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THE FAILURE OF THE DUE PROCESS DEFENSE IN *UNITED STATES V. GAMBLE*

INTRODUCTION

In *United States v. Gamble*[1] the defendant was randomly targeted in an undercover scheme conceived and contrived by United States postal inspectors.[2] Upon appeal of his conviction, the defendant raised the defense of outrageous governmental conduct: the due process defense. The Tenth Circuit Court of Appeals held that the government's conduct was not so outrageous as to shock the conscience of the court.[3] The case is unremarkable insofar as Dr. Gamble's defense failed; the defense has been successful only once in the federal courts — in the Third Circuit Court of Appeals' 1978 decision in *United States v. Twigg*.[4] *Gamble* is, however, an excellent example of police undercover work which focuses on anticipating rather than investigating crime and of the federal courts' failure to adjust due process analysis when faced with such tactics.

I. LEGAL BACKGROUND

A. *Entrapment and the Development of the Due Process Defense*

In *Sorrells v. United States*,[5] the Supreme Court for the first time recognized entrapment[6] as a valid defense to criminal charges.[7] Chief Justice Hughes, writing for the majority, based the Court's finding for the defendant on three factors: (1) the conduct of the government in instigating the crime;[8] (2) the purpose of the statute;[9] and (3) the predisposition of the defendant.[10] The Court reasoned that a nonpredisposed defendant cannot be guilty of committing an offense which was created

1. 737 F.2d 853 (10th Cir. 1984).

2. The undercover operation was dubbed "MAIL-Fraud" for Medical and Insurance Fraud, discussed *infra*, notes 63-72 and accompanying text.

3. The 'shocks-the-conscience' standard, as it has come to be called, is that announced in United States v. Russell, 411 U.S. 423 (1973), discussed *infra*, text accompanying notes 25-35.

4. 588 F.2d 373 (3d Cir. 1978), discussed *infra*, text accompanying notes 49-56.

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

6. The lower federal courts had already recognized the entrapment defense. *See, e.g.*, Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).

7. In *Sorrells*, the defendant was twice approached by a prohibition agent to purchase whiskey for him. Sorrells finally capitulated after repeated appeals to sympathy and friendship. *Sorrells*, 287 U.S. at 439. At trial, no evidence was produced showing that the defendant had ever bought, sold, or possessed alcoholic beverages prior to the event in question. *Id.* at 441.

8. Although acknowledging that the government may use "[a]rtifice and stratagem" to ferret out crime, "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id.* at 441-42.

9. The majority found that Congress could not have intended that enforcement of its laws was to be achieved by inducing innocent victims to commit the offense. *Id.* at 448.

10. *Id.* at 451.

and instigated by the government for its subsequent prosecution. The controlling question in any court's inquiry, the majority stated, is whether an "otherwise innocent" individual was entrapped solely because of the government's "creative activity."[11]

Finding the Court's reasoning fallacious, Justice Roberts, concurring in the result, contended that the sole issue was the government's conduct, regardless of the statutory construction[12] and regardless of the defendant's predisposition.[13] The reason for the defense, argued Justice Roberts, lies in "the public policy which protects the purity of government and its processes."[14]

The majority and concurring opinions thus respectively expressed the "subjective" and "objective" theories of entrapment. Both agreed that a defendant ensnared by improper governmental conduct could not be prosecuted and convicted for the offense. But while the proponents of the subjective theory would examine the government's conduct in light of the defendant's predisposition and dismiss the prosecution only upon a finding that the defendant would not have committed the act but for the government's enticement, those adhering to the objective theory would view the defendant's predisposition as irrelevant and would dismiss the case whenever the government employed illegal, improper, or impermissible strategies in order to prosecute and convict a defendant.

Further developing the subjective standard espoused in *Sorrells*, the Court in *Sherman v. United States*[15] stated that the entrapment issue turns on whether the trap ensnares the "unwary innocent" or the "unwary criminal"[16] — that is, the individual predisposed to commit the crime. In *Sherman*, a government informant who, along with the defendant Sherman, was undergoing treatment for heroin addiction, repeatedly pressed Sherman to supply him with narcotics because he was in pain and not responding to treatment. The defendant succumbed to these appeals and was subsequently indicted and convicted. The Supreme Court reversed the conviction, finding that the defendant had established entrapment as a matter of law.[17]

The Court thus rejected the government's argument that the de-

11. *Id.*

12. Joined by Justices Brandeis and Stone, Justice Roberts castigated the majority for its finding of an "unspoken and implied mandate" in any given statute that a person can be found not guilty because of the government's conduct. *Id.* at 456 (Roberts, J., concurring). The statutory construction theory has been abandoned by the courts. Abramson & Lindeman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. L. 139, 158 n.67. (1980).

13. "To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorent transaction." *Sorrells*, 287 U.S. at 459 (Roberts, J., concurring).

14. *Id.* at 455.

15. 356 U.S. 369 (1958). Chief Justice Warren wrote the majority opinion. Justices Frankfurter, Douglas, Harlan and Brennan concurred in the result, but would have based the opinion on the objective theory of entrapment as expressed by Justice Roberts in *Sorrells*.

16. *Sherman*, 356 U.S. at 372.

17. *Id.* at 370-72.

fendant was predisposed[18] and found the government's actions, through its informant, highly improper because they "play[ed] on the weaknesses of an innocent party and beguile[d] him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."[19] The concurring Justices[20] expressed their concern for the majority's lack of forthright analysis. They argued that, although ostensibly adhering to the subjective theory of entrapment, the Court's holding was nonetheless based on "the conduct of the informer . . . and not [on the fact that] the Government has failed to draw a convincing picture of petitioner's [predisposition]."[21]

When the Court again considered the entrapment defense in *United States v. Russell*[22] and *Hampton v. United States*,[23] the tension between the subjective and objective theories of entrapment was apparent in the creation of the new, constitutionally-based due process defense.[24] *Russell* presented the Supreme Court with its first case on the due process defense. The defendant had been convicted of manufacturing, possessing, and selling methamphetamine (speed).[25] Because he was predisposed, Russell was foreclosed from basing his defense on entrapment.[26] He argued instead that the informant had supplied the defendants with an essential component of the drug,[27] and that without the government's intervention, the component could not have been obtained nor the drug manufactured. Thus, although predisposed, his conviction could not stand because of the level of governmental involvement in the crime for which he was prosecuted. He therefore requested that the Court base the entrapment defense on constitutional grounds.[28] He analogized his case to the Court's holdings in *Mapp v. Ohio*[29] and *Miranda v. Arizona*[30]

18. The government attempted to prove Sherman's predisposition on the basis of several drug sales, *id.* at 374; his acquiesence to the scheme, *id.* at 375; and on the basis of prior narcotics convictions, *id.* The Court rejected this evidence as "insufficient . . . particularly when we must assume from the record he was trying to overcome the narcotics habit at the time." *Id.* at 375-76.

19. *Id.* at 376.

20. Justice Frankfurter, joined by Justices Douglas, Harlan and Brennan.

21. *Sherman*, 356 U.S. at 383 (Frankfurter, J., concurring). Justice Frankfurter defended the objective theory and called for clear analytical standards defining the defense and the boundaries of permissible law enforcement practices. *Id.* at 380-85 (Frankfurter, J., concurring). For an indepth discussion of the subjective and objective theories of entrapment, see Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976) and Note, *Entrapment as a Due Process Defense: Developments After* Hampton v. United States, 57 IND. L.J. 89, 89-101 (1982).

22. 411 U.S. 423 (1973).

23. 425 U.S. 484 (1976).

24. Entrapment is "not of a constitutional dimension." *Russell*, 411 U.S. at 433.

25. *Id.* at 424.

26. The informant had infiltrated the existing drug manufacturing ring of Russell and two other defendants. *Id.* at 425.

27. *Id.* at 425-26. The ingredient supplied was phenyl-2-propanone (P-2-P).

28. *Id.* at 430. Russell also argued for the objective theory of entrapment to be adopted by the Court. *Id.* at 432-33. The Court declined to do so and reaffirmed its holdings in *Sorrells* and *Sherman*. *Id.* at 433-34.

29. 367 U.S. 643 (1961) (illegal search and seizure, fourth amendment).

30. 384 U.S. 436 (1966) (self-incrimination clause, fifth amendment).

in which the Court developed the exclusionary rule as the remedial measure for illegal searches and seizures and coerced confessions.

Justice Rehnquist, writing for the majority, declined to raise the entrapment defense to constitutional status. He found the analogy to *Mapp* and *Miranda* inapposite because the exclusionary rule was developed in those cases as the result of the government's illegal conduct which violated the defendants' fourth and fifth amendment rights. Russell's case was different, he stated, because "the Government's conduct here violated no independent constitutional right of the [defendant]."[31] Furthermore, in *Russell*, the informant had broken no laws, breached no rules, nor committed any crimes in its infiltration of the drug manufacturing ring.[32] Justice Rehnquist then delivered the celebrated dictum that has become the standard for due process analysis:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California [citation omitted], the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.[33]

The *Russell* opinion thus failed to set guidelines for impermissible law enforcement practices, merely stating that they must rise to the level of "outrageous" or "shocking" to the conscience.

Because *Russell* concerned a drug manufacturing ring, "a continuing, . . . illegal, business enterprise,"[34] the government was allowed some participation in the enterprise in order to secure convictions. The Court further cautioned that "the defense of entrapment . . . was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve."[35] Thus, to attain the status of a due process violation warranting dismissal, law enforcement techniques must be demonstrably egregious. The circumstances considered by the Court in deciding this issue were the means available

31. *Russell*, 411 U.S. at 430. *See* Tribe, *The Supreme Court 1972 Term*, 87 HARV. L. REV. 55, 248 n.45 (1973) ("In using the expression 'independent constitutional right,' Justice Rehnquist was apparently referring to any constitutional right not derived from the due process clause.").

32. *Russell*, 411 U.S. at 430-31. The Court also stated that the drug was not impossible to obtain. *Id.* at 431.

33. *Id.* at 431-32 (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960)). The use of Rochin v. California, 342 U.S. 165 (1952), as the touchstone for due process violations has caused confusion in determining the boundaries of the defense. *See infra* note 59 and accompanying text. In *Rochin*, the police illegally entered the defendant's house and, when he swallowed two capsules lying on his nightstand, forcibly attempted to remove them from his mouth. Unable to remove the capsules, the police handcuffed him, took him to the hospital and, without consent, forcibly pumped his stomach to examine the contents for contraband. The vomited material was the evidence used to secure his conviction. *Rochin*, 342 U.S. at 166.

34. *Russell*, 411 U.S. at 432.

35. *Id.* at 435.

to the authorities to combat the crime and the government's level of involvement in that crime. Three years later, the focus of analysis shifted.

Relying on the dictum in *Russell*, the defendant in *Hampton v. United States*[36] claimed a violation of due process principles of fundamental fairness through governmental involvement in a crime instigated and directed by the government. He argued that his conviction for narcotics sales should be overturned because the government both supplied him with the drug and then purchased it from him.[37]

The Court split into factions when the plurality[38] attempted to establish a *per se* rule that the remedy for a predisposed defendant "lies *solely* in the defense of entrapment"[39] and that due process is violated "only when the Government activity in question violates some protected right of the *defendant*."[40] The plurality thus determined that predisposition is always the crucial issue whether the defense rests on entrapment or due process grounds: a predisposed defendant can have no claim against the government for its practices short of violence against the person, in the manner of *Rochin*.

Justice Powell rejected the plurality's *per se* rule because he did not find that the subjective theory of entrapment had encroached upon due process principles to the point of making predisposition the sole, determinative issue.[41] Although emphasizing that cases in which "proof of predisposition is not dispositive will be rare,"[42] he did not foreclose reliance on either due process or the Court's supervisory powers to warrant dismissal of the prosecution.[43]

Justice Powell further recognized that the due process defense as thus far developed had only dealt with contraband cases and that the Court had not considered criteria for impermissible governmental conduct outside that particular realm.[44] And even within the realm of contraband offenses, he noted that the plurality's focus on predisposition and concomitant *per se* rule left many unanswered questions. For exam-

36. 425 U.S. 484 (1976).

37. *Hampton*, 425 U.S. at 488. The dissent characterized the case as one in which "[t]he Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary." *Id.* at 498 (Brennan, J., dissenting).

38. Justice Rehnquist delivered the plurality opinion, joined by Chief Justice Burger and Justice White. Justice Powell concurred in the judgment, joined by Justice Blackmun. Justices Brennan, Stewart, and Marshall dissented. Justice Stevens did not participate.

39. *Hampton*, 425 U.S. at 490 (emphasis added). This means, of course, that a predisposed defendant has no defense because a finding of predisposition precludes the entrapment defense.

40. *Id.* (emphasis by the Court). The basis for Justice Rehnquist's unnecessarily crabbed interpretation of the due process clause apparently lies in his distaste for the remedy engendered by that defense: "If the police engage 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 laws." *Id.*

41. *Id.* at 492-93 & n.2 (Powell, J., concurring).

42. *Id.* at 495 n.7.

43. *Id.* at 494 nn. 5 & 6, 495.

44. *Id.* at 493.

ple, "varying degrees of criminal involvement" engender varying types of investigative procedures, "and under the flat rule enunciated . . . by the plurality the differences between the circumstances would be irrelevant despite the most outrageous conduct conceivable by the Government agents relative to the circumstances."[45]

In *Hampton*, five justices indicated that some investigative practices may warrant dismissal on either supervisory power or constitutional grounds. At present, at least five members of the Court[46] may be willing to assess due process claims in light of all circumstances involved.

B. *Assessment of the Supreme Court's Holdings*

Sorrells, *Sherman*, *Russell*, and *Hampton* make up the Supreme Court's effort to articulate standards for the entrapment and due process defenses. Although the entrapment defense clearly is based upon the subjective theory of the defendant's predisposition, the basis for the due process defense remains blurred. The *Hampton* plurality made a strong attempt to separate the defense from the objective theory of entrapment by its retreat from the *Russell* dictum and by use of the "independent right" language in its *Hampton* opinion. Moreoever, because in both *Russell* and *Hampton* the defendants were predisposed, the Court never examined governmental conduct absent predisposition. Thus, the following issues were never evaluated by the Court: (1) what factors are to be used to determine governmental overreaching or overinvolvement in crime; (2) what weight is to be given any factor; and (3) what level must these factors attain before a deprivation of due process occurs sufficient to dismiss the prosecution. One may infer from the Court's subsequent analyses of *Sorrells* and *Sherman* in the due process context that while the government may not instigate the crime, the mere affording of an opportunity is not impermissible government conduct.[47] The line between instigation and affording an opportunity is tenuous at best, and the Court has made no effort to define it.[48]

45. *Id.* at 494 n.5. He offered as an example the difference between a "high-school youth whose 'pushing' is limited to a few . . . classmates" and the "hardcore professional, in the 'business' on a large scale." *Id.*

46. In *Hampton*, the dissenters charged that law enforcement interests were not promoted when the government supplied the defendant with contraband and then provided him with a buyer: "plainly [such conduct] is not designed to discover ongoing drug traffic." *Hampton*, 425 U.S. at 498 (Brennan,J., dissenting). One of the dissenters, Justice Stewart, has since been replaced by Justice O'Connor. As one commentator points out, the views of neither Justice O'Connor nor Justice Stevens (who did not participate in *Hampton*) are known regarding the due process defense. Mascolo, *Due Process, Fundamental Fairness, and Conduct That Shocks the Conscience: The Right Not to be Enticed or Induced to Crime by Government and its Agents*, 7 W. NEW ENG. L. REV. 1, 42 (1984).

47. *See Hampton*, 425 U.S. at 489. Although noting the differences between the defendant's and the government's testimony as to who initiated the scheme, the *Hampton* Court never addressed the issue of instigation as it applied to the due process defense.

48. *Compare Russell*, 411 U.S. at 436 (entrapment) (the defendant "was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the Government agent had left the scene") *with Hampton*, 425 U.S. at 489-90 (due process) (where defendant was drawn into scheme by the government, supplied with the contraband and the buyer, the plurality

C. *The Due Process Defense in the Federal Courts of Appeals*

1. The *Twigg* Decision

United States v. Twigg[49] represents the only successful due process defense in the federal courts.[50] The case involved a drug manufacturing operation set up by a government informant. Defendant Neville was in charge of raising funds and the informant was in charge of manufacturing. Defendant Twigg was brought into the scheme by Neville. The planning stages took approximately six months and the drug manufacturing ring operated for only one week, under the guidance and expertise of the informant. The defendants were arrested at the end of their week's labor.[51]

The Third Circuit Court of Appeals found the level of governmental involvement sufficient to bar prosecution as a violation of due process.[52] The court distinguished *Hampton* from *Twigg* by finding that drug sales (as in *Hampton*) might "require more extreme methods of investigation"[53] than infiltration of a drug manufacturing ring. More important, however, the court found that in *Twigg* the entire scheme was "conceived and contrived by the government agents."[54] The court determined that the rule left by *Hampton* is that predisposition is not determinative and that fundamental fairness precludes conviction when police conduct is "outrageous."[55] Although noting that defining outrageous conduct is difficult at best, the *Twigg* court concluded that when the government designs the scheme, provides the expertise, and the defendants do not encourage the scheme but are merely receptive to it, due process demands dismissal.[56]

2. Federal Court Decisions Since *Twigg*

Since the 1978 *Twigg* decision, the due process defense has not been successful in the federal appellate courts, due, in part, to the questions surrounding the nature of the defense itself. That is, does the de-

stated that "petitioner's case is different from Russell's but the difference is one of degree, not of kind. . . . [I]n each case the Government agents were acting in concert with the defendant . . . .").

49. 588 F.2d 373 (3d Cir. 1978).

50. Greene v. United States, 454 F.2d 783 (9th Cir. 1971) is sometimes cited as a successful due process defense case, but the *Greene* court did not analyze it as such. *Greene* was cited by the defendant in *Russell* as an example of extreme governmental overinvolvement. *See Russell*, 411 U.S. at 428. It is apparent from the *Greene* opinion that the defendants were small-time operators who were goaded into a large-scale operation by the government, which also created the only market for the contraband. *Greene*, 454 F.2d at 784-86.

51. *Twigg*, 588 F.2d at 375-76. For a thorough analysis of *Twigg*, see Comment, *Due Process Defense When Government Agents Instigate and Abet Crime*, 67 GEO. L.J. 1455 (1979).

52. *Twigg*, 588 F.2d at 377.

53. *Id.* at 378.

54. *Id.*

55. *Id.* at 379.

56. *Id.* at 380-81. In a sharp dissent, Judge Adams criticized the majority for resurrecting the objective theory of entrapment "under a new name." *Id.* at 383 (Adams, J., dissenting).

fense apply only when enforcement practices have encroached upon some protected, "independent" right of the defendant and thus violated due process?[57] Or is it a limitation on government investigations, grounded in due process principles of fundamental fairness?[58] Because of the dictum in *Russell* and the lack of a majority view in *Hampton*, the answer to these questions is by no means clear. The federal courts have therefore fashioned various tests to examine claims of due process violations.[59]

Although both the Fifth and Seventh Circuit Courts of Appeals still consider *Twigg* an example of outrageous conduct,[60] the continued efficacy of that case may be in question.[61] Still, some courts are expressing concern about overzealous and questionable tactics used by various governmental agencies,[62] although the case has not yet arisen which is sufficient to shock a court's conscience.

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57. *See supra* note 31 and accompanying text.

58. One commentator, posing the question similarly, concludes that "the protection of due process, with its comprehensive guarantee of fairness in the relations between government and citizen, is not dependent upon any violation, by police misconduct, of a separate right of the defendant." Mascolo, *supra* note 46, at 36.

Many commentators have urged the Court to establish a constitutional basis for controlling undercover investigations. *See* Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203 (1975) (calling for uniform standards in undercover work based upon protections inherent in the fourth amendment); Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 611 (1982) (proposing a two-tiered due process analysis focusing on ends and means which requires the government to justify procedures used); Note, *supra* note 21, at 122 ("[T]he defense is clearly and most logically required as a matter of substantive due process: the criminalization of acts which would not have occurred absent the government's solicitation and aid can serve no legitimate purpose."). *But see* Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 274 (1976) ("Governmental bodies with the power to investigate [enforcement practices], subpoena witnesses, publicize abuses, recommend discipline, and institute prosecution are likely to be more effective than attempts at control through sporadic acquittal of criminal defendants.").

59. *See, e.g.*, United States v. Kelly, 707 F.2d 1460, 1468 n.49 (D.C. Cir. 1983) (The D.C. Circuit, citing the dictum in *Russell* concerning outrageous governmental conduct, *see supra* note 33 and accompanying text, stated "[t]he Second Circuit has read this citation to indicate that due process will bar a prosecution only if the government's conduct directly invades some personal right of the defendant."). *Compare* Archer v. Commissioner of Correction (*Archer II*), 646 F.2d 44, 47 (2d Cir.) ("[I]mpermissible police conduct [must be] inflicted directly upon the defendant."), *cert. denied*, 454 U.S. 851 (1981) *with* United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1981) (relevant to due process inquiry are government instigation, government control of the criminal activity, and the "causal relationship between the challenged . . . conduct and the commission of the [defendant's] acts . . . ."). For a thorough examination of cases prior to 1980, see generally Abramson & Lindeman, *supra* note 12.

60. *See* United States v. Yater, 756 F.2d 1058, 1065, 1066 n.12 (5th Cir. 1985); United States v. Thoma, 726 F.2d 1191, 1199 (7th Cir.), *cert. denied*, 104 S. Ct. 2683 (1984).

61. In United States v. Jannotti, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S.1106 (1982), the court stated that three of the judges wanted to overrule *Twigg*: "[U]nless further guidance is given [in the area of the due process defense], district courts, in a faithful attempt to apply *Twigg* , . . . will continue to reach results that cannot be reconciled with the teaching of the Supreme Court in *Hampton*." *Id.* at 610 n.17. *But see supra* text accompanying note 60.

62. *See* United States v. Beverly, 723 F.2d 11, 13 (3d Cir. 1983); United States v. Garrett, 716 F.2d 257, 275 n.10 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1910 (1984).

II. *UNITED STATES v. GAMBLE*

A. *Facts*

In 1980, United States postal inspectors in Kansas City, Missouri, concocted an intricate scheme to discover attorneys and physicians involved in insurance fraud.[63] The inspectors obtained driver's licenses using fictitious names, registered nonexistent vehicles under those names, and then purchased automobile liability insurance for the vehicles.[64]

The postal inspectors, working with the Kansas City Police Department, had an officer prepare false accident reports, indicating that each accident was the cited inspector's fault. The police issued traffic citations to the inspectors and they subsequently appeared in Kansas City Municipal Court and pleaded guilty before unsuspecting prosecutors and judges.[65]

Two inspectors, posing as husband and wife, visited Dr. Gamble's office and told him they had been passengers in a one-car accident on May 6, 1980 and, although uninjured, wanted to obtain some money from their insurance company.[66] They visited Dr. Gamble's office on seven occasions. During each visit the defendant checked the inspectors' weights, blood pressures, and temperatures and charged them ten to twelve dollars each.[67] On the fourth visit, the defendant's assistant prepared insurance forms and, at the direction of one of the inspectors, indicated on the form that the inspector had been unable to work for approximately two months. On their final visit, the inspectors brought with them a draft from the insurance company for $180, the medical expense claimed. Dr. Gamble calculated the amount owed him which the inspectors paid by money order, keeping the draft.[68]

Two months later, another false accident report was filed and a second "husband and wife" undercover team appeared at Dr. Gamble's office claiming to have been involved in a rear-end collision. The inspectors told Dr. Gamble they were uninjured but that the driver of the car that hit them was insured and they wanted to obtain some money

63. The scheme is described in detail in United States v. Warren, 747 F.2d 1339 (10th Cir. 1984), a case decided four months after United States v. Gamble, 737 F.2d 853 (10th Cir. 1984). Both defendants, Warren and Gamble, were physicians in Kansas City and both were targeted (apparently randomly) by United States postal inspectors as part of the undercover operation "MAIL-Fraud") (Medical And Insurance Liability Fraud). *Warren*, 747 F.2d at 1340. It does not appear from either the *Warren* or *Gamble* decision that the postal authorities suspected wholesale insurance fraud among doctors and lawyers, but instead were on what may be termed a fishing expedition.

64. *Warren*, 747 F.2d at 1340; *Gamble*, 737 F.2d at 854.

65. *Gamble*, 737 F.2d at 854.

66. *Id.* One of the inspectors told Dr. Gamble he had broken his glasses in the accident but otherwise had suffered no injuries. *Id.*

67. *Id.*

68. Dr. Gamble calculated incorrectly. The draft was for $180. The inspectors had paid $104 and the defendant calculated they owed him $66. The correct amount owed was $76. *Id.* Apparently, the medical expenses and the notation on the form regarding leave from work were to serve as the basis for some later action against either the "driver" of the vehicle or a claim against the insurance company.

through his insurance.[69] The inspectors visited the defendant on five occasions and were given routine medical examinations on each visit. After several weeks, the inspectors told Dr. Gamble they had contacted the insurance company. At a later visit the inspectors gave the defendant an envelope addressed to the insurance company. Dr. Gamble wrote out a bill, placed it in the envelope and asked the inspectors to handle it.[70] On December 11, 1980, the inspectors gave the defendant the $160 draft they had received from the insurance company. They were reimbursed the $50 they had paid on the prior five visits and then signed the draft over to Dr. Gamble.[71]

Dr. Gamble was subsequently arrested and convicted on four counts of mail fraud.[72]

B. *The Opinion*

A three-judge panel[73] for the Tenth Circuit Court of Appeals affirmed Dr. Gamble's conviction, rejecting the defendant's claims that (1) the requirements of the mail fraud statute[74] were not satisfied, and (2) the Government's conduct was so outrageous as to bar his conviction as a violation of due process of law.

1. Mail Fraud

Dr. Gamble's appeal was predicated on the fact that he neither devised the scheme to defraud nor mailed any documents. He further contended that the use of the mails was not crucial to the scheme.[75] Finally, he argued that section 1341 was not applicable to him because the government planned the scheme and his was a peripheral role.[76]

The court rejected all of the defendant's claims. First, the court stated that only two elements are required to prove mail fraud: "(1) a scheme to defraud, and (2) the mailing or causing the mailing of a letter

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69. *Id.* at 855. Dr. Gamble told his "patients:"

> "You'll just have to play it up. You can't go out there tell that man ah, I wasn't hurt. . . ." "You gotta have a back injury and you gotta have a neck injury or something. . . . "We have to write it up to that effect and you'll make some money out of the deal."

Id.

70. *Id.*

71. *Id.* As with the other inspectors' visits, Dr. Gamble's profit, if any, was minimal.

72. The federal mail fraud statute provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office . . . or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1982).

73. Judge Logan wrote the opinion and was joined by Judges Holloway and Breitenstein.

74. 18 U.S.C. § 1341 (1982). *See supra* note 72.

75. *Gamble*, 737 F.2d at 855. Dr. Gamble "admitted in tape recorded meetings with the inspectors that he knew the mails would be used to execute the scheme." *Id.* at 856.

76. *Id.*

or other item for the purpose of executing the scheme."[77] As long as the defendant had the requisite intent to defraud,[78] the scheme need not be devised by the defendant.[79] Nor is there a requirement for agreement among the participants similar to that required in the act of conspiracy.[80]

2. The Due Process Claim

The court began its analysis of the defendant's due process claim by citing the dictum in *Russell* and the opinions in *Hampton*. The court also discussed *Twigg* and *Greene v. United States*,[81] noting that in both cases the government instigated, conceived and directed the schemes; provided essential services and supplies; and, in the case of *Greene*, was the sole purchaser of the contraband.[82]

The court next asserted that the due process defense, like the defense of entrapment, is based upon the principle that " 'courts must be closed to the trial of a crime instigated by the government's own agents.' "[83] Crucial to this determination is the extent to which the government's actions directly enticed the defendant to commit the crimes for which he stands accused: "Thus, the more immediate the impact of the government's conduct upon the particular defendant, the more vigorously would be applied *Russell's* test for constitutional impropriety."[84] The government's conduct, moreover, must be assessed in light of the defendant's predisposition. The determination of whether governmental conduct exceeds permissible levels depends upon "the type of opportunity to become involved with crime that this conduct provides to the unwitting defendant."[85] The court stated that Dr. Gamble had no criminal record and the government had no apparent suspicion that he was predisposed to criminal acts. However, the court stated that such

77. *Id.* at 855 (citing Pereira v. United States, 347 U.S. 1, 8-9 (1954)).

78. *Gamble*, 737 F.2d at 856. *See* United States v. Rasheed, 663 F.2d 843, 847 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982).

79. *Gamble*, 737 F.2d at 856. *See* United States v. Toney, 598 F.2d 1349, 1356 (5th Cir. 1979), *cert. denied*, 444 U.S. 1033 (1980).

80. "[M]ail fraud, unlike conspiracy, does not require an agreement. Thus, the fact that only one of the participants . . . had a specific intent to defraud does not bar conviction . . . ." *Gamble*, 737 F.2d at 856. Here, the court concluded that the evidence established that Dr. Gamble had the requisite intent to defraud. The fact that it was the government that engendered and carried out the scheme is not fatal to the issue of the defendant's intent. *Id.*

81. 454 F.2d 783 (9th Cir. 1971). *See supra* note 50.

82. *Gamble*, 737 F.2d at 857.

83. *Id.* (quoting Sorrells v. United States, 287 U.S. 435, 459 (1932) (Roberts, J., concurring)). Why entrapment was not pleaded in *Gamble* is unclear. The court acknowledged the defendant's lack of predisposition and absence of a criminal record. *Gamble*, 737 F.2d at 859.

84. *Id.* at 858 (quoting United States v. Spivey, 508 F.2d 146, 150 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975)). In *Spivey* the court found that the informant's conduct was not outrageous because the defendant was predisposed and engaged in illegal conduct without the government's assistance: "We cannot accept defendant's argument [that his conduct] may be rationalized only by predicating a pervasive and creative participation by the government in the criminal activity." *Spivey*, 508 F.2d at 151.

85. *Gamble*, 737 F.2d at 858. *See supra* note 84 and accompanying text.

reasonable suspicion is not a prerequisite to undercover activities.[86]

Although the government agents obtained false documents, lied to prosecutors and judges, submitted false claims to the insurance companies, and lied to the insurance agents,[87] this web of deceit did not induce the defendant to commit the fraud, the court asserted. Following the reasoning of the Second Circuit Court of Appeals in *Archer II*,[88] the court determined that because none of these outrageous acts of the government was perpetrated against Dr. Gamble, he could not claim a due process violation in this area of the government's conduct.[89]

The area of governmental conduct that did directly affect the defendant, although deceitful, was not sufficient to violate due process, the court stated. Dr. Gamble is a black doctor who practiced in the Kansas City ghetto area. The agents presented themselves as poor and needing financial help. The court conceded that the circumstances were "appealing" to the doctor who "might [have] appear[ed] callous if he did not cooperate."[90] Although finding that the government created and controlled the crime in which the defendant joined, the court concluded that insurance fraud represents a legitimate target for police undercover activity.[91]

Finally, the court discussed the government's conduct and Dr. Gamble's subsequent conviction in conjunction with its supervisory power. The court concluded that it was foreclosed from exercising its power because "we may not fashion a 'sub-constitutional' rule to permit dismissal of this case because of the government agents' conduct."[92]

III. ANALYSIS

United States v. Gamble presented the Tenth Circuit with a clear case of government-manufactured crime entered into for the purpose of convicting offenders. The government violated at least five state statutes and lied to prosecutors, judges and insurance companies (which were the purported beneficiaries of the scheme) in order to secure convictions of randomly targeted individuals.[93] The government conceived,

86. *Id.* at 859-60.

87. *Id.* at 858-59. The court was clearly outraged at this conduct: "The government agents in the case before us displayed shocking disregard for the legal system." *Id.* at 859.

88. 646 F.2d 44 (2d Cir.), *cert. denied*, 454 U.S. 851 (1981).

89. *Gamble*, 737 F.2d at 859.

90. *Id.*

91. *Id.* at 860.

92. *Id.*, citing United States v. Payner, 447 U.S. 727 (1980) for the proposition that even when an investigation is "tainted with gross illegalities," a court may not dismiss a prosecution of its own accord when the defendant does not have standing to object to the agents' conduct. *See supra* text accompanying notes 87-89.

93. In the Appellant's Brief for *Warren*, 747 F.2d 1339 (10th Cir. 1984), which concerned the same scheme as that in *Gamble*, the defendant listed five Missouri state statutes violated in the undercover operation: Mo. Ann. Stat. §§ 302.220 (prohibited uses of licenses); 570.090 (forgery; class C felony); 575.060 (false declarations; class B misdemeanor); 575.080 (false reports; class B misdemeanor); 575.00 (tampering with physical evidence; class A misdemeanor); 575.110 (tampering with public record; class A misdemeanor) (Vernon 1979). Appellant's Brief at 7-13.

created and directed the operation from start to finish. *Gamble* is thus indistinguishable from *Twigg*.[94] And, like *Twigg*, the defendant in *Gamble* was merely an auxiliary, the last element needed to complete the contrived crime. Yet, unlike *Twigg*, the due process defense in *Gamble* was unsuccessful.

The court cited extensively from *Twigg* and *Greene*, apparently with approval, noting that those cases stand for the proposition that the government may not instigate, manufacture, nor become enmeshed in crime from beginning to end for the purpose of securing convictions of individuals who were " 'minding [their] own affairs.' "[95] The court also noted that the due process defense survives because of the *Hampton* concurring and dissenting opinions which deemed fundamental fairness would prevent conviction of a predisposed defendant (and, *a fortiori*, a nonpredisposed defendant) under certain circumstances.[96]

Despite these references, the Tenth Circuit failed to draw the obvious parallel.[97] It reiterated its holding in *United States v. Spivey*[98] which formulated the test used by the Tenth Circuit to determine due process violations:

> [T]o be relevant at all, the government's conduct must be postured as connected in some way to the commission of the acts for which the defendant stands convicted. In cases decided since *Russell* . . . this connection has been implicitly acknowledged by reference to the extent to which the government instigated, participated in, or was involved or enmeshed in, the criminal activity itself. Thus, the more immediate the impact of the government's conduct upon the particular defendant, the more vigorously would be applied *Russell's* test for constitutional impropriety.[99]

Spivey's defense failed because of his own independent illegal conduct and the fact that in that case the government neither initiated contact

94. In *Twigg*, the court stated that "[i]t is unclear whether the parties had the means or the money to obtain the chemical [which the government supplied] on their own." *Twigg*, 588 F.2d at 380. The court also determined that the defendants lacked the expertise to manufacture the drug. *Id.* at 381. In *Gamble*, no such "expertise" was required due to the nature of the crime but, like *Twigg*, "[t]he assistance . . . provided [by the defendant] was minimal and then at the specific direction of [the government]." *Id.*

95. *Gamble*, 737 F.2d at 858 (quoting United States v. Twigg, 588 F.2d 373, 381 (3d Cir. 1978)).

96. *Gamble*, 737 F.2d at 856-57 (citing *Hampton*, 425 U.S. at 492 (Powell, J., concurring), 497 (Brennan, J., dissenting)). *See supra* notes 41-46 and accompanying text.

97. In United States v. Warren, 747 F.2d 1339 (10th Cir. 1984), the court stated that *Greene* and *Twigg* "involved facts readily distinguishable from the present case." *Warren*, 747 F.2d at 1343. The court did not make this claim in *Gamble*, and it is difficult to see how *Gamble* and *Warren* differ from *Twigg*. The difference between *Gamble* and *Warren* is that in *Warren* the defendant was an active, profiting participant in the scheme. *See Warren*, 747 F.2d at 1341 n.3 (four agents, over a period of months, visited defendant's office 34 times; the insurance company was billed for 100 visits at a total charge (calculated by the defendant) of $3,625).

98. 508 F.2d 146 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975). *See supra* note 84.

99. *Gamble*, 737 F.2d at 858 (quoting *Spivey*, 508 F.2d at 149-50). The *Russell* test is that expressed by Justice Rehnquist which referred to *Rochin*. *See supra* text accompanying note 33.

nor instigated the drug sales.[100] In *Gamble*, the government both initiated contact and instigated the scheme. By the court's own characterization, "[t]he government . . . enmeshed in criminal schemes fabricated entirely by government agents a black doctor who had no criminal record and with respect to whom the agents had no apparent hint of a predisposition to criminal activity."[101]

The court avoided the consequences of its own determination that the due process defense is properly invoked when " 'the government's conduct [is] . . . connected in some way to the commission of the acts for which the defendant stands convicted' "[102] by dividing its analysis into discrete parts: the crime of mail fraud, the government's unlawful activities prior to inducement, and the government's actions as they directly affected Dr. Gamble. These elements should not be separated because to do so prevents a complete examination of the government's creation and instigation of the scheme and its level of involvement therein. This examination is the very heart of the due process defense. Nor can the causal connection between the government's inducement and the defendant's commission of the crime be fairly examined if these factors are viewed in isolation. The *Gamble* court did not view the government's conduct as a whole and did not consider Justice Powell's comments in *Hampton* that noncontraband offenses may engender different criteria for due process analysis, with the focus on the tactics used in light of the circumstances involved.[103] The *Gamble* court merely concluded that it did not find insurance fraud so "commonplace that it is improper for the government to try *to catch* and convict citizens who engage in it."[104] Drug-related crimes and corruption in public offices involve issues and societal effects which are demonstrably different from those of small-scale insurance fraud. This is not to say that the latter should be condoned. It should not. But when that crime, which by its very nature necessitates random targeting, becomes the subject of an intricate and intrusive undercover operation, such as that in *Gamble*, the issue turns not merely on whether the crime is a proper target for undercover operations but also on whether greater societal interests are at stake.

Because the *Gamble* court apparently determined that the defendant was not predisposed and that the government instigated the crime,[105]

100. *Spivey*, 508 F.2d at 150, 151. *See supra* note 84; *see also* United States v. Szycher, 585 F.2d 443, 446-49 (10th Cir. 1978) (defendant attended party given by informant and DEA agents, invited them to his home for some cocaine, and agents subsequently expressed their desire to purchase the drug in quantity; court adopted trial court's determination that this constituted mere opportunity for commission of crime *because of the defendant's predisposition*).

101. *Gamble*, 737 F.2d at 859. In both *Russell* and *Hampton* the defendants were predisposed. *See supra* section I(B).

102. *Gamble*, 737 F.2d at 858 (quoting *Spivey*, 508 F.2d at 149).

103. *Hampton*, 425 U.S. at 493 (Powell, J., concurring). *See also supra* text accompanying notes 44-45.

104. *Gamble*, 737 F.2d at 860 (emphasis added). "[T]o catch" implies a defendant already engaged in the activity. Given the facts of *Gamble*, the proper phrasing would be "to induce."

105. *See supra* text accompanying notes 86-87, 91.

the court should have examined the following *interdependent* factors for its due process analysis: (1) whether the government manufactured crime for the sole purpose of obtaining a conviction;[106] (2) the nature of the crime involved;[107] and (3) whether the defendant acted "in concert" with the government in committing the crime for which he was convicted.[108]

By failing to evaluate Dr. Gamble's due process claim in this manner, the Tenth Circuit ignores the anomoly of convicting a defendant who had far less participation in a crime than did the government.[109] It also ignores the implications of police undercover work which focuses on anticipating rather than investigating crime; that is, undercover work which amounts to random integrity testing.[110] If the issue is outrageous police conduct, then that conduct must be assessed in light of all circumstances involved — including the detection practices employed to induce the defendant's commission of the crime.[111] The *Gamble* court only found "outrageous" the government's "shocking disregard for the

106. *See supra* text accompanying note 83; *see also supra* text accompanying notes 54-56 for the *Twigg* court's assessment of government-created crimes.

107. *See supra* text accompanying notes 44-45. Relevant to this inquiry is the difficulty of detection, *see Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring) and United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1980), society's need to deter and detect such crime, and a balancing of the interests involved. *See supra* text accompanying notes 103-04; *see also* United States v. Archer (*Archer I*) 486 F.2d 670, 677 (2d Cir. 1973) (noting the danger in assigning "too little [weight] to the rights of citizens to be free from government-induced criminality") (dictum); Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 613 (1982) (arguing that random targeting amounts to "intrusive and deceptive undercover weaponry to test the integrity or criminal propensities of citizens at large").

108. *See supra* note 48. Related to this analysis, and a factor not addressed by the *Gamble* court, is an evaluation of the elements of the crime itself, *see supra* text accompanying note 77. In *Gamble*, the government provided both of the elements required. Although this fact does not prevent conviction, *see supra* notes 75-80 and accompanying text, the court's separation of this issue from the due process claim is myopic. The court states that "[t]he government's actions in formulating the scheme and drawing defendant into it are not to be condemned as failing to satisfy the 'scheme' element." *Gamble*, 737 F.2d at 856. Yet such conduct must be evaluated in view of the "in concert" requirement of *Hampton*. *Hampton*, 425 U.S. at 489-90. If "in concert" means anything, it must require that the defendant be "an *active* participant in an illegal . . . enterprise." *Russell*, 411 U.S. at 436 (emphasis added). *See* United States v. Tobias, 662 F.2d 381, 387 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982) (no due process violation when defendant initiated contact with DEA agent and was thus found to be "a *predisposed active participant* [in the scheme], motivated solely by a desire to make money") (emphasis by the court); *cf. supra* note 97.

109. *See supra* notes 93 and 107 and accompanying text.

110. *See generally* Marx, *Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work*, 28 CRIME & DELINQ. 165, 175 (1982) (noting "[t]he government's unregulated power to carry out integrity tests at will . . ."); Comment, *supra* note 51, at 1471 ("[It] is difficult to square arbitrary and unrestrained solicitation of crime with the requirement of fundamental fairness inherent in due process.").

111. *See supra* notes 44-45 and accompanying text; Marx, *supra* note 110, at 167 ("At a very general level, there appears [in law enforcement practices] to be a decline in the acceptance of coercive means to control people, with a concomitant rise in deceptive means."); Rotenberg, *The Police Detection Practice of Encouragement*: Lewis v. United States *and Beyond*, 4 HOUS. L. REV. 609, 611 (1967) ("To the extent that the propriety of a practice is raised by a defendant on appeal . . . the inquiry is limited to the specific detection practice in question. . . . Without 'total' thinking about detection, however, society fails to identify and articulate detection 'values' for its detection system.").

legal system."[112] But the government's quiet invasion into the homes and offices of its citizens to test their propensity for crime manifests a more insidious, although less dramatic, encroachment on personal liberties than did *Rochin*.[113] These tactics are outrageous.

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112. *Gamble*, 737 F.2d at 859.

113. *See also* Mascolo, *supra* note 46, at 29 ("The degree of [police] misconduct . . . which will warrant the barring of prosecution, should not be restricted to situations involving police brutality that rivals 'the rack and the screw' in its assault upon human dignity.") (quoting Rochin v. California, 342 U.S. 165, 172 (1952)); Comment, *Entrapment, De Lorean and the Undercover Operation: A Constitutional Connection*, 18 J. MAR. L. REV. 365, 397 (1985) (arguing that "the individual's privacy interests, ["the citizen's 'right to be let alone' "], become a necessary consideration in cases of entrapment and outrageous government misconduct") (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

In another context, in Poe v. Ullman, but expressing similar sentiments, Justice Harlan declared:

> The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but also the *choice of means* becomes relevant to any Constitutional judgment on what is done.

367 U.S. 497, 547 (1960) (Harlan, J., dissenting) (emphasis in original).