January 1983

Constitutional Law - Entrapment and Due Process of Law - The Efficacy of ABSCAM Type Operations

Dennis Franks

Follow this and additional works at: http://scholarship.law.campbell.edu/clr

Part of the Constitutional Law Commons

Recommended Citation

INTRODUCTION

Will elaborate “sting” operations conducted by law enforce-ment agents, whose purpose is to ensnare or detect those predis-posed to accept or extort bribes, be allowed by the federal courts? As indicated most recently by the reaction of federal courts to the ABSCAM operation,¹ the United States Supreme Court will allow such operations to be conducted absent a showing that the govern-ment implanted the intent to engage in the criminal conduct in the defendant’s minds, and absent unconstitutionally “outrageous” government conduct.² The Third Circuit Court of Appeals in United States v. Jannotti,³ held that the acceptance by two Phila-delphia City Council members of $30,000 and $10,000 respectively as bribes from FBI agents posing as representatives of a mythical Arab Sheik was in violation of federal criminal law, that there was no entrapment as a matter of law where the jury found defendants to be predisposed to commit the crimes, and that such conduct by the FBI was not in violation of due process.⁴

Where government agents offer bribes to public officials, the acceptance of the bribes by public officials may itself evidence pre-disposition which negates the defense of entrapment (as long as

3. 673 F.2d 578 (3d Cir.) (en banc), cert. denied, 102 S. Ct. 2906 (1982).
4. Id.
the bribes are not excessive). Furthermore, such conduct by the government in offering the bribes to public officials in a "sting" operation does not alone amount to a violation of due process, and evidently there is no due process violation when the government agents persist to offer the bribes to the public official.

This note will analyze primarily the United States v. Jannotti phase of the overall ABSCAM operation, because of its particular facts and its extensive discussion of both the entrapment defense and its interrelated due process claim. The Third Circuit (in a 7-2 decision) reversed the district court's judgment notwithstanding the verdict. The Third Circuit, the Second Circuit, and the District of Columbia Circuit, in addressing other portions of ABSCAM, have ruled that such government "sting" operations, within proper bounds, are permissible under the law of entrapment and under the Constitution. These holdings echo the law of entrapment that the Supreme Court has pronounced since 1932, using the subjective test of the defendant's predisposition rather than an objective test which focuses on the government's conduct. The courts also looked at the nebulous constitutional test of whether the government's conduct is "outrageous," thus in violation of due process. The Jannotti decision reveals a fundamental distinction between the subjective and objective tests of entrapment. This difference pertains to who should decide whether entrapment exists: the majority of the court ruled that the jury is to decide the question of whether defendant is predisposed; the district court judge ruled that there was entrapment as a matter of law; and, the dissent argued that the judge should objectively consider the question of entrapment.

With the denial of certiorari by the Supreme Court, this deci-

5. Id. at 604. See infra notes 159-64 and accompanying text.
6. Id. at 606-10.
8. Jannotti, 673 F.2d 578; Myers, 692 F.2d 823 (2d Cir. 1982); Alexandro, 675 F.2d 34 (2d Cir.), cert. denied, 103 S. Ct. 78 (1982). The District of Columbia Circuit has held (since the writing of this note) that the ABSCAM operation with regard to Congressman Kelly was not in violation of due process. United States v. Kelly, 33 CRIM. L. REP. 2151 (D.C. Cir. May 10, 1983).
9. See infra notes 47-84 and accompanying text.
10. See infra note 108 and accompanying text.
11. See infra notes 124-25 and accompanying text.
12. See infra notes 143-46 and accompanying text.
sion indicates that the government will be allowed to conduct these “sting” operations as long as the jury finds that the defendants were subjectively predisposed to commit the crimes, that the government did not implant the disposition and that merely offering the bribes to public officials is not unconstitutional even though the government has no prior suspicion of the defendants. This decision also affirms the rule that the jury, and not the judge, is to decide whether the bribes offered are excessive or whether defendants are otherwise predisposed to commit the crimes. The Supreme Court and lower federal courts recognize the need for this type of law enforcement activity to combat otherwise virtually undetectable “victimless” public corruption and illegal drug dealings.

The Case

In United States v. Jannotti, the president of the Philadelphia City Council, George Schwartz, and the Council’s majority leader, Harry Jannotti, were found guilty by a jury of accepting bribes in violation of federal law. The incident originated through the efforts of the FBI’s ABSCAM operation. In the overall operation, FBI agents posed as representatives of a fictional import-export firm, Abdul Enterprises, Ltd. The agents in the overall operation represented that their principal, fictional Arab Sheik Yassir Habib of the nation of Abu Dhabi, was interested in investing large amounts of money in the United States and in immigrating here. The government’s plan was “conceived to create opportunities for illicit conduct by public officials predisposed to commit political
The elaborate scheme also enlisted the aid of professional con-artist Melvin Weinburg, who was to help spread the word that the Sheik was interested in meeting public officials who could facilitate the Sheik's planned investments and immigration.20

In the Philadelphia phase, Weinburg telephoned Howard Criden, a Philadelphia attorney, and told him that the Sheik wanted to build a hotel in Philadelphia.21 Criden had previously received money from ABSCAM agents for introducing them to interested congressmen in another phase of ABSCAM.22 Criden's response to Weinburg was that building a hotel in Philadelphia without problems related to zoning, condemnations and variances, required the aid of city councilmen.23 Criden also represented that his law firm partner, Louis Johanson, was on the city council and that the president of the council, George Schwartz, "is a powerful guy . . . Has got power."24

When asked by an agent, posing as a representative of the Sheik, whether they could deal with Schwartz, Criden answered that they could,25 even though Criden actually did not personally know Schwartz.26 The agent and Criden then agreed on an offer of $30,000 and Criden said that he would see if Schwartz would "bite at thirty."27

In a later meeting, the agents were told by Johanson, that he, Schwartz and Jannotti ran the city council, and Johanson and Schwartz agreed to bring Jannotti in on the deal.28 Criden then

20. 673 F.2d at 581.
21. Id.
22. Id. This was done with Criden's aid of Louis C. Johanson and Mayor Errichetti of Camden, New Jersey. They arranged for ABSCAM agents to meet with four congressmen, including Philadelphia Congressmen Myers and Lederer. Id. The congressmen agreed to introduce immigration bills in return for money, and they were indicted and convicted. See United States v. Myers, 692 F.2d 823 (2d Cir. 1982); United States v. Myers, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Myers, 527 F. Supp. 1206 (E.D.N.Y. 1981).
23. 673 F.2d at 582. Criden was told by the agents that titles impress the Sheik and that they wanted to deal with someone in municipal government to avoid such problems. Id.
24. Record at A354-55, id. at 582.
25. 673 F.2d at 582.
26. Id. at 583.
27. Record at A376-77, id.
28. 673 F.2d at 583.
sent word through intermediaries that investors were willing to pay for Schwartz’s “advice.”

Schwartz responded that he would be interested in anyone who would invest $150 million to build a hotel in Philadelphia and met with Criden.45

Schwartz and Criden then met with the agents.46 The lead ABSCAM agent told Schwartz he wanted to firm up the investment, that the Sheik wanted to take up permanent residence in Philadelphia, and that he was there to take care of the Sheik’s potential problems.47 Schwartz then boasted of his political power, of his ability to control the council and of his power to deliver the council members to the agent for his birthday.48 He further explained that there would be no “insurmountable” problems as long as the hotel was a “proper project” because there were relief mechanisms in the building standards and zoning commissions.49 The agent, assured that the problems would be taken care of, handed Schwartz an envelope containing $30,000 and Schwartz placed it into his pocket.50

Later, Jannotti arrived with Criden after being briefed by Criden and Schwartz.51 After being assured that the hotel would be “on board” and not phony, and after being told by the agents of the “Arab state of mind’s” need for “friends” to prevent problems, Jannotti assured the agents that they had a friend and a vote, that he and Schwartz controlled the city council, and that Criden had been “very graphic” about the transaction.52 An agent then handed

29. Id. at 583-84. Six thousand dollars were given to the two friends of Schwartz who arranged for the meeting of Criden with Schwartz. One of the intermediaries was a Philadelphia County Court of Common Pleas Judge. But nothing in the opinion indicates that the intermediaries were breaking the law in arranging the meeting in return for the money. In fact, the judge gave his $3,000 share to the other intermediary to avoid any impropriety. Id.

30. Id. at 584.

31. There is no record of the conversation of their meeting. Id.

32. Id. The meeting between Schwartz, Criden and the agents was videotaped. Id.

33. Id.

34. Id. at 584-85.

35. Record at A698, id. at 585.

36. 673 F.2d at 585. The agent responded that the hotel was not going to be a cathouse. Id.

37. Id. at 586. At this point, Criden received a $5,000 fee for the arrangements. Id. at 587.

38. Id. at 587. They had “explained the whole situation.”

39. Id. at 588. When the agent asked Jannotti whether he could go back to the Sheik and tell him that he “dealt with a man . . . explain who you were, what
Jannotti an envelope containing $10,000 and asked if that amount was sufficient.40 Jannotti took the envelope saying that it had been "discussed" and he refused to discuss it any further.41

The jury found both Schwartz and Jannotti guilty of accepting bribes in violation of federal law42 but the district court judge set aside the verdict, ruling that both defendants were entitled to acquittal on grounds that entrapment was established as a matter of law and that, alternatively, the defendants were entitled to acquittal on the grounds that the government's conduct was overreaching in violation of due process.43 The Third Circuit Court of Appeals reversed the district court and reinstated the jury's verdict, ruling that the evidence presented by the government was sufficient to permit the jury to find that the defendants had sufficient predisposition to commit the crimes involved and that the government's conduct did not amount to a deprivation of due process.44 According to the court of appeals, the district court erred in its legal analysis and usurped the function of the jury to decide contested issues of fact.45

BACKGROUND

The United States Supreme Court first considered the entrapment defense in 1932 in Sorrells v. United States,46 although the lower federal courts had recognized the defense for quite some time.47 The Supreme Court held that the jury was entitled to consider whether defendant's acts of possessing and selling one-half

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 . . . . [H]e has influence . . . .," Jannotti answered that, "Problems might arise, but problems ah, you might say problems can be solved." Id. at 589.

40. Id. at 589.
41. Id.
42. United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980). Schwartz was found guilty by the jury of conspiring to violate provisions of the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1962(d), and both Schwartz and Jannotti were found guilty by the jury of conspiring to obstruct interstate commerce in violation of the Hobbs Act, 18 U.S.C. § 1951(a).
43. Id.
44. 673 F.2d 578 (3d Cir.) (en banc), cert. denied, 102 S. Ct. 2906 (1982).
45. Id. at 581.
46. 287 U.S. 435 (1932).
47. See Woo Wai v. United States, 223 F. 412 (9th Cir. 1915); Murchison, The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine, 47 Miss. L.J. 211 (1976).
gallon of whiskey in violation of the National Prohibition Act were instigated by an undercover prohibition agent; the jury was to decide whether the government implanted "in the mind of an innocent person the disposition to commit the alleged offense and induce[d] its commission in order that they may prosecute." \(^{48}\) Thus, the test set forth by the Court focuses on whether the defendant is predisposed to commit the crime. The Court's rationale lies not in the Constitution but rather in a belief that Congress did not intend for statutes to be enforced by the government tempting innocent persons into violations. \(^{49}\)

The Court further ruled, however, that the government merely affording the opportunities or facilities for commission of the offense does not defeat prosecution, \(^{50}\) and that law enforcement may use "artifice and stratagem" to catch those engaged in criminal enterprises. \(^{51}\)

The Supreme Court next addressed the entrapment defense in *Sherman v. United States*. \(^{52}\) In *Sherman*, Mr. Chief Justice Warren's majority opinion stated that the undisputed testimony of the prosecution's witnesses established entrapment as a matter of law; the defendant obtained narcotics for the government's informer only after the informer's repeated persuasion, appeal to sympathy and inducement of defendant himself to return to a narcotics habit. \(^{53}\) Adhering to the predisposition test, the Supreme Court concluded that "[t]o 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." \(^{54}\) The function of law enforcement does not include the manufacturing of crime. \(^{55}\) In determining whether the government had convinced an otherwise unwilling person to commit a criminal act, the "accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence." \(^{56}\)

\(^{48}\) 287 U.S. at 442.
\(^{49}\) Id. at 445-49.
\(^{50}\) Id. at 441.
\(^{51}\) Id.
\(^{52}\) 356 U.S. 369 (1958).
\(^{53}\) Id.
\(^{54}\) Id. at 372.
\(^{55}\) Id.
\(^{56}\) Id. at 373 (quoting Sorrells v. United States, 287 U.S. 435, 451 (1932)).
A. The Subjective Versus Objective Approaches

These two Supreme Court decisions thus established the subjective theory of entrapment. The theory focuses on whether the government implanted the disposition to commit the crime in the defendant's mind, not on whether the government's conduct is reasonable. Inquiry must be made into whether the defendant was predisposed to commit the crime, and the Supreme Court majority have left this determination with the jury.\(^\text{57}\)

The objective theory, on the other hand, first advocated by Mr. Justice Roberts' concurrence in \textit{Sorrells}, would focus on the nature of the government's conduct.\(^\text{58}\) Likewise, Mr. Justice Frankfurter, concurring in \textit{Sherman}, would shift the "attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime."\(^\text{59}\) If the government's conduct does not meet this objective standard, the defendant's predisposition is inconsequential.\(^\text{60}\) Unlike the majority opinions in \textit{Sorrells} and \textit{Sherman}, Mr. Justice Frankfurter argued that it is a fiction to say Congress did not intend the statutes to be enforced by tempting innocent persons into violations.\(^\text{61}\) He reasoned that "the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged;"\(^\text{62}\) therefore he concluded that the focus of the test of entrapment should be on the reasonableness of the government's conduct.\(^\text{63}\)

The objective theory ultimately rests with Mr. Justice Roberts' belief that public policy requires the courts to protect "the purity of government and its processes"\(^\text{64}\) and, with what Mr. Justice Frankfurter expressed\(^\text{65}\) as the corollary supervisory power of the Court, to formulate and apply proper standards for federal law

\(^{57}\) \textit{See infra} note 147 and accompanying text.\(^\text{58}\) 287 U.S. at 453-59 (Roberts, J., concurring).\(^\text{59}\) 356 U.S. at 384 (Frankfurter, J., concurring).\(^\text{60}\) \textit{Id.} at 380.\(^\text{61}\) \textit{Id.} at 379.\(^\text{62}\) \textit{Id.}\(^\text{63}\) \textit{Id.} at 382.\(^\text{64}\) \textit{Sorrells v. United States}, 287 U.S. 435, 455 (1932) (Roberts, J., concurring).\(^\text{65}\) \textit{Sherman v. United States}, 356 U.S. 369, 380-81 (1958) (Frankfurter, J., concurring).
entrapment. Thus, as the argument goes, the test should be applied by the court and not the jury.

Since Sherman, only two more Supreme Court cases have directly addressed the entrapment issue. In United States v. Russell, an undercover narcotics agent was investigating defendant and his confederates who were in the process of unlawfully manufacturing and possessing a drug. The agent offered the defendants an essential ingredient which, although difficult to obtain, was legal to possess and was obtainable.

The Court in an opinion written by Mr. Justice Rehnquist held that the agent's contribution of the ingredient to such criminal enterprise did not violate the due process clause of the fifth amendment. The majority reaffirmed the subjective test of Sorrells and Sherman and ruled that creative involvement by government agents is not a defense for a predisposed defendant. On appeal, the defendant conceded that the jury properly found him predisposed, but he argued that the evidence established entrapment as a matter of law. The court of appeals agreed with the defendant, so it expanded the traditional test of entrapment by allowing the court to determine whether there has been "an intol-


67. Sherman, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); Sorrells, 287 U.S. 435, 457 (1932) (Roberts, J., concurring). See also Note, supra note 66 at 98-100; Parks, The Entrapment Controversy, 60 MINN. L. REV. 163 (1976). The argument is also made that the subjective test is inherently prejudicial to defendants in that it permits admission of character and reputation evidence bearing on disposition. United States v. Russell, 411 U.S. 423, 443 (Stewart, J., dissenting); Sherman, 356 U.S. 369, 382 (Frankfurter, J., concurring). Another criticism of the subjective test is that it fosters unequal treatment under the law between those who are predisposed and those who are not, regardless of the government's conduct. See Note, supra note 66 at 99. Also, some argue that the subjective test fails to provide law enforcement with guidelines for permissible conduct. Sherman, 356 U.S. 369, 385 (Frankfurter, J., concurring). On the other hand, the argument is made that per se rules of the objective test would allow cautious criminals to design their activities to the letter to avoid the law. See Parks, supra at 228; J. Skolnick, Justice Without Trial 103 (1966).


69. Id. at 424-25. The drug was methamphetamine.

70. Id. The ingredient was phenyl-2-propanone.

71. Id. at 432.

72. Id. at 433.

73. Id. at 427.

74. United States v. Russell, 459 F.2d 671 (9th Cir. 1972).
erable degree of governmental participation in criminal enterprises.” 75 The Supreme Court majority, however, reversed the court of appeals’ decision and expressly refused to alter the defense of entrapment as defined by the majority opinions of Sorrells and Sherman. 76

According to the Supreme Court in Russell, the defense of entrapment is:

rooted, not in the authority of the Judicial Branch to dismiss prosecutions for what it feels to have been “overzealous law enforcement,” but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government. 77

While the Court in Russell reaffirmed the predisposition approach of entrapment, it did mention the possibility of another defense (or claim) based upon due process: “While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processess to obtain a conviction . . . the instant case is distinctly not of that breed.” 78 However, the opinion at the same time acknowledged the difficulty of embodying the notion of due process of law into fixed rules. 79

The dissenting opinion again advocated adoption of an objective approach. Mr. Justice Stewart argued that the underlying basis of the entrapment defense demands adherence to an approach that focuses on the government’s conduct rather than on whether the defendant was predisposed. 80

In its fourth address of the entrapment defense, the Supreme Court followed its previous decisions. In Hampton v. United States, 81 the Court held that the fact that heroin sold by the de-

75. Id. at 673.
76. 411 U.S. at 433.
77. Id. at 435.
78. Id. at 431-32 (emphasis added) (citation omitted). The Court based the concept of outrageous conduct on the shocking to the conscience standard of Rochin v. California, 342 U.S. 165 (1952).
79. 411 U.S. 431.
fendant to government agents was originally supplied to defendant by a government informant did not violate due process rights of the defendant who was predisposed to commit the crime. The jury found predisposition even though, according to the defendant, the government supplied the corpus delecti itself. The majority of the Court, in an opinion written by Mr. Justice Rehnquist and a concurring opinion written by Mr. Justice Powell, adhered to the subjective test as set out in Sorrells and followed in Sherman and Russell: "It is only when the government's deception actually implants the criminal design in the mind of defendant that the defense of entrapment comes into play."

In Hampton, the defendant requested and advocated an objective type of approach focusing on the government's behavior rather than on predisposition of the defendant, but the Supreme Court ruled that the defense of entrapment is not available to a predisposed defendant. Furthermore, the Court rejected the defendant's due process defense as the plurality emphasized that defendant's constitutional rights had to be violated in order to avail on a due process claim: "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant."

In fact, three members of the Court in Hampton would limit further when a claim of violation of due process may be asserted. The Chief Justice and Mr. Justice White joined Mr. Justice Rehnquist in the opinion that, if the defendant is found to be predisposed, not only is the defense of entrapment unavailable but also a

82. *Id.*
83. 425 U.S. 484, 485-87 (1976). The government's evidence differed with defendant's contention that the government informant initiated the illegal drug deals. Predisposition was little in doubt, for the defendant requested a jury instruction that he was entrapped if they found that the government informer, acting for the government supplied the narcotics even though defendant may have been predisposed. *Id.* at 485-88.
85. *Id.* at 487-88.
86. *Id.* at 490. The Court went on to state that "the police conduct here no more deprived defendant of any right secured by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights." *Id.* at 490-91.
87. *Id.* at 490.
violation of due process cannot properly be claimed. Mr. Justice Powell, in a concurring opinion with whom Mr. Justice Blackmun joined, agreed that there was no entrapment in the case at hand but felt that a finding of predisposition was not a bar to a due process claim. While agreeing with Mr. Justices Powell and Blackmun that a finding of entrapment was no bar to a due process claim, the dissenting opinion of Mr. Justices Brennan, Stewart and Marshall advocated the objective test where the judge, and not the jury, would decide whether the conduct of the government was unlawful. Thus, the majority ruling maintained the subjective approach to the question of entrapment and it also provided that a defendant who is predisposed to commit the crime in question is not barred from properly asserting a claim that the government’s conduct was unconstitutionally “outrageous.”

B. Unconstitutional Outrageous Government Conduct

From Sorrells to Hampton, the majority of the Supreme Court has refused to adopt the objective approach. Instead, the Court has recognized the possibility of police conduct being so outrageous as to amount to a violation of due process rights, thereby barring prosecution. Due to the difficulty of embodying the notion of what is “outrageous” into fixed rules, an ad hoc approach has been followed.

The theory behind the concept of outrageous conduct is apparently based upon the concept of “fundamental fairness” as enunciated in Rochin v. California, the theoretical basis of the Rochin standard is based upon substantive due process.

The due process-outrageous conduct defense has been sus-

88. Id. at 489-90.
89. Id. at 491-95.
90. Id. at 496-500.
92. Id. at 431.
93. Id. at 431-32.
94. 342 U.S. 165, 169 (1952) (“canons of decency and fairness which express the notions of justice of English speaking people. . . .”) (pumping stomach for evidence was shocking to the conscience). The exclusionary rule of search and seizure cases is a step away from the nebulous Rochin standard. See Mapp v. Ohio, 367 U.S. 643, 654-55 (1961). See also Abramson & Lindeman, Entrapment and Due Process in the Federal Courts, 8 AM. J. CRIM. L. 139 (1980).
95. See Angel, Substantive Due Process and the Criminal Law, 9 Loy. Chi. L.J. 61, 74 (1977) (substantive due process in criminal law); Note supra, note 66, at 122.
tained in a Third Circuit Court of Appeals case, in a federal district court case in California, and recently in a separate federal district court ABSCAM trial before being reversed on appeal. In United States v. Twigg, the government supplied essential ingredients, glassware, and other laboratory equipment, in addition to a suitable location, for defendants to produce LSD. The government's informant provided expertise and was at all times in charge of the laboratory. Twigg furnished neither knowledge, money, supplies nor ideas. He merely began running errands at the request of the informant, and "would not even have shared in the proceeds of the sale of the drug." The Third Circuit found such conduct to be "overreaching" and in violation of due process of law, for the "egregious conduct on the part of government agents generated new crimes . . . merely for the sake of pressing criminal charges."

The ABSCAM operation, however, provided the courts an opportunity to apply the defense of entrapment to, and determine the constitutionality of, government operations that are designed to create opportunities for illicit conduct by public officials predisposed to commit political corruption.

99. 588 F.2d 373 (3d Cir. 1978).
100. Id. at 380.
101. Id. at 380-81.
102. Id. at 382.
103. Id. at 376.
104. Id. at 382.
105. Id. at 381. In United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981), the defendants were indicted for conspiracy to import cocaine into the United States. But because they had no prior experience in large-scale drug smuggling and lacked the ability to smuggle drugs into the United States on their own, the court ruled that government agents therefore "manufactured' a crime that . . . could not and would not have been committed," and such conduct thus violated due process. Id. at 751-52.
ANALYSIS

In United States v. Jannotti, the Third Circuit held that the evidence presented by the government was sufficient to permit the jury to find that defendants had sufficient predisposition to commit the acts of bribery and extortion, and that their convictions were not the result of entrapment as a matter of law. In so holding, the Third Circuit ruled that the district court, in granting an acquittal notwithstanding the jury's verdict, usurped the function of the jury to decide contested issues of fact. Furthermore, the Third Circuit held that the government's conduct in this portion of the ABSCAM operation was not "outrageous" conduct in violation of due process of law.

Although the legal principles were not in serious dispute, the court of appeals' application of the legal principles of the four Supreme Court cases dealing with entrapment strictly adhered to the subjective approach established in those Supreme Court cases, while the district court's application was akin to the objective approach. The Jannotti court of appeals' opinion reiterated the test set out in Sorrells: whether the government implanted "in the mind of an innocent person the disposition to commit the alleged offense" and induced its commission. The opinion also reiterated the test set out in Sherman: "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." Strengthening its stance on the subjective approach, the

106. 673 F.2d 578 (3d Cir.) (en banc), cert. denied, 102 S. Ct. 2906 (1982).
107. Id. at 580-81. Defendant Schwartz was found guilty by the jury of conspiring to violate provisions of the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1962(d), and both Schwartz and Jannotti were found guilty by the jury of conspiring to obstruct interstate commerce in violation of the Hobbs Act, 18 U.S.C. § 1951(a). Id. at 580.
108. Id. at 581.
109. Id.
110. Id. at 596.
112. 673 F.2d at 596-606.
113. See United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980). District court judge found entrapment as a matter of law basing his decision, in sum, on the opinion that the government offered "such attractive inducements" as were bound to overwhelm. Id. at 1200.
court of appeals noted that in *Russell* "the Court expressly disapproved of the decisions of the lower federal courts which had expanded the entrapment defense beyond the Court's opinions in *Sorrells* and *Sherman*." The Third Circuit in *Jannotti* further reasoned that the test of entrapment rests with whether the defendant is predisposed, because the defense of entrapment is not of constitutional dimension and is a "relatively limited defense . . . which cannot be used by a predisposed defendant." This rule is supported in *Hampton*, where even though the government supplied the corpus delicti, no entrapment was found because defendant was predisposed.

The *Jannotti* decision, therefore, falls in line with the Supreme Court's enunciation that as long as the government's conduct is within constitutional limitations courts will not interfere with the Executive Branch's enforcement of federal laws against predisposed defendants. Proponents of the objective approach, however, argue that it is within the power of federal courts in the administration of criminal justice to "formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts.'" Whatever the merits of each approach may be, it seems that the latter approach is more appropriately within the realm of substantive due process and thus part of the outrageous conduct due process standard. Although the Supreme Court has

116. 673 F.2d at 597. Indeed, the Court in *Russell*, in referring to the lower federal court decisions expanding the entrapment defense, stated that, the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. We think that the decision of the Court of Appeals in this case quite unnecessarily introduces an unmanageably subjective standard which is contrary to the holdings of this Court in *Sorrells* and *Sherman*. 411 U.S. 423 at 435.


118. 425 U.S. 484 (1976). According to the defendant, the government's informant enlisted his partnership in the illegal drug dealings, although he admitted predisposition. *Id.* at 486-88.


120. *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring) (quoting McNabb v. United States, 318 U.S. 332, 341 (1943)).
perhaps "been applying substantive due process analysis in criminal cases under the rubrics of procedural due process, equal protection, right to privacy and eighth amendment," it would be difficult to embody fixed rules to apply to the entrapment defense since each case is usually so factually subjective.

For example, the amount of a bribe offered to an office clerk might not be tempting to a wealthier public official, and what is tempting to one public official might not be tempting to a wealthier official. Thus, who is to decide whether the bribe offered was so excessive as to induce an otherwise innocent person to accept it, even with the supposition that the "sting" otherwise met the requirements of an objective approach? Even if the judge were to decide the question by applying an objective standard, she would have to look at the particular defendant's position in life to determine whether the amount of the bribe offered would induce an otherwise innocent person in the same position. Since it would be impossible to establish rules to apply to every conceivable position in life, a question exists as to whether a reasonable person in the defendant's position in life would be likely to accept or refuse the bribe. The jury can decide this question by applying everyday standards of logic, knowledge and fair play.

Therefore, the Third Circuit reiterated the subjective approach in that the entrapment defense focuses on "intent or predisposition of the defendant to commit the crime." This test of entrapment has survived from Sorrells through Sherman and was definitely reaffirmed in Russell and Hampton.

The Jannotti district court, in theory, was generally in accord with the court of appeals as to the law of the subjective test but ruled as a matter of law that entrapment existed. The major differences between the decisions of the district court and the court of appeals rests in their interpretation of "predisposition," and when evidence is insufficient as a matter of law to establish predisposition.

There was no question in Jannotti, however, that in order to raise the defense of entrapment the defendant must first present evidence that the government induced the defendant's action and

121. See Angel, supra note 95, at 74.
122. See United States v. Jannotti, 673 F.2d at 599.
123. Id. See United States v. Russell, 411 U.S. at 429.
125. See generally id. at 1200 and 673 F.2d at 597-606.
then present some evidence that he was not predisposed. The government then has the burden to disprove entrapment by showing predisposition.

A. Predisposition

A person is predisposed to commit a crime when he or she is ready and willing to commit the crime prior to the government’s involvement through solicitation or aid. Stated in the negative, a person is not predisposed when the government implants in the mind of an innocent person the disposition to commit the offense and induces its commission.

The Third Circuit in *Jannotti*, addressing the question of predisposition, stated that “although there may be instances where undisputed facts establish the entrapment defense as a matter of law . . . entrapment is generally a jury question.” The district court judge based his decision in part on the fact that the government, in establishing predisposition, relied exclusively on the fact that defendants accepted the money. The general rule, however, with which the district court agreed, is that a defendant’s ready acquiescence to the government’s suggestion may be enough to jus-

126. 673 F.2d at 597. See United States v. Armocida, 515 F.2d 49 (3d Cir. 1975); Kadis v. United States, 373 F.2d 370 (1st Cir. 1967); United States v. Riley, 363 F.2d 955 (2d Cir. 1966). Once the defendant has raised the entrapment defense, he will be subjected to an “appropriate and searching inquiry into his own conduct and predisposition,” as bearing on his claim of innocence.” Sherman v. United States, 356 U.S. 369, 373 (1958) (quoting Sorrells v. United States, 287 U.S. 435, 451 (1932)).


129. Sorrells, 287 U.S. at 442.


133. *Id.*
Yet, the district court judge believed that defendants were not predisposed to accept the bribes because the bribes were "such attractive inducements as to preclude any reliance upon the defendants' acceptance of the money as proof of predisposition." But Schwartz and Jannotti accepted the money readily and without refusal. Congressman Kelly in United States v. Kelly was found by the trial judge, over the jury's verdict, not to be predisposed when he purportedly accepted the bribe money only after many refusals; but, this finding was reversed on appeal.

The district court in Jannotti remarked that "[n]o-one who has viewed the videotape evidence in this case could avoid feelings of distress and disgust at the crass behavior [of the defendants' that] the tapes reveal." The district court nevertheless granted judgment for defendants because "[t]he evidence was, as a matter of law, insufficient to establish the defendants' predisposition beyond a reasonable doubt."

Of primary importance to the question of entrapment, however, is who is to decide whether defendants are predisposed to commit the crimes. The district court, in overruling the jury's verdict, believed that this determination was for the judge in this particular case, and the court of appeals' dissenting opinion agreed. The majority of the court of appeals, on the other hand, ruled to the contrary. Thus, the Third Circuit's en banc decision in Jannotti, which is in line with the Supreme Court's rulings on entrapment, in effect provides that it is for the jury to decide whether or not the government implanted in the mind of a defendant the disposition to commit the crime where government undercover agents offer bribes to public officials in a "sting" operation.

Accordingly, the court of appeals criticized the district court's judgment notwithstanding the verdict by proclaiming that before overturning a jury's finding of predisposition, "the trial court must

137. Id.
139. Id. at 1200.
view the evidence in the light most favorable to the prosecution, and resolve all inferences therefrom in its favor."\textsuperscript{140} Furthermore, there is entrapment as a matter of law only when on the evidence before the jury, no reasonable juror could find predisposition beyond a reasonable doubt.\textsuperscript{141} The court of appeals also pointed out that credibility determinations are for the jury,\textsuperscript{142} in determining whether a defendant was predisposed to commit the crime.

The \textit{Jannotti} dissenting opinion argued, however, that for a jury question to exist there must be an issue of credibility of the witnesses, and that there was no contest here.\textsuperscript{143} The dissent reasoned that determinations of the weight to be given evidence applies in only two situations: where credibility is an issue and where proof beyond a reasonable doubt is an issue.\textsuperscript{144} According to the dissent, before determinations of questions of fact go to the jury, the judge is to make a legal determination as to the beyond a reasonable doubt standard with all reasonable inferences in favor of the prosecution.\textsuperscript{145} This is the test, argued the dissent, that should be applied on the issue of whether defendants were predisposed to commit the acts absent inducement by the government.\textsuperscript{146}

While there may be merit in this argument framed as an objective approach, the Supreme Court has since \textit{Sorrells} rejected the notion that the factual issue of entrapment is to be decided by the trial judge.\textsuperscript{147} Thus, the question arises as to whether there is a factual issue. If there is a factual issue, there are also questions of witness credibility.

The \textit{Jannotti} dissent argued that there was no question of fact for the jury because it was not proved beyond a reasonable doubt that defendants were predisposed.\textsuperscript{148} Yet, courts have ruled that mere acceptance of bribe money can show predisposition;\textsuperscript{149} and

\textsuperscript{140} 673 F.2d at 598. \textit{See} Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Artuso, 618 F.2d 192, 195-96 (2d Cir.), \textit{cert. denied}, 449 U.S. 861 (1980).

\textsuperscript{141} 673 F.2d at 598. \textit{See} Burks v. United States, 437 U.S. 1, 16 (1978).

\textsuperscript{142} 673 F.2d at 598. \textit{See e.g.,} United States v. Bocra, 623 F.2d 281, 289 (3d Cir.), \textit{cert. denied}, 449 U.S. 875 (1980).

\textsuperscript{143} 673 F.2d at 623 (Aldisert, J., dissenting).

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} Sherman v. United States, 356 U.S. at 377.

\textsuperscript{148} 673 F.2d at 614.

\textsuperscript{149} United States v. Jannotti, 673 F.2d at 599; United States v. Jannotti, 501 F. Supp. at 1200; United States v. Valencia, 645 F.2d 1158, 1167-68 (2d Cir.)
since predisposition depends upon subjective intent, there is then a question of fact for the jury as to intent. Thus, credibility questions exist, such as to actions determinative of intent. Also, even with the dissent's stance that the judge should first decide whether the prosecution has overcome the beyond a reasonable doubt standard, the judge must apply the facts to the law to see whether the standard has been overcome. Nevertheless, if subjective intent is to be determined there is a question of fact, no matter what legal precedents apply.

Thus, the dissent's reasoning would work under the objective approach, in whether the government's conduct was reasonable, for the judge would only have to apply a reasonable person standard without subjective intent and credibility having to be determined. Indeed, the argument has been made that the test of entrapment should be based on whether the government's conduct would be likely to induce a reasonable person to commit the illegal acts he would not otherwise commit but for the inducement. But in applying the reasonable person standard, it is the jury and not the court in a civil negligence case that applies the facts to the standard, unless the court is convinced that no reasonable juror could decide otherwise.

As long as the subjective test is used, the question of predisposition is for the jury, and although there is a beyond a reasonable doubt standard in establishing predisposition, there are credibility questions for the jury as to the question of subjective intent. Nevertheless, there appears to be some objectiveness for the jury in using the subjective test. This objectiveness can be found in both the Sherman test that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal" and the Sorrells test that the government cannot implant in the mind of an innocent person the disposition to commit the offense.

The district court in Jannotti ruled that three factors contrib-


151. See Sherman v. United States, 356 U.S. at 384 (Frankfurter, J., concurring) (conduct that is likely to entrap only those ready and willing to commit crime); Note, supra note 66, at 125.

152. 356 U.S. at 372.

153. 287 U.S. at 442.
uted to its conclusion that the evidence was insufficient to prove predisposition. First, the district court found the $30,000 and $10,000 bribes were so large or “exceedingly generous” “as to overcome an official’s natural reluctance to accept a bribe. . . . What would be tempting to an office clerk plainly would not be enough to tempt a millionaire.”

In a separate ABSCAM case, United States v. Myers, District Court Judge Pratt pointed out that other legislators who had been approached with bribes of sums exceeding $30,000 found themselves capable of rejecting the offers. Therefore, a question exists as to whether the amounts were excessive in trying to accomplish the “sting’s” objective of detecting those who are ready and willing to engage in public corruption. If other legislators are capable of turning down equal or greater sums of money, who is to decide whether the government implanted the disposition in the minds of the defendants? This certainly falls under a question of fact for the jury. As Mr. Justice Powell said in Hampton, in deciding the issue of predisposition there is a question of degree of criminal involvement and intent. Therefore, it is virtually impossible to proscribe rules to determine whether a particular defendant’s position in life satisfies the requirements of being an “unwary innocent.” Again, a question of fact exists for jury determination.

The second factor the district court in Jannotti relied on in ruling that predisposition was not proved beyond a reasonable doubt was that defendants were not asked or expected to do anything improper nor inconsistent with their obligations as city council members. However, the district court also stated that, “[t]here is no dispute about the defendants’ receipt of the payments, and the evidence permitted, although it did not compel, the inference that the payments represented bribes paid in exchange for favors.”

154. 673 F.2d at 599. There was barely any evidence of the defendants’ financial positions. Schwartz had previously practiced law and Jannotti owned a bar. *Id.*


156. *Id.* at 1227-29.

157. 425 U.S. at 494 n.5. Mr. Justice Powell uses the drug scene to illustrate the difference between a “pusher” and a “hard core” professional versus a high school youth “pushing” to friends. *Id.*

158. This is without regard to whether the government’s conduct is so outrageous as to violate due process. For discussion of outrageous conduct, see infra text accompanying notes 186-207.

159. 501 F. Supp. at 1200.
for the defendants' assurances of using their official positions to pave the way for expeditious completion of the project.\textsuperscript{160}

The court of appeals pointed out facts which dispel any notion that legitimate consulting work was to be conducted. For example, Schwartz boasted that he had five or six city council members he could give to the Sheik's representative for his birthday, and Jannotti agreed that there would be no problems and that he would use his political influence.\textsuperscript{161} These questions of fact regarding expectations and influence are for jury determination. Furthermore, "it is neither material nor a defense to bribery that 'had there been no bribe, the [public official] might, on the available data, lawfully and properly have made the very recommendation that the [briber] wanted him to make.'"\textsuperscript{162}

In toto, the district court in\textit{Jannotti} ruled that acceptance of the money itself was insufficient to show predisposition and that the payments were such "attractive inducements" as to overwhelm defendants.\textsuperscript{163} As previously discussed, however, acceptance of bribe offers may in itself establish predisposition, especially if there is ready acquiescence in such offers.\textsuperscript{164} The Third Circuit reasoned that predisposition more often than not has to be proven by circumstantial evidence such as actions, words, demeanor, and so forth,\textsuperscript{165} or by proof of defendant's prior convictions or participation in similar transactions.\textsuperscript{166} Predisposition is especially difficult

\textsuperscript{160} Id. at 1184.
\textsuperscript{161} 673 F.2d at 600-601.
\textsuperscript{162} Id. at 601 (quoting United States v. Labovitz, 251 F.2d 393, 394 (3d Cir. 1958)).
\textsuperscript{163} 501 F. Supp. at 1200. The third factor relied upon by the district court in overruling the jury was that acceptance of the bribes was necessary to "satisfy the Arab state of mind" and therefore secure building of the hotel in Philadelphia. The court of appeals, however, ruled that the record revealed that the agents told Schwartz during their meeting that the Sheik had already selected Philadelphia as his new home and location of the proposed hotel—i.e., construction of hotel was not contingent on acceptance of payments. 673 F.2d at 602. (Since the district court overruled the jury's verdict, the court of appeals could look at the same evidence. \textit{Id.} at 598.)
\textsuperscript{164} Id. at 599; United States v. Valencia, 645 F.2d 1158, 1167-68 (2d Cir. 1980); United States v. Viviano, 437 F.2d 295, 299 (2d Cir.),\textit{ cert. denied}, 402 U.S. 983 (1971). See supra note 134 and accompanying text.
\textsuperscript{166} \textit{See} Hampton v. United States, 425 U.S. 484, 488-89 (1976); United States v. Russell, 411 U.S. 423, 433 (1973). Hearsay evidence, however, is not ad-
to prove in cases of official corruption, as expressed in *Jannotti*:

Because such officials are often intelligent, educated and worldly, it is unlikely that they will accept money from those to whom they have not had "safe" introductions and who, because they are also implicated, are unlikely to report to the authorities. In addition, because the crime has no direct victim, its occurrence leaves no public trail which cries for investigation. Since the ultimate factual determination is whether the defendant was "ready and willing to commit the crime if an opportunity should be presented," as distinguished from having been corrupted by some overreaching or special inducement . . . the very acceptance of a bribe by a public official may be evidence of a predisposition to do so when the opportunity is presented. 67

Thus, the Third Circuit reaffirmed the adequacy of production by the government of mere acceptance of the bribes and other circumstances in proving predisposition to commit the crime.

Furthermore, the Ninth Circuit has ruled that, "While none of the factors alone indicates either the presence or absence of predispositions, the most important factor, as revealed by the Supreme Court and other decisions, is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated government inducement." 168 In fact, the Ninth Circuit did not find a case in which the defense of entrapment was successful where the defendant did not indicate reluctance to engage in illegal activity. 169 Indeed, neither Schwartz nor Jannotti refused the money offered. 170

---

166. United States v. Jannotti, 673 F.2d at 604 (quoting United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978)).

167. 673 F.2d at 604 (citation omitted). "Researchers have found it difficult to locate a case in which the defense of entrapment has been successfully interposed in prosecutions of public officials for accepting, agreeing to receive, or soliciting bribes." *Id.* at 604 n.13. *See Annot.*, 69 A.L.R.2d 1397, 1431 (1960).


170. Additional evidence existed, according to the court of appeals in *Jannotti*, which the jury could have used in deciding the question of predisposition: Schwartz's acceptance of "finder's fee," shortly after acceptance of the $30,000, in return for introducing Criden to Jannotti, and the introduction of Jannotti, another public official, so that he could participate in a similar transaction. 673 F.2d at 605.
Circumstantial evidence, moreover, is usually the only way in which intent can be proven. With regard to video tapes of the transaction, the Third Circuit in *Jannotti* reasoned that “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.”171 Similarly, the district court in *United States v. Myers*,172 expressed that there cannot be a more reliable basis for measuring the culpability of defendants than video tapes.173 With video tapes, the jury may observe the defendant’s mannerisms and voice inflections, and whether there is any reluctance by defendant when the money is handed to him. The jury can see the occurrence itself, preferably from the beginning of the discussions to the transaction itself.

The Third Circuit in *Jannotti* further elaborated that,

The ultimate factual decision in an entrapment case must be left to the jury. Where, as here, the jury was uniquely equipped to inquire into the calculus of human interaction, a court should not interfere with its conclusions. We conclude that in determining that defendants were entitled to a judgment of acquittal on the ground of entrapment as a matter of law the district court impermissibly substituted its own determination of the culpability of witnesses, the weight of the evidence and the inferences to be drawn from the evidence for that of the jury.174

The dissent in *Jannotti*, however, argued that an additional fault with allowing the jury to decide the question of predisposition is that it prejudices defendants.175 The dissent reasoned that since the Third Circuit requires a defendant to admit commission of the acts making up the offense,176 a jury is reluctant to let the defendants go free on a “technicality” as judges will.177 In the other circuits, however, admission of the elements of the crime is not required.178 With the use of videotapes moreover, party admis-

171. 673 F.2d at 604.
172. 527 F. Supp. 1206 (E.D.N.Y. 1981), aff’d in part and rev’d and remanded in part on other grounds, 692 F.2d 823 (2d Cir. 1982).
173. Id. at 1223.
174. 673 F.2d at 606.
175. Id. at 614.
176. Id.
177. Id.
sion is not necessary because the jury simply views what happened.

Thus, video tapes provide the jury with a better means than testimony alone of determining a defendant's intent and disposition to commit the crime—a different question from the "reasonableness" or "outrageousness" of the government's conduct.

B. Due Process of Law

The second entrapment-type of defense is the due process claim. For the defense to be sustained, the government's conduct, objectively considered, must be so extreme as to be "outrageous."

In application as well as in its language, this defense has sustained little success, with only a few cases where the government's conduct was declared unconstitutional. For instance, Mr. Justice Powell in Hampton said that "the cases, if any, in which proof of predisposition is not dispositive will be rare," and that "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction."

The Third Circuit in Jannotti reversed the district court's ruling that the government's conduct in offering the bribes to Schwartz and Jannotti amounted to a violation of due process of law. The district court's ruling on this constitutional issue was based upon the same factors upon which it made its finding of entrapment—basically, that the offers were such attractive inducements as to overwhelm the defendants. The court of appeals reasoned that "[i]t is plain from the Court's opinions in Russell and the separate opinions in Hampton, however, that a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense." To allow a lesser showing of government conduct to

180. See supra notes 96-98.
181. 425 U.S. at 495 n.7 (Powell, J., concurring in the result).
182. United States v. Jannotti, 501 F. Supp. at 1204. The district court stated: "[I]t 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." Id. at 1204.
183. United States v. Jannotti, 673 F.2d at 607. The Court in Russell, however, apparently did not directly rule that to be a violation of due process the government's conduct must be beyond that necessary to sustain an entrapment
suffice as outrageous conduct, would transform the subjective intent (predisposition) standard of entrapment into the objective standard relative to the government's conduct. While there is merit in the logic of this concern of transforming the real test, such a rule requiring that the degree of government conduct necessary to sustain a due process claim must go beyond that conduct necessary to sustain an entrapment defense, approaches the rule advocated by Mr. Justice Rehnquist and two other justices in Hampton that a predisposed defendant is precluded from asserting a due process claim. While the government's conduct in Jannotti may not amount to being outrageous, even predisposed defendants should be free from outrageous government conduct—that is, society should be immune from such conduct. But do the same factors regarding predisposition apply to outrageous government conduct?

The ultimate rationale for the court of appeals' rule was that the entrapment defense rests with the court's interpretation of legislative intent; that because the defense of entrapment is not of constitutional dimension, Congress is free to adopt its own entrapment defense; and that constitutional ramifications are wider with constitutional issues. However, the Third Circuit in Jannotti seemed to be saying that if the government's conduct will trap only the unwary guilty—i.e., those predisposed—and it does not implant in the mind of an innocent person the disposition to commit the crime, then the government's conduct is not outrageous in itself even though it conceivably might induce a hypothetical otherwise innocent person to commit the crime. The court then is to determine if the government's conduct, objectively considered, is something on the order of "shocking to the conscience"—outrageous.

Nevertheless, the Third Circuit in Jannotti expressed its in-
tention to adhere to the long standing subjective approach of the entrapment question and not allow the due process defense to become just another term for an objective test of entrapment.\textsuperscript{187} Indeed, while the lines are hazy, the majority of the Supreme Court has reserved for a constitutional due process defense only the most intolerable government conduct.\textsuperscript{188}

Requiring a successful due process defense to be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense, may erroneously approach the minority Supreme Court standard that would preclude a predisposed defendant from successfully asserting a due process defense. However, the reasons for which the district court found outrageous government conduct did not rise to a constitutional due process dimension. Because the district court ruled that the government's conduct in \textit{Jannotti} was outrageous for the same reason that entrapment existed, the Third Circuit ruled that since the government "inducements were not so 'exceedingly generous' as to negate the evidence of predispositions as a matter of law, it follows that they could not have been so overreaching as to violate the defendants' due process rights."\textsuperscript{189}

The Third Circuit, therefore, apparently justified its rule on the ground that the "exceedingly generous" standard is an entrapment-predisposition test and not a constitutional due process test. While in \textit{Jannotti}, the Third Circuit noted that a finding of predisposition does not preclude a successful due process defense, it nonetheless concluded that "where, as here, the extent of government inducement necessarily was considered by the fact finder in its rejection of the entrapment defense, and we have held that issue as appropriately submitted to the jury, a successful due process defense must be predicated on other grounds."\textsuperscript{190} This idea dangerously approaches the Rehnquist preclusion theory. The jury in considering the question of entrapment focuses primarily on the subjective intent of defendant and not as much on the government's conduct. The Third Circuit's rule in \textit{Jannotti}, therefore, in effect allows the jury to determine that due process of law was not

\textsuperscript{187} 673 F.2d at 608 ("we must be careful not to undermine the Court's consistent rejection of the objective test of entrapment by permitting it to re-emerge cloaked as a due process defense.") \textit{Id.}

\textsuperscript{188} See United States v. Russell, 411 U.S. at 427; United States v. Jannotti; 673 F.2d at 608.

\textsuperscript{189} 673 F.2d at 608.

\textsuperscript{190} \textit{Id.}
violated by finding defendants predisposed. But in Jannotti, the due process question was the same as the entrapment question—whether the bribe offers were "exceedingly generous." Furthermore, when a jury finds that a defendant was predisposed to commit the crime, theoretically at least, it is finding that the government's conduct did not implant the criminal intent in the defendant's mind\(^\text{191}\) and that the government's conduct did not lay a trap for the unwary innocent.\(^\text{192}\) Thus, the jury probably interjects their own feelings into deciding whether the government's conduct was overreaching. Ultimately, however, the constitutional question should be left to the judge.

At any rate, the question in Jannotti was, according to the district court judge, whether the inducements offered by the government were so "exceedingly generous" as to be outrageous. But is whether inducements are "exceedingly generous" a due process-outrageous conduct question? Accordingly, the standard to govern what is "exceedingly generous" to a white-collar legislator is not the same standard to govern what is "exceedingly generous" to a street corner drug pusher or office clerk. Certainly, constitutional standards cannot establish amounts as "exceedingly generous" to fit all types of people ensnared in a government "sting" operation.\(^\text{193}\) Also, even if amounts could be set to define "exceedingly," set rules may allow intelligent criminals to design their activities around the rules.\(^\text{194}\) What is "exceedingly generous," therefore, is quite appropriately a question of fact as it relates to Jannotti.

Thus, the language in Jannotti that the amount of government conduct necessary to sustain a due process defense must surpass that necessary to sustain an entrapment defense dangerously approaches the would-be approach of a minority of the Supreme Court which would preclude a predisposed defendant from successfully asserting the due process defense. Society should be protected from government conduct that is "shocking to the conscience." When, however, the government conduct in question ultimately rests with whether the inducements offered were so "exceedingly generous" as to be "outrageous," as the district court found in Jannotti, a question of fact about entrapment exists rather than a


\(^{194}\) See Parks, The Entrapment Controversy, 60 Minn. L. Rev. 163, 228 (1976).
question of constitutional dimension. The result rendered by the Third Circuit in *Jannotti* was therefore correct.

What is "outrageous" government conduct then? The FBI's conduct in *Jannotti* falls short of the government's conduct in *United States v. Twigg*. In *Twigg*, DEA agents "set up" the defendant, "encouraged him" and "provided the essential supplies and technical expertise." In *Jannotti*, however, the FBI provided neither material nor technical expertise in assistance to defendants; the FBI "merely created the fiction that it sought to buy the commodity—influence—that the defendants proclaimed they already possessed."

Perhaps then, a distinction can be made. On the one hand the government provides: (1) the body of the crime itself—the chemicals needed to manufacture illegal drugs or the illegal drugs alone; (2) the means by which to accomplish an otherwise practically improbable act; and (3) the temptations to commit the crime. On the other hand, the government provides the temptations alone or in addition provides the body of the crime, without having to provide the means. The former can be characterized by *Twigg* as being outrageous. But the latter, such as supplying the *corpus delecti* itself or supplying only a portion of the means by which to accomplish the illegal task, does not amount to outrageous behavior. Furthermore, merely supplying the fruits, such as bribe money, to one who already possesses the means, acts of corrupt influence, amounts to even less.

195. 588 F.2d 373 (3d Cir. 1978) (where "outrageous" conduct found). See *supra* note 96 and accompanying text.
196. Id. at 381.
197. United States v. Jannotti, 673 F.2d at 608.
200. In a separate ABSCAM trial, the Second Circuit stated that, "The bare suggestion to a Congressman that he take a bribe, even for a promise he need only pretend to make, surely does not violate a constitutional standard of 'outrageous' behavior." United States v. Myers, 692 F.2d 823, 843 (2d Cir. 1982). The Second Circuit rejected the argument that the government "created" the crimes, for the government merely produced people with false identities who were ready to pay bribes to Congressmen and then waited to see who showed up to take the bribes and videotape them in the act of doing so. *Id.* at 837.

The district court had ruled that the government's solicitation of bribes to Congressmen was not outrageous for two reasons: (1) defendants could simply
C. The Need For ABSCAM Type Of Operations

ABSCAM and similar "sting" operations raise several issues: whether probable cause should be required before the government can validly initiate the operation; whether the government should provide inducements; whether the government is creating crime just to prosecute; whether government law enforcement should use deceit; and whether there is a need for detection of "victimless" crimes.

Should the government have probable cause or reasonable suspicion before attempting to ensnare those who are ready and willing to participate in the criminal activity targeted, or should the government offer the opportunity to anyone who is willing? Both the Second and Third Circuits have ruled that neither probable cause nor reasonable suspicion is required before initiation of an operation. In United States v. Myers, 527 F. Supp. 1206. (E.D.N.Y. 1981). See also United States v. Myers, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980).

In United States v. Kelly, 539 F. Supp. 363 (D.D.C. 1982), rev'd, 33 CRIM. L. REP. 2151 (D.C. Cir. May 10, 1983), however, the district court granted a dismissal on the ground that the government's conduct was in violation of due process. Where the middleman between the FBI agents and Congressman Kelly told the agents posing as representatives of the Arab sheik that Kelly had refused the bribe money but wanted to talk to them about investments in his district and where Kelly refused the offers in front of the agents, the district court held that the continued pressing of the bribe in face of the rejections was "overreaching." Id. There was disagreement in the court of appeals, however, as to whether Kelly actually refused the bribe. Nevertheless, the court of appeals reversed the district court and reinstated the jury's conviction.

Even FBI Director Webster had directed that agents were to be sure to turn away anyone if any ambiguity existed about whether he wanted to take money in exchange for legislative acts. Id. at 374 n.48. A Justice Department attorney monitoring the transaction, however, urged the agent to press on. Id. at 374.

The district court ruled that, "If the government had no knowledge of Kelly doing anything wrong up to his rejection of illicit money, its continuing role as a third man in a fight between his conscience and temptation rises above the level of mere offensiveness to that of being 'outrageous.'" Id. at 376.

The problem with looking at refusals of the bribe offer in regard to the due process question, however, is how many refusals does it take before the government's bribe offers become "outrageous" conduct? If it is limited at one, two, or whatever number as in Kelly, knowledgeable criminals can merely refuse and then await another offer to accept. Therefore, is this not a question of fact?
undercover operation such as ABSCAM.\textsuperscript{201} If the government targets individuals in advance without probable cause (such as political targets), however, there may be a violation of due process.\textsuperscript{202} Then, why not always require probable cause? One argument may be that on the basis of reasonably suspected past criminal activity or present suspected activity, individuals would be targeted for deceit by the government. Another argument is that a requirement of probable cause overlooks the fundamental law enforcement problem with public corruption, which is extreme difficulty and improbability of detection.\textsuperscript{203}

Nevertheless, perhaps safeguards aside from probable cause should be adhered to before-the-fact. There should be guidelines to prevent coercion of those who do not appear to be willing to accept the bribe offers. For example, FBI Director Webster issued instructions that agents were to turn away those potential defendants when there was ambiguity as to whether or not they would accept money in return for legislation.\textsuperscript{204} Not only does this safeguard against entrapment, it also more clearly delineates the question of predisposition for the jury.

Another issue is whether the government should be allowed to induce crime instead of merely trying to detect it after-the-fact.\textsuperscript{205} As far back as 1932, in its first address of the entrapment question, the United States Supreme Court ruled that the fact that the government merely affords the opportunities or facilities for commission of an offense does not defeat prosecution.\textsuperscript{206}

Accordingly, artifice and strategem may be employed to catch

\begin{itemize}
\item \textsuperscript{201} Mye\textsuperscript{s}, 692 F.2d at 835 (Constitution does not require prior suspicion of criminal activity before Congressman may be confronted with a “governmentally created opportunity” to commit a crime); Jannotti, 673 F.2d at 609 (“where the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait.”); United States v. Silver, 457 F.2d 1217, 1220 (3d Cir. 1972); United States v. Catanzaro, 407 F.2d 998 (3d Cir. 1969).
\item \textsuperscript{202} Jannotti, 673 F.2d at 609. In Jannotti, Criden furnished the names and presence of Schwartz and Jannotti.
\item \textsuperscript{203} See infra pp. 409-410.
\item \textsuperscript{204} See supra note 200. In Jannotti, the agents, posing as representatives of the Sheik, instructed Criden not to bring Schwartz or Jannotti unless they were going to accept the money. 673 F.2d at 609.
\item \textsuperscript{205} See infra pp. 410-412.
\end{itemize}
those engaged in criminal enterprises as long as the government does not implant in the mind of an innocent person the disposition to commit the offense and induce its commission.\textsuperscript{207} The Third Circuit in \textit{Jannotti} further ruled that "it is neither material nor a defense to bribery that 'had there been no bribe, the [public official] might, on the available data, lawfully have made the very recommendation that [the briber] wanted him to make.'"\textsuperscript{208} The Second Circuit agrees: "The bare suggestion to a Congressman that he take a bribe, even for a promise he need only pretend to make, surely does not violate a constitutional standard of 'outrageous' behavior."\textsuperscript{209}

An argument to the contrary contends that providing such temptations to even the most morally scrupulous runs contrary to the Judeo-Christian concept of the weakness of man.\textsuperscript{210} But the most morally scrupulous will turn down an illegal offer unless it is so overwhelming as to implant the disposition in the mind of an innocent person to commit the criminal offense. Has society become so morally unscrupulous that the ordinary person cannot be tempted? This is not to say that the government should engage in the practice of tempting people, just to see if they are morally scrupulous or if they will commit a crime, for our society should not live in fear of government oppression or in fear of a secret police. Yet such "sting" tactics are necessary to combat otherwise virtually undetectable and unknown "victimless" crimes where someone passes money to a legislator in return for corrupt influence from the legislator (without anyone else knowing of the deal).

An interrelated question is whether the government is in effect creating crime to prosecute. The Supreme Court in \textit{Sorrells} expressed this concern: "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing

\textsuperscript{207} 287 U.S. at 441-42.
\textsuperscript{208} 673 F.2d at 601 (quoting United States v. Labovitz, 251 F.2d 393, 394 (3d Cir. 1958)).
\textsuperscript{209} Myers, 692 F.2d at 843. The Sixth Circuit ruled in 1925 that it is not automatically entrapment for a government agent to offer a bribe to a public official. Scriber v. United States, 4 F.2d 97 (6th Cir. 1925). As to the definiteness of knowledge that the money offered is a bribe, undercover agents need not say, "Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action." Myers, 692 F.2d at 844.
\textsuperscript{210} See United States v. Jannotti, 673 F.2d at 615 (Aldisert, dissenting, joined by Weis, with the exception of Part VII).
it." While this maxim is inherently valid, a distinction exists between on the one hand creating crime to manufacture it for prosecution and on the other hand creating opportunities to detect and deter otherwise undetectable crimes. In the words of the Second Circuit in *Myers*, speaking of its particular portion of ABSCAM:

Though the "sting" was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so. The Government produced people with fictitious identities ready to pay bribes to Congressmen. Word of the availability of bribe money was made known. From that point on, the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them doing so.

The dissent in *Jannotti* argued, however, that finding fish to bite does not show predisposition to take the bait, although the dissent agreed that it is permissible for the government to offer inducements as long as defendants are predisposed and that the government may search out contemplated or ongoing criminal conduct and participate in the illegal enterprise.

Another argument against ABSCAM type of operations is that criminal sanctions are not justified when the government "manufactures" crimes that would otherwise not occur. First, according to this argument, punishing a defendant who commits a crime where the government manufactures a crime that would not otherwise occur is not needed to deter misconduct because, absent the government's involvement, no crime would have been committed. But without the creation of opportunities to detect those ready and willing to commit on-going or potential crimes, how else could law enforcement detect "victimless" crimes where both par-

211. 287 U.S. at 444 (quoting Butts v. United States, 273 Fed. 35, 38 (8th Cir. 1921)).
212. Two unacceptable alternatives are either to plant agents in legitimate operations to monitor transactions, or to completely allow corruption to exist.
213. 692 F.2d at 837.
214. 673 F.2d at 621.
215. *Id.* at 616. The dissent also expressed fear of a secret police pouring honey down defendants' throats, *id.* at 613, and it compares the government's conduct in *Jannotti* to Alexander Solzhenitsyn's expression, "Just give us a person—and we'll create the case!" *Id.* at 617-18.
216. Note, *supra* 66, at 125. Deterrence, restraint, rehabilitation, or retribution are expressed as the purposes of criminal sanctions. *Id.* at 124 n.169.
217. *Id.* at 125.
ties to the transaction have an interest in concealment. How else would society know of a crime such as bribery or extortion? Furthermore, the searching out and consequent publicity of such corruption is a deterrence to similar conduct, particularly where the corrupt officials are generally educated and sophisticated.

The next related argument is that a defendant need not be incarcerated to protect society if that defendant is unlikely to commit the crime without the government's interference. The predisposition test, however, takes this concern into consideration. Had there been a real sheik or developer offering the bribe, the corruption would never have been detected. Also, as to the argument that rehabilitation is not needed if defendant would not have committed the crime but for the government's involvement, there is a need for rehabilitation if defendant is predisposed and commits the crime.

The argument that no one is harmed where law enforcement agents "manufacture" a "victimless" crime fails to grasp the overall picture—the harm to society produced by so-called "victimless" crimes. Society suffers where public leaders illegally indulge in and extract tributes from various economic activities, initially related to public welfare.

Thus, government law enforcement should not set traps for the unwary innocent, but those public officials who are clearly predisposed to commit the crimes—those who are corrupt—should be detected by the best, if not the only, means existing.

There are contentions, however, that this function is an impermissible testing of virtue by the government. Yet, the Supreme

218. Id.

219. Furthermore, there is a difference between tempting a would-be moonshiner as in Sorrells—where detection is easier—and tempting a would-be corrupt public official.

220. "Victimless" crimes are generally thought of as those illegal exchanges between willing parties, where there is no direct physical victim.

221. Corruption as in Sicily virtually holds society at its grasp. See H. Hess, MAFIA AND MAFIOSI: THE STRUCTURE OF POWER (1973). While in Sicilian society organized corruption has been a way of life for a couple of centuries, and American culture is no comparison, more and more public and private leaders in the United States, who have legitimate appearing statuses—e.g., business leaders, corporate executives, politicians, judges, and so on—are dipping their hands into illegally tainted activities. The result is that this corrupt influence ultimately embeds itself in our culture—i.e., it becomes an accepted way of life.

Court as early as *Sorrells* indicated that the use of decoys by law enforcement is permissible to ensnare criminals and present the opportunity to those intending or willing to commit crime. Likewise, the Supreme Court in *Russell* was of the opinion that "there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." Even the dissenting opinion in *Russell* agreed that "[i]ndeed, many crimes, especially so-called victimless crimes, could not otherwise be detected. Thus, government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit a crime an opportunity to do so." Furthermore, four of the justices in *Sherman* expressed the opinion that although the defendant was entrapped in that case, "[t]his does not mean that the police may not act so as to detect those engaged in criminal conduct and [those] ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation."

The difficulty in detecting bribery, extortion and other forms of corruption by public officials cannot be overemphasized. "[N]othing more is required than 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." Mr. Chief Justice Warren, writing in *Sherman*, would seem to agree where he quoted Judge Learned Hand that "it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offense contended that testing virtue is not a function of law enforcement and that is what the FBI was doing.

223. 287 U.S. at 445.
224. 411 U.S. at 436.
225. Mr. Justice Stewart, joined by Mr. Justice Brennan and Mr. Justice Marshall.
227. 356 U.S. at 384 (Mr. Justice Frankfurter, joined by Mr. Justice Douglas, Mr. Justice Harlan, and Mr. Justice Brennan, concurring in the result).
which consist of transactions that are carried on in secret." Accordingly, bribery may be even more difficult to uncover than drug deals. With contraband such as in illegal drug deals, there is clear illegality; but with bribery, both aspects of the transaction are apparently legal—i.e., the money and the actions by the public officials.

CONCLUSION

As indicated by the recent decisions of the Second and Third Circuits of the United States Court of Appeals, and by the Supreme Court's denial of certiorari, the government will be permitted to conduct ABSCAM type of undercover "sting" operations, which are designed to uncover ongoing or potential public corruption, as long as the government does not implant the intent to engage in the criminal conduct in the defendant's mind and as long as the government's conduct does not rise to an unconstitutional level of "outrageousness."

The Third Circuit in United States v. Jannotti held that the acceptance by two Philadelphia City Council members of $30,000 and $10,000 respectively as bribe offers from FBI agents posing as representatives of a mythical Arab Sheik was in violation of federal criminal law, that there was no entrapment as a matter of law where the jury found the defendants to be predisposed, and that such conduct by the FBI was not in violation of due process. The Third Circuit in so ruling adhered to the subjective approach of the entrapment defense as set out by Supreme Court decisions, despite advocacy of an objective approach by a minority in the Supreme Court decisions. The decision reaffirms jury determination of whether a defendant was entrapped—that is, whether defendant was predisposed or whether the government implanted in defendant's mind the disposition to commit the offense. Furthermore, the decision, in effect, leaves for jury determination the question of whether the amount offered as bribe money by the government was "excessive." Thus, whether the amount was excessive is more of a question of fact than a question of law.

The net effect of the ABSCAM decisions is to rightfully allow

229. 356 U.S. at 377 n.7 (editing theirs) (quoting United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952)).


the government to conduct these “sting” operations to combat public corruption, and such conduct is not a violation of due process in itself.

The courts recognize the need for such government “sting” operations despite argument that such conduct may be overreaching. Judge Pratt in *United States v. Myers* most eloquently provides a response to this concern:

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.232

*Dennis Franks*