Prosecutors, who, he accused, had taken a negative view of everything about Abscam. They acted as if they had convinced themselves that the highest duties of a prosecutor were to manufacture arguments for defendants, to follow an ultra-cautious approach, and to be skeptical of all new investigative techniques. Throughout . . . they urged the Justice Department to move more cautiously and slowly. Indeed, they did not want to move at all until every possible flaw in the investigation could be meticulously checked.

Of course, the government must not infringe the constitutional rights of any of its citizens, and New Jersey's abstract, cautious approach to law enforcement activities has great appeal in some circles of government, of law, and of academia. But such hesitation and caution is unrealistic in the practical hurly-burly of a fast moving investigation that would not wait for lengthy reflection, but instead demanded immediate decisions, aggressive attention, and imaginative, courageous responses to rapid developments.

This was criticism calculated to sting, and while it detracts somewhat from the detached sentiments which make up most of this incisive opinion, the judge's frustration shows. "If all federal prosecutors were as hesitant to proceed in the uncharted Abscam waters as was the New Jersey office, federal law enforcement in this country would be about as effective as was New Jersey's with the New Jersey Abscam people—i.e., there would be few, if any, indictments."  

"There is no perfect case," observed Judge Pratt, and this was no exception, but all in all, Abscam did the government credit. The "defendants' crass conduct here reveals only greed, dishonesty and corruption" and their "major defense has been that they were tricked into committing the crime on videotape." By contrast, although "the government's conduct of the investigation was not flawless," it "reflects a moderate, fair, careful approach to an undercover investigation which

481. 527 F. Supp. at 1229 (emphasis added).
482. Id. at 1246.
483. Id.
suddenly and unexpectedly proved effective in uncovering corruption in Congress."484 Responding the next day, New Jersey Prosecutor Del Tufo contended that the judge had a "warped" view of a prosecutor's proper role.485

Judge Pratt respectfully addressed Judge Fullam's Jannotti condemnation of Abscam: "Judge Fullam was obviously influenced strongly by the tenuous connection between the Philadelphia trial events and federal jurisdiction, and he expressly disapproved the 'artificial federalization of purely state crimes.'"486 Furthermore, said Judge Pratt, the Philadelphia defendants had

made no commitment that they would be influenced in their decisions. Indeed, they were so anxious to have the sheik construct his hotel complex in the city that the mere offer to make such an investment would have guaranteed any reasonable variances required. Defendants had not requested the bribe payments and they made it clear that such payments were unnecessary.487

This sharply contrasted with bribery cases of United States congressmen where there were "direct violations of federal law by federal officials" and therefore "unquestioned federal jurisdiction."488 In Myers, there were no threats by the sheik's representatives, nor a great emphasis on the Arab mind. "Moreover, unlike the case involving the Philadelphia councilmen, the Congressmen here were presented with a clear request that their official conduct be influenced in a manner that would otherwise not occur."489

The large sums,

the fact that the councilmen were not asked to act improperly but only to do what they would have done anyway, and the threat that if they did not take the money there would be no project, all combined in Judge Fullam's view to preclude the mere acceptance of the money as sufficient evidence of predisposition.490

Furthermore, since Judge Fullam was sitting in the Third Circuit, he was governed by Twigg, which had set aside a conviction because of
the government's overreaching and creative involvement in a crime. But Twigg did not govern Judge Pratt, who was sitting in the Second Circuit. The closest the Second Circuit had come to invoking governmental outrageousness in corruption or other cases was Archer, where it had flirted with but not actually utilized the due process defense.

Judge Pratt, however, was unwilling to argue away all possible inconsistencies between Judge Fullam's and his own approach to Abscam's undercover techniques: "To the extent that Judge Fullam found due process violations in the undercover agents offering bribe proposals in the absence of 'suspected ongoing corrupt activities on the part of the targeted officials' this court respectfully disagrees. "If Judge Fullam's opinion should properly be read to be grounded on outrageous governmental conduct because the undercover agents initiated bribe offers and provided extremely generous financial inducements, then this court again disagrees. . . . Judge Fullam's premise that providing 'extremely generous financial inducements' offends due process, is, respectfully, unsound."

Judge Pratt buttressed his claim with some challenging logic:

If the courts were to establish a threshold amount beyond which no public official could be convicted of bribery, the rich and the powerful, those most likely to be in a position to demand large bribes, would automatically have the benefit of this defense and the crime of bribery as we know it would become the poor public official's burden. There can be no per se amount at which a bribe offer becomes so generous as to constitute entrapment as a matter of law. . . . [A] per se rule with respect to the size of monetary inducement is illogical, unworkable, and unfair.

But Judge Fullam had not argued for a per se rule as to a dollar amount; rather, the fluid market price of real corruption should determine the rough range of permissible governmental inducements in sham schemes. If the rich and powerful are in control of key segments of public authority, then presumably they will set their price high, in which case the government may offer correspondingly higher inducements. But honest public officials possessed of common human frailties, who would remain "clean" by pricing themselves out of the corrupt market, must be protected from government investigations which

491. See supra note 341.
492. See supra text accompanying notes 92-94.
495. 527 F. Supp. at 1245.
create an artificial market and thereby corrupt the otherwise uncorruptible.

On August 13, Judge Pratt sentenced Representatives Murphy, Myers and Lederer each to three years in prison. Angelo Errichetti got six years.\(^{496}\)

At this point, the United States Supreme Court was offered a perfect opportunity to address the problems of entrapment and due process where the federal government created carefully monitored simulations directed against local corruption without prior suspicion as to particular defendants. The narrow issue which Judge Friendly had identified as undecided in his 1981 Archer opinion—whether due process could prohibit prosecution although the outrageous law enforcement conduct was not directly inflicted upon the defendant—was presented to the Court by the defendant Archer. But on October 5, 1981, the United States Supreme Court denied certiorari, and formally ended the Archer legal saga, declining to utilize a decade of experience and erase the stain.\(^{497}\)

On December 22, 1981, Judge Pratt decided that United States Senator Harrison Williams' conviction had not violated due process.\(^{498}\) Williams had advanced mostly the same arguments as the Myers defendants. His predisposition was in slightly greater doubt. In Myers, Judge Pratt had declared the jury "virtually compelled" to find each congressional defendant guilty.\(^{499}\) In Williams, however, there was "extensive evidence at trial from which the jury could properly find predisposition. While the court does not agree with the government's characterization of that evidence as 'overwhelming,' it does view the evidence as sufficient to support the jury's findings beyond a reasonable doubt that both defendants were predisposed."\(^{500}\)

Williams added another wrinkle or two to Myers. For example, the Senator claimed that the "'pre' in 'predisposition' require[d] as a matter of law that a defendant's inclination to commit a crime must exist before he ha[d] any contact with government agents."\(^{501}\) As a matter of entrapment doctrine, if accepted, this would require the jury to

\(^{496}\) Id. at 1206.


\(^{498}\) United States v. Williams, 529 F. Supp. 1085 (E.D.N.Y. 1981), aff'd, 705 F.2d 603 (2d Cir.), cert. denied 104 S. Ct. 524 (1983). Based on an in-depth analysis of the trial court record, Judge Pratt found evidence of Williams' predisposition sufficient for the jury to conclude that the government's behavior was not so outrageous as to make predisposition irrelevant. 529 F. Supp. at 1094-1102.


\(^{500}\) 529 F. Supp. at 1096.

\(^{501}\) Id. (emphasis added).
focus not upon the time when the crime was committed, but upon the time when the government's investigation began. On a conceptual level, the court rejects this argument. The relevant time for determining predisposition cannot be so precisely focused. Evidence of everything that happened before final completion of the crime was relevant.\footnote{502}

As to the infamous coaching incident, at trial Williams had claimed that he paid little attention to Weinberg's coaching.\footnote{503} Now, after conviction on appeal with new counsel he was claiming that Weinberg had overwhelmed him. His own earlier unequivocal sworn testimony to the contrary destroyed his argument.

Not only FBI agents testified for the government; Sandy Williams also testified against his former friend. Most damaging to all the Abscam defendants were the tapes. The Senator's counsel "grudgingly acknowledged" that according to prevailing Supreme Court doctrine, consensual recordings were not subject to fourth amendment restrictions.\footnote{504} Senator Williams' new counsel argued, however, that in this case, because so many tapes had been used, their cumulative effect became unreasonable and therefore unconstitutional.\footnote{505}

Judge Pratt not only rejected this argument, "as wanting in logic as it is unsound in principle," he scoffed at it: "A cynic might characterize defendants' argument as urging that while a little 'truth' is permissible, large quantities of 'truth' are unconstitutional."\footnote{506} It did seem a desperate last move of a definitely guilty person.

A little more than two months after the judge rejected the Senator's apparently silly claim, however, linguist Roger Shuy, in testimony before the House subcommittee suggested that too many tapes might very well "swamp" the truth.\footnote{507} The jury becomes inundated with data. Cases involving many tapes of many people over long periods of time lead to a tremendous overload of information.\footnote{508} Eventually, swamping "causes jurors and the layman in general to give up and say, 'well, it can't be figured out, I'll just have to make my best guess.'"\footnote{509}

Shuy, who had appeared as an expert witness on language issues in several federal courts in criminal cases, exposed the House members to a hidden world of meaning and purpose within conversation. "Some rather simple and obvious principles go right by the layman some-
times, such as a person’s agenda in a conversation to do a certain thing or say a certain thing. The number of times he recycles that topic is a clear indication of his agenda.” The simple assumption that “the tapes speak for themselves” was in a sense quite dangerous.

“In normal everyday conversation, [the listener is] expected to give feedback to the person who is talking.” Without such feedback, speakers will soon stop talking on the topic and ask if the other person understands or is listening. The most commonly used signals for such feedback are what linguists call lax-tokens. The positive lax-tokens usually take the form of un-huh, alright, yeah, or ok, but other words, such as right, are also lax-tokens in quality. Since the function of the lax-token is to provide feedback to the speaker, its meaning, though positive, “cannot be taken as agreement.” Yet prosecutors, courts, and juries often mistake these as agreement.

If an indictment is made on the basis of a presumed agreement when, in fact, the response meant “I hear you, keep talking,” a false indictment has been made. In matters involving guilt or innocence, the FBI should be certain that the target’s response is a full token such as “I agree,” “That’s right,” “I’m with you,” or “You have my agreement,” “It’s a deal,” or even yes followed by another positive marker such as “Yes, of course” or “Yes, that’s right.” To be completely unambiguous in what the target means, a true positive response must be obtained. Shuy insisted that the FBI had manipulated the taped conversations to produce false appearances of corrupt agreement where there was no real agreement.

“Securing the appearance of agreement” was only the first of seven distinct FBI manipulative strategies that Shuy identified. The others were coaching; camouflaging, i.e., making something important or visible seem unimportant or invisible; criminalizing, i.e. translating perfectly legal terms or concepts used by the target into terms or concepts which are illegal or covert; blocked exculpatory statements; insider-outsider by which a person’s natural desire not to appear ignorant or belligerent to an event which the others may have agreed to, tends to cause the targets to “go along” with something about which they may know very little; and finally, culture language difference strategy, where the target is forced to tolerate and treat with politeness and dignity rather than with scorn the strange speech and actions of foreigners.

Shuy went into detail, illustrating how each of these strategies had

510. Id. at 79.
511. Id.
512. Id. at 79, 81.
513. Id. at 81.
514. Id. at 81-89.
been employed against Senator Williams. The last, the culture language difference strategy, was perhaps the most insidious linguistic trap. "You are more polite and more tolerant of the inarticulateness and garbled speech of the foreigner. That is, when standard speakers converse with nonstandard English-speakers, the latter are given accommodations." When skilled government agents posing as Arabs used words like deal for transaction, or buy a pardon for obtain a pardon, the temptation of the target is to excuse such usage as the best the speaker could do, even if inappropriate.

Shuy summed up and concluded:

[I]t may be true, as Paul Michel has observed in previous testimony, that the honest man simply rejects the offer and departs. For the man who is unlucky enough to be indicted for a lax token agreement rather than a true agreement, Mr. Michel's statement may not be so true.

If the offer has been camouflaged into looking like something quite different and the man is indicted, the statement may not hold water. If the man has been coached or scripted to say something other than he intended, and then is indicted, the truth of the statement is in question.

If the man's honest intentions are criminalized through contamination of the agent's language, and he is then indicted, the statement is not true. If the man attempts to utter exculpatory statements that are blocked by the agents, and then the man is indicted, Mr. Michel's statement has no truth in it.

If the man is isolated from the information which others have and succumbs to group pressure to go along with the others and gets indicted for it, the truth of the statement is questionable.

If the man is confused by the garbled language of a nonnative speaking agent and does not catch the subtleties of the garbled speech and is indicted as a result, the truth of Mr. Michel's observation is nil.

Representative Kastenmeier, who found the testimony "fascinating," couldn't help but interrupt with some questions: "Is it your view that the Justice Department and its agents . . . consciously understand the strategy that you have analyzed?" Shuy replied:

No, I would not make that assumption. I think that people are

515. Id. at 88.
516. Id.
517. Id. at 89-90.
518. Id. at 90.
able to use language without a conscious awareness of how they
do it. That's one of the more fascinating things about language,
that we all have conversational strategies, and we apply them
to all situations, but we are usually not aware of how we do it,
any more than we are aware of how we walk as we walk.

So, I would not want to say that it's a conscious strategy.
It perhaps is. I don't know. But I don't have any way of deter-
mining that.19

Whatever else, Shuy had undercut the assumption that the “tapes
speak for themselves.”

Meanwhile, Jannotti’s appeal had been argued before a three-judge
panel of the Third Circuit on June 10, 1981.520 Almost certainly the
vote was 2-1 to affirm Judge Fullam’s dismissal of the convictions, but
Judge Sloviter must have urged the circuit to hear the case en banc.
The appeal was reargued before a larger panel on November 23, 1981,
and on February 11, 1982, the Third Circuit sitting en banc became the
first appellate court to decide an Abscam case.521 Judge Sloviter, the
lone dissenter in the first three-judge panel, had attracted six new ad-
herents in the nine-judge panel which now voted 7-2 to reverse Judge
Fullam and reinstate Jannotti’s conviction. Writing for the majority,
Judge Sloviter reviewed the facts of Abscam’s Philadelphia phase,
quoting extensively from the tapes, and reversing Judge Fullam’s legal
conclusions, point by point.

The federal appellate court rejected the district court’s holding
that an actual potential effect on interstate commerce was a jurisdict-
ional prerequisite to federal prosecution for a conspiracy to violate the
Hobbs Act.522 Congress’ power reached activities “affecting” interstate
commerce; and when Schwartz and Jannotti each agreed with the
sheik’s representatives, their agreement was criminal although impos-
sible to fulfill. The majority declared it “irrelevant that the ends of the
conspiracy were from the very inception of the agreement objectively
unattainable.23 As long as defendants would have affected commerce
had they acted as they thought possible, a sufficient federal interest
existed to prosecute.

The dissenters attacked this reasoning as the “essential flaw in the
majority’s opinion.”524 The majority was confused; it interwove its ju-
risdiction argument with the well known principle of criminal law that

519. Id.
520. United States v. Jannotti, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106
(1982).
521. Id. at 591.
522. Id.
523. Id. (citations omitted).
524. Id. at 626 (Aldisert, J., dissenting).
"factual impossibility of completing a substantive offense does not bar a conviction of conspiracy. They confuse proof of the crime of conspiracy with the jurisdictional power to punish the crime." 525

The majority and dissent in Jannotti agreed that Archer was a leading instance of artificially created federal jurisdiction. The majority held, after a lengthy analysis, that Archer was different from Abscam. 526 Archer rejected federal jurisdiction not because Salvatore Barone was unreal but, quoting Judge Friendly, because the interstate element, the phone calls, was "insufficient to transform a 'federally provoked incident of local corruption into a crime against the United States.'" 527 In Archer, "the phone calls were purposely made in order to create an interstate element for what would otherwise have been merely a local crime." 528

On the other hand, as the dissent forcefully pointed out: Why should the defendants' misperceptions have any bearing on the logically prior question of the power of the federal government to punish their acts? The government's argument obliquely concedes that the fantasies of federal agents cannot alone create federal jurisdiction, but then moves without logical support to a conclusion that belief by a listener can somehow convert a speaker's fancy into fact. I reject the government's theory that building castles in the air somehow confers federal jurisdiction on the ground. 529

The dissent agreed with the district court that the evidence did not establish federal jurisdiction:

The Hobbs Act contemplates conspiracies that have at least a realistic probability of affecting interstate commerce. A purely hypothetical effect, a fairy tale conjured by the FBI's answer to the Brothers Grimm, is not "a sufficient threat to [commerce] so as to give rise to federal jurisdiction." . . . Cf. United States v. Archer, 486 F.2d 670, 681-82 (2d Cir. 1973) (Friendly, J.) . . . 530

The disagreement over entrapment and the constitutional right to due process was deeper than that over jurisdiction, and the dissent more fervent. The jury had found Jannotti predisposed. In deciding

525. Id.
526. Id.
527. Id. at 610 (quoting United States v. Archer, 486 F.2d 670, 683 (2d Cir. 1973)).
528. Id. at 611 (quoting United States v. Gambino, 566 F.2d 414, 419 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978)).
529. Id. at 625 (Aldisert, J., dissenting).
530. Id. at 626 (quoting United States v. Feola, 420 U.S. 671, 695 (1975)) (citation omitted).
whether to overturn that verdict, the appellate majority declared that Judge Fullam

must view the evidence in the light most favorable to the prosecution, [and] . . . viewing the evidence in this light, the trial court must uphold the jury's verdict unless no reasonable jury could conclude beyond a reasonable doubt that the defendant was predisposed to commit the offense for which he was convicted.\textsuperscript{531}

Examining the evidence, the majority found that “[e]ven if the dollar amount offered were relevant to disprove predisposition, a question which we do not decide,” $10,000, considering Jannotti’s circumstances, was not necessarily overwhelming. The Jannotti majority endorsed Judge Pratt’s statement in Myers that “$50,000 is simply not an overpowering sum of money.”\textsuperscript{532} Judge Fullam’s “overturning the jury’s resolution of this issue was plainly an intrusion on the jury’s prerogative.”\textsuperscript{533} Repeatedly, the majority chastised the trial judge for having overstepped his proper bounds, “impermissibly substituting” his judgment for the jury’s, “usurping” their proper function to decide:

This case is unique in that through the videotape the jury could observe the entire criminal transaction. . . . [They] could observe the amount of pressure, overt or tacit, if any, placed on the defendants to accept the bribes. In short, this jury had in its hands some of the most valuable tools possible with which to conduct its inquiry into the state of mind of each defendant, the crucial factor in an entrapment defense.\textsuperscript{534}

Therefore, “the district court’s substitution of its view of the evidence in deciding that as a matter of law there could be no predisposition represented an unfortunate usurpation of the jury’s prerogative.”\textsuperscript{535}

“Passionate” was how the majority too tepidly characterized the dissent. If the majority strongly rebuked Judge Fullam, the dissent more strongly castigated the executive and supported the judge. First the dissent stated “fundamental and irreconcilable differences” between it and the majority. Then Judge Aldisert, joined by Judge Weis, came out blazing:

The majority opinion reads like a paean to the FBI for its conduct in this case; but as an American citizen and as a federal judge, I find that conduct revolting.

\textsuperscript{531} 673 F.2d at 598.
\textsuperscript{532} Id. at 599.
\textsuperscript{533} Id.
\textsuperscript{534} Id. at 604.
\textsuperscript{535} Id. at 602.
The FBI has a long and proud history. It has earned the admiration and respect of the American people for its efficiency and fairness. . . . But like all human institutions it is subject to the frailties of man. . . . The chief deterrent [against agents' abberational behavior has been] the resolve shared by agents, judges, and the public that the FBI not become an American version of the secret police so infamous in many countries.536

Like all "judges [we] come to our robes bearing the stigmata of our respective experiences." Judge Aldisert recalled his immigrant father's abhorrence of secret police, and worst of all the "agent provocateur, a person employed to pretend sympathy with members of a group and incite them to illegal action, and thus to expose them to apprehension and punishment."537

"From my childhood I remember stories told in broken English by gnarled refugees from Russia, the Ukraine, and Poland, recounting in graphic detail the abuses inflicted upon them in peasant villages by the Ochrana, the secret police of the Czar. . . ." That was followed by "the dreaded secret police of the Stalinist era."538

"The apogee of government artifice, guile, and deceit was reached with the formation of the Gestapo in Nazi Germany. The story of the Holocaust is an account of the agent provocateur at his ruthless worst. It is an account of fraudulent representations to determine the identity of Jews, of cajoling incrimination of father by son and son by father . . . and of gas chambers disguised as shower rooms. Such spectres cannot be easily exorcised.539

"The Gestapo were the consummate users of the 'honey pot' . . ."540 Here, too, in Abscam,

[t]he FBI employed the honey pot through a secret agent who, by ostentatiously flashing and giving away wads of money, would attract both the wary and the unwary, the scrupulous and the unscrupulous. Having attracted, the honey pot would serve also to capture those who were willing, that is, predisposed, to make the flight to the honey in the first place, as well

536. Id. at 612 (Aldisert, J., dissenting).
537. Id.
538. Id.
539. Id. at 612-13.
540. Id. at 613.
as those who would have been unwilling, but who made the flight to the pot only because of the strength of the lure.

... To the Department of Justice, its operation was a taste of honey; to me, it emanates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice that I hold dear. 541

The FBI had

acted efficiently to ensnare their arbitrarily selected customers. . . . Their technique was a page torn from Aleksandr Solzhenitsyn's vivid description of the dreaded Soviet Blue Caps: "Just give us a person—and we'll create the case!" I am persuaded that this case presents a classic model of the type of entrapment that our society emphatically condemns. 542

... [T]hose who receive society's commission to go forth and capture transgressors may not themselves transgress. A free society can exist only to the extent that those charged with enforcing the law respect it themselves. . . . A society cannot long remain free if we permit the law enforcer to offer more than opportunity for transgression; a free society cannot and will not endure if it permits law enforcers to select individuals arbitrarily, and then to proceed by deception to persuade, cajole, entice, and implant a law-breaking disposition that was not theretofore present. 543

There is a "Judeo-Christian understanding that weakness has inhered in mankind since the days of Adam, [and] even the most morally scrupulous members of society can be persuaded to breach behavioral standards if presented with sufficiently tempting inducements." 544

These were the stakes: "I refuse to proceed as if no important social issue were involved in this case. . . . I believe that we are confronting an extremely sensitive intersection between morals and positive law, which demands that the judiciary assume rather than shirk responsibility." 545

Adopting the government's best case scenario, given the inducement, no reasonable fact finder could conclude beyond a reasonable doubt that Jannotti actually was predisposed. The dissent agreed with "Judge Fullam's determination that the government failed to present

541. Id. (emphasis added).
542. Id. at 617-18.
543. Id. at 614-15.
544. Id. at 615.
545. Id. at 616.
sufficient evidence of predisposition to submit the entrapment issue to the jury.”

“The dissent’s passionate grandiloquent essay on judicial responsibility and courage,” said the majority, “simply glosses over the salient fact which is inescapable because of the videotape record: defendants accepted the money readily, unprotestingly, even casually, without ever once attempting to use their consummate political skill to say, as diplomatically as the circumstances required, ‘Thanks, but no thanks.’”

Unlike entrapment, due process was a constitutional question which everyone agreed was for the judge to decide. The prosecution conceded that Judge Fullam had rightfully identified “fundamental fairness” as the key standard, but argued that the district court erred in applying that standard.

The majority agreed:

We must necessarily exercise scrupulous restraint before we denounce law enforcement conduct as constitutionally unacceptable . . . .

We must be careful not to undermine the [Supreme] Court’s consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense. While the lines between the objective test of entrapment favored by a minority of the Justices and the due process defense accepted by a majority of the Justices are indeed hazy, the majority of the Court has manifestly reserved for the constitutional defense only the most intolerable government conduct.

This was not such an instance, but

[i]n reversing the district court’s judgment of acquittal on the ground of a due process violation, we do not place our imprimatur either of approval or disapproval on the government’s conduct. As citizens, we have differing views of the necessity or advisability of the entire ABSCAM project. As judges, however, we rule only on whether the limits which the Constitution

546. Id. at 621.
547. 673 F.2d at 606.
548. Id. at 607-08. Abscam was not analogous to Twigg where DEA agents had “set up, encouraged, and provided essential supplies and technical expertise” to the defendant. United States v. Twigg, 588 F.2d 373, 381 (3d Cir. 1978). By contrast, in Abscam “the FBI provided neither material nor technical assistance to the defendants; it merely created the fiction that it sought to buy the commodity—influence—that the defendants proclaimed they already possessed.” Nor was this “a case where the government’s involvement in criminal activity has caused injury to third persons or extended beyond the very activity for which the defendant[s were] prosecuted,” factors emphasized by Judge Friendly in dictum in United States v. Archer. . . .” United States v. Jannotti, 673 F.2d at 608.
places on another branch of government have been exceeded. We find that the government's conduct as to these two defendants did not violate their due process rights, and that therefore the district court's judgment of acquittal on this ground must be reversed.\footnote{549}{United States v. Jannotti, 673 F.2d at 610.}

Over a passionate dissent, the Third Circuit had reinstated Jannotti's legal guilt. But what of his moral and psychological culpability? A couple of weeks after the court's opinion, Roger Shuy had testified before the House Subcommittee that the FBI may have unconsciously manipulated Senator Williams into apparent criminality where there may have really been innocence.\footnote{550}{Operations Hearings, supra note 153, at 81 (testimony of Prof. Roger Shuy). For a discussion of Professor Shuy's testimony, see supra notes 507-19 and accompanying text.}

Shuy was followed by Albert Levitt, a consulting psychologist at Temple University, and Mary Galligher, a PhD, linguist and attorney.\footnote{551}{Id. at 91, 96.}

Levitt, who had analyzed Jannotti's situation at the behest of defense attorneys, pointed out that, perhaps unintentionally, the FBI had staged the meeting with the sheik's representatives almost exactly as Solomon Asch had staged a famous psychological experiment—to demonstrate that through peer group pressure, a target could be made to agree to what he knew to be false.\footnote{552}{Id. at 91-93.}

Jannotti was in unfamiliar surroundings; he was "psychologically outmaneuvered. Physically he was outmanned and verbally outtalked." Jannotti, a simple unsophisticated tavern owner,

did not have presence of mind to ask for a delay or the verbal skills to take command of the situation—many would respond the same way—and herein lies the problem.

It is possible for the F.B.I. to create a situation and have

\footnote{549}{United States v. Jannotti, 673 F.2d at 610.}
\footnote{550}{Operations Hearings, supra note 153, at 81 (testimony of Prof. Roger Shuy). For a discussion of Professor Shuy's testimony, see supra notes 507-19 and accompanying text.}
\footnote{551}{Id. at 91, 96.}
\footnote{552}{Id. at 91-93. The ASCH Experiment revealed that a group preprogrammed to respond a particular way could influence an individual to acquiesce to the group norm even when the individual's perceptions of concrete stimuli is [sic] different than his opinion.

A preprogrammed group is told how to respond to long and short lines placed on a wall. The group is told to say the short lines are longer and the long lines are shorter.

An individual is brought in and seated in such a way that he hears many opinions before he can verbalize his own perceptions. Essentially, he sees something different than what the group is saying, and he has to decide whether to go along with the group or go along with his own perceptions.

The experiment shows that a majority yielded to the group pressure and went against their perceptions and judgments without other inducements or enticements.

Id.
less adequate, unsophisticated, verbally inept individuals submit or acquiesce to their proposals—and by doing so expose themselves to criminal prosecution. . . .

[How] quickly and easily a person can be influenced by group pressure. We see it in religious proselytizers.

We see ourselves talked into buying an item we don’t want, we see it in many aspects of life—but when we see a politician talked into accepting a legitimate business for the city [we raise] a great hue and cry.553

A few days after Jannotti was reversed and the technique vindicated by the Third Circuit, Judge Pratt sentenced Senator Williams to three years in prison. As the Senate proceeded towards the Senator’s expulsion, Senator Mathias was named to head an eight-member committee to review the FBI tactics in Abscam. The Second Circuit joined the Third Circuit in supporting the technique by affirming the conviction of INS official Alexander A. Alexandro, Jr.554 So, while secretly monitored shams were under serious attack in Congress, they were quickly gathering support in the courts.

On May 13, 1982, however, Senior District Judge William B. Bryant dismissed the indictment of convicted Congressman Richard Kelly because the government had violated due process.555 In some ways Judge Bryant’s opinion paralleled Judge Fullam’s. The judge was troubled by the government’s linking illegal immigration assistance with the prospect of substantial investment in the Congressman’s district.

Also disturbing was Kelly’s own uncontradicted testimony that he had initially rejected a payoff, and if the videotaped representations of Ciuzio, the unwitting middleman, were believed, the Congressman was not previously involved in corrupt deals. Consider this conversation between Ciuzio and Weinberg, about Kelly:

“He’s a kid and I know he’s ripe for the first big . . . score. This is a Congressman, ya understand? This ain’t a . . . hustler, cause we’re hustlers. We’re wiseguys. . . . Don’t hand him no . . . money, don’t talk money, tell him what the problem is, how could ya help, he’ll explain it. . . .”

“I don’t know,” [said Weinberg.] “ya gotta speak to him. That may be a problem. . . .”

“Listen, let me tell ya what you’re buying here, ok . . . .

553. Id. at 93.
Cause maybe this is his first shot in this role, all right? He ain’t buying no . . . Congressman. He’s buying the vehicle to accomplish your package, ya follow . . . .”

“Let Tony hand you the money in front of him. Long as we know he’s getting money. . . .”

“That’s ok. But don’t say hey, Congressman . . . you know what I mean? Ya can’t make him a . . . hood, ya know.”

“No but he’s gotta know that he’s getting paid to do it . . . . [T]he guy ain’t lilly [sic] white, you know. God forbid he backs out.”

“I’ll vouch for the guy. . . .”

Although Ciuzio had repeatedly tried to impress the sheik’s people not to directly offer the Congressman money, when Agent Amoroso met with Kelly alone he proposed a direct payment. Kelly told him he was interested in the investment in his district but that he had “no part” in whatever arrangements Amoroso might make about paying money for his help with immigration. Amoroso had intimated the sheik might go elsewhere. At this point John Jacobs, a Justice Department attorney who was monitoring the conversation, told Amoroso over the phone that Kelly was “being cute.” Amoroso then persisted with Kelly and soon thereafter displayed $25,000 in packets of $100 bills as an initial payment. On videotape, much to the amusement and disgust of a jury and the general public later viewing the tapes, Kelly stuffed the money in his pockets.657

As Judge Bryant saw it, “what the government attorney perceived as ‘being cute’ may very well have been a brief victory of conscience over temptation,” if only from fear of the consequences.658 The judge “fully appreciate[d] the need for and the value of aggressive, resourceful, and innovative law enforcement in our modern society which far too often is beset with diabolical criminal conduct so sophisticated as to be nearly impossible to detect.”659 Therefore “carefully devised and supervised covert investigations often [were] the only means of discovering breaches of the fundamental mandate of one’s office.”660

Yet, in Judge Bryant’s opinion, “as it affected Kelly,” Abscam was “outrageous.” There had been “nothing to trigger” the investigation against him. The FBI had done what Webster had disavowed as illegitimate—it had simply “test[ed] the faith of those in high echelons of government.”661 The judge “readily” admitted that this test was “of-
fensive to [him]. Government agents hard about the business of cor-
rupting public officials who are free of suspicion, essentially subvert
our government; and on its face this presents an unwholesome
spectacle."

Judge Bryant conceded that judges were

not privileged to dismiss a case against a criminal defendant
because they do not like the case or because they have some
strong personal aversion to the government's conduct, [and
that this] standing alone is not a sufficient basis for determin-
ning that such conduct is outrageous to the point of depriving
a defendant of due process. But at the same time it is inevitable
that a strong visceral reaction provides the starting point or
triggering mechanism which ultimately leads to the assessment
that conduct is so outrageous that it transcends any standard
of fundamental fairness. Aware that what is repugnant to me
may not be repugnant to the Constitution, I have sought to
identify some discernible line between conduct which arouses
my personal resentment and that which falls short of minimal
standards of fairness.

A very difficult challenge faced Judge Bryant and all other respon-
sible judges in this context: distinguishing personal feelings of distaste
from constitutional violation. Virtue testing of public officials, which
this essay advocates and Judge Bryant rejected as an illegitimate func-
tion of law enforcement, was not a basis for constitutional rejection.

Judge Bryant courageously attempted to draw a more specific line.
Assuming arguendo that virtue testing was not necessarily unconstitu-
tional, citing Heymann and Webster's testimony before the House Ju-
diciary Subcommittee, the judge found that the Constitution did re-
quire that the “temptation should be one which the individual is likely
to encounter in the ordinary course.” Secondly, he declared that
“when improper proposals are rejected in these virtue-testing ventures,
the guinea pig should be left alone,” because “[i]n ordinary real life situations anyone who would seek to corrupt a Congressman would certainly not continue to press in the face of a rejection for fear of being reported and arrested.” When the government heard Kelly himself reject Amoroso’s offer with the words “I got no part in that,” the testing should have ceased.

Obviously we like to think, and we hope, that our Congressmen and Senators, and indeed all public servants, are strong enough to withstand any imaginable pressure and reject any type of temptation no matter how attractive, and walk away. When they succumb to temptation, we are disappointed and chagrined, as I was at the sight of Kelly stuffing $100 bills into his pockets. But in reality, the hard fact is that our public servants are not recruited from the seminaries and monasteries across the land and that they are plagued by the frailties of human nature.

Judge Bryant’s constitutional rejection of the government’s conduct rested on the assumption that the government’s “litmus test” had been unreal—reality wasn’t modelled because “it is highly unlikely that anyone other than a government agent immune from prosecution for violating this statute would make repeated flagrant attempts at corrupting a Congressman for fear that the Congressman would notify the FBI.” The judge reasoned from that premise to a constitutional per se mandate that “[a] suspicion-free subject should be exempted from further testing on the basis of winning the first battle against temptation. He should not be required to win a prolonged war of attrition against chicanery.”

But if Judge Bryant’s premise is not true, then his conclusion loses its power. Is repeated pressure necessarily “unreal” because any offeror would fear that the initially resisting official would turn him in? The fact was that in Abscam, as well as in Archer and countless other situations, however honest or corrupt, however solicited, no public official reported a bribe offer to the FBI or other law enforcement agency. On what basis does Judge Bryant conclude that Congressman Kelly would not face repeated solicitation in the real world?

Furthermore, while the judge did offer a bright-line constitutional

566. Id.
567. Id. In the instant case, the FBI had no such restraints.
568. Id. at 375.
569. Id. at 376.
570. Id. “Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime.” Id. (quoting Sherman v. United States, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring)).
test of due process based on the probably false assumption that in the real world corrupters don’t push in the face of initial rejection—his per se test—his “workable discernible line separating the merely offensive and the constitutionally impermissible”—would create the very reality it denies. Suppose the citizenry heeded Judge Bryant’s bright-line test: “If after an illegal offer is made, the subject rejects it in any fashion, the government cannot press on.” What would be the result of such a per se rule?

Judge Pratt in *Myers* anticipated the flaw in Judge Bryant’s rule:

If adopted, it would provide a corrupt politician easy insurance against any undercover investigation, for when the suggestion of improper conduct was raised, all the subject would have to do would be to invoke the magic incantation, “I desire to act within the law” and then plunge into his nefarious activities, confident that thereafter any statements or conduct by him would be immune from investigation. Such a per se rule would soon frustrate virtually all undercover law enforcement.571

Two weeks after Judge Bryant decided *Kelly*, on June 7, 1982, the United States Supreme Court denied certiorari in *Jannotti*, thus allowing Jannotti’s convictions to stand, and the Third Circuit’s opinion to govern itself.572 The nation’s High Court declined to clarify the murky due process “outrageousness” with which Judge Friendly had flirted in *Archer*, Judges Fullam and Bryant found in *Jannotti* and *Kelly*, and other courts had so far rejected in corruption prosecutions.

On September 3, 1982, the Court of Appeals for the Second Circuit unanimously affirmed *Myers*, essentially adopting Judge Pratt’s “detailed and thoughtful opinion” but adding a few perspectives worth noting.573

The defendants had urged that their convictions be overturned on a separation of powers argument, i.e., that absent prior suspicion, the Executive had no business investigating the Legislature. The *Myers* appeals court rejected any such double standards: “Members of Congress enjoy no special constitutional role that requires prior suspicion of criminal activity before they may be confronted with a governmentally created opportunity to commit a crime.”574

The three-judge court, which included Judge Friendly, also rejected the fundamental unfairness claim, pointing out *Russell, Hampton*, the three *Archer* cases and *Twigg*. Myers had been prosecuted for

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574. *Id.* at 835.
his "corrupt" receipt of money "in return for being influenced in his performance of any official act." Myers, said the Second Circuit, was "the first public official in a reported federal decision to defend a bribery charge on the ground that he intended to keep the bribe but not to keep the promise he made to the bribe-payer." The appeals court held that "being influenced" need not describe the Congressman's true intent, but only the intention he conveyed to the briber in exchange for the bribe. Therefore even "[i]f Myers was 'playacting' and giving false promises of assistance to people he believed were offering him money to influence his official actions, he violated the bribery statute." The appellate court also found "interesting" the argument of Representatives Thompson and Murphy that due process required government undercover agents to eliminate or at least minimize all ambiguities in the critical events which formed the basis of criminal liability. "Perhaps at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness," the court agreed, as an abstract matter of constitutional law, but "[w]herever those limits might be, they have not been crossed in these cases." Government was entitled to "simulate the guarded conversation that would be expected of those proposing an unlawful venture. They need not say, 'Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action,' " The government was only playing by ground rules designed by cautious but corrupt congressmen.

Where a bribery prosecution presented a "close question as to whether money was received as an illegal bribe or a lawful campaign contribution," the evidence must show "specific knowledge of a definite official act" as a quid pro quo for the payment. In this case, however, no congressman claimed he had received what he thought was only a campaign contribution.

Concluding their opinion, the court emphasized that it was "not passing judgment on the wisdom of the Abscam investigation"; it was determining only whether the investigatory "methods employed" and the ensuing trials rendered the convictions invalid under the Constitution. "The conduct of the investigation, though subject to some criticism, affords no basis for rejecting the conviction," the court held,

575. 18 U.S.C. § 201(c)(1) (1982); see also 692 F.2d at 827.
576. 692 F.2d at 841.
577. Id. at 842.
578. Id. at 843.
579. Id. at 844.
580. Id. at 845.
581. Id. at 860.
praising the "fairness, patience and thoroughness of the District Judges," and repeatedly endorsing Judge Pratt's "comprehensive opinion." With the Supreme Court refusing to clarify its views on due process, the federal appeals courts had to rely on their own decisions.

On April 5, 1983, the Second Circuit affirmed Judge Pratt's refusal to void Senator Williams' convictions on the basis of entrapment and due process. The opinion, written by Judge Newman, who had also written Myers, noted that the major legal issues were "similar" to those already considered in other Abscam cases. The court found "overwhelming evidence that the Senator had sought financing of the mining venture in exchange for his assistance in obtaining government contracts."

Entrapment was a more serious issue. At trial, Judge Pratt had emphasized to the jury the government's burden to prove predisposition beyond a reasonable doubt, but he also instructed the jury to decide whether defendant was predisposed at the time when he committed the crime.

"As a general proposition of law," said the Second Circuit, this "fragment" was "erroneous." The standard jury instruction on entrapment required the prosecution to prove the defendant ready and willing to commit the crime "before anything at all occurred respecting the alleged offense." Unlike Judge Pratt, the appellate court applied this proposition literally:

A defendant's predisposition is not to be assessed "as of that time when he committed the crime." Normally, predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime. By "state of mind" we do not mean to require any specific prior contemplation of criminal conduct. It is sufficient if the defendant is of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion. The phrase "ready and willing" adequately captures that concept.

582. Id.


584. Id. at 606.

585. Id. at 612.

586. Id. at 617-18.

587. Id. at 618.

588. Id. at 618 n.9 (quoting 1 E. Devitt & C. Blackmar, Federal Jury Practice & Instruction § 1309, at 364 (3d ed. 1977)).

589. 705 F.2d at 618.
In spite of Judge Pratt’s erroneous ruling on the time frame of predisposition, the appellate court refused to grant Senator Williams a new trial because counsel had not objected to the judge’s statement at trial, nor asked for a clarifying instruction.690 Furthermore, declared the Second Circuit, the jury was “fully entitled to find, from the totality of the evidence, that the defendants were ‘ready and willing’ to commit the crimes charged as soon as the opportunity was first presented . . . .”691

What entrapment time frame had the appellate court adopted? In its view, the standard jury instruction which required a defendant ready and willing “before anything at all occurred respecting the alleged offense” merely referred to the moment an inducement to commit the crime was first offered. “Simply cultivating the friendship of a target preparatory to presenting a criminal opportunity is not inducement to commit a crime.”692 This clearly implies that while a government agent cultivates his friendship the target need not be predisposed, as long as he becomes predisposed by the time the first criminal offer is made.

Such a test is very troubling, especially concerning private acts of private persons. The simple fact is that friendship itself might cause predisposition. Imagine a condominium of retirees. Every day is spent on a pool deck, walking, or sitting around swapping stories. Friendships develop quickly; a government agent cultivates one retiree-target. This person has no “specific contemplation of criminal conduct.” But many people will do for a friend what they wouldn’t dream of doing for a stranger. The target chooses his friends carefully; they are law-abiding citizens. But this one “friend,” initially rebuffed, has forced himself into the target’s affections by persistent kindness—picking up relatives at the airport, buying groceries, finding a mechanic to fix a car cheaply, celebrating a 50th anniversary, etc. One day the target’s “friend,” who all along has told war stories of the garment trade and 40 years of payoffs, asks the target to help him launder money by depositing funds in a bank. It is an important favor, perfectly safe, and the government will never find out, assures the target’s friend. Besides, the target can keep the interest from funds deposited under his name.

The target agrees, deposits the money, and is prosecuted by the federal government; his “friend” was an FBI agent and he, is he a criminal? Was he entrapped? Was he predisposed?

By the time the “criminal opportunity” was first offered, because of friendship, the defendant, who had no prior contemplation of criminal conduct, preferred to help his friend. According to the doctrine of

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590. Id.
591. Id. at 616.
592. Id. at 618 n.9 (emphasis added).
the Second Circuit in *Williams*, that defendant was not entrapped. If friendship is a necessary prerequisite for a (private) defendant’s predisposition, where an agent insinuates himself into the defendant’s affections before offering the criminal opportunity, conviction should be barred by entrapment.

In these circumstances, entrapment should bar conviction under a subjective view because the defendant does not deserve to be punished, and under an objective view, because of the social harm from tactics such as these which threaten average law-abiding citizens acting in their private lives with loyalty and affection.

If it is held that in these circumstances there has not been entrapment, has government been “fundamentally fair”? These are just more unrefined aspects of “the as yet undefined standard of ‘outrageous’ conduct that the Supreme Court has suggested might offend constitutional limits.” Abscam had not played upon misplaced friendship or personal loyalty. Unquestionably, it did have its flaws. But “outrageousness” was the appellate court’s measuring rod, and however little the “tactics might square with our personal notions of appropriate law enforcement conduct,” lacking any indication that it was “persistently directed at an unwilling subject in an unconscionable effort to erode his law abiding instinct,” the appellate court found that Williams’ coaching, albeit regrettable, did not violate the United States Supreme Court’s undeveloped standard. Although “unquestionably . . . far in excess of the amounts normally tendered by government agents in an attempt to catch an ‘unwary criminal,’” an instant multimillion dollar profit was also not an outrageous inducement: “We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator.”

Jurisdiction wasn’t seriously contested, but the defendants desperately objected that their conspiracy charge was not a federal offense because the indictment alleged they had conspired to deprive the *United States* of the “honest and faithful services of a United States Senator,” whereas a Senator, having been elected by the citizens of a *single* state, owed honest and faithful service only to that state and not the United States as a whole. The court appropriately brushed this claim aside, emphasizing a “significant interest on the part of the na-

593. *Id.* at 620; *see supra* text accompanying notes 115-25.
594. 705 F.2d at 620.
595. *Id.*
596. *Id.* (citation omitted).
597. *Id.*
tional government in the honest performance of duties by those elected to the national legislature."

One last Abscam case remaining before the federal appellate courts would unanimously vindicate the technique. On May 10, 1983, the United States Court of Appeals for the District of Columbia Circuit reversed Judge Bryant, reinstating Congressman Kelly's conviction. The court was unanimous only in its conclusion that the government's conduct did not reach the "demonstrable level of outrageousness" which would bar prosecution.

Judge MacKinnon saw Abscam as just another well conducted undercover operation "extraordinary only in the positions of some of the individuals involved and in the intangible nature of the 'commodity' purchased." His two colleagues, Chief Judge Robinson, and Judge Ginsburg, who wrote a separate opinion, saw Abscam as an extraordinary operation, flawed by large inducements and a lack of supervision.

Judge MacKinnon pointed out that the court "need not determine the exact limits on government involvement in crime imposed by the due process clause, for clearly the government involvement in Abscam was less than that [already] found unobjectionable by the Supreme Court." In passing, Judge MacKinnon characterized Judge Bryant's proffered due process test as "unduly speculative," reiterating that "members of the federal judiciary have no power to veto law enforcement practices merely because such practices offend their personal tastes."

In their concurrence, the other two judges praised Judge Bryant's "thoughtful opinion" condemning Abscam as "an extraordinary operation," but agreed that, as applied, his "real-world test" was "speculative." The district judge had assumed that "a person who offers a bribe would retreat upon encountering an initial rejection and would not 'have the audacity' to press on 'for fear of being reported.'" But, pointed out the concurring judges, realistically, "the first overture renders the party offering the bribe vulnerable to prosecution. 'In for a calf,' such a person might press on if he perceives any chance of ulti-

598. Id. at 622.
600. 707 F.2d at 1461 (quoting Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring)).
601. 707 F.2d at 1469 n.51.
602. Id. at 1474-76 (Ginsburg, J., concurring).
603. Id. at 1470.
604. Id. at 1470 n.52, 1471.
605. Id. at 1474-75 (Ginsburg, J., concurring).
mate success. Nonetheless, were the slate clean, we might be attracted to an approach similar to the District Court’s.\textsuperscript{606}

The slate was far from clean. In fact it was quite smudged with lines, suggestions and commands from the United States Supreme Court as well as the federal appellate courts. And so, although obviously disturbed about Abscam, the court felt constrained to affirm Kelly’s conviction. Perhaps to prod the Supreme Court to speak further, or perhaps ironically, Judge Ginsburg in his separate opinion, chalked out the narrowest due process defense:

The requisite level of outrageousness, the Supreme Court has indicated, is not established merely upon a showing of obnoxious behavior or even flagrant misconduct on the part of the police; the broad “fundamental fairness” guarantee, it appears from High Court decisions, is not transgressed absent “coercion, violence or brutality to the person.” Without further Supreme Court elaboration we have no guide to a more dynamic definition of the outrageousness concept, and no warrant, as lower court judges, to devise such a definition in advance of any signal to do so from higher authority.\textsuperscript{607}

The signal has not yet come from the High Court. Nor is it likely soon. The Supreme Court’s decision not to decide may indicate that it is not yet collectively prepared to say anything definitive about outrageous prosecutorial techniques in public corruption cases. Perhaps waiting is a sign of wisdom. Opinions from thoughtful experts before congressional committees, lower court judges, and a new situation may compel the Court to give the guidance that so many await. In October and December 1983, however, in largely unheralded moves, the United States Supreme Court did to Abscam what it had done to Archer: It virtually ended the judicial phase by refusing to hear Kelly\textsuperscript{608} and Williams,\textsuperscript{609} thus leaving the state and federal judiciaries, executives, and legislatures, and the Nation to their own devices.

\textbf{BEYOND 1984}

\textit{[I]n all cases where power is to be conferred, the point first to be decided is whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.}

James Madison, The 41st Federalist\textsuperscript{610}

\textsuperscript{606} Id. at 1475.
\textsuperscript{607} Id. at 1476 (quoting Irvine v. California, 347 U.S. 128, 132-33 (1954)).
\textsuperscript{608} Kelly v. United States, 104 S. Ct. 264 (1983).
\textsuperscript{609} Williams v. United States, 104 S. Ct. 524 (1983).
\textsuperscript{610} The Federalist, supra note 1, No. 41, at 256 (J. Madison).
In *Kelly*, the Supreme Court declined to decide whether without any other prior suspicion of a particular defendant's corruption or a pattern of ongoing criminal activity, federal officials, consistent with due process, may virtue-test because "public servants . . . are plagued by frailties of human nature," because "dishonest public officials . . . may cause grave harm to our society," and because official corruption is "difficult to detect"?611

What must be known, or suspected, and with what degree of confidence before the government initiates an undercover operation, or offers a particular individual a particular opportunity? Some strong critics of government-created criminal simulations urge a judicially-warranted probable cause standard. Other critics urge "reasonable suspicion."612

The Senate Select Committee declared that the government could not meet a threshold predicate suspicion "by assertions such as 'Everyone knows that politicians are corrupt,' or even by the arguably accurate assertion that some number of individuals in every discrete group are likely to be lawbreakers. Those assertions are not specific facts relating to the particular situations under investigation."613

These critics condemn "fishing expeditions." They abhor random "trolling." Their sentiments have been echoed even by Philip Heymann, who told the House Subcommittee that "[n]o one felt that they were out 'testing' the corruptibility of Congressmen or Senators. The sense was that the Bureau was discovering what were the practices among a handful of corrupt politicians . . . that it was learning what was going on, not creating something new."614

This statement is troubling; "testing" need not be synonymous with "creating." Yet what physicists have told us about the behavior of the smallest particles we also discover about the behavior of particular

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612. The ACLU has recommended that undercover operations . . . be authorized only when there exists a sufficient amount of prior evidence of a pattern of criminal activity. We also believe that before any particular individual or group becomes a target of an infiltration or undercover operation, a high standard of reliable evidence indicating involvement or likely involvement in criminal activity must be met, and that the judgment of whether such evidence is sufficient should not be made by those seeking the authorization.


individual human beings. There is no strictly unperturbing monitoring. We effect behavior by measuring it.\textsuperscript{615} We seek to investigate, not create crime, but sometimes it will be created by monitoring. When government investigates government, however, the possibility of creating crime is less troubling. When a public official’s use of public power is involved, then our collective security demands that we monitor our public officials’ faithfulness to the Constitution. Even absent particular articulable suspicion, “testing” may be the only way to learn what is going on.

When Representative Kastenmeier asked, “[Y]ou said the guidelines recognize that inducements may be offered to an individual even though there is no reasonable indication that the particular individual has engaged or is engaging in an illegal activity. . . . What is the public interest in offering such inducements under those circumstances?,”\textsuperscript{616} FBI Director Webster replied, that with consensual crimes, where you do not have clear evidence that someone is engaging in [them] . . . [w]hat you have is a smell. You have people who talk about it and talk around it and the tendency in our investigations is to focus upon this kind of activity. . . . No clear evidence as such but a clear kind of smell. . . . Now these people begin to talk about their contacts. And that becomes even more remote. But if we say that we must have a predication, a prior bite by the dog, we wipe out the decoy in the park, we wipe out a whole range of sting operations, a whole range of undercover things.”\textsuperscript{617}

Testifying before the Senate Select Committee, Assistant FBI Di-

\textsuperscript{615} For example, at the subatomic level, elementary particles such as electrons and photons exhibit characteristics of both particles and waves while simultaneously being neither. An electron in orbit around an atomic nucleus is described as a mathematical wave, or probability function, and according to Heisenberg’s Uncertainty Principle, the electron has neither a position nor a momentum until one of these quantities is observed: The very act of observation creates the quantity measured. As a result, the measurement of both momentum, a vector quantity, and position, a static one, simultaneously, is not possible without a certain degree of uncertainty in one or the other quantity. This uncertainty is not a function of the accuracy of the measuring device, but is an objective maximum of precision inherent in reality itself. Note that either quantity can be determined exactly, if the other is not determined at all, and that on any scale larger than the subatomic, the principle does not apply. See V. Guillemin, The Story of Quantum Mechanics, 91-103 (1968); see also W. Heisenberg, Physics and Philosophy (1958). On a macroscopic, and more familiar scale, the creation of behavior by the act of measuring it is not uncommon in anthropological field studies. See, e.g., N. Chagnon, Yanomamo: The Fierce People (1968); N. Chagnon, Studying the Yanomamo 89-90 (1974).


\textsuperscript{617} Id. at 418 (testimony by William H. Webster, Director, FBI).
rector Revell spoke similarly: "[O]ur antennae picked up some vibrations, and we set out to follow those vibrations, and in doing so, we established a scenario to test that intelligence, and once we found that it was accurate, we proceeded."618

In its final report, the Senate Committee recognize[d] that the undercover technique may be employed in the absence of particular suspects so long as there is a reasonable suspicion that a pattern of criminal activity is underway in a particular area. But "vibrations" . . . do not constitute reasonable suspicion.

. . . FBI officials do not need the power to conduct undercover operations without reasonable suspicion, despite their references to "vibrations" or "smells."619

The Committee's Final Report recommended "Legislation Establishing Threshold Requirements for the Initiation of an Undercover Operation" which would prohibit the Justice Department from initiating (or expanding) an undercover operation except when there is "reasonable suspicion, based upon articulable facts" that the person offered the bait "has engaged, is engaging, or is likely to engage in criminal activity. . . ."620 Similarly, when the undercover operation was directed at a type of criminal act without an identified individual target, there must be "reasonable suspicion, based on articulable facts, that the operation will detect past, ongoing, or planned criminal activity of that specified type. . . ."621

It may be wise resource management in most cases to articulate the basis for undertaking an undercover investigation wherever there is such a basis. Furthermore, there should be a judicial warrant,622 or at

618. Senate Hearings, supra note 153, at 906 (testimony of Oliver B. Revell, Ass't. Dir., Criminal Investigative Division, FBI).
619. SELECT COMM., supra note 153, at 333-34.
620. Id. at 28, 377.
621. Id.
622. New York's Special Prosecutor for Corruption in Criminal Justice now may submit its plans for simulated crimes to prior judicial scrutiny. According to Justice Ernst H. Rosenberger, Presiding Justice of the Extraordinary Special and Trial Terms (and who hears corruption cases in New York City),

The Special Prosecutor writes me a letter, referring to an investigation by number only. In the letter, I am informed of the background of the investigation, technique, and the proposal for its utilization. If I approve, I write a letter which indicates, in substance, the following language:

"You have given me details of an active investigation, bearing number XX-XXXXX-X-XX. You have informed me of the proposed investigative techniques. These techniques do not appear to be inappropriate in the circumstances described."

There have also been occasions where a more formal long form order has been
the very least prior authorization by a nonpartisan undercover operations review board, a majority of whose members are not themselves government officials.

The FBI and Justice Department are likely to resist establishing an outside civilian watchdog panel as an unwarranted intrusion upon their own effectiveness. In the 15th Federalist, Hamilton noted "in the nature of sovereign power an impatience of control that disposes those who are invested with the exercise of it to look with an evil eye upon all external attempts to restrain or direct its operations." But such a board would be an exercise of the great democratic principle of civilian control over the military and popular control over the government manifested in the jury system. This review board would be a jury of experts.

Probable cause or reasonable suspicion of criminality, however, should not always be necessary predicates for initiating all operations or offering an opportunity to a particular individual. The general deterrent value of anti-corruption probes is greatly enhanced when it is known that, say, five percent of the executive's undercover budget is allocated to routine "street" patrols. Where public corruption exists in the private sanctuaries of the powerful, these "streets" are only patrolable by resourceful, dissembling, and penetrating undercover agents.

These "patrols" should be carried very far. For example, young federal agent-attorneys might be sent into local prosecutors' offices as assistant D.A.'s to perform their law enforcement function simultaneously on two levels, both as local prosecutors and as national secret agents investigating local corruption in those offices. State law enforcement should similarly monitor itself. This recommendation is not likely to sit well with the vast majority of prosecutors who are honest, nor would a similar operation in which agents became judge's clerks to discover who, on the bench, is corrupt. Nonetheless, in Chicago's Operation Greylord, the FBI has gone even further, using undercover judges.

Perhaps the chief frustration of the Archer investigation was its premature abortion which prevented it from reaching its ultimate target—the rotten core of the corrupt criminal justice system—judges. As

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used. The letters or orders are kept in the safe in my chambers and are not placed in the clerk's office unless later circumstances warrant.

Letter from Justice Ernst H. Rosenberger to the Author (March 22, 1984).

623. THE FEDERALIST, supra note 1, No. 15, at 111 (A. Hamilton).

624. See supra notes 33-35 and accompanying text. The flaw in a system which relies on the investigators to monitor their own techniques is exemplified by Operation Corkscrew. For a detailed discussion of Operation Corkscrew, in which "safeguards in practice were little more than rhetoric," Committee Print, supra note 153, at 41, so much so that the House subcommittee termed it a "text book example of the dangers inherent in undercover operations," id. at 51, see Committee Print, supra note 153, at 40-75.
Leuci complained, judges "set the pace" for the rest. Abscam was "a first and substantial step by the FBI and Justice Department beyond where law enforcement had been before," declared defense attorney Richard Ben-Veniste,

[but I don’t think they had the guts or the foolishness to make the same approach to the other coordinate branch, the judiciary.

Can you imagine an Abscam investigation directed to the judiciary? "Let's get the judges. Let's test which judges are susceptible, given enough inducement, to being bribed." They are not that crazy, but this was the first step.

If it is not stopped here, then we are going to have 1984 ahead of schedule in this country. It will go to the press. . . . The Congress is open game already. Why not the judiciary, selective troublemakers in various agencies? 622

Here Representative Hyde interrupted: "You don't doubt there are judges who are on the take somewhere in this great land of ours, do you?"

"Well, if so, I don't know about it, but I assume from past history and cases . . . ." 622

Ben-Veniste had overstated executive tyranny in Abscam, and surely he had understated the significance of judicial corruption. As the chief prosecutor of Archer, he must have at one time been aware that Frank Klein, former president of the Queens Criminal Bar Association, named sitting judges through whom organized crime cases were routinely funnelled to be fixed.

But if there must be suspicion of a type of corruption before initiating a scam, many of the citizens in this country also believe that some form of corruption occurs in virtually every criminal justice system, every legislature, every zoning board, liquor and turnpike authority, in every court system, in municipal, state, and the federal government. A very small minority of public officials may be corrupt, but the fixers are well distributed throughout the levels. If this is wrong, if this "realism" is nothing more than cynicism and false distrust of entirely clean public systems and authorities, then it can only be proved wrong by vigorous trolling whose nets consistently come up empty. If nothing else, the effect will be to increase public respect for government.

Those who disagree with the conclusions of this essay and urge a probable cause predicate before government actively initiates any stings in the private and public contexts assume that a probable cause

626. Id. at 345.
threshold is a real, effective check on unfettered discretion. But exactly what this standard means, what protection it gives, is unclear. By its very name, “probable cause” rests on a probability far short of certainty. In the search-and-seizure fourth amendment context, rules and tests were gradually developed to specify predicate suspicion adequate for magistrates to issue search warrants. In June, 1983, however, in Illinois v. Gates, a plurality of the United States Supreme Court jettisoned all “rigid legal rules” for determining probable cause, substituting instead a “totality of the circumstances” test. “Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a ‘practical, nontechnical conception,’ ” the Court declared.

At this point, the real dispute may be whether there should be any predicate, rather than what the predicate should be. Even this is too simple, because it assumes that all kinds of undercover scams require the same predicate suspicion. It presupposes one set of standards whether the targets are private citizens or public officials. The Senate Select Committee had introduced double standards when they proposed “a higher threshold test that must be met before undercover techniques may be employed to infiltrate entities that were organized to further legitimate political, governmental, religious, or journalistic ends.”

**Double Standards**

The question of double standards saturates the history from Serpico to Abscam. Serpico had refused to wear a wire to implicate low-level cops and insisted on focusing upon police corruption at higher levels. After The New York Times published Serpico’s story, Reverend Mitchell demanded an “on-going investigation not only of corrupt police, but corrupt judges.... We have got to deal not only with local pressure, but with wickedness in high places.” As a price for his total cooperation, Bob Leuci extracted a promise from the

628. Illinois v. Gates, 103 S. Ct. 2317, 2328-32 (1983). Writing for the majority, Justice Rehnquist set forth the broad standard a magistrate should follow when deciding whether to issue a search warrant:

> [M]ake a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

103 S. Ct. at 2332.
629. 103 S. Ct. at 2328 (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)).
630. SELECT COMM., supra note 153, at 384.
United States Attorneys that the investigation would not be directed only at his fellow police officers, but would reach lawyers, prosecutors, and judges. Police Commissioner Patrick V. Murphy also insisted the investigation not be limited to the police department, but must reach lawyers and judges; no pulling back when high ranking public officials got involved. Later, Murphy tried to deflect mounting public scorn focused solely on the Department, declaring, "The record will show that judges have been bought, that judges have bought their jobs. Be assured that the courts aren't perfect, the prosecutors' offices aren't perfect and city government isn't perfect, but the police are very visible."383

David Durk, Serpico's associate, concluded his televised testimony before the Knapp Commission with a passionate attack on double standards:

The policeman is convinced that he lives and works in the middle of a corrupt society, that everybody is getting theirs and why shouldn't he, and that if somebody cared about corruption, something would have been done about it a long time ago. Tell us about the D.A.'s and the courts and the bar, and the Mayor and the Governor.384

Special Prosecutor Maurice Nadjari demonstrated an evenhanded zealously: "When you're involved with drug sellers, you have to go out and buy drugs. When judges are selling fixes, you have to go out and buy the fix. This is the only way to do it." On another occasion, Nadjari had declared: "Cops and prosecutors and judges who are indicted deserved no greater dignity or better treatment than other citizens arrested for committing heinous crimes." Nadjari's chief deputy had lashed out at the Appellate Court which reversed a case against


United States Attorney Seymour, although troubled by sending an undercover agent into the criminal justice system to induce and simulate, adopted the strategy because not to use the technique, which was already standard fare for detecting other victimless crimes, would have immunized ranking public officials and violated his promises to Murphy and confirmed the cynicism of Serpico, Durk, Leuci, and countless others, that double standards prevail, that powerful lawyers inevitably protect their fellows.

Governor Rockefeller also decried double standards: "Corruption must be faced openly. It must be faced squarely. The problem must be confronted wherever it occurs in the criminal justice system—not just in the police department but at the prosecuting and judicial levels." N.Y. Times, Sept. 15, 1972, at 1, col. 1.
the Queens D.A., declaring, "Its action fosters the belief that a dual system of Justice exists—a corrupt one for the dishonest District Attorney, Judge or influential politician, another more rigorous for the ordinary criminal."\textsuperscript{637} Counterattacking, Justice Titone challenged the undercover technique, declaring, "The rule of law applies to all of us in our daily endeavors, whether we interpret laws and administer justice, prosecute the accused, drive a bus, or dig a ditch."\textsuperscript{638}

Double standards continued to play a vital role in the Abscam debate. Soon after it broke, the FBI Director declared that undercover operations had not been and would not be aimed specifically at politicians as such. But whereas the primary thrust of the attack on double standards in the Archer phase was against pursuing low level corrupt officials while high ranking corrupt officialdom was left alone, the dominant double standards theme in Abscam has been the private citizen versus the public official.

When Professor Heymann and FBI Director Webster made their first appearance before the House Subcommittee, Representative Seiberling declared that "[W]herever you have any reasonable or probable cause to believe that officials or anyone else are engaged in corrupt activities, you have the obligation to go ahead and investigate those and pursue them."\textsuperscript{639} Heymann observed that an unhealthy disrespect for law was generated when there was a perception of a dual standard: Strict enforcement for ordinary people and lackadaisical attitudes toward the powerful or prominent. His prepared statement declared in boldface: "Undercover investigations of political figures, while posing special problems, should not be subject to different rules."\textsuperscript{640} Webster concurred: "The investigation of a public official is a particularly seri-

\begin{itemize}
\item \textsuperscript{637} Id., Apr. 24, 1975, at 1, col. 1.
\item \textsuperscript{638} People v. Rao, 53 A.D.2d 904, 921, 386 N.Y.S.2d 441, 459 (2d Dep't 1976) (J. Titone dissenting); see supra note 114.
\item \textsuperscript{639} Oversight Hearings, supra note 153, at 127 (remark by Rep. John F. Seiberling).
\item \textsuperscript{640} Oversight Hearings, supra note 153, at 135 (statement of Prof. Phillip B. Heymann).
\end{itemize}
ous undertaking [but] the same criminal standard always applied."\textsuperscript{641} Responding to a question by Representative Hyde, Professor Heymann stated, "There is no and should be no special category of undercover operations that go to public integrity questions."\textsuperscript{642}

Some attacks on the technique strongly but implicitly condemned double standards by assuming that public officials and private citizens were indistinguishable as targets. Chairman Edwards observed, "Police, whether they're Federal or State or local, randomly just going around all our cities and stopping people in the street and offering people bribes or offering them money or trying to sell them drugs . . . would produce serious damage to the fabric of our society."\textsuperscript{643} Professor Seidman also implicitly rejected double standards by using "people" to blur all distinction between public officials and private citizens.\textsuperscript{644}

In an emotional exchange with Webster, Congressman Hughes more explicitly rejected double standards:

\begin{quote}
[A]s members of Congress, as citizens . . . we would all like to make sure that our Government does not focus in on us unless there is some reasonable basis. . . . We like to feel secure that the Government will not target us . . . unless there is some reasonable basis. . . . I am speaking not just for me, but for the other innocent public officials and other citizens.\textsuperscript{645}
\end{quote}

With very few exceptions, then, critics and supporters of Abscam have publicly rejected double standards. Professor Heymann summed it up:

\begin{quote}
There should be no special rules for the investigations of Congress in any form. The rules should be general with regard to undercover operations. . . . I do not like special rules for any class of people, executive, legislative, judicial. . . . In sum, whatever one thinks should be the proper rules for undercover investigations, these rules should apply generally to ordinary citizens and their elected representatives alike, and to crimes of bribery as well as any other crimes.\textsuperscript{646}
\end{quote}

\textsuperscript{641} Id. at 138 (statement of William H. Webster, Director, FBI).
\textsuperscript{642} Id. at 153 (testimony of Prof. Phillip B. Heymann).
\textsuperscript{643} Id. at 25 (remark by Rep. Don Edwards, Subcomm. Chairman) (emphasis added).
\textsuperscript{644} Id. (testimony of Prof. Louis Seidman). "There's no legitimate purpose served by conducting little tests of the morality of people. It's hard enough with the tests that people have to contend with in the real world without government making it harder still for people to walk the straight and narrow." Id. (emphasis added).
\textsuperscript{645} Id. at 430 (remark by Rep. William J. Hughes).
\textsuperscript{646} Id. at 497 (testimony of Prof. Phillip B. Heymann).
Heymann’s former deputy, Nathan, saw Abscam’s principal strength as its rejection of double standards:

I think this is extremely important and I know was very important to Judge Pratt, no political official was put off limits. No allegation, regardless of the party, power, or position of the official involved was disregarded as too hot to pursue. . . . I know this subcommittee and the American people desire that there be no different sets of law enforcement standards and techniques which depend in any way on social status, economic condition, or political power of the lawbreakers involved. . . . I very strongly believe that it is important to make thorough investigations of allegations involving public officials. I think it is important for our body politic to be satisfied that people in positions of power are not exempt from the same kinds of investigations that ordinary people receive when allegations of crime are raised."47

Against this chorus of thoughtful critics, it takes some courage to support double standards. Double standards have a bad ring; “equal protection under law” seems their very antithesis. Yet most critics attack double standards from a totally warranted rejection of an unfair society where the rich and powerful live by their own private set of rules, while the ordinary citizen is subject to the rules on the books, or worse, to arbitrary targeting by individual law enforcement agents because of race, politics, or whim. In short, much of the attack upon double standards is designed to deny special benefit and protection to the powerful.

Avoiding the 1984 we abhor—the totalitarianism we always rightly fear, requires special protection of private citizens acting in their private capacity. That extra protection requires double standards, but double standards which promote a vigorous attack on public corruption while providing an unyielding resistance to Orwell’s horrible vision.

Many who declared against all double standards may really be ambivalent about them. Congressman Hyde, for example, not only attacked special exemptions for public officials, but also observed that “whether or not they should be treated like other people inasmuch as they are public officials with public trust is still another question. I do not know that we will ever get answers.”48 Professor Heymann, who asserted that “there should be no special rules,” nevertheless also acknowledged

648. Id. at 519 (statement of Rep. Henry Hyde).
the special importance of investigating official bribery . . . .

[Where one individual has the power that any number of others with money need if they are to accomplish their ends, he can afford to sit back and require those others to come to him with proposals. Thus investigating such crimes requires more than ordinary initiative by law enforcement agents; they must come forward with proposals.]

Professor Heymann seemed to advance a somewhat separate set of investigative techniques for public corruption: Corrupt public officials may require more persistent solicitation. This troubled him; he called it the Committee's "most difficult problem." Professor Heymann said that "Offering a public official corrupt money with no predicate out there at all, no reason for it, no operation suggesting it to us from the outside world, [w]as right on the line.

Heymann did not, however, support a policy of random stings against private citizens. It would seem, then, that random stings against public officials are arguable for Professor Heymann only because he implicitly distinguishes public from private and applies double standards.

Although oversimplistic, it is very important first to separate the public (official) from the private (citizen). It is axiomatic in the United States of America that private citizens acting in their private capacity are entitled to privacy, i.e., no government snooping except for an extremely good reason.

What about drug dealers, prostitutes, bootleggers, pornographers, homosexuals, adulterers? Consensual crimes—so called victimless crimes—demand criminal simulation for their detection. This alone is a good argument for adopting the Knapp Commission's recommendation to reduce police corruption by legalizing gambling and other victimless crimes. A whole libertarian tradition powerfully

649. Id. at 498 (statement of Prof. Phillip Heymann) (emphasis added).
650. Id. at 500.
651. Oversight Hearings, supra note 153, at 160 (statement of Prof. Phillip Heymann).
652. Commission to Investigate Allegations of Police Corruption, COMMISSION REPORT (1972) at 17-20. "Corrupt activity must be curtailed by eliminating as many situations as possible which expose policemen to corruption." Id. at 17. The Commission also urged that to whatever extent gambling and Sabbath closing laws remained in force, their enforcement should not be a function of the police department. Id. at 18. The Commission did not, however, recommend that the police cease their regulatory and prohibitory role in the narcotics area:

The Commission believes that the police must continue to assume responsibility for enforcement of laws forbidding narcotics sale and possession as long as society deems it necessary to invoke criminal sanctions in this area. However, increased study and attention should be given to ways other than criminal sanc-
represented by John Stuart Mill's classic essay *On Liberty* argues that government should punish no act between two consenting adults. Nonetheless, it seems clear that a majority of the citizenry through their representatives will continue to outlaw some private consensual activities. Government must have reasonable suspicion if not probable cause to believe a particular private citizen acting in a private capacity is engaging in a prohibited private act which offends public sensibilities, before probing private life and testing virtue. At the opposite extreme of private citizens engaging in private acts are public officials engaging in public acts: e.g., Norman Archer presenting Barone's case to a grand jury, or representatives sponsoring legislation.

The Senate Select Committee recommended legislation distinguishing private life from government in just the wrong way: Whereas ordinarily the federal government could initiate stings only when there was "reasonable suspicion based upon articulable facts," those same undercover operations could "infiltrate any political, or governmental . . . organization or entity" only upon a stricter "finding that there is probable cause to believe that the operation is necessary to detect or to prevent specific acts of criminality." Religious and news media as private institutions were appropriately singled out for special protection, but the Committee's double standards, which especially protect public office from effective scrutiny, are objectionable.

The better view is that, without any prior suspicion of their corruption, public officials acting with public power should be subject to secret monitoring. Random virtue testing of public officials is therapeutic to our society, helping us more nearly approach our goal of a true republic. "Public officials" are those who, as a condition of employment, swear an oath of allegiance to the United States Constitu-

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653. Mill argued that consensual conduct not injurious to others was outside the proper scope of societal control. However,

[a]s soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all persons concerned being of full age and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.


tion. To help ensure their oaths are true, their pledges of faith something real, let every public official assume always that some agent of the principal observes all their use of public power. Let them assume that each passing lure may contain a hook. For in the end, as Thomas Jefferson said, “when a man assumes a public trust, he should consider himself as public property.” It is good preventive medicine for every public official to assume that all use of public power is being constantly monitored.

Government, pervasively testing and monitoring private citizens in their private lives would be a totalitarian destruction of our free society, but government testing and monitoring itself is good republican government. “Suspicion is a virtue, as long as its object is the preservation of the public good, and as long as it stays within proper bounds,” declared Patrick Henry. “Should it fall on me, I am contented: Conscious rectitude is a powerful consolation.”

There are prominent points on the continuum between the extremes of a private citizen acting privately and a public official acting with public power. Private citizens often act in a public or quasi-public capacity. For example, corrupt lawyers like Klein or Rosner often corrupt the public process in their private but licensed representation of clients. So too do business people, especially where there are government contracts. Throughout our country, small business routinely bribes elevator, building, liquor and other public inspectors.

If we adopt this double standards approach and accept in principle that public officials may be monitored and tested while acting with public power, it follows that all private citizens interacting with public officials in their use of public power are similarly subject. Here, the active/passive distinction takes on critical importance. Let every private corrupter wonder whether the public official with whom he strikes a corrupt deal is really an honest government agent.

Although sham opportunities should be made available to private business by undercover agents posing as corrupt officials, government agents should not initiate the bribe offers and a fortiori agents should not “shake down” private citizens by demanding bribes and then prosecuting their payment. A private citizen who initiates a bribe to a public official for overlooking a violation should be prosecuted.

Even this is too simplistic. Many building codes, for example, can

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655. Remark of Thomas Jefferson to Baron von Humboldt, 1807, quoted in Bartlett’s Familiar Quotations 375 (13th ed. 1955). The sentiment is valid, but the authenticity of this statement is subject to some doubt. It does not appear in what purports to be the complete correspondence between von Humboldt and Jefferson, H. de Terra, The Humboldt–Jefferson Correspondence, 103 Proceedings of the American Philosophical Society 787 (1959), and does not appear in the 15th edition of Bartlett’s.

656. 5 The Anti-Federalist, supra note 2, at 213 (Patrick Henry, statement to Virginia ratifying convention, June 1788).
never be enforced in detail without shutting down legitimate small construction companies. It is not uncommon to find honest builders who pay cops not to force them to sweep all the sand and fill all the holes every night, not to enforce unrealistic rules about distance from a road that materials may rest overnight, regulations enacted long ago for large construction sites, but inappropriate for single family remodelling jobs. This is wrong, but it would be troubling if the government sent undercover agents dressed as cops to "hang around" a site, making their presence known in a way that did not actively solicit but did suggest an approach to a savvy builder. Of course paying a public official to overlook a truly unsafe condition is very serious and should be prosecuted. By accepting money up front, Jannotti might have placed himself in a position to be pressured into overlooking hotel safety code violations. When private citizens in their business capacity interact with public officials in their official capacity, there are fine lines to be drawn in the use of undercover techniques.

Business bribery may involve no public official. For centuries, suppliers worldwide have paid kickbacks to purchasing agents. Often these acts are crimes, and the faithless agents' private employers are the unwilling victims. It requires undercover monitoring and simulation to effectively prosecute all bribery, including this private type. The most carefully corrupt and the most unwary innocent resemble each other in the private no less than the public sphere. Here, warnings of the Archer/Abscam critics assume significance. With one major exception—organized crime—absent judicially warranted approval, based at least on reasonable suspicion if not probable cause that a particular individual was committing these crimes, government should not introduce criminal simulations into the private business context.657

Another segment in the continuum between public officials acting in their public capacity and private citizens acting in their private capacity includes public officials acting in their private capacity. Although this essay has urged that, as a condition of employment, every public official, having sworn an oath of allegiance to abide by the Constitution, and entrusted with some portion of the public power, also agrees to be monitored and tested when using the public power, public officials are also citizens and human beings with private lives. Their dual capacity led many critics and supporters of Abscam to deny the

657. Oversight Hearings, supra note 153, at 25 (testimony of Prof. Geoffrey Stone). Private employers may still hire private agents to gather evidence for whatever reason to present to a District Attorney—leaving themselves open for possible civil suits for any unwarranted intrusions.

Undercover scams privately initiated against private citizens may be very intrusive but, as Professor Stone warned, it would be a "mistake too easily to equate the dangers posed by intrusions into privacy by government and superficially similar intrusions by other elements of society." Id.
public/private distinction and urge "one set of rules" to protect all citizens. A distinction can be made, however, between public officials acting in their public capacity and public officials in their private capacity.

When Professor Heymann appeared before the House Subcommittee a month after Abscam first broke, Congressman Hyde, testing Heymann's flat rejection of double standards, confronted him with his own written assertion that the Justice Department would "not shirk our responsibility to continue the investigation and to prosecute, if warranted, regardless of how prominent or powerful the official may be."658

"Now you told us about the investigation of electrical inspectors in Chicago," said the Illinois congressman to President Carter's Criminal Division Chief, "tell me again why you didn't investigate and prosecute Dr. Peter Bourne in the White House."659

Heymann hesitated. "I'm wondering for a minute, Mr. Hyde, whether it's appropriate for me to say anything about that or not."660

Congressman Rodino, Chairman of the Judiciary Committee, and Subcommittee Chairman Edwards signaled Congressman Hyde not to press. "I don't want to embarrass anybody, so I will withdraw the question."661

Professor Heymann, on a moment's reflection, decided the question deserved its "simple answer":

To the best of my knowledge no one is prosecuted for similar behavior, and that ought to apply to political figures, too. It's easy for someone in my position to say let's go ahead and prosecute a political figure. Administrative, executive, or legislative, State or Federal.

It's hard to say let's not prosecute a political figure who may or may not have technically violated the law in a situation where no one else would be prosecuted.662

"Well, if that's so, that's fine," said Congressman Hyde, "if that wasn't a violation . . . ."

"It's not a matter of saying it's not a violation," corrected the Professor. "Whether it was or not, it's a matter of saying there are situations where no one else would be prosecuted, and I believe in those situations, even if a political figure has violated the law, he or she

660. Id. (statement of Prof. Phillip Heymann).
662. Id. (statement of Prof. Phillip Heymann).
should not be prosecuted where no one else would be, simply because they are public figures.\textsuperscript{663}

Although Bourne was a public official who had violated the law and we do not want public officials breaking the law with impunity, the fate of the physician sits well with us, as it did with the committee, only if we imagine his violation as having occurred in his private capacity. He was only incidentally a public official.

Similarly, after the Town of North Muskegon Police Department dismissed a police officer for violating the adultery statute by cohabiting with a married woman not his wife, a federal district court in western Michigan rejected the city’s argument that the cop’s off duty conduct at least potentially affected his job performance, and rejected the town’s claim that as a condition of their employment law enforcement officers can be required to be totally law abiding citizens. The court reinstated this public official, upholding his constitutional right of sexual privacy\textsuperscript{664}

Of course, it is usually illegitimate for government agents posing as willing sexual partners, fellow sports bettors, or the like, to test public officials in their private capacity to see if they will commit crimes unrelated to their use and abuse of the public trust. But here, too, there are troubling cases.

For example, a public official who because of sexual misconduct is subject to blackmail may be a threat to the republic. So, too, a compulsive gambler, alcoholic, etc. A simple rule here would be that public officials acting in their private capacity should not be offered a simulated criminal opportunity unless there is reasonable suspicion to believe their private disability interferes with their public trust. Before assuming their public office and swearing oaths to abide by the United States Constitution, perhaps in a confidential background check, public officials should reveal under oath, their particular vulnerabilities. The questionnaire might read: “Have you committed any crimes for which you have not been convicted or arrested? Have you engaged in any activity which you would be embarrassed to have made public? If the answer is ‘yes,’ specify. The failure to include anything here constitutes a waiver of your right to privacy concerning it.”

Such revelations would not eliminate but would diminish a public official’s vulnerability to blackmail, because he could report the attempt to authorities without also having to reveal anything newly embarrassing. Thus, the inclination to temporize with a blackmailer would be diminished.

Critics might claim that such a system would be impractical and in

\textsuperscript{663} Id.

any event would scare away potential public servants. It might be workable; some assistants at the New York special prosecutor’s office, confronted with similar questions before swearing their oaths, admitted they had smoked marihuana.665

It is difficult but possible to separate to some degree the public life from the private life of a public official. Professor Heymann had testified that the Justice Department generally imposed on itself a rule that it would not pressure the target’s immediate family. “It’s legal, but we don’t do it. But friends, yes; girlfriends, boyfriends, best friends, yes.”666

This constitutes a rough outline of the double standards this essay urges. The main distinctions are four: public officials in their public capacity, public citizens in their private capacity, private citizens in their public capacity, and private citizens in their private capacity. Specific checks and fine lines have yet to be worked out. However subtle the graduations become, the extremes are clearly separate: Officials acting with the public power should be subject to much greater scrutiny, simulated criminal opportunity, and monitored temptation related to their public trust than private citizens acting in their private capacity.

At bottom, double standards as a component of fundamental fairness rests upon the basic belief that government should be held to the strictest standards. This cuts many ways. It applies to government as investigators, as legislators, as judges, as prosecutors, and finally, yes, as targets.

This double standard double cut was well expressed by former United States Attorney Whitney North Seymour in defending the technique under cross examination in the Archer due process hearing:

“You felt[,] did you not[,] that the end justified the means[,] is that right?”

“No,” said Seymour, “I felt there was a plain obligation to pursue what appeared to be solid information of unlawful conduct in the administration of justice in Queens County and that we were the only agency in a position to do anything about it at the time.”

“Did you think that the government officials should be subjected to the same rules of conduct that are commanded of a citizen?”

665. Personal knowledge of Author.
666. FBI Hearings, supra note 672, at 147. When I was a special prosecutor, I saw an associate display no sensitivity to this distinction, coercively blending private and public. A businessman who refused to cooperate with our investigation into police shakedowns was given an added incentive when his wife and his girlfriend were each subpoenaed to appear before the grand jury at the same time. At most, they had unimportant information to provide. He cooperated to avoid that confrontation. In my view, this tactic was unfair, and would have remained outrageous even had he been a targeted public official.
“I believe that they should be subjected to a higher standard. I think that higher standard was met in this case.”

In sum, when government officials are investigating government officials, when “government” is agent and target, then double standards are deeply embedded, even, ironically, in Justice Brandeis’ classic, stirring call for their abolition:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

ENTRAPMENT

Traditionally an entrapment defense was supposed to check government overreach. The Senate Select Committee would accomplish this by Congressional legislation establishing an objective entrapment defense making it entrapment per se whenever “federal agents provided goods or services that were necessary to the commission of the crime [which] defendant could not have obtained without government participation.”

The Senate Select Committee’s final report vigorously attacks the “prevailing” subjective entrapment doctrine as unjustifiable in theory and often perverse in practice. . . .

[Although the [Supreme] Court had failed to articulate it[,] police should refrain from offering inducements that are significantly larger than those actually proferred under similar circumstances in the real world or that are attractive enough to persuade virtually anyone in similar circumstances to commit a crime. . . . The entrapment inquiry now focuses on the defendant’s predisposition, rather than on the police conduct. As a

669. SELECT COMM., supra note 153, at 27.
result, the conviction of a predisposed defendant will stand even if he was lured into criminality through the offer of a wildly unrealistic inducement to which most people would have succumbed. Conversely, a defendant snared through the use of reasonable and otherwise proper police methods must be acquitted if he is found not predisposed.\textsuperscript{670}

Actually, the Senate attack here does not go far enough. Again, there is that flawed doctrinal connection between government inducement and defendant’s predisposition: an enormous inducement makes the target all the more willing, all the more plainly predisposed, and therefore all the less entrapped.

There are at least two responses to this “flaw”: (1) Define predisposition as “otherwise ready, willing, and able to commit crimes of this type,” thus leaving public officials alone with their otherwise unrealizable corrupt fantasies; and (2) Alternatively, under a subjective approach, admit that a larger inducement is less subjectively entrapping, but rely on due process—fundamental fairness—to pick up the slack. By this reasoning, when the government offers an enormous inducement, it ensures predisposition and no entrapment, but only at a greater risk of due process violation. Due process, then, checks entrapment.

Whether or not acknowledged doctrinally, this check will operate any way. “It may be likely,” the Senate Committee observed, “that a jury would find that a defendant had been entrapped if a huge inducement had been offered to commit some trivial offense (e.g., $5,000,000 to double park), but such a jury surely would be motivated not by the articulated predisposition principle, but by outrage at the police conduct.”\textsuperscript{671}

A second attack upon subjective entrapment is that it is internally incoherent. If an entrapment defense excuses only non-predisposed defendants because they are less blameworthy and less personally deserving of punishment, why not excuse all non-predisposed defendants, even where private persons induce their targets for private motives and thereby overbear their innocent wills? Since subjectivists restrict entrapment to inducement by government agents or informants, that standard is not consistently concerned with defendants’ personal guilt or innocence. As the Senate Committee summed up this attack, “the defendant’s moral blameworthiness cannot be affected by the tempter’s hidden identity as a federal agent.”\textsuperscript{672}

One of the few commentators who agrees with the majority of the

\begin{footnotes}
\item[670] Id. at 365.
\item[671] Id. at 366.
\item[672] Id. at 364.
\end{footnotes}
United States Supreme Court in preferring a subjective entrapment defense, Professor Roger Park, countered that although entrapment is concerned with defendants' personal culpability, that defense has other objectives which sometimes require persons of equal moral culpability to be treated differently under the law.\(^673\) In his excellent and widely cited *The Entrapment Controversy*, Park offered an analogy in defense of subjective entrapment. If two defendants each rely upon a lawyer's expert advice that a particular act is legal, he who relies upon a public official later has a defense of "mistake of law," whereas the other person who in good faith relied upon private counsel is nevertheless guilty.\(^674\)

Private inducement is not entrapment under either a subjective or objective view. "Designing an entrapment defense, then, requires a candid recognition that the entrapment doctrine has very little to do with culpability and very much to do with directing law enforcement efforts into effective and socially desirable channels," the Senate Committee's final report declared.\(^675\) "[I]f society actually believes that those tempted into criminality are not culpable (a notion that the Select Committee rejects),\(^676\) the substantive criminal law should be modified to reflect that fact and to acquit persons tempted into crime, whether by governmental or by non-governmental actors."\(^677\)

The catalogue of objections to subjective entrapment is lengthy, including an apparent circularity and post hoc method of proving predisposition noted by the Senate Committee: "[I]n modern practice 'predisposition' permits a finding that any defendant who commits any crime in response to any inducement is predisposed, because such defendant has, by accepting the inducement, demonstrated his willingness to engage in illegal conduct."\(^678\)

Perhaps the greatest problem with subjective entrapment is the nature of predisposition. What is it? Can the question, "Was the defendant predisposed?" be answered truly with a "yes" or "no"?

Take Harry Jannotti. Given the Arab mind, with apparently limit-

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674. *Id.* Note Park's double reliance upon a private/public distinction. In entrapment, that distinction is critical as to the source of the inducement—a public official or cooperating citizen acting in a public capacity is necessary for entrapment, whereas a private person inducing in a private capacity cannot entrap. Troubling cases include a public official acting privately; e.g., a corrupt cop inducing a merchant to bribe, or a private person acting apparently publicly—a phony "cop" inducing the bribe. Strictly, the merchant does not have an entrapment defense to attempted bribery, nor a defense of duress absent fear of physical force.
675. SELECT COMM., supra note 153, at 372.
676. *Id.* at 368.
677. *Id.* at 369.
678. *Id.* at 366.
less wealth, the skills of representatives who also pushed the right buttons, and the enormous municipal benefit from this apparently legitimate project, can it be said with any certainty that Jannotti either was or was not predisposed?

In the end, predisposition may not only be unknown, it may in fact be unknowable. Predisposed/non-predisposed is not a useful dichotomy as much as a continuum. We are all more or less prone or resistant to certain opportunities. Almost anyone will yield to inducement, coercion, and emergency at some level of love, sympathy, or need. A subjective entrapment defense makes predisposition an all-or-nothing question: Was the defendant predisposed? Even if the answer could be known, it might well turn out to be a matter of degree, accurately expressed as a likelihood, a probability that all other things equal, in situations of this type, given this inducement, the defendant would act criminally. How is a jury to decide?

When we are unsure of whether the defendant has been entrapped, who should have to prove what? Under the objective view, the defendant has the burden to prove the government's failing, whereas generally with subjective entrapment, the government has the burden to establish predisposition. Each must prove the other's flaw.

679. Thus, for example, the MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962) incorporates an objective test for entrapment. Under such a statute, the inquiry focuses on the likelihood that police conduct would induce a hypothetical law-abiding person to commit a crime of the type alleged against the defendant. The predisposed defendant, the one ready and perhaps eager to commit the crime, may still be acquitted if it can be shown by a preponderance of evidence that police conduct created a substantial risk of inducing non-predisposed persons to commit such a crime.

The classic formulation of the burden of proof under the subjective theory is that of Judge Hand, who stated that entrapment cases raise two questions of fact:

(1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it.

United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952) (reversing the conviction of defendant, who was again convicted on retrial, a judgment which was affirmed by the court of appeals, United States v. Sherman, 240 F.2d 949 (2d Cir. 1957), and reversed by the Supreme Court, Sherman v. United States, 356 U.S. 369 (1958)). Under most recent decisions, the defendant's burden is met merely by the introduction of some evidence of government inducement; the defendant's burden is only the burden of production, not the burden of persuasion. See Park, supra note 673, at 262-67. In the Abscam cases, where the existence of the sting operations was not contested, the defendants all easily met their burden as to inducement.

In most cases when an entrapment defense is raised, the second issue, the defendant's predisposition, is actively contested. Id. at 263. Once the defense of entrapment has been properly raised, the government must prove the defendant's predisposition beyond a reasonable doubt. Id. at 264. This focus on the predisposition of the defendant was explained by the Court in Sherman v. United States, 356 U.S. 369 (1958): "To determine whether entrapment has been established, a line must be drawn between the trap
If a federal jury took it seriously, the government’s burden of persuasion as to defendant’s predisposition might well make the difference between guilt or innocence. Can it be said *beyond a reasonable doubt* that Harry Jannotti was predisposed to criminality? Judge Fullam and the two Appellate dissenters concluded that clearly, as a matter of law, the evidence did not permit a fair-minded jury to conclude beyond a reasonable doubt that Jannotti was predisposed. On the other hand, in some states like New York, where a defendant must persuade the jury by a preponderance of the evidence that predisposition was absent, a state court might reasonably affirm Jannotti’s conviction, on the ground that, as required, the defendant had failed to persuade the jury by a preponderance of the evidence that he was not predisposed.

In all federal courts, once the government’s inducement is shown, a jury is instructed to acquit unless they are convinced “*beyond a reasonable doubt that the defendant was ready and willing to commit the crime at any favorable opportunity.*” The word “any” here is ambiguous. Does it mean “every”? If the jury doubts the defendant would have committed the (type of) crime had the inducement been smaller and more reasonable, should it acquit? Or does “any” mean “at least one,” so that a defendant who would have seized a different opportunity was not entrapped? To be sensible, “the crime” must be elastic in the proper way. How much of “the crime” includes the actual circumstances, including the inducement that surrounded its commission? What is the precise (type of) crime that Jannotti either was or was not willing to commit at “any” favorable opportunity?

Suppose Jannotti was not predisposed to cheat the People, but only to serve them. Suppose he was not predisposed to allow anything unsafe or adverse in his district. Suppose he accepted money from a for the unwary innocent and the trap for the unwary criminal.” *Id.* at 372. In most cases, subjective entrapment is a question for the jury. United States v. Jannotti, 673 F.2d 578, 597 (3d Cir.), cert. denied, 457 U.S. 1106 (1982).

New York’s affirmative defense of entrapment by definition requires the defendant to bear the burden of persuasion by a preponderance of the evidence. New York’s entrapment defense reads as if it were both subjective and objective. See *id.* On the other hand, the official practice commentary reads: “The formulation of this offense is based upon the federal standards as enunciated in Sorrells v. United States, and Sherman v. United States.” (citations omitted). *Id.*, Practice Commentary.

Roger Park has pointed out that New York and New Hampshire’s high courts, with identical statutes, have interpreted them oppositely—New York held to have a “subjective” and New Hampshire an “objective” standard. See Park, *supra* note 673, at 168-69 n.16 and cases cited therein.

680. N.Y. PENAL LAW § 40.05 (McKinney 1975).

681. Park, *supra* note 673, at 176 n.39 and cases cited therein. This instruction was approved as a standard jury instruction in *Russell*, 411 U.S. at 427 n.4, and is taken from E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 13.09, at 364 (3d ed. 1977).
sheik to whom it meant nothing but proof of his willingness to aid a legitimate project. In that case, was Jannotti predisposed to accept a bribe under “any favorable opportunity”?

Finally, suppose predisposition can be adequately defined and decided by a jury—should it make the difference between guilt or innocence? Two defendants are offered the same criminal opportunity; both accept it, both are aware it is criminal and consciously exchange official acts for money. Yet one is not entrapped because he is predisposed. Subjective entrapment seems to violate a basic prohibition against punishing status and thought crime. A person is to be punished not for what he thinks, or for who he is, but only for how he has intentionally, knowingly, recklessly, or negligently acted. We should punish the intentional act, not the predisposition, the argument goes; status crimes, thought crimes, head us toward Orwell’s bleak vision in 1984.

The Senate Select Committee, which had nothing but scorn for the Supreme Court’s subjective entrapment defense, recommended in its final report that Congress consider legislation establishing a federal affirmative defense of entrapment, providing for a defendant’s acquittal when a federal agent (or cooperating private person) “is shown by a preponderance of the evidence to have induced the defendant to commit an offense, using methods that more likely than not would have

682. Thus, if the defendant has a record of offenses similar to the one charged, it will be almost impossible to prevent a finding of predisposition by the jury. The mere attempt to raise the entrapment defense by such a defendant will often result in the jury’s deciding on a guilty verdict because the defendant is a “bad person,” irrespective of the showing as to the particular offense charged:

It is a strange doctrine that makes guilt or innocence depend on whether a defendant has committed other similar offenses. However bad a person may be, however guilty of crime, it is nevertheless a principle of our system of criminal law administration that conviction and punishment must be for some specific act or crime proved against an accused by competent evidence compelling an inference of guilt as to the specific act, and not for a general criminal depravity or wickedness. The admission of this kind of evidence invariably prejudices the jury against the accused and diverts their attention from an impartial consideration of the evidence of the particular crime charged.

Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs, 60 Yale L.J. 683, 1108 (1951).

Because the defendant with a shady past will have a nearly impossible time avoiding a finding of predisposition, entrapment may be foreclosed as a practical option for defense. See 1 U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, WORKING PAPERS 306 (1970). This inability to mount a successful entrapment defense, say critics of subjective entrapment, encourages police to adopt abusive tactics against such defendants: “One of the most serious shortcomings of the present entrapment law is that the predisposition element tends to encourage or tempt law enforcement into a ‘devil-may-care’ or ‘anything goes’ attitude toward persons of a known criminal reputation.” Id. at 306-07.
caused a normally law-abiding citizen to commit a similar offense.”

This objective standard, too, has its obvious flaws. Who is a “normally law-abiding citizen”? Is he wealthy, powerful, easily befriended, loyal? Not only is the standard unclear, it is inefficacious. Take the very wealthy, cautiously corrupt public official, thoroughly predisposed to corruption, but only under the most favorable conditions. Insulated by intermediaries, this most thoroughly corrupt target may refuse $10,000 bribes as not worth considering. If government agents cannot become intimate with the most cautious, they must compensate by offering an inducement so substantial it would cause a normally law-abiding citizen to violate the law, yet is necessary because it represents a typical corrupt price for this wealthy, cautiously crooked official. Under the proposed objective entrapment doctrine, these inducements would result in acquittals, in spite of the fact that they are tailored to the particular target and represent the minimum bribe sufficient to reveal serious corruption.

A complementary danger inheres in the objective standard: consider a particularly weak, susceptible target who is not predisposed and has not previously engaged in criminality, but is caught in the government net, unable to resist temptations that a hypothetical average person should be able to resist. Park urges that such a weak-willed defendant should be acquitted, and only a subjective entrapment defense permits it: “[A]n inducement . . . fair in the abstract may be unfair in a particular case, for reasons that are unknown to the agent and therefore do not affect the propriety of his conduct.”

A strength of subjective entrapment is that it focuses upon each particular defendant’s behavior and mental state. Did he brag of an ability to fix, did he readily acquiesce, did he show expert knowledge? As Park points out, even under an objective entrapment defense, the particular defendant’s predisposition might be relevant to the decency of the police conduct. In Sherman, for example, the agent’s knowledge of the target’s weakness—his former addiction, his predisposition to use narcotics although presently abstaining—was a factor in assessing the agent’s conduct. The particular context, the particular defendant’s subjective mental state, must play some role even in an objective defense. “A hypothetical person cannot be wholly hypothetical. He must be endowed with some of the actual qualities of the defendant.” The question, difficult to answer, becomes—Which?

Perhaps a public/private distinction is necessary here. Otherwise an objective standard would place the most wealthy corrupt officials out of reach, while convicting the weak-willed private citizen. “Nor-

683. Select Comm., supra note 153, at 373.
684. Park, supra note 673, at 220.
685. Id. at 204.
normally law-abiding citizen” is too broad a category. The normal citizen
does not swear an oath of allegiance to the United States Constitution
as a condition precedent of employment. The normal citizen is not en-
trusted with public power. If an objective standard is to be employed,
perhaps the measuring rod should be a “normally law-abiding public
official in the defendant’s particular office.” Still a problem remains
with the very wealthy, canny corrupt, who will only take small risks for
great sums.

With the weak-willed, the public/private distinction is also attrac-
tive, but problematic. On the one hand, a non-predisposed, weak-willed
public official, particularly susceptible to temptations that the average
official would resist, is dangerous, and ought not to occupy a position of
public trust. That the objective entrapment defense is unavailable to
such a person is good, but on the other hand, that it is unavailable to
the non-predisposed private citizen inadvertently tangled in the gov-
ernment net is disturbing. Obviously, double standards have their lim-
its, here reached. Even for violations of their public trust, as criminal
defendants, public officials are entitled to the same guarantees, and the
same burden of persuasion requirements, as all other citizens.686

Obviously, another flaw with any objective entrapment standard
outlawing methods more likely than not to cause a normally law-abid-
ing citizen to commit a similar offense, is its vagueness. Vagueness was
also the key problem with a due process protection “whose nature and
even existence” the Senate Committee found “in considerable
doubt.”687

“One way to forestall the most serious potential abuse of the gov-
ernment’s ‘inducement power’ is to codify the due process principles,”
said the Committee. They concluded, however, that due process legis-
lation was not yet needed, and that a “general outrageousness standard
would provide law enforcement officials and the judiciary with little
useful guidance. Unacceptably intrusive undercover tactics cannot all
be identified through the use of a simple formula.”688

Yet the Committee was willing to identify common ground:

Most people would agree, for example, that law enforcement
agents should not use threats of harm . . . that police should
not manipulate a target’s personal or vocational situation—for
example, by destroying his property so as to increase his need
for money—[in order] to increase the likelihood of his engaging
in criminal conduct; . . . that undercover agents should not

686. In dismissal or impeachment hearings, however, where the public official is judg-
ed and disciplined in a public capacity, a different standard may govern to protect the
public.
687. SELECT COMM., supra note 153, at 368.
688. Id. at 370.
cultivate intimate relationships with targets, the better to lure them into criminality; and that law enforcement agents should not engage in serious and harmful criminal activity or intentionally injure innocent third parties in an attempt to deter crime. (See generally United States v. Archer). 689

The Senate Committee codified these formulae into three situations that constituted per se entrapment: When it was shown by a preponderance of the evidence that the defendant committed the crime

1. Because of a threat of harm, to the person or property of any individual . . . ;
2. Because federal law enforcement agents manipulated the defendant’s personal, economic, or vocational situation to increase the likelihood of his committing that crime; or
3. Because . . . agents provided goods or services that were necessary to the commission of the crime and that the defendant could not have obtained without government participation. 690

This classification is incomplete without a recognition of a public/private distinction. In small towns, influential corrupters typically manipulate local public officials’ vocational, economic, and/or personal situations in order to convince them to cooperate and join the corrupt fold. It is not inconceivable that a foreign power would so manipulate a national official’s situation. Unfortunately, duplicating this pressure may be necessary to determine whether the public official’s character is adequate to the public trust. The government must never do this to private citizens, and should avoid such manipulations of public officials in their private capacity, although the boundary may be difficult to determine.

Objective entrapment typically is an issue for the judge and not the jury. 691 The Senate Committee observed, “the ‘normally law-abiding individual’ standard does not require the resolution of any factual issues, and it does not, of course, purport to hinge on the innocence of the accused, two areas that typically are the province of the jury.” 692

The exact nature of an “average law-abiding citizen,” however, does seem to be a factual issue.

Highly critical of Abscam, United States Attorney Weir asked,

[H]ow many hoops does a man have to jump through, how many times does he have to say no before he crumbles, because

689. Id.
690. Id. at 362.
691. Id. at 375.
692. Id.
we are dealing with something which exists in everyone to a degree, and that is greed.

How many times should a man say no to several million dollars before he agrees to perpetrate a fraud on a fictitious sheik?693

“What is your answer?” inquired Congressman Hyde.

“I would look at the amount of pressure put on him and let the jury decide.”694

Traditionally, in a free society, the jury, as representative of the community’s sense of fairness, is a primary restraint on government encroachment of citizens’ liberty. Aristotle identified the jury as the most essential guarantor of personal rights in a democracy695 and the Maryland Farmer saw the jury, “the democratic branch of the judiciary power—more necessary than representatives in the legislature: for these [judges’] usurpations which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks.”696 Contemporaneously, in the 83rd Federalist, Hamilton, himself no populist, nevertheless extolled the value of the jury as “essential in a representative republic” and a check upon “arbitrary methods of prosecuting pretended offenses.”697 Ultimately, for Hamilton, the “strongest argument” for a jury was its “security against corruption. . . . [T]here is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion . . . .”698 In short, giving joint control of the outcome of trial to a judge and jury afforded a “double security;

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694. Id. at 484.
696. 5 THE ANTI-FEDERALIST, supra note 2, at 38 (Maryland Farmer) (pseudonym of John Francis Mercer, a non-signing member of the Constitutional Convention, id. at 5).
697. THE FEDERALIST, supra note 1, No. 83, at 499 (Hamilton).
698. Id. at 500.
and it will readily be perceived that this complicated agency tends to
preserve the purity of both institutions.”

In the end, an insurmountable problem with objective entrapment
is that it diverts attention from the defendant’s guilt or innocence. In
determining whether the defendant was entrapped, why should a judge
decide what some hypothetical person would have done in some range
of average circumstances not actually present? The subjectivists are
concerned with a defendant’s mind-set on a specific occasion, with that
defendant’s responsibility. Unfortunately, both standards of entrap-
ment are seriously flawed. The Select Committee considered, but re-
jected for now, abolishing the entrapment defense. As the Committee
observed in a subjectivist moment,

an entrapment defense serves a powerful and necessary—even
if largely symbolic—function. It reflects the deeply rooted and
often unarticulated feeling that “[h]uman nature is weak
enough and sufficiently beset by temptations without govern-
ment adding to them and generating crime. . . .” An entrap-
ment defense also gives force to the general perception that it
is inappropriate for the government to “play on the weaknesses
of an innocent party and beguile him into committing crimes
which he otherwise would not have attempted.”

A majority of the Justices of the Supreme Court agree that a due
process defense exists separately from either subjective or objective en-
trapment. That defense does not stem from the Court’s supervisory
authority over the federal judicial system; nor is it implied in congres-
sional statutory intent. Rather, due process outlaws only outrageous
behavior, which is not merely distasteful but so fundamentally unfair
as to be unconstitutional. In retrospect, the key question in Archer
and Abscam is fairness.

699. Id. at 501.
700. SELECT COMM., supra note 153, at 369.
701. See supra text accompanying notes 74-77 & 115-25.
702. Justice Rehnquist suggested in dictum in United States v. Russell, 411 U.S. 423,
431-32 (1973), that a due process defense might be available in a case involving outra-
geous police conduct. He cited Rochin v. California, 342 U.S. 165 (1952), as an example
of such a case. 411 U.S. at 432. In Rochin, in which a conviction based on evidence
obtained by forcibly pumping the defendant’s stomach was reversed as violative of due
process, Justice Frankfurter explained that such conduct does “more than offend some
fastidious squeamishness or private sentimentalism about combatting crime too energeti-
cally. This is conduct that shocks the conscience.” 342 U.S. at 172.

Citing Rochin, Justice Powell argued in Hampton that a due process defense based
on outrageous police conduct should be available even to a predisposed defendant: “Due
process in essence means fundamental fairness.” Hampton v. United States, 425 U.S.
484, 494 n.6 (Powell, J., concurring). To violate due process and bar conviction, “[p]olice
overinvolvement in crime would have to reach a demonstrable level of outrageousness.”
Id. at 495 n.7 (Powell, J., concurring).
Unfortunately, the Supreme Court has not yet found a fit occasion to articulate its views. It missed a perfect opportunity by denying certiorari in *Archer*. That investigation was not only fair, it was the model investigation, situationally targeted with probable cause of corruption in the Queens County criminal justice system; it was carefully monitored; the corrupt opportunity was unambiguous; the unwitting middleman, Wasserberger, without hesitation led undercover agents to a defense attorney who actively structured the corrupt strategy. The defense attorney set the price, and reasonable realities were duplicated.

Furthermore, the chief operative in the New York probe, Bob Leuci, was a government agent-informant who was strongly committed to documenting corruption without ensnaring innocent people, and he had been replaced as soon as possible by undercover agent Sante Bario. In the Archer investigation, the corrupt middleman De Stefano had made one single introduction and immediately dropped from the case, leaving it under the tight supervision and control of the federal agencies.

In contrast, however valid on balance, Abscam was seriously flawed. Mel Weinberg, whom Ben-Veniste called "so unbelievably cunning and Machiavellian that the FBI agents can be eaten for breakfast, lunch, and dinner by a guy like that," had a club over his head and had made a deal to delay or escape prison. Out for himself and largely on his own, the "walking cesspool" as Congressman Hughes called him, had "dragged the whole investigation down." Principal detractors and admirers all agree that Abscam's fundamental mistake was too little supervision of its chief operative, informant Mel Weinberg.

"Abscam," concluded the Senate Select Committee, "demonstrate[s] the importance of replacing informants with undercover special agents at the earliest practicable moment in an undercover operation; if pressure is to be applied, it should be applied by an undercover agent fully familiar with the boundaries established by the entrapment doctrine and by the due process clause."

But what are the boundaries established by the due process clause? What was fundamentally fair or unfair about Abscam?

An "aberration, something totally different than any other experience," United States Attorney Plaza called it, "a perversion of the truth." Plaza told the House Subcommittee: "I feel that the jury

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704. Id. at 765 (remark by Rep. William J. Hughes).
should have been entitled to the complete picture. . . . The feeling [in Washington] was that the video tapes spoke for themselves. [But] there were illusions within illusions."

Ben-Veniste had already explained to the House Committee how Abscam was a "scam within a scam." The FBI had assured Weinberg that no targeted political figure would ever be called upon to perform any action whatsoever, and the Bureau allowed Weinberg to tell the targets he was double-dealing the sheik. Taken together, Weinberg could orchestrate a performance that no one took seriously. "[T]he Department of Justice has suggested that the Abscam premise approximated a real-world situation . . . the bizarre scenario of an eccentric billionaire sheik with his overtly unfaithful financial adviser who would give away substantial amounts of money for mere words without action hardly mirrors reality."708

Not only have judges and juries unanimously rejected Ben-Veniste's and Plaza's scam-within-a-scam scenario, but also the Senate Select Committee's own "Comprehensive Review of the Record Amassed" "compelled" it to "reject the contention that Abscam perverted the truth and convicted individuals for playacting."709 Reviewing virtually every bit of evidence and analyzing all relevant conversations in detail, the Select Committee "unequivocally" rejected as "pure prevarication" the Myers defendants' claims that they believed there was no real quid pro quo for the bribes.710 This was especially strong language from a Committee that often couched its factual conclusions in probabilistic terms.

Nor is a "scam within a scam" per se outrageous: In the Archer investigation, he was Salvatore Barone, Las Vegas junket coordinator, to the Queens grand jury before whom he was relating his story; while to his attorney and bail bondsman waiting outside, whom he had paid to fix his case, Sam Barone, mob killer, was telling the grand jury a phony story; while United States Attorneys Scoppetta and Shaw knew their undercover agent Sante Bario was simultaneously playing two other roles to prove the system's corruption. This scam within a scam, illusion within an illusion, was necessary, proper, and fair.

Nevertheless, if Abscam were truly as Ben-Veniste and Plaza characterized it, it would have been improper and fundamentally unfair. Targets should be public officials who are willing to sacrifice the public good for private gain. The essence of public corruption is the public sacrifice, not the private gain. The Philadelphia phase was too rushed, the investigation was closing down; the feds had to make it happen too

707. Id. at 474.
708. Id. at 322 (testimony of Richard Ben-Veniste).
709. SELECT COMM., supra note 153, at 173.
710. Id. at 201.
fast. They did, and left a nagging doubt about whether Jannotti is innocent or guilty.

Abscam had its weaknesses, particularly Jannotti, but these are far from enough to reject its basic technique. That stands fully vindicated in essence as necessary and proper.

Abscam must be kept in perspective; it was far from brutal totalitarianism.

[T]here was no pressure brought on the public official. There was no badgering, no threats, no harassment, no appeals to friendship or duty and no attempt to play on the weaknesses of any party. . . .

. . . .

There were no wiretaps sought or used in which all parties to the conversation were unaware that they were being taped . . . no search warrants used to invade . . . anyone's home or office. There was no effort to turn relatives or other close confidants of public officials into informants against them. Virtually all of the evidence came from statements and promises volunteered by public officials to third parties whom they barely knew and whom they trusted to maintain their silence.711

United States Attorney Robert Del Tufo bitterly complained to the House Subcommittee that "some of those prosecutors with oversight responsibilities forgot or perhaps some never knew the obligations of prosecutors in this society, which is to strike hard blows, but fair blows." He also 

urge[d], finally, that the subcommittee guard against the inclination to overreact against Abscam. The lapses in prosecutorial responsibility should not overshadow the dedicated efforts of thousands of other prosecutors who have acted properly and effectively. Only in recent years has law enforcement demonstrated the resolve and the ability to deal effectively with organized crime, political corruption and white collar crime.

The effort must continue and covert operations are indispensable to it. Law enforcement has largely demonstrated an ability to apply undercover techniques in a responsible and controlled way, the approach should not be lost or impaired.712

This is no doubt common ground among all truly responsible critics. When Representative Washington asked critics Del Tufo and Robertson, "Aren't you really saying that this Abscam technique, unrefined as it is, is inherently too dangerous for the Government to go tinkering 

711. Operations Hearings, supra note 153, at 615, 621 (testimony of Irvin Nathan).
712. Id. at 714-15 (testimony of U.S. Att'y Robert Del Tufo).
Robertson made absolutely clear the limits of his criticism: “Mr. Washington, I have to respond to that. I am not saying that. I do not believe that the technique, the undercover technique, the use of individuals of the ilk of Mel Weinberg is too dangerous. I don’t believe that even the creation of perhaps some fictitious illegal activity is too dangerous. . . . As long as these things are monitored and managed . . . they can be kept within bounds and individual liberties can be protected.”

That, of course, brings us back to the question of bounds. Where are the boundaries, how do we settle them, and how do we police them?

Of the many dimensions of fairness this essay has attempted to survey (see particularly those suggested by Professor Gary Marx, and by the New York Court of Appeals in Isaacson) the active/passive continuum stands out as especially significant. Unarguably fair is the passive agent posing as a helpless, elderly person on a park bench to capture a mugger.

At the other extreme, a benchmark of outrageous government pressure would be a purported conversation between federal informant Hoffman and his target, automaker John DeLorean, eventually acquitted of trafficking in cocaine:

DeLorean: “All I ever wanted was an investment to save the company. I was willing to pay your $1,800,000 commission, and if you wanted to put that in a dope deal, that’s your business. Just count me out.”

Hoffman: “You honor your part of the deal. That way you obviously live longer.”

DeLorean: “I don’t have money or any collateral. I just want out. [I] won’t talk.”

Hoffman: “How is your little daughter? Wanna get her head smashed?”

Johnny Oleszewski (“Johnny O”) was one of a small group of IRS criminal intelligence supervisors who in the 1950’s and 1960’s pioneered the scam by successfully penetrating organized crime:

We knew who was gambling in Detroit. We had heard that if you started a bookmaking operation and you did not use the

713. Id. at 760 (question posed by Rep. Harold Washington).
714. Id. (statement of William Robertson, former U.S. Att’y for the District of New Jersey).
715. See supra notes 135, 138, 142, 407-50 and accompanying text.
716. N.Y. Times, Nov. 1, 1983, at B5, col. 5-6 (subheading omitted).
Syndicate for their services, they would put you out of business. So our agency set up a bookmaking operation and let it be known in circles that it was operating and let the syndicate people come there and say, “Look, you’re in my turf; you’re either going to pay off or you’re going to be killed.” So you set up what appears to be a gambling operation, so that these people will have the opportunity if they so choose, to come in and threaten and extort.\footnote{717}{The entire “Johnny O” passage is based on personal communication with the Author.}

Soon after Abscam broke, I asked Johnny O how it compared to his earlier simulations.

There is a difference; we did not go out to notify anybody—“We’re in the business; we want your business”—and induce them to come to us. If it happened, fine—but if it didn’t happen, we would not entrap them, overtly entice them to take action.

That’s the difference. But when you let someone know you’re going to pay them $100,000—even if the guy is honest, he’s going to be curious—you don’t know what this guy is going to come through with, that becomes a little bit hairy, and I’m not sure . . .

Was it the activity of the Abscam agents or the sweetness of the deal that distinguished earlier IRS anti-mob operations from Abscam-type stings? It was both factors blended:

They had to come and put the arm on us. The active is considerably different. If I advertise that I can get a contract for the purchase of oil out of Libya and I’ve got the type of contacts, and I indicate to outsiders that I’ve got a real hot deal going and given the right type of juice, I can make a deal that will make everybody a million dollars, at that particular point, I’ve already got the sugar on the apple, and these birds are humming around to try to peck at it. Not because they thought they should do something, but because I brought them into it. I set the deal up where they think they can make a million bucks. And they’re a little bit greedy, but they have no idea that they’re going to have to do anything illegal. So I’m setting them up, whereas in our phony bookie operation, we had people that were engaged in an activity that is competitive. If the other people believed that was a threat and if they wanted to take over, they must move in. I’m not telling them anything. I’ve made no contact with them. They have to take the initia-
tive to do something. In the case of the oil deal, I've already taken the initiative. I've thrown something out that's false and enticing, and it's the honey on the trap.

Johnny O's passivity would not uncover corruption in the criminal justice system. Passive stings won't uncover judges and D.A.'s fixing cases. Rarely will those public officials make the first approach. If you are committed to cleaning up a corrupt criminal justice system, you cannot be passive.

"You're absolutely right," agreed Johnny O. "Given that circumstance of a corrupt judicial system, if I had that responsibility to make that kind of case, that's probably the course I'd take."

Returning to Abscam, if congressmen were selling their votes, would a passive approach work? Would representatives approach government agents—"You want my vote? It's going to cost you."

Johnny O was unwilling to make the same concession:

I think to make that kind of case stick, you're going to have to take a passive approach. You might say, "Look, I've got a problem; I'm looking for some help." And after that they've got to come to you and say, "I can give you the help but it will cost." But to go to them and say, "Look, I've got $100,000," or, "It can be worth your while because they are the people I'm representing"... It's a fine line, but to me you've crossed it.

While I might be a swinger in certain areas, I'd have to evaluate that very carefully before I would make a move, because the amount of sugar involved would induce that fly to land. It's too close. I don't know enough of the Abscam circumstances to really give an opinion, but I'd say you're treading on very, very thin ice. There was nobody more anxious to make a good case than I was, but at the same time you have to be very careful that you're not going beyond the bounds of fairness.

Did Johnny O recommend drawing guidelines in advance, or did we have to trust undercover agents' instincts? "No, you can't do that. You have to draw the guidelines, however difficult they are."718

Perhaps we can identify some points along an active/passive continuum. The most passive sting occurs where the government poses as a passive victim of physical violence—e.g., the park bench victim. Next, perhaps, where it poses as legitimate business awaiting coercion, protection money demands, or payoff requests by municipal inspectors. More active is an illegitimate business scam awaiting those approaches. More active still is establishing that business as a neutral prop in a larger criminal setting—a fencing operation, a safe repository for stolen

718. Id.
goods. The government is even more active where its undercover operation supplies ingredients or expertise not absolutely unavailable but otherwise difficult to obtain. Finally, it is most active where the undercover operation is a fully fashioned world, now no longer a prop, but more a complete set. In this world, people unwittingly play their parts, relationships are formed, and targets are initially contacted, and actively enticed with inducements.

No point in this continuum should be out of bounds per se, but guidelines in advance are important, and the Attorney General's Guidelines have it about right. The nature of the corrupt opportunity should be made clear, the inducement should duplicate reasonable reality, and should be within the scope of activities sought to be deterred. A very sophisticated corrupt politician can take advantage of these guidelines by insisting all offers and payments are made through a bagman, who only meets prospective corrupters at sites he selects at the last minute and who checks for a wire. The bagman instructs the payor never to mention any quid pro quo directly to the official, but merely to propose legislation or other official action justified as good policy.

If this agreement is violated, the public official acts outraged and immediately accuses the offeror of attempted bribery, or at least immediately ends the meeting and cancels any further contact. In this way, protected by the guidelines, a wary corrupt public official knows that any deal or fix that is not constructed as manifestly illegal is not being offered by a federal agent.

Almost all per se rules of fairness may be manipulated to the advantage of the corrupt. In November, 1983, for example, a New York Times article that reported how the use of government surveillance was successful in attacking organized crime in Las Vegas also noted that savvy criminals were conspiring in their bedrooms or lawyers' offices, aware that government refrained as a matter of course from bugging those protected sanctuaries.719

The second FBI Guideline, that the inducement must reasonably duplicate reality, is one of the few per se rules that cannot easily be manipulated. A clever public official who sets a rate above market price only needs one taker, and that higher price immediately becomes market. The corrupt official must either grow geometrically and will soon be priced out of any corrupt market, or he will be dealing market prices. There is no test the corrupt can design to separate the duck from the decoys.

A few additional guidelines have been suggested that should also be adopted, not as hard and fast rules, but as presumptive fairness

boundaries that need a good excuse to be violated. Wherever possible, a target should be given time to reflect upon a proposed corrupt deal. Furthermore, lax tokens like "yes," "uh huh" ordinarily should not be taken as proof of agreement.

Finally, as to fairness, we should adopt double standards and distinguish active inducements legitimately targeted at public officials acting in their public capacity from government scams targeted at private citizens operating in their private capacity.

In sum, we are best served by a subjective entrapment defense coupled with a meaningful due process defense. With this combination, a jury of the defendant's peers assesses the particular defendant's personal culpability, giving the defendant the benefit of all reasonable doubts, adopting, perhaps, something akin to a "root of the evil" test. Was the defendant, on the balance, sufficiently the author of a corrupt act so as to justify prosecution? Like the insanity defense, entrapment is in this view ultimately a subjective question of a particular defendant's moral culpability, best decided by the standards of the community.

At the same time, it is vitally important to a free, republican government that the Executive be kept in check by the Judiciary, which determines whether its methods of investigation are fundamentally fair or outrageous. A due process standard must be fleshed out. Countless suggestions have come from courts, commentators, and public officials in the other branches. Hopefully, soon the Supreme Court will take an overview of the decade and a half from Archer to Abscam and give some sense of the constitutional boundaries they first explicitly noticed in Russell and barely reaffirmed in Hampton. Otherwise, we are left with the Third Circuit's Kelly holding, that the due process clause's "broad 'fundamental fairness' guarantee . . . is not transgressed 'absent coercion, violence or brutality to the person.'" If due process is

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720. For a discussion of the due process defense as developed in United States v. Russell, 411 U.S. 423 (1973), and Hampton v. United States, 425 U.S. 484 (1976), see supra note 702 and accompanying text.

721. United States v. Kelly, 707 F.2d 1460, 1476 (3d Cir.) (quoting Irvine v. California, 347 U.S. 128, 132-33 (1954)), cert. denied, 104 S. Ct. 264 (1983). Cases in which law enforcement activity would support a Rochin-type due process defense, opined the Third Circuit, would form a "slim category." Id. at 1476 n.13. Just how slim can be gleaned from the list of cases, cited with approval by the court, id., in which a due process defense was not sustained: Yanez v. Romero, 619 F.2d 851 (10th Cir.) (threat to use catheter to take urine sample), cert. denied, 449 U.S. 876 (1980); United States v. VanMaanen, 547 F.2d 50 (8th Cir. 1976) (police prepared false reports, advised witness to leave town, failed to disclose existence of informant before trial); United States v. Gengler, 510 F.2d 62 (2d Cir.) (kidnapping of defendant from Bolivia), cert. denied, 421 U.S. 1001 (1975); United States v. Harrison, 432 F.2d 1328 (D.C. Cir. 1970) (grabbing suspect's throat to prevent swallowing of heroin); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966) (body cavity border search), cert. denied, 386 U.S. 945 (1967); Blefare v.
meaningfully to complement subjective entrapment, it surely means more than this. In the absence of a Supreme Court declaration, Congress must seriously consider issuing temporary but federally binding guidelines declarative of their understanding of the constitutional limits on undercover in a free society, leaving it to the several states to articulate their views under their respective state constitutions.

GARDEN PARTIES TAPED

A retake opens with Adam and Eve, contentedly basking in the sunshine, Adam staring at the partly cloudy sky, Eve picking flowers. One of God's agents, a snake, approaches Adam:

"Nice day."
"They all are."
"Want an apple?"
"No thank you; they're everywhere. I pick what I like."
"Oh? I notice you don't touch the apples from the tree in the middle."
"Right. From this one tree our Sovereign Lord has told us we may not eat."
"God was only testing you to see if you would pass up good fruit for no reason. Don't be so gullible. God really wants you to eat it and prove you're a man."
"No, God specifically said . . ."
"Don't quote scripture to me. Trust me."
"Ask Eve."
"Hey, Eve, this fellow you live with ain't so bright, but you strike me as a pretty sharp lady. Let's be honest. You would like to try the fruit from the tree in the center."
"What are you suggesting? Absolutely not. It's against the Lord."

United States, 362 F.2d 870 (9th Cir. 1966) (in connection with border search, rectal examination, administration of an emetic, pumping of stomach, largely without objection at the time by defendant). The Third Circuit, following United States v. Payner, 447 U.S. 727 (1980), discussed supra note 146, also limited the due process defense to cases where the outrageous, fundamentally unfair conduct of the government was inflicted directly on the defendant. 707 F.2d at 1476. While the Third Circuit was compelled to follow the holding in Payner, it is more difficult to understand why the court thought its role in defining the limits of the due process defense under Rochin had to be so very limited: "Without further Supreme Court elaboration, we have no guide to a more dynamic definition of the outrageousness concept, and no warrant, as lower court judges, to devise such a definition in advance of any signal to do so from higher authority." Id. (footnote omitted). To be meaningful, a due process defense must encompass more than the most egregious physical invasions of the defendant's person. Nothing in the concepts of "outrageousness" or "fundamental fairness" suggests they should be limited to infringements on a person's physical integrity. The Third Circuit in Kelly took too literally Justice Frankfurter's reference in Rochin to "the rack and the screw."
“Admit it; you want to.”
“It never occurred to me.”
“OK, but think about it; you do desire to taste it.”
“Now that you mention it, I am rather curious; it does look good.”
“Come on, taste it.”
“No, God told us not to eat it. We can’t.”
“Can’t or won’t?”
“God says we die if we eat it; it must be poisonous.”
“Die? Ha. I eat it all the time. It’s delicious.”
“No, God says we die. God wouldn’t lie.”
“Don’t be naive. God doesn’t want you to eat it because God
doesn’t want you to be able to think for yourself and resemble God.
Once you eat it, you will be free.”
“I could do it, but it would be wrong.”
“Come on, taste it; have an open mind. Just take one bite; if you
don’t like it, don’t finish it. I’ll finish it. I’m only doing this for you
because you’re my friend.”
“I don’t know.”
“Oh, but you will. Come on, try it.”
And with that, the snake plucked the fruit from the tree and
handed it to Eve: “You can honestly say you never ate the fruit from
the tree.”
The rest is the human condition. Entrapment? Fundamental
unfairness?

**Jurisdiction: A Right to Determine**

An issue resolved prior to a defendant’s guilt or innocence, jurisdic-
tion may be the most important question of the *Archer*/Abscam legacy. Jurisdiction is not merely a “technical” legal question, but a com-
prehensive problem which links almost all others. It is indisputable
that bribery may be a serious crime, and if properly proved should be
punished and, where possible, prevented. At the same time, the meta-
question of jurisdiction is whether and when a particular branch of
government, or a particular government, or government itself has the
right to determine a target’s guilt or innocence.

Phrased this way, then, the jurisdictional question is at least three
separate questions:

1. Does the Executive have jurisdiction to sting the Legislature
    and/or Judiciary without undermining the separation of powers which
    Americans take as absolutely necessary for a well-working constitutional
    republic?

2. Does the federal Executive have jurisdiction to sting branches of state
    government without seriously undermining essential foundations of our federal constitutional republic?
3. Finally, under what conditions does Government—whether federal or state—have jurisdiction to demonstrate corruption through the use of carefully monitored undercover stings without destroying that humane free society which our constitutional republic was primarily designed to promote?

At the dawn of Western civilization, the first scientists and philosophers conceived a well-working universe as stemming from encroaching opposites successively checking each other’s transgressions. Heraclitus pointed out that stability masked an underlying strife between contending opposites. Basic English constitutional liberties were established only by centuries of wars fought by Parliamentarians to acquire Legislative independence from a perpetually encroaching Executive overreach. Through the efforts of great judges like Sir Edward Coke, the Judiciary asserted its independence from both the Legislative and Executive. In his Spirit of the Laws, Montesquieu laid

722. In the sixth century B.C., the Greek philosopher Anaximander speculated that the universe worked because of a continual mutual encroachment of such opposites as hot and cold, moist and dry “according to necessity; for they pay penalty and retribution to each other for their injustice. . . .” Anaximander, Fragment 1, trans. in G. KIRK & J. RAVEN, THE PRESOCRATIC PHILOSOPHERS 117 (1957). See generally W. GUTHRIE, A HISTORY OF GREEK PHILOSOPHY (1962). “It is necessary to know . . . that all things happen by strife. . . .” Heraclitus, Fragment 80, trans. in G. KIRK & J. RAVEN, supra, at 195. Heraclitus analogized the stability of the universe to that of a tightly strung bow or lyre. Heraclitus, Fragment 51, trans. in id. at 193.

723. Foremost among the guarantees against arbitrary executive power extracted from King John at Runnymede was that “No free man shall be taken, imprisoned, dispossessed, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.” Magna Carta, ch. 39, trans. in A. HOWARD, MAGNA CARTA, TEXT AND COMMENTARY 43 (1964). The contest between King and Parliament culminated in the triumph of parliamentary supremacy over royal prerogative in the Glorious Revolution of 1688. See generally J. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY (1928).

In parallel with the struggle between King and Parliament, the Judiciary grew more independent. By the time of Edward I, judicial power was being exercised, not by the monarch in person, but by a professional cadre of lawyers and judges who, though they served at the king's pleasure, did not always decide as the king pleased, but according to law and precedent. See F. THOMPSON, THE FIRST CENTURY OF MAGNA CARTA: WHY IT PERSISTED AS A DOCUMENT 57-58 (1923). In a famous confrontation between royal power and judicial independence, the common law judges, led by the indomitable Chief Justice Coke, told James I that they, not the king, had the ultimate authority to determine their own jurisdiction:

The judges informed the King that no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the courts of justice . . . . Then the King said he thought the law was founded upon reason and that he and others had reason as well as the judges. To which it was answered by me [Coke] that . . . his Majesty was not learned in the laws of his realm of England, and causes . . . are not to be decided by natural reason but by
down a principle that became axiomatic for the American founders: A well-working constitutional republic required a separation of powers. The Executive, Legislative, and Judiciary must each have their own sphere of authority, and any two should prevent the third from destroying the delicate constitutional balance necessary for liberty. Although the Judiciary is traditionally considered the weakest, least dangerous branch of government, possessing neither purse nor sword and depending upon the other branches for the enforcement of its decrees, the fate of Maurice Nadjari, New York’s anticorruption special prosecutor, shows that a Judiciary resisting what it sees as Executive overreach in the use of undercover techniques can undermine public confidence in special prosecutors and bring about their downfall.

The post-Abscam period has demonstrated the separation of powers working well at the national level. Congress has conducted a most searching inquiry into the proper limits of undercover operations. Through legislation and budget cuts, Congress could greatly limit and even abolish the use of such tactics by the FBI. The Judiciary, through an entrapment and due process defense, can block the Executive from successfully prosecuting and punishing individuals unfairly.

Although it criticized many aspects of the Executive’s behavior in Abscam, the Senate Select Committee’s Final Report found the sting not to threaten our constitutional balance. But, beyond Abscam and Archer, is there a serious separation of powers problem in widespread federal or state executive stings against the other two branches? Philip Heymann thought not:

I don’t think that undercover operations should be treated separately for Congress on the ground that there is a special

the artificial reason and judgment of law... which requires long study and experience before... a man can attain to the cognizance of it... E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 38-39 (1955) (quoting Coke’s account of the incident). The king responded that such law would be treasonous, but Coke countered with a maxim of Bracton’s that the king was “under God and Law.” Id. 724. Thus, in The Federalist, supra note 1, No. 47, Madison characterized the separation of the executive, judicial, and legislative powers as “the sacred maxim of free government” and acknowledged the contribution of Montesquieu: “The oracle who is always consulted on this subject is the celebrated Montesquieu.” Id. at 308, 301. See generally P. SPURLIN, MONTESQUIEU IN AMERICA 1760-1801 (1940).
725. See supra note 22 and accompanying text.
726. SELECT COMMM., supra note 153, at 32.

The Abscam undercover operation initially raised questions about the possibility that the executive branch could use its law enforcement powers to encroach upon the independence of the other branches of government and thereby to endanger the constitutionally mandated separation of powers. The Select Committee’s investigation shows that no such encroachment occurred in Abscam.

Id.
threat to the separation of powers inherent in this type of investigation. I think undercover operations are a rather clumsy way for a malicious executive to try to dominate or intimidate Congress.\textsuperscript{727}

Executive domination here depended upon a “fund of corruptibility in Congress,” which Professor Heymann believed absent. Also, a sting against a group relies on no one blowing the whistle, making it public. Furthermore, after the fact, probing congressional committees would reveal any improper political targeting, thus discrediting the Executive. In short, “[t]here are other ways, far more to be feared, for an unscrupulous Executive . . . to get at Congress.”\textsuperscript{728}

Heymann seemed not to greatly fear party politics with an executive of one party—a president, a governor, a locally elected district attorney—attacking legislative members of another party by utilizing undercover investigations. The succession of office is a check against that possibility, for when the people learn of this executive abuse, they will vote that executive out of office. Another check is the realization by legislative members of the executive’s own party that subsequent administrations may turn the techniques against them.

But executive stings may be abused to undercut the separation of powers. In 1984, this nation is fortunate to have as FBI Director William Webster, who is scrupulously sensitive to constitutional issues of fairness, privacy, and the separation of powers. It has not always been so; nor can it always be expected. We should not allow our respect for the person who presently possesses the power to lull our fear of its abuse. Two hundred years ago, in a moment of extreme caution, the Maryland Farmer warned:

The chief magistrate is now clothed with full authority to do good—If he does so, he confirms a solid tyranny for his degenerate successors—For if power does not corrupt him it certainly will those that follow: In this view, the best . . . magistrates have only entailed misery on mankind.\textsuperscript{729}

As Director of the FBI, J. Edgar Hoover shied away from using the sting, but he was quite willing to keep dossiers on politicians and exploit them. It is entirely possible, and a danger worth guarding against, that an ambitious FBI Director armed with an uncontrolled discretion to utilize criminal simulations, might document politicians’ private weaknesses, exploiting them to the serious detriment of the constitu-

\textsuperscript{727} Operations Hearings, supra note 153, at 491 (statement of Prof. Phillip B. Heymann).
\textsuperscript{728} Id.
\textsuperscript{729} 5 The Anti-Federalist, supra note 2, at 56-57 (Maryland Farmer).
tional plan. The Judiciary would not exercise control as there would be no trials stemming from the technique. Rather, the tapes would be utilized only on rare occasions as a secret means to force a vulnerable Congress to increase the FBI’s budget, decrease congressional oversight, and so on.

A ruthless executive, misusing stings, accumulating dirt for blackmail, might destroy the balance “constitutionally, and by one of those silent operations which frequently takes place without being noticed, but which often produces such changes as entirely to alter a government, subvert a free constitution, and rivet the chains on a free people before they perceive they are forged.” 72 Slowly and silently the FBI might gain control of government and we would discover our tyranny, if at all, long after we could prevent it. The odds are long, but the stakes are high.

Some would trust that no such persons will be in positions of power with an inclination to usurp it. But, as Charles Turner observed at our founding, “[P]ower long continued . . . makes men giddy, turns the head, and heart too, many times.” 73 An Old Whig warned,

[T]he only safe way of reasoning on political subjects is, to consider men, abstractly as men, with like passions and infirmities throughout the world, in every age, and every country; and to believe that the same guards and checks against arbitrary power, which were necessary two thousand years ago, are equally necessary at present, and will be so two thousand years hence. 74

If there is a real threat to the separation of powers, why not simply outlaw the technique at least against Congress? Because, while it is dangerous, the technique is absolutely necessary to combat official corruption.

In their attempt to insure legislative independence from the Executive, the founders placed in the Constitution a guarantee that “for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.” 75 In 1979, in circumstances like Abscam, the United States Supreme Court ruled in United States v. Helstoski 76 that this “speech and debate” clause precludes the prosecution in a bribery trial from making any reference to

730. 2 id. at 386-87 (Brutus).
731. 4 id. at 237 (A Friend to the Rights of the People) (pseudonym of Thomas Cogswell, Chief Justice of the New Hampshire Court of Common Pleas, id. at 204, 234).
732. 3 id. at 48 (An Old Whig) (author’s identity unknown).
any legislative act performed by the defendant Representative.\footnote{735}{442 U.S. at 488.} "The usual way we would prove an allegation of bribery outside a Congressional context," said Professor Heymann, "is to show that money was transferred more or less contemporaneously with the performance of an official act for which the money was promised."\footnote{736}{Oversight Hearings, supra note 153, at 135 (statement of Prof. Phillip B. Heymann).} But now, "although we can prove that money passed (the quid), Helstoski prevents introducing evidence of the official act (the quo)."\footnote{737}{Id.} Without undercover scams, often congressional bribery is simply unprovable.

The best demonstration of this, perhaps, is "Koreagate" where, as a House Committee report on Standards of Official Conduct concluded, Korean officials had made illegal cash payments to a number of congressmen in order to obtain influence in Congress.\footnote{738}{House Comm. on Standards of Official Conduct, Korean Influence Investigation, H.R. Doc. No. 252, 95th Cong., 2d Sess. (1978).} Although reportedly as many as 115 congressmen had taken bribes from South Korean agents, since neither the Koreans nor congressmen involved would admit paying or receiving money, not a single representative was even censured.\footnote{739}{Nathan and Heymann emphasized this point during their testimony. Oversight Hearings, supra note 153, at 491-92 (testimony of Prof. Phillip B. Heymann); at 598 (testimony of Irvin B. Nathan, former Dep. Ass't Atty. Gen., Crim. Div., Dept. of Justice).} Again, when all is said and done, without undercover scams congressional bribery is extremely difficult if not impossible to prove.

Not only is the executive scam necessary to prove corruption in government, it is particularly effective in preventing it. If, as the Federal Farmer declared, "It is the probable chance of escaping punishment that induces men to transgress,"\footnote{740}{2 THE ANTI-FEDERALIST, supra note 2, at 305 (Federal Farmer).} then it must also be true that the prospect of punishment prevents the transgression. The likelihood of punishment fails to deter many classes of criminals, but politicians, trained to think contingently, and act cautiously, with reputations, positions, power, and fortunes to protect, are most likely to think before they take bribes, and be deterred even by a tiny but real prospect of detection.

We must have undercover stings against members in the coordinate branches of government: We must risk executive domination and our constitutional plan to maintain our republic. The use of this power, however, must be surrounded with restraints—external checks. Just as the jury system is a democratic check upon judicial abuse, and frequent elections are democratic checks upon some forms of executive
and legislative abuse, so an undercover operations review board, composed in large part of private citizens with access to FBI files in all undercover operations, might provide a helpful early check upon the otherwise unrestrained executive power.

Congressionally enacted FBI guidelines, which give FBI subordinates grounds for resisting clear overreach by their superiors, provide another check. Agents who realize that the agency is definitely violating congressional and judicial mandate could oppose their agency from within and, if unsuccessful, could warn Congress, the judiciary, and the press.

In the end, although there exists a serious risk to the separation of powers from the abuse of the technique, there is also jurisdiction for the Executive to sting the Legislative and the Judiciary.

No less important to our constitutional plan than separating the branches of government is the task of dividing sovereignty between central and local government. This is, of course, a perpetual problem of government in all ages: How to combine local autonomy with central control? The United States jettisoned its Articles of Confederation in favor of our present Constitution primarily to insure adequate central power to maintain ourselves as one nation. On the other hand, we are a pluralist nation of states, committed to local government over local concerns. The essence of state sovereignty has always included defining, detecting, prosecuting, and punishing crime.

Yet the central government has a legitimate interest in defining,

741. The framers of the Constitution, meeting at Philadelphia, abandoned the idea of amending the Articles of Confederation at an early stage of their deliberations. See generally M. Farrand, The Records of the Federal Convention (1911). The obstacles to effective national government inherent in the loose confederacy established under the Articles of Confederation are extensively detailed in The Federalist, Nos. 15-22. Arguing for total replacement of the Articles, Alexander Hamilton characterized the defects of the old system as beyond remedy: "It must be by this time evident to all men of reflection, . . . that it is a system so radically vicious and unsound as to admit not of amendment but by an entire change in its leading features and characters." The Federalist, supra note 1, No. 22, at 151.

742. Thus, in Abbate v. United States, 359 U.S. 187 (1959), the Court acknowledged the primacy of the states’ role: "[T]he States under our federal system have the principal responsibility for defining and prosecuting crimes." Id. at 195. Similarly, in Rochin v. California, 342 U.S. 165 (1952), the Court delineated a limited federal role:

In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U.S. Const., Art. I, § 8, cl. 18. Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, § 10, cl. 1 in the original Constitution, prohibiting bills of attainder and ex post facto laws, and the Thirteenth and Fourteenth Amendments.

Id. at 168.
detecting, prosecuting and punishing certain national crimes, such as counterfeiting and treason. Those who initially opposed the Constitution did so primarily because of two essential fears. Without a Bill of Rights, they believed the federal government would slowly but surely encroach upon individual liberties and local sovereignty. Second, they believed the central government would eventually abolish the independence and autonomy of the states, the federal judiciary actively cooperating in this federal encroachment of state rights. They were not altogether wrong.

Congress has stretched its delegated power to “make all laws necessary and proper” and produced federal criminal statutes like the Travel Act, under which Archer was prosecuted, and the Hobbs Act, under which Jannotti was prosecuted by the federal government for committing what were essentially only state crimes “affecting commerce.” Reading the discussions and debates of our founders who proposed and the people who ratified the Constitution, it seems clear that Congress, with the cooperation of the federal courts, has extended its power beyond originally agreed limits.

United States history, from its founding to its Civil War, establishes beyond dispute that under the constitutional plan, a state may not annul federal legislation it believes usurps its essential rights.

743. The absence of a bill of rights was the foremost objection to ratification advanced by the Anti-Federalist opponents of the Constitution. See generally The Anti-Federalist, supra note 2. George Mason, who had been among the Virginia delegates to the constitutional convention refused to sign the Constitution and became a prominent Anti-Federalist. He listed the lack of a bill of rights as the first among his objections, expressing fear that the national government would use its power to annul citizen rights guaranteed by state law: “There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws of the several States, the Declaration of Rights in the separate States are no Security.” G. Mason, Objections to the Constitution of Government formed by the Convention (1787), reprinted in 2 id. at 11.

744. The pseudonymous Brutus, see supra note 11, a leading Anti-Federalist polemicist, warned that “the judicial power of the United States . . . will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favor an extension of its jurisdiction. . . .” 2 The Anti-Federalist, supra note 2, at 417, 420 (Brutus). Brutus predicted that this judicially fostered encroachment of state power would render the states trivial and irrelevant: “[H]in proportion as the general government acquires power and jurisdiction, by the liberal construction which the judges may give the constitution, will those of the states lose its rights, until they become so trifling and unimportant, as not to be worth having.” Id. at 426-27.


746. Id. art. I, § 8, cl. 3.


749. Thus, for example, President Andrew Jackson’s response to South Carolina’s attempt at nullification of federal tariff legislation, see supra note 29, was his strongly worded Proclamation to the People of South Carolina (Dec. 10, 1832), reprinted in 3
Ultimately, the national government polices the subtle, ever-changing boundaries between national and local sovereignty. When national legislation conflicts with contrary state legislation, the former prevails. There is no more essential principle of federalism than national supremacy under the Constitution, as explicitly declared by the supremacy clause: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."\textsuperscript{750}

Those who originally expounded states' rights—including state control over essentially local crime—were wrong to assume the federal judiciary would always cooperate in this slow but steady congressional power grab. Concerned not to upset the optimal constitutional balance between national supremacy and local autonomy, leading federal jurists like Henry Friendly have sought to check federal usurpations of state sovereignty over local crimes.\textsuperscript{751}

This essay has criticized Judge Friendly for his \textit{Archer} opinion, but his sensitivity to proper federal-state relations, his resistance to manufacturing phony federal jurisdiction over essentially local crime, is salutary. Federal judges like Friendly help us remember that ordinarily it is not the job of the federal government to detect and prosecute local crime, and that it is bad public policy, if not unconstitutional, to ground federal prosecutions upon a stretched definition of interstate commerce. In our federal plan, national supremacy complements but does not supplant states' rights. The tenth amendment and the closing passage of the Bill of Rights state: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."\textsuperscript{752}

Congressional hearings in the wake of Abscam have probed deeply into almost every significant aspect of the FBI's undercover techniques. Perhaps the most notable exception, the area left least explored, is the basic problem of federal jurisdiction over local corruption. In passing, Chairman Edwards had asked Professor Seidman

\textit{MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897} 1203 (1897), in which he made it clear that nullification was an intolerable threat to the Union:

\begin{quote}
I consider, then, the power to annul a law of the United States, assumed by one State, \textit{incompatible with the existence of the Union}, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.
\end{quote}

\textit{Id.} at 1206.

\textsuperscript{750.} \textit{U.S. Const.} art. VI, cl. 2.

\textsuperscript{751.} \textit{H. Friendly, Federal Jurisdiction: A General View} (1973), discussed \textit{supra} notes 63-73 and accompanying text.

\textsuperscript{752.} \textit{U.S. Const.} amend. X.
whether an FBI agent could be prosecuted for violating state law when engaging in authorized undercover behavior. Not having studied this problem, the Georgetown Law Professor declined to offer an opinion, but did observe that "there would be complex supremacy clause problems." In any event, he found it "indefensible" for the federal government to authorize violations of state criminal statutes: "I don’t think that the Federal Government ought to be in the business of authorizing its agents to go around violating State laws against things like armed robbery and murder. I just don’t see the justification."

No one disagreed with this, but the problem was more difficult: what about non-violent state “crimes” like lying to a grand jury, or filing false affidavits? In the Archer investigation, the United States attorneys had rejected using a real defendant to attempt to buy his way out of the criminal justice system, partly because they feared he might be prosecuted for bribery by the local authorities if the case busted. They assumed that a federal agent would be immune. Police Commissioner Murphy had hesitated before supplying the cop to arrest Bario in the scam because he, too, feared local prosecution, unsure whether the federal attorneys could immunize the cop from state prosecution.

After Professor Seidman declined to address it, Chairman Edwards, himself an ex-FBI agent, continued to muse aloud on this “interesting question.” If “the informant was authorized to institute a burglary and was arrested by the local police, what would happen” at a local trial? "I’m sure it would be offered as a defense. But whether or not it would stand up is something else. We really don’t know, do we?" It was “an interesting constitutional question,” Seidman agreed. The conversation shifted, and never returned to federal-state relations.

A little over a year later, in June 1982, the Eleventh Circuit was forced to consider this very question. The FBI had been investigating a Stone Mountain, Georgia district attorney whom it suspected was selling protection to local gamblers. The district attorney turned the tables by arresting the corrupt middleman, a state legislator who offered him a bribe. A specially appointed district attorney then tried to prosecute the FBI agent under Georgia law for attempted bribery. "We do not face so extreme a case as Archer,” said the federal appeals

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754. Id. (testimony of Prof. Louis Seidman).
755. Id.
757. Id.
758. Baucom v. Martin, 677 F.2d 1346 (11th Cir. 1982).
court, "but disruption of the state judicial process by federal officers, even without an improper motive, can be serious." The Court issued a stern warning:

Investigators and prosecutors must be as aware as are the courts of the "delicate interface between state and federal law enforcement." Deliberate violations of state law for federal purposes must be the rare exception, and be clearly seen to be reasonable, necessary, and proper. Otherwise, federal officers will have to be abandoned by federal courts as the Supremacy Clause will not save them.

Once again, the Archer experience—that thoroughly vindicated federal investigation of New York's corrupt criminal justice system—had been distorted, its lessons lost to the Eleventh Circuit, probably because the Second Circuit had not seen fit to correct its own misstatements and fully inform other federal circuit courts.

The federal appeals court did recognize that the FBI must employ agents to detect and prosecute crimes against the United States. "The purchase as well as sale of narcotics may constitute a state violation, but seldom gives rise to state objection." This "analogy between narcotics and official corruption cases [was] not a strained one, both are often very difficult to make." Furthermore, "[a] dishonest public official who profanes his official trust may do more harm to our society than common criminals, and be much more difficult to investigate and convict." Nor was there any better method to investigate the allegations, and finally, perhaps critically, "[t]his bribery episode was after all not a pure federal intrusion into a state matter. The state itself was a partner of the federal government in the investigation in pursuit of common interests of public concern."

The federal court refused to throw the federal agent to the angry local District Attorney, concluding, "the Supremacy Clause controls."

Apparently unaware that Archer, which it found more "extreme," also involved extensive federal-state cooperation, the federal appeals court did not squarely face the question: What is a federal agent's liability in strictly federal investigations for federally authorized acts which otherwise violate state criminal law? Absent bad faith, there

759. Id. at 1350.
760. Id. at 1351 (quoting District Judge Ward's unreported opinion) (emphasis added).
761. Id. at 1350 (footnote omitted).
762. Id.
763. Id. at 1351.
764. Id.
765. Id.
clearly seems to be immunity under the supremacy clause, but if, according to the court's analysis, the "Supremacy Clause controls" only where the investigative technique was reasonably employed, and if that technique was reasonable only where there was a federal basis to investigate, we are thrown back to the question of jurisdiction.

Judge Friendly ignored it in Archer; the House Subcommittee had ignored it too. By its own declaration, the Senate Select Committee had studied "constitutional provisions, statutes, regulations, guidelines and judicial decisions governing important aspects of undercover operations," all the hearings of the House Subcommittee, as well as "nearly 40,000 pages of trial transcripts and due process hearing transcripts," and more than 20,000 Abscam documents. Yet, although it pointed out the "most relevant constitutional provisions" as the fourth amendment, fifth amendment, speech and debate clause, and the first amendment, its minutely comprehensive report also ignored sixteen words in the United States Constitution which this essay seeks to demonstrate give the federal government its real jurisdiction to investigate local corruption by simulating crimes: "The United States shall guarantee to every State in this Union a Republican Form of Government."

In a republic, the citizens exercise their supreme power through representatives elected by them and responsible to them. Whatever their differences on the appropriate balance between state and federal power, those who designed and debated the United States Constitution "took for granted, that all agree in this, that whatever government we adopt, it ought to be a free one; that it should be so framed as to secure the liberty of the citizens of America, and such... as to admit of a full, fair and equal representation of the people." When state legislators secretly sell their votes to special interests in derogation of the common good, then the people are not fully, fairly and equally represented. Where district attorneys and judges take bribes to fix cases of mob killers caught with unlicensed guns, then the will of the people, as expressed in their legislatively adopted penal law, is not translated into actual fact, and there is no true republic. "The soul of republicanism," observed the Impartial Examiner, is "that reciprocity of common interest between the legislature and the bulk of the nation." Official corruption is an antithesis of real republican government.

At its founding two hundred years ago, some pessimists like the Maryland Farmer felt that our republic, like all "government by repre-

768. 2 The Anti-Federalist, supra note 2, at 368 (Brutus).
769. Id. at 193 (Impartial Examiner) (author's identity unknown).
sentation, seems only to have been established to disgrace itself and be abolished . . . it perishes by speedy corruption.”

The Constitution only guarantees the people in their states a republican “form” of government. If elections and other outward forms are maintained, hasn’t the constitutional guarantee been met? Clearly not, and this, too, was common ground among the founders. “I believe the people of the United States are full in the opinion, that a free and mild government can be preserved . . . only under the substantial forms of a federal republic,” declared the Federal Farmer. Defending the guarantee clause in the 43rd Federalist, Madison emphasized:

The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be substantially maintained. But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution?

That depository is the federal government. Madison went on to cite Montesquieu: “Should abuses creep into one part, they are reformed by all those that remain sound.”

In the 71st Federalist, Hamilton said: “The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs.” Under a republican government, then, two conditions must be met: First, Legislatures—the people’s representatives—must enact rules which they believe reflect the people’s will to promote the public good, with the Executive and Judiciary evenhandedly translating these legal rules into social fact. Second, citizens must be able to assess whether and when those to whom they delegate public power are faithless with the public trust, so as to remove them from office. As Madison said, “the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust.”

If the essence of representative government is free elections, which are occasions for the people to make meaningful choices, undetected

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770. Id. at 42 (Maryland Farmer).
771. Id. at 53 (Federal Farmer).
772. The Federalist, supra note 1, No. 43, at 274-75 (J. Madison).
773. Id. at 277-78.
774. Id. at 71, at 432 (A. Hamilton).
corruption seriously undercuts the ability to assess those candidates and it therefore seriously undercuts real representation. Undetected official corruption denies us truly representative government.

Ironically, this linkage was most explicitly recognized by Judge Pratt in Myers, a case where federal jurisdiction was not even questioned:

When public officials are as readily corrupted as were the defendants in these cases, the republic is in grave danger. Far more threatening to our national survival than any foreign enemy is corruption and rot at the center of our government. If legislative actions by members of congress can be purchased with funds supplied by unseen foreigners, in jeopardy is the very core of our democratic government, faithful representation of citizens by their elected representatives.776

Only through carefully monitored undercover simulations are the people assured that their government is truly republican. Where corrupt local government will not reveal itself except through federal stings, the guarantee clause gives the federal government jurisdiction to demonstrate local corruption in office. The clause demands no less. In its Study Draft of a new Federal Criminal Code, the National Commission on Reform of Federal Criminal Laws expressed views virtually identical to those stated here.777 They proposed that Congress use its "largely untested constitutional power" and make bribing local officials a federal offense.778

776. Myers, 527 F. Supp. at 1236.
778. Id. at 721. In his consultant's report, Norman Abrams, a professor at U.C.L.A. Law School, explained:

Federal investigation and prosecution of what is essentially a local offense may also be appropriate where the case involves corruption of local government or, for some other reason, a breakdown of local law enforcement. . . . And Federal investigation and prosecution may be desirable because local law enforcement may find it difficult or awkward to proceed since local officials are involved. Federal intervention in such cases is justified by the same type of reasoning that might lead a State governor to send a special prosecutor to a local county to prosecute a case of local corruption.

Id. at 54.

The report justified federal detection of local corruption in other ways: Although defendants may not themselves be local officials, there may be concern that the offenders will be able to corrupt local officials and thus block local prosecution. This is a more speculative basis for Federal prosecution, since it may depend on mere suspicion rather than the nature of the charge, the position of the accused or other such factors. But it is difficult to reject it as an adequate justification, particularly where such suspicions are strong.
The analysis of consultants Bancroft and Dean included the precise justification for the federal investigation of the New York criminal justice system, spearheaded by Detective Leuci, culminating in the Archer case: “The Federal interest in securing protection for the honest local public servant who may not be able, because of local corruption, to secure vindication from his own sovereign is a direct and substantial function of the Federal interest in the prosecution of local corruption itself.”

We who appreciate state rights might protest that to adopt this essay’s recommendations—rejecting unwarranted federal criminal jurisdiction over activities which merely “affect commerce” while resting it on the guarantee clause—only amounts to exchanging one intrusion upon state sovereignty for another. After all, if the states are primarily responsible for defining, detecting, prosecuting, and punishing local crime, and bribery remains essentially local crime, why shouldn’t the states prosecute it?

They should. Investigating and prosecuting local corruption is and should continue to be a state function. The states are primarily responsible for keeping their own systems clean and initiating their own stings. Throughout the United States, however, there are pockets of official corruption which have remained unperturbed for decades. Without federal investigation, these local nests of corruption will remain and the outward forms of republican government will be a solemn mockery.

This is only part of the solution. As the Consultant’s Report on Jurisdiction declared, “Federal investigation need not of course inevitably lead to Federal prosecution. Federal agents might ‘make’ the case, then turn over their files to State officials, and be available to testify when necessary in the State prosecution.”

State autonomy can be maintained by distinguishing between federal jurisdiction to investigate local official corruption under the guarantee clause, and federal jurisdiction to prosecute. Judge Friendly suggested in his lectures, Federal Jurisdiction: A General View, that federal law enforcement agencies must turn over local bribery cases to

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Id.

In their working papers, consultants Bancroft and Dean observed: “Federal concern with local corruption appears to be a function of two interrelated considerations: (1) The Federal interest in preserving an essentially republican form of government for the Union and for each of the States. (2) The Federal interest in defeating the national aspects of organized crime.” Id. at 709.

779. Id. at 712. For a detailed analysis of the guarantee clause, finding it “to be a proper, albeit largely unrecognized basis for Federal jurisdiction over local corruption and intimidation,” see id. at 721.

780. Id. at 52.

781. H. Friendly, supra note 63.
the states whenever in their judgment those cases can be prosecuted effectively by nonfederal agencies.\footnote{782} Specifically, unless rebutted by a contrary written finding by the United States Attorney or Attorney General, a presumption of state competence to prosecute would mandate state prosecution.

When the federal government has some reasonable suspicion, the guarantee clause gives the federal government a right to sting the states. The intentions of the founders and the spirit of the tenth amendment would require that federal prosecution be declined in favor of state prosecution whenever practical, but the supremacy clause gives the federal government unquestionable jurisdiction to decide whether and when local prosecution is appropriate. Not only the federal executive but also Congress have a vital role to play by making local corruption a federal crime, and specifically giving federal investigative agencies jurisdiction under the guarantee clause.

Government's Jurisdiction over Private Lives: 1984 and Beyond

Under our federal republic, Archer-type investigations should be cloned, and instituted throughout the United States by federal and local government. There are many cities and towns where judges, prosecutors, legislators, police, and other officials are on the take. The United States Constitution, the supreme law of the land, justifies undercover scams because it guarantees all citizens that government at all levels will be a straight game.

The same Constitution equally guarantees our basic freedoms, fundamental fairness, and our essential rights. The third and final jurisdictional question concerns not the executive versus the other branches, nor federal versus state government, but government versus the people: Does government, whether state or federal, have the jurisdiction to sting private persons acting in their private capacities?

Much of life, like much of law, is a balancing act. At one extreme in the continuum is a Hobbesian state of nature, an anarchy where not rules but power arrangements of the moment govern in a war of all against all, with life, "poore, nasty, brutish, and short."\footnote{783} Everyone grabs what they can. Perhaps this brutal anarchy is disguised by the outer forms of government under a rule of law.

Laws are cobwebs, catching only the flies and letting the wasps escape. The great and powerful can easily bring to justice the poor and humble offender; but who is to lead to punishment the great? These lords of the earth, who have extensive and

\footnote{782} Id. at 60.  
\footnote{783} T. Hobbes, Leviathan *62 (1651).
powerful connexions, who aim at no trifling larcenies; but who plunder a people of their liberties and put public revenues into their private purses, under the sanction of laws made by themselves:—These are the men who deprive their fellow mortals of their fondest hopes.\textsuperscript{784}

The people release government agents to sting the wasps, only to confront a greater horror at the other extreme. Twenty-four hundred years ago, Aristotle listed “tyranny’s three aims in relation to its subjects, namely that they shall a) have no minds of their own, b) have no trust in each other, and c) have no means of carrying out anything.”\textsuperscript{785} George Orwell has updated Aristotle’s nightmare.

In 1984, two-way telescreens and planted microphones helped government to pervade private lives. Big Brother was everywhere—“asleep or awake, working or resting, in [the] bath or in bed”—no escape.\textsuperscript{786} Winston Smith, the tragic hero of 1984, could try to duck out of the telescreen’s sight, and avoid the planted microphones that dotted the landscape, but he could not avoid the Thought Police, those elite government investigators who “for seven years . . . had watched him like a beetle under a magnifying glass. There was no physical act, no word spoken aloud, that they had not noticed, no train of thought that they had not been able to infer . . . .”\textsuperscript{787} “Nothing [was] efficient in Oceania except the Thought Police.”\textsuperscript{788} Everywhere in 1984 government agents were testing morality, testing thought itself, testing the predisposition for crime. Agents of the Thought Police record every gesture for indications of “thought crime,” “the essential crime that contained all others.”\textsuperscript{789}

In 1984, every aspect of a person’s life was subject to inspection, every relationship suspect. It was a world of sameness and solitude, but no privacy. From outside the Party impressed its uniformity, and you fled, terrified and isolated, safe for the moment only in the furthest recesses of your own skull. Privacy and trust—neither total togetherness nor complete isolation—were obliterated. Personal loyalty, an experience denying uniform rules, was anathema to Total Government. Winston Smith’s last defiance, even after he had been tortured to an aged skeleton, was to cling to the thought of his private love for Julia, but the Thought Police forced him to betray even this. Their agents had offered him opportunities: an antique shop owner with quaint attachments to the old days, who lent Winston a bedoom for his private

\begin{thebibliography}{9}
\addcontentsline{toc}{section}{Notes}
\bibitem{784} \textit{5 The Anti-Federalist, supra} note 2, at 56 (Maryland Farmer).
\bibitem{785} \textit{Aristotle, Politics, supra} note 5, Bk. V, ch. xi, at 277.
\bibitem{786} \textit{G. Orwell, supra} note 6, at 173.
\bibitem{787} \textit{Id.} at 228.
\bibitem{788} \textit{Id.} at 163.
\bibitem{789} \textit{Id.} at 19.
\end{thebibliography}
love, secretly monitored. O'Brien, an Inner Party member and apparently rebellious fellow spirit who welcomed Winston into the Resistance in order to betray him and supervise Winston's torture cure.

Against this total control, corruption was the only hope. "Anything that hinted at corruption always filled him with a wild hope. Who knew? Perhaps the Party was rotten under the surface ... ." 790 The Party could be destroyed by corruption: its purity turned to ash. Corruption rots, weakens, loosens order and control. However horrible when played for keeps, an anarchistically corrupt free-for-all is infinitely better than totalitarian freedom-for-none. "Despotism is a settled gloom that totally extinguishes happiness," said Centinel. "[C]ontinual civil war, which is the most destructive and horrible scene of human discord, is preferable to the uniformity of wretchedness and misery attendant upon despotism;—of all possible evils, ... this is the worst and most to be dreaded." 791

Why portray these extremes? Passing beyond 1984, the United States of America is neither an anarchistic jungle nor a totalitarian laboratory. We are suspended not between Totalitarianism and Anarchy, but more moderately between community and autonomy. While as Justice Harlan pointed out in 1970, we now possess "devices that make technologically feasible the Orwellian Big Brother," a supermarket's television camera also monitors the parking lot for our safety from muggers. 792 We note with approval the headline in the newspaper next to pictures of eagle, elk, big horn sheep, and grizzly bears: "Wildlife Agents Shift Tactics to Trap Poachers." 793 The article recounts that agents are now going undercover, posing as out-of-town commercial hunters willing to pay local poachers for endangered trophies. "We're the FBI of the wildlife world," says Terry Grosz, head of the Fish and Wildlife Service's Law Enforcement Division in Denver. "The uniformed game warden is almost a thing of the past." 794 The agency has a covert operations branch, with headquarters in Washington, whose agents were recruited from the FBI, Drug Enforcement, and the CIA. They use fake storefronts, hidden tape recorders, cameras and false identities, posing as pet dealers, placing advertisements in magazines. The scam is the only technique that works when the victims, whose extinction is truly a crime against nature, cannot complain. Yet to save our precious wildlife we may gradually sacrifice our own precious private life.

"There is no public abuse that does not spring from the necessary

790. Id. at 104.
791. 2 THE ANTI-FEDERALIST, supra note 2, at 186-87 (Centinel) (footnote omitted).
794. Id.
use of power," observed the Maryland Farmer at the founding of our republic.985 "[T]he insensible progress from the use to the abuse, that has led mankind through scenes of calamity and woe, that makes us now shrink back with horror, from the history of our species."986

The technique threatens us in 1984 and beyond, less totally but more subtly than in 1984. Orwell’s vision was horrible, but blatant and overwhelmingly total. Big Brother and telescreens were obvious signs which put Winston on notice that the Government sought to be everywhere and the Thought Police would, if they could, monitor his every thought and deed. We are mostly free in the United States. However guarded we may be at the office, outside it we feel at liberty to talk openly, act openly, express ourselves and expose ourselves. Winston Smith sought a safe harbor; he sought to conceal himself from Big Brother—at least he was aware of the opposition, he knew the game, but we trust that persons are who they seem. In private, we quickly open up to new friends whose acquaintance we "chance" to make.

The United States tends to be smug about its free society. On July 4, 1983, the last celebration before 1984 of our Declaration to the world that a people may revolt to effectuate their inalienable rights to life, liberty, and the pursuit of happiness, there appeared in our newspapers an article headlined "Soviets Seek Citizen Spies":

Soviet authorities in some cities are distributing postcards urging citizens to report suspicious behavior by their neighbors—anonymously if they like—in line with Soviet leader Yuri Andropov’s drive for law and order.

Postcards from the city of Krasnodar were made available to Western correspondents yesterday. They gave citizens a choice of 12 accusations that could be brought against neighbors.

The cards, apparently issued as an experiment in an initial run of 10,000, asked accusers to underline, for example, if the accused does odd jobs, has unearned income, refuses to pay alimony, is not working, has been previously imprisoned, does not raise his children responsibly, drinks or uses drugs.987

We look at Soviet society with repulsion, and think again of its resemblance to 1984:

The children . . . were systematically turned against their parents and taught to spy on them and report their deviations. The family had become in effect an extension of the Thought Police. It was a device by means of which everyone could be

795. 5 THE ANTI-FEDERALIST, supra note 2, at 27 (Maryland Farmer).
796. Id.