



1984

The Ethics of BRILAB

Michael Vitiello

University of the Pacific, mvitiello@pacific.edu

Follow this and additional works at: <https://scholarlycommons.pacific.edu/facultyarticles>



Part of the [Law Commons](#)

Recommended Citation

Michael Vitiello, *The Ethics of BRILAB*, 27 How. L. J. 905 (1984).

Available at: <https://scholarlycommons.pacific.edu/facultyarticles/601>

This Article is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Scholarly Articles by an authorized administrator of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

The Ethics of Brilab

MICHAEL VITELLO*

INTRODUCTION

On April 11, 1983, the United States Court of Appeals for the Fifth Circuit issued a brief opinion in *United States v. Roemer* affirming the convictions of Carlos Marcello and Charles E. Roemer, II.¹ That decision effectively ended Brilab.² Before Brilab fades from memory, it invites critical attention; like Abscam³ the Brilab operation was long and expensive, part of a significant change in emphasis within the Federal Bureau of Investigation transforming from cops and robbers to sophisticated undercover sting operations.⁴

A consequence of the FBI's new emphasis on proactive investigations is a stepped up need to rely on con men who can work as undercover agents for the government.⁵ But problems exist when the government enters a partnership with a con man. Brilab illustrates some of those problems: One outstanding problem that the Supreme Court has found no fourth amendment protection applicable to face-

* Associate Professor of Law, Loyola University School of Law; B.A. Swarthmore College 1969; J.D. University of Pennsylvania 1974. The author wishes to thank his research assistants especially David Shea, for their considerable efforts on this project. Support for this article was provided by the Alfred J. Bonomo Sr. Family Scholarship Fund. Copyright reserved by the author.

1. *United States v. Roemer*, 703 F.2d 805 (5th Cir. 1983).

2. Defendants' petition for hearing en banc has been denied. 707 F.2d 515 (5th Cir. 1983). The term Brilab derived from the original purpose of the investigation, to uncover bribery of labor leaders in exchange for insurance contracts. *United States v. Marcello*, 508 F. Supp. 586, 589 (E.D. La. 1981).

3. The term Abscam was derived from both "Abdul Enterprises Ltd.," and the word "scam." *United States v. Myers*, 635 F.2d 932, 934 n.1 (2d Cir. 1980), cert. denied, 449 U.S. 956 (1980).

4. MARX, "WHO REALLY GETS STUNG? SOME ISSUES RAISED BY THE NEW POLICE UNDERCOVER WORK," reprinted in CAPLAN, *ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* 65-66 (1983).

5. Proactive strategies, which are especially effective for detecting invisible crimes (ones unlikely to be reported) have been described as "more intrusive than the traditional methods; for example, covert surveillance, heavier reliance on informants, the use of undercover operations to instigate offenses. . . ." Moore, "Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement," reprinted in Caplan at 20.

to-face encounters between an unsuspecting individual and an undercover agent.⁶ As a result, the government can target an individual for investigation based on no preliminary showing of culpability; it can reward friends and associates to intrude into the individual's private life, to play upon trust to discover evidence of crime, or to offer opportunity to commit crime. Brilab was possible because the government's con man, Joseph Hauser, pressured an old friend, I. Irving Davidson, into helping him secure insurance business in Louisiana. When the government targeted Davidson for Hauser's repeated entreaties, Davidson had no privacy rights recognized by the Supreme Court.

Brilab illustrates a second problem particularly endemic to proactive investigations. Hauser was, in the words of the trial court in *United States v. Marcello* "a convicted felon and a career con man."⁷ Faced with serious legal difficulties, Hauser entered a partnership with the government. However, a con man like Hauser does not come cheap; he was able to escape substantial penalties and, in turn, reap substantial benefits. Utilitarian ethics may justify cooperation between the government and law breakers if on balance the partnership rids society of more evil than it upholds. There is serious question whether that balance tipped in the government's favor in Brilab.

The two problems outlined above are related and a possible solution could be that the government be required to make a preliminary showing of its reasons to believe that a targeted individual is engaged in a particular type of crime and let a court determine whether those articulated reasons justify an initial intrusion into the suspect's privacy. Further, if the government is forced to explain the expected benefits and costs prior to sending its agent undercover the court could balance whether relieving the con man of criminal liability is justified in light of the seriousness of the crimes allegedly being committed and the probability that the crimes are in fact being committed.

As discussed below,⁸ current judicial doctrines are inadequate to protect against the abuses that have surfaced in proactive investi-

6. See *infra* notes 48-81.

7. *United States v. Marcello*, 537 F. Supp. 1364, 1367 (E.D. La. 1982).

8. See *infra* notes 82-122.

gations. Therefore, it falls to Congress to provide guidelines to limit unbridled government investigations. This article concludes with a discussion of possible congressional action.

The Facts: An Overview

As indicated by the trial court, Brilab was born when "a convicted felon and career con man named Joseph Hauser" pleaded guilty to federal charges arising out of a scheme whereby Hauser swindled substantial sums from the Teamsters' health, welfare and pension plans.⁹ Hauser's cooperation was exchanged for assistance from the Justice Department in receiving a lenient sentence, substantial compensation, reimbursement for expenses during Brilab and participation in the federal witness program at the end of any incarceration.¹⁰

Initially unsuccessful in its efforts to involve labor leaders in Los

9. *Marcello*, 537 F. Supp. at 1367.

10. *Id.* The following is a copy of the agreement between Hauser and the government:

Mr. Hauser has agreed to enter a plea of guilty to: Count I of the Indictment (in violation of 18 U.S.C. §§ 1961, 1962(d) and 1963); Count II of the Indictment (in violation of 18 U.S.C. §§ 1961, 1962(c), 1963 and 2); and Count IV of the Indictment (in violation of 18 U.S.C. §§ 2315 and 2) as charged.

In exchange for Mr. Hauser's plea of guilty to Counts I, II and IV of the Indictment, the United States agrees to the following:

1. At the time of sentencing, all remaining counts of the above-captioned indictment will be dismissed.
2. The United States will make known to the Court at the time of sentencing the extent of any cooperation Mr. Hauser may provide with respect to this indictment and other investigations.

It is expressly understood by the defendant that this agreement is not intended by the parties to act as a vehicle whereby Mr. Hauser may withdraw his plea of guilty, as set forth above, should he not be satisfied with the sentence imposed by the District Court of Arizona.

No additional promises or considerations exist concerning Mr. Hauser's plea of guilty.

Letter from Bruce Kelton and Harvey T. Oringher, Special Attorneys, United States, Department of Justice to Henry Rothblatt, Esquire (February 2, 1979) (discussing the agreement with Joseph Hauser).

The government submitted a ten page memorandum in which the United States Attorney recommended that Hauser "be sentenced to a period of two and one-half years in the custody of the Attorney General, said sentence to be served at the same time he serves the sentence he received as a result of his conviction in the Central District of California" Government's Sentencing Memorandum in *United States v. Hauser*, No. CR 78-204-PHK-WPC at 9. The court sentenced Hauser to a two year term on two counts of the indictment, to run concurrently with the prior sentence, and suspended sentence on the final count and placed Hauser on five years of probation on that count. Transcript of Sentencing Proceedings, May 5, 1980, in *United States v. Hauser*, before Judge Copple, United States District Court for the District of Arizona.

Angeles,¹¹ the government launched Louisiana Brilab in February, 1979. Hauser and two FBI agents, Michael Wachs and Larry Montague, set up a bogus company, Fidelity Financial Consultants.¹² Contrary to an agreement with the Prudential Insurance Company to cooperate in the investigation, the three men had cards printed indicating that they represented the insurance giant. "Interestingly," observed the trial court, "the name Prudential Insurance Company was printed on the business cards in boldface type at least twice as large as the lightface printing used for the name Fidelity Financial Consultants."¹³

Through his friendship with Davidson, Hauser was able to contact Carlos Marcello, reputed New Orleans area Mafia chieftain,¹⁴ who in turn arranged a meeting between the three men and various politicians. One of the "big fish" to come within the Brilab net was Charles E. Roemer II, the Louisiana Commissioner of Administration and head of then-State Senator "Sonny" Mouton's gubernatorial campaign.¹⁵ Almost all of the meetings between the three men and the defendants were taped, either with Hauser's consent or pursuant to a judicial order. During Brilab's one year of existence, the FBI agents made payments to several gubernatorial candidates. Not all led to indictments.¹⁶ Two payments totaling \$25,000 made to Roemer were a substantial part of the government's case at trial. Roemer contended that the payments were a campaign contribution

11. Notes of Testimony at 285-88, 323-24 [hereinafter cited as N.T.].

12. *Marcello*, 537 F. Supp. at 1367 (Wachs used the pseudonym of Michael Sachs; Montague, Larry Golden).

13. *Id.* at n.3.

14. See, e.g., *Marcello*, 508 F. Supp. at 590 (in which "Marcello stated that government prosecutors labeled him as the head of organized crime . . ."); *Marcello*, 537 F. Supp. at 1378 (where FBI agents testified Marcello was a head figure in organized crime); see also Amoss and Baquet, "Carlos Marcello," *Dixie* at 15-19 (February 28, 1982 *The Times-Picayune*) (a discussion of Marcello's career including his reputed position as a Mafia chieftan).

15. *Marcello*, 537 F. Supp. at 1368.

16. See, e.g., *id.* at 1372. One such payment that did not lead to an indictment was the subject of the following discussion between gubernatorial candidate Lambert and Hauser:

Lambert: What do you want to contribute to my campaign?

Hauser: I want to give you ten thousand dollars cash right now.

Lambert: And I'm gonna give you, let me tell you what I'm doing so you can just (unintelligible). . . . Wait, right . . . til I go get some tickets.

Hauser: Oh, leave me alone, give them to L.G. Moore, leave me alone.

Lambert: You take the goddamn tickets and then we've done it the right way.

Hauser: Okay.

Lambert: That scares you, but you just have to learn we've got a new policy.

and that he was stringing along people who he thought were con men.¹⁷ The government argued that they were bribes in exchange for Roemer's influence in getting Fidelity the state employees insurance contract.¹⁸ Marcello's criminal involvement stemmed from his efforts in contacting various politicians, arranging for Roemer to receive the bribes, and planning to receive money from Hauser for his efforts.¹⁹ Marcello, Roemer, Davidson, a Washington public relations man and a friend of both Marcello and Hauser²⁰ and Vincent Marinello, a New Orleans lawyer, were indicted by a grand jury on June 17, 1980. On August 14, the grand jury indicted Aubrey Young in a superceding indictment.²¹ The multiple count indictment charged the defendants with:

(1) a conspiracy to obtain insurance contracts by committing criminal acts in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act²² . . . ; (2) a substantive violation of RICO . . . , in that the defendants were allegedly 'associated in fact' as an 'enterprise' to obtain insurance contracts by committing criminal acts;²³ (3) violations of the federal mail fraud statute²⁴ . . . ; (4) violations of the federal wire fraud statute²⁵ . . . ; and (5) interstate travel or transportation in aid of racketeering²⁶

Trial took eighteen weeks. At the end of the government's case, the court directed a verdict of acquittal pursuant to Rule 29(a), Federal Rules Criminal Procedure, on all counts in favor of Young, on one count in favor of Marinello, and on two counts in favor of Roemer. The jury convicted Marcello and Roemer of count one, the conspiracy to violate RICO. It acquitted Marcello of eleven additional charges, and Roemer of three charges. It acquitted Davidson of all charges and Marinello of all remaining charges.²⁷ The court

17. N.T., *supra* note 11, at 8560-62, 8576-80.

18. *Marcello*, 537 F. Supp. at 1368.

19. *Id.*

20. N.T., *supra* note 11, at 4187, 7246-49.

21. *Marcello*, 508 F. Supp. at 589.

22. 18 U.S.C. § 1962(c) (1976).

23. 18 U.S.C. § 1961(4) (1976).

24. 18 U.S.C. § 1341 (1976).

25. 18 U.S.C. § 1343 (1976).

26. 18 U.S.C. § 1952 (1976).

27. *Marcello*, 537 F. Supp. at 1368.

sentenced Roemer and Marcello respectively to three years and seven years imprisonment.²⁸

The Confidence Game: Invasion of Intimacy or Misplaced Confidence?

After Hauser agreed to cooperate with the government the FBI first attempted to reinvolve Hauser with his union contacts in Los Angeles. During the debriefing Hauser mentioned Marcello as a possible subject of investigation. Unsuccessful in its efforts on the West Coast, the government turned its attention to Louisiana.²⁹

Hauser made contact with Marcello through his friend Davidson. Davidson had known Marcello since 1951 when according to Davidson's testimony Marcello was trying to locate a loan for a New Orleans area university.³⁰ Hauser had known Davidson since 1975. At that time Hauser gave the impression of being a "very successful insurance man and finance man."³¹ Davidson first introduced Hauser to former Attorney General Richard Kleindienst who was instrumental in helping Hauser secure a \$24 million insurance contract with the Teamsters.³²

Hauser and Davidson were more than business associates. The two men became personal friends before Hauser went undercover for the government. During the summer of 1976, for example, Davidson and the Hauser family took a trip to Israel.³³ Hauser frequently confided in Davidson concerning business difficulties. Davidson lent Hauser money and provided him with airline tickets. Hauser frequently complained to Davidson about his financial status.³⁴

In March, 1979, after entering into his agreement with the government, Hauser began "begging and pleading" with Davidson to introduce Hauser to important people to try to get him work.³⁵

28. Appellant's Brief at 2, *United States v. Marcello*, 508 F. Supp. 586 (E.D. La. 1981).

29. N.T., *supra* note 11, at 240.

30. *Id.* at 7266.

31. *Id.* at 7267.

32. *Id.* at 7269-72, 7297.

33. *Id.* at 7277-78.

34. *Id.* at 7280-81.

35. *Id.* at 7306-08.

Hauser raised Marcello's name as a source of assistance.³⁶

On March 15, 1979, Hauser and Davidson met in Los Angeles, at which time Hauser explained that he had formed an insurance agency and had made a deal with the Prudential Insurance Company.³⁷ After numerous phone conversations Hauser prevailed upon Davidson to arrange a meeting with Marcello. On April 2, 1979, Hauser and the two FBI agents assigned to "supervise" Hauser,³⁸ met with Marcello at a New Orleans hotel. Marcello made two calls on Hauser's behalf but nothing came of those calls.³⁹ Thereafter, Hauser contacted Marcello persistently, leading Marcello to complain to Davidson and to ask Davidson to have Hauser stop calling him.⁴⁰

Obviously, Hauser repeatedly lied to Davidson during the stepped up communication with his friend. FBI case agent Fleming, the government's first witness at trial, admitted that in order to convince Davidson that Hauser was not cooperating with the government, the agents encouraged Hauser to continue the same kind of conversations with Davidson as he had in the past, including stories of terrible financial woes.⁴¹ That included stories, for example, that Hauser could not pay his son's tuition⁴² and that his phone service was being cut off for nonpayment of his utility bills.⁴³

On June 25, 1979, Davidson met with Hauser and his two "nephews", Wachs and Montague, with whom Hauser had allegedly set up Fidelity Financial Consultants. Davidson was impressed with the agents and with their representation of Prudential.⁴⁴ According to Davidson, he was motivated by a desire to help Hauser and his family when he called Marcello about possible assistance in securing business. Davidson arranged a meeting between himself, Marcello, and the three representatives of Fidelity for June 27, in New Orle-

36. *Id.* at 7309.

37. *Id.* at 4226-28.

38. In private conversation with one of the defense attorneys, he characterized Hauser's role: "Hauser ran Brilab."

39. N.T., *supra* note 11, at 4261, 7311.

40. *Id.* at 7311-12.

41. *Id.* at 317.

42. *Id.* at 319.

43. *Id.* at 320.

44. *Id.* at 7314, 7316.

ans.⁴⁵ The first overt criminal act specified in the indictment took place on June 28, when Davidson and Marcello specifically discussed bribing officials in Orleans and Jefferson Parishes to obtain insurance contracts.⁴⁶ Davidson's later participation was limited to attendance at a September meeting, the first with defendant Roemer and Hauser and the FBI agents.⁴⁷

Invasion of Intimacy: The Court's Response

Louisiana Brilab began through Hauser's solicitation of his friend Davidson. Hauser aggressively pursued Davidson, appealed to friendship, presented himself as pitiable to secure his friend's assistance. Hauser played upon the intimacy of friendship to enmesh Davidson in subsequent criminal acts. But because of the law governing undercover activity, the government was not required to prove whether it had any basis to suspect Davidson of any criminal activity when it targeted him for Hauser's aggressive attack on their intimacy.⁴⁸ The question is why the fourth amendment provides no protection in such a case despite the general notion that the fourth amendment protects us from unreasonable invasions of privacy.

*Gouled v. United States*⁴⁹ is one of the Supreme Court's earliest pronouncements on the conduct of undercover agents. In *Gouled* the Court excluded documents which incriminated the defendant. The government secured them by arranging for one of the defendant's business associates to enter his office by pretending to be there on a social call, and to search the office in defendant's absence.⁵⁰ A unanimous Court held that "whether entrance to the home or office . . . be obtained . . . by stealth or through social acquaintance, or in the guise of a business call, and whether the owner be present or not

45. *Id.* at 7316.

46. *Id.* at 7321.

47. *Id.* at 849.

48. The government may have had ample probable cause or reasonable suspicion to believe that Davidson would enter into a criminal conspiracy with Hauser. But the only basis on the record for targeting Davidson is the bald assertion by Hauser that Davidson would lead him to Marcello: "Through IRVING DAVIDSON, with whom HAUSER is in close contact, he has met with MARCELLO and claims that MARCELLO has agreed to introduce to him and arrange for HAUSER to get all the union business on the Gulf Coast. This will be likewise explored during this undercover operation." FBI Brilab Proposal Memorandum dated March 22, 1979.

49. *Gouled v. United States*, 255 U.S. 298 (1921).

50. *Id.* at 304.

when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of prohibition of the Fourth Amendment."⁵¹ In a case like *Brilab*, one might be tempted to make a close analogy; the undercover agent is able to gain entrance only by virtue of stealth, and because of that, any subsequent evidence seen or heard by the agent is secretly (or falsely) and, therefore, unlawfully seized. But the law governing face-to-face encounters has not followed that analogy; instead, the Court has established a distinct line of precedent.

As long ago as 1952, when notions of trespass law still educated the Court's fourth amendment analysis, the Court in *On Lee v. United States* rejected the contention that an undercover agent, wired to transmit sound, was a trespasser because he obtained admission to defendant's premises fraudulently.⁵² In *On Lee*, Chin Poy entered On Lee's laundry and during their conversation, elicited incriminating statements by On Lee concerning his involvement in the narcotics trade.⁵³ On Lee was willing to incriminate himself so easily because Chin Poy was his old acquaintance and former employee.⁵⁴ The statements were introduced at trial by a narcotics agent who overheard the conversation aided by a receiver that picked up signals from the transmitter carried by Chin Poy.⁵⁵ On Lee argued that the entry obtained by fraud amounted to a trespass, an unlawful search and seizure absent prior judicial authorization.⁵⁶ The Court found the consent freely given; it also characterized as frivolous the contention that the narcotics agent was a trespasser because he overheard the conversation through a device on the premises.⁵⁷

51. *Id.* at 306.

52. *On Lee v. United States*, 343 U.S. 747, 750-51 (1952).

53. *Id.* at 749.

54. *Id.*

55. *Id.*

56. *Id.* at 750-51, 752.

57. *Id.* at 754. Concerning the agent's conduct the Court stated:

[t]he use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here.

In 1963, the Court in *Lopez v. United States* came within one vote of overruling *On Lee*.⁵⁸ In *Lopez*, the defendant attempted to bribe an IRS agent.⁵⁹ The agent reported the attempt to his superiors who instructed him to "pretend to play along with the scheme."⁶⁰ At their subsequent meeting, the agent recorded the defendant's bribe offer by means of a pocket sized tape recorder.⁶¹ Again the government did not secure prior judicial authorization although on these facts the government could have secured it.⁶² The Court rejected *Lopez's* argument that the case involved illegal eavesdropping: "The Government did not use an electronic devise to listen in on conversations it could not otherwise have heard. . . . And the device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself."⁶³

Justice Brennan dissented on the use of the recording device.⁶⁴ But in so doing, he distinguished the simple use of eavesdropping and disguise from artificial listening and recording devices, and conceded that "[disguise does not] seriously intrude upon the right of privacy. The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak."⁶⁵

The Court proved Justice Brennan's unfortunately sweeping statement correct in *Hoffa v. United States*.⁶⁶ *Hoffa* involved perhaps the most intrusive conduct by an undercover operative yet en-

Id.

58. *Lopez v. United States*, 373 U.S. 427, 441 (1963) (in which Chief Justice Warren concurred, with the dissenters that *On Lee* was wrongly decided, however, he believed that *Lopez* was constitutionally distinguishable).

59. *Id.* at 429.

60. *Id.* at 430.

61. *Id.* at 430-31.

62. *See, e.g., Osborn v. United States*, 385 U.S. 323 (1966).

63. *Lopez*, 373 U.S. at 439.

64. *Id.* at 446.

65. *Id.* at 465.

66. *Hoffa v. United States*, 385 U.S. 293 (1966).

dorsed by the Supreme Court. Chief Justice Warren described the government's conduct in his dissent:

Here, Edward Partin, a jailbird languishing in a Louisiana jail under indictments for such state and federal crimes as embezzlement, kidnapping, and manslaughter (and soon to be charged with perjury and assault), contacted federal authorities and told them he was willing to become, and would be useful as, an informer against Hoffa who was then about to be tried in the Test Fleet case. A motive for his doing this is immediately apparent—namely, his strong desire to work his way out of jail and out of his various legal entanglements with the State and Federal Governments. And it is interesting to note that, if this was his motive, he has been uniquely successful in satisfying it. In the four years since he first volunteered to be an informer against Hoffa he has not been prosecuted on any of the serious federal charges for which he was at that time jailed, and the *state charges* have apparently vanished into *thin air*.

[P]ursuant to the general instructions he received from federal authorities to report 'any attempts at witness intimidation or tampering with the jury,' 'anything illegal,' or even 'anything of interest,' Partin became the equivalent of a bugging device which moved with Hoffa wherever he went. Everything Partin saw or heard was reported to federal authorities and much of it was ultimately the subject matter of his testimony in this case. For his services he was well paid by the Government, both through devious and secret alimony payments to his divorced wife and, it may be inferred, by executed promises not to pursue the indictments under which he was charged at the time he became an informer.⁶⁷

Hoffa, decided in 1966, was argued in terms of whether Hoffa's hotel suite was a "constitutionally protected area."⁶⁸ It was not, concluded the Court; instead Hoffa's was simply a case of "misplaced confidence that Partin would not reveal his wrongdoing."⁶⁹

Shortly thereafter, the Court in *Katz v. United States*, abandoned the constitutionally protected area analysis in favor of a new formulation to determine whether government conduct required compliance with the fourth amendment.⁷⁰ *Katz* required a determi-

67. *Id.* at 317-18, 319.

68. *Id.* at 301.

69. *Id.* at 302.

70. *Katz v. United States*, 389 U.S. 347 (1967).

nation whether the police conduct intruded upon a suspect's justified expectation of privacy.⁷¹ But like *Gouled*, *Katz* involved conduct of which the suspect was unaware instead of participant monitoring as in *On Lee*, *Lopez*, and *Hoffa*. Unbeknownst to *Katz* and his listeners, the FBI overheard their conversations via an unauthorized bug attached to one of *Katz*'s regularly used telephone booths.⁷²

After *Katz*, the use of undercover agents would also be subjected to expectation of privacy analysis. For example, the defendant in a case like *On Lee* could argue that *Katz* freed the fourth amendment analysis from the law of trespass,⁷³ and that depending on the facts of the case, a person may have a reasonable expectation of privacy that the government would not induce his friends to betray him or plant a person to befriend him to discover his criminal involvement, absent compliance with the fourth amendment. That is, *Katz* arguably required the government to show some basis of suspicion and to secure a warrant, absent an exception, before unleashing the undercover agent. As with cases controlled by *Katz*,⁷⁴ the use of undercover agents would vary based on the reasonableness of the particular suspect's expectations and the reasonableness of the agent's conduct.

So one might have thought. The Supreme Court in *United States v. White*⁷⁵ did subject the use of undercover agents to *Katz*'s reasonable expectation of privacy analysis and noted that:

The Court of Appeals [held] that *On Lee* was no longer good law. In that case, which involved facts very similar to the case before us, the Court first rejected claims of a Fourth Amendment violation because the informer had not trespassed when he entered the defendant's premises and conversed with him. To this extent the

71. *Id.* at 353. Courts frequently discuss the *Katz* test as requiring two inquiries: (1) whether the defendant had a subjective expectation of privacy and if so, (2) whether the expectation was reasonable. See, e.g., *Smith v. Maryland*, 442 U.S. 735 (1979). That formulation appears in Justice Harlan's concurring opinion, not in Justice Stewart's majority opinion. *Katz*, 389 U.S. at 361 (Harlan, J. concurring).

72. *Id.* at 348.

73. According to Justice Stewart's majority opinion, the "effort to decide whether or not a given 'area,' viewed in the abstract is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places." *Id.* at 351.

74. See, e.g., *Ouimet v. Howard*, 468 F.2d 1363 (1st Cir. 1972); *People v. Triggs*, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973); *State v. Bryant*, 287 Minn. 205, 177 N.W.2d 800 (1977); *Buchanan v. State*, 471 S.W.2d 401 (Tex. Crim. 1971).

75. *United States v. White*, 401 U.S. 745 (1971).

Court's rationale cannot survive *Katz*.⁷⁶

But a plurality of the Court concluded that "*Hoffa*, which was left undisturbed by *Katz*, held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities."⁷⁷ It follows from *White*'s questionable endorsement of *Hoffa* that for purposes of initiating a criminal investigation by use of an undercover agent almost anything goes.⁷⁸

Brilab illustrates the evil of the Court's refusal to require compliance with the fourth amendment before targeting a suspect for infiltration by an undercover agent. At least on the record, the government had little basis for belief that Davidson was engaged or ready to engage in illegal activity, other than perhaps his friendship with Hauser.⁷⁹ Nonetheless Hauser was able to contact him repeatedly, to appeal to friendship, to invade intimacy to bring him into a potentially criminal conspiracy. That Davidson was acquitted is only partial compensation; he was not exonerated because of the government's conduct and was forced to defend himself in an eighteen week trial (we can only speculate on the financial cost). Just as important are the intangible costs to the individual and to society from having been subjected to an undercover investigation where personal friendship and disguise were manipulated. "[I]t is deeply subversive of the possibility of friendship, love, and trust. This use is

76. *Id.* at 750.

77. *Id.* at 749; Justice Black concurred, adhering to his dissent in *Katz*; *White*, 401 U.S. at 754. Justice Brennan concurred in the result because he agreed that *Katz* should not be given retroactive application. *Id.* at 755.

78. *Cf.* Chief Justice Warren's dissenting opinion in *Hoffa*:

I do not say that the Government may never use as a witness a person of dubious or even bad character. In performing its duty to prosecute crime the Government must take the witnesses as it finds them. They may be persons of good, bad, or doubtful credibility, but their testimony may be the only way to establish the facts, leaving it to the jury to determine their credibility. In this case, however, we have a totally different situation. [Here the Government reaches into the jailhouse to employ a man who was himself facing indictments far more serious (and late including one for perjury) than the one confronting the man against whom he offered to inform.] It employed him not for the purpose of testifying to something that had already happened, but rather for the purpose of infiltration to see if crimes would in the future be committed. . . . Certainly if a criminal defendant insinuated his informer into the prosecution's camp in this manner he would be guilty of obstructing justice

. . . .
Hoffa, 385 U.S. at 320-21.

79. See *supra* note 48.

morally equivalent to the decision to use violence; indeed it is a kind of torture. Perhaps it can be defended . . . but we should place greater barriers, including legal ones, in the way of casually embarking on such use."⁸⁰

In addition to costs to the individual, at least one critic of the tactics of Abscam has identified costs to society:

In recent decades, undercover police activities . . . damaged the protected freedoms of political dissenters. But now, through a spill-over effect, they may be inhibiting the speech of a much broader segment of society. The free and open speech protected by the Bill of Rights may be chilled for everyone. After ABSCAM, for example, people in government cannot help but wonder who it is they are dealing with. Communication may become more guarded and the free and open dialogue traditionally seen as necessary in high levels of government inhibited. Similar effects may occur in business and private life.

A major demand in totalitarian countries that undergo liberalization is for the abolition of the secret police and secret police tactics. Fake documents, lies, subterfuge, infiltration, secret and intrusive surveillance, and the creation of apparent reality are not generally associated with United States law enforcement. However, we may be taking small but steady steps toward paranoia and suspicion that characterize many totalitarian countries.⁸¹

The Utilitarian Balance

There is general agreement that solving crime would be far more difficult if police were unable to rely on informants.⁸² I have argued initially that before the government engages in intrusive procedures as used in Brilab it should be required to show that sufficient proof exists to justify the invasion of privacy, one of the fundamental guarantees of the fourth amendment. I do not dispute the need to rely on undercover agents, especially in cases involving white collar crimes involving parties unlikely to report the criminal transaction.⁸³

80. Levinson, *The Hidden Cost of Infiltration*, 12 HASTINGS CENTER REPORT 29, 31-32 (1982).

81. MARX, *supra* note 4, at 93-94.

82. *Id.* at 65-67; Reuter, "Licensing Criminals: Police and Informants," reprinted in CAPLAN, *supra* note 4, at 100-02.

83. See Moore, "Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement," in Caplan, *supra* note 4, at 20.

There is a second problem associated with the undercover agents necessary in proactive investigations. Most informants command a *quid pro quo* for their assistance, but con men who make big cases like Abscam and Brilab do not come cheap.⁸⁴ Further, "sting men" will seldom be law abiders. Often the government must rely on someone of questionable credibility. Nevertheless, those are the kind of people who associate with the persons the government is after.⁸⁵

The problem arises when the government is a partner with a crook more culpable than the people whom it pursues. The following hypothetical is admittedly extreme, but it illustrates the problem: a suspect is charged with murder; the government wants to determine whether the suspect's criminal defense attorney reports income when she receives large cash payments; to test her, the government makes a deal with the suspect substantially reducing any forthcoming penalty for murder, and then sits back to see if the attorney reports the fee. The attorney is punished for tax evasion when she fails to report the fee. The government's conduct is indefensible. We are reminded of Justice Brandeis' dissent in *Olmstead v. United States*:

Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against this pernicious doctrine the Court should resolutely set its face.⁸⁶

Our society has rejected an extreme stance, that a criminal partnership is never justified, but certainly utilitarian morality dictates that

84. See, e.g., MARX, *supra* note 4, at 80-81 for a description of the benefits received by Melvin Weinberg, the con man who made the ABSCAM cases possible: "The convicted swindler in ABSCAM (described by Judge Fullman as 'an archetypical, amoral, fast-buck artist') had a three-year prison sentence waived and received \$133,150 for his cooperation in the two-year investigation. Accounts in an internal Justice Department memorandum indicate that he 'would be paid a lumpsum at the end of ABSCAM, contingent upon the success of the prosecution.' In testimony at Representative John Jenrette's trial, the informer acknowledged that he expects to make more than \$200,000 from his undercover activities. He also received a \$15,000 advance for a book on his exploits." *Id.*

85. Alpern, *The New FBI's Watching*, Newsweek, Feb. 25, 1980, at 39.

86. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

the government cannot sacrifice punishment of the more culpable for the punishment of the less culpable.

An examination of the record in Brilab is disquieting. As discussed below, Hauser was a bad character, convicted of four felonies, charged in a ten count indictment and under investigation for additional crimes. The government made him a lucrative deal. It is arguable that the government entered a partnership with a criminal more culpable than the defendants it pursued.

The Evil Endorsed

In 1976, Hauser met former attorney General Richard Kleindienst, at that time a member of a law firm trying to clean up the image of one of its clients, the Teamsters.⁸⁷ With Kleindienst's assistance, Hauser obtained an insurance contract with the Teamsters worth \$24 million.⁸⁸ In the same year because of his success in procuring that contract, Hauser purchased the National American Life Insurance Company from two Baton Rouge businessmen.⁸⁹

Before the end of 1976, Hauser's insurance empire began to crumble. In October, he was indicted for bribing union officials in Los Angeles to obtain business for his prepaid medical insurance program.⁹⁰ In March, 1977, he was convicted on four counts of bribery.⁹¹ A second investigation began in 1976, leading to a 1978 indictment. The indictment charged Hauser with converting union funds through his various insurance companies. He had apparently diverted funds from the Central States Teamster fund in Chicago. Hauser was indicted for a violation of RICO for diversion and conversion of \$3.5 million, about \$1.8 million of which was salted away in a Swiss bank account.⁹² In addition, Hauser was under investigation for misuse of \$7 million from Teamster funds in Florida.⁹³ After being persuaded by two FBI agents, William Wiechert and William Fleming, Hauser decided to cooperate with the

87. N.T., *supra* note 11, at 7269-71, 7293.

88. *Id.* at 7272, 7297.

89. *Id.* at 4188, 4200, 7273-76.

90. *Id.* at 7-9.

91. *Id.* at 9.

92. *Id.* at 9-11, 180-82.

93. *Id.* at 177.

government.⁹⁴

On February 5, 1979, Hauser entered his plea agreement with the government. The government agreed to intervene at the sentencing stage to inform the court of Hauser's cooperation.⁹⁵ During cross-examination of the government's first Brilab witness, FBI agent William Fleming, defense attorneys were able to extract details of Hauser's legal difficulties and his deal with the government. Hauser pleaded guilty to three of ten counts of the indictment in Arizona and faced up to fifty years in prison and substantial fines.⁹⁶ Hauser was a potential defendant in both Miami and Boston;⁹⁷ he incriminated himself while testifying in Boston without an attorney with the understanding that he would not be prosecuted.⁹⁸ He committed perjury in Los Angeles and Fleming admitted that Hauser would not be indicted. At least up to the time of trial, Hauser had yet to pay a \$40,000 fine imposed in previous court proceedings.⁹⁹ Fleming also learned during his investigation of Hauser that the Internal Revenue Service was investigating Hauser for nonpayment of taxes.¹⁰⁰ On cross-examination Hauser admitted owing the government approximately three-quarters of a million dollars.¹⁰¹ Meanwhile the government paid Hauser in excess of \$75,000 for his assistance during 19 months of investigation.¹⁰²

As indicated by Fleming, the government assigned two agents to Hauser during Brilab because of concern about his credibility.¹⁰³ Hauser had been convicted of four felonies and pleaded guilty to three others. The government obviously solicited the help of an unseemly character and has forgiven many of his misdeeds.

94. *Marcello*, 537 F. Supp. at 1367.

95. See *supra* note 10.

96. N.T., *supra* note 11, at 183.

97. *Id.* at 200-01.

98. *Id.* at 204.

99. *Id.* at 207.

100. *Id.* at 213.

101. *Id.* at 4433-34.

102. Appellant's Brief at 10, *United States v. Roemer*, 703 F.2d 805 (5th Cir. 1983).

103. N.T., *supra* note 11, at 268-69. Apparently, the government had cause for concern. On at least two occasions Hauser attempted to make up incriminating conversations when the targeted suspect was out of the room. *Marcello*, 537 F. Supp. at 1372.

The Evil Pursued

Unless judged by the extreme view that the government should never enter a partnership with a crook, the government could justify its deal with Hauser by reference to the evil that it pursued. That is, if we use a utilitarian balance, the government could argue that there was a reasonable probability of ridding society of more evil than it forgave or created. I asserted above that on the public record there is serious question whether that balance tipped in the government's favor.

Because Brilab involved a proactive investigation, the focus must be on what the government knew at the time it commenced its undercover operation. In a retroactive investigation, the prosecutor or the police who make a deal with an informant know in advance how serious the crime is which they are attempting to solve. Proactive investigations like Brilab and Abscam display graphically that initial expectations about targeted crimes may be far different from those eventually discovered or committed. Louisiana Brilab had nothing to do with bribery of labor¹⁰⁴ and Abscam went far beyond recovery of stolen art and securities.¹⁰⁵ The government should not be faulted for discovering more serious crimes than it initially anticipated. But to guarantee that it does not let its con man off the hook in exchange for trivial violations there ought to be a preliminary showing that some defendants will probably engage in specified conduct. For example, few would sanction a deal granting release to a jailed murderer in exchange for information needed to convict a petty extortionist for past misdeeds.¹⁰⁶ The problem is more acute when it is uncertain if any future crimes will take place.

As discussed above,¹⁰⁷ the record is silent on whether at the inception of Louisiana Brilab the government had evidence in hand to indicate the probability that anyone who might become involved

104. As noted by the trial court, "Ironically, the Louisiana component of the Brilab investigation in no way implicated labor unions or their officials in any alleged or actual wrongdoing uncovered by the investigation." *Marcello*, 537 F. Supp. 1367, n.1.

105. "ABSCAM began in the Hauppauge office of the FBI in Long Island in early 1978. . . . The scope of the operation was limited at the outset to solving property crimes and recovering stolen or forged securities or art work." Nathan, "ABSCAM: A Fair and Effective Method for Fighting Public Corruption," reprinted in Caplan, *supra* note 4, at 5.

106. *But see Hoffa*, 385 U.S. at 293.

107. *See supra* notes 29-48 and accompanying text.

with Hauser was engaged or was likely to engage in accepting bribes in exchange for procuring insurance business. The government may have had ample evidence, but under current law, until the government secured a judicial order to wiretap Marcello's phone, no preliminary showing was required.

The record is also silent on whether the government had evidence that specific individuals who it targeted were engaged or likely to engage in criminal activity. The agents knew that Hauser would contact Davidson and try to have Davidson lead him to Marcello.¹⁰⁸ Davidson was a Washington, D.C. public relations man, available to help people through the maze of governmental agencies.¹⁰⁹ He was a registered arms dealer and was a registered agent for several foreign countries.¹¹⁰ He had no prior criminal record.¹¹¹

At trial the government established that after Hauser secured the Teamsters \$24 million contract, he paid Kleindienst \$250,000 for his help, a quarter of which was eventually paid to Davidson.¹¹² Davidson repaid the money voluntarily when Arizona brought suit to reclaim it.¹¹³ The receipt of the fee never led to criminal prosecution, and without more, it is unclear whether a crime could have been proven. More important, the record is unclear whether the government was aware of the fee splitting at the time it encouraged Hauser to target Davidson.

There is no question that the government hoped the investigation would lead to Marcello once Louisiana Brilab was conceived.¹¹⁴ At first blush, Marcello would seem to meet the criteria discussed above, that the government have reason to believe that the suspect is engaging in or will engage in illegal conduct. Marcello, after all, is a reputed Mafia chieftain.¹¹⁵ Marcello has apparently been the subject of considerable FBI interest in the past,¹¹⁶ and the government may have ample evidence to justify its belief that Marcello would engage

108. See *supra* note 2.

109. N.T., *supra* note 11, at 7262.

110. *Id.* at 7263.

111. At least the record is silent on that question.

112. N.T., *supra* note 11, at 7273, 7297.

113. *Id.* at 7297.

114. See *supra* note 29.

115. See *supra* note 14.

116. *Id.*

in criminal conduct. But again, the government never had to justify targeting Marcello before the investigation.

Obviously, examination of the tapes after the investigation had begun is not conclusive on the question of the government's preinvestigation knowledge. At trial the evidence revealed that Marcello was willing to engage in peddling influence with Louisiana politicians.¹¹⁷ But the disquieting fact about the record in Brilab is the absence of support for the widely held view that Marcello is a Mafia chieftain. The government was able to tape hundreds of hours of conversations both by telephone tap and a bug in Marcello's office.¹¹⁸ One hundred and thirty tapes were introduced into evidence at trial.¹¹⁹ The tapes simply did not support his reputation as a mob kingpin.

It is true that hundreds of taped conversations were not made public. Judge Sear blocked access by the media to tapes not used at trial.¹²⁰ Those tapes may include proof that Marcello was engaged in wide ranging criminal activity. But if the tapes did evidence deep involvement in crime, it is curious that the only indictment forthcoming was the Brilab indictment, which was a case that the government barely won. That is, had the tapes revealed evidence of other crimes, it is doubtful that the government would rely exclusively on the complex RICO case which took eighteen weeks to try and which it almost lost completely.

If the public record reflects the government's knowledge at the time it commenced Louisiana Brilab, the government's bargain with Hauser was unjustified. In exchange for guaranteeing Hauser a lightened sentence, substantial compensation and a place in the federal witness program, the government targeted a businessman with no criminal record and an old man who was convicted in 1968¹²¹ of assaulting a federal agent and in 1938 for a marijuana offense.¹²² It is unclear how probable it was that these two men

117. See, e.g., N.T., *supra* note 11, at 729-40.

118. *Marcello*, 537 F. Supp. at 1368.

119. *Id.*

120. *Belo Broadcasting Corporation v. Clark*, 654 F.2d 423 (5th Cir. 1981).

121. Amoss and Baquet, *Carlos Marcello*, *Times-Picayune Dixie Magazine* Feb. 21, 1982 at 15.

122. *Id.*

would engage in bribery; it was an established fact that Hauser had bilked millions of dollars from the Teamsters.

A SUGGESTED REMEDY

I have assumed throughout this article that the government had only the information which appeared on the record. The government almost certainly had more information.¹²³ This assumption is justified because under current law the government need not justify a far reaching intrusive proactive investigation; the law requires no evidence before the government attempts to infiltrate a person's private life, as long as it does so by face-to-face encounters, no matter how duplicitous that person may be.

Because the Supreme Court has refused to apply fourth amendment protections to undercover operations, whatever protection exists in such circumstances is provided by the entrapment defense. But that protection exists almost exclusively for those who are not predisposed to commit crime, and even for them, may not be a tenable defense.¹²⁴ Thus overreaching by the government, corrosive of privacy expectations generally, has almost never been raised successfully by a criminal defendant, apart from the subjective test afforded by the Supreme Court's entrapment test.¹²⁵ Largely in response to concerns raised by Abscam, the Department of Justice promulgated the "Attorney General's Guidelines on FBI Undercover Operations."¹²⁶ The standards require internal authorization where agents' activities will create opportunities for unsuspecting individuals to engage in criminal activity. The first standard for authorization is met when "there is reasonable indication . . . that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type."¹²⁷

123. See *supra* note 14.

124. See, e.g., Gershman, "Abscam, the Judiciary, and the Ethics of Entrapment," [hereinafter cited as Gershman], 91 YALE L.J. 1565 (1982); Comment, "Entrapment Through Unsuspecting Middlemen," 95 HARV. L. REV. 1122 (1982).

125. *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); cf. *United States v. Marcello*, 537 F. Supp. at 1370: "The Fifth Circuit has acknowledged that a defense of government misconduct grounded on concepts of due process and existing separately from the traditional defense of entrapment is available in some circumstances . . . but in no case has the Fifth Circuit yet reversed a conviction on that specific ground."

126. Comment, *supra* note 124, at 1131.

127. *Id.* at 1132, citing the "Attorney General Guidelines on FBI Undercover Operations."

Even if the Guidelines had been in effect at the time Brilab was begun, the Brilab defendants could not have raised a violation as a bar to prosecution. The Guidelines do not provide for sanctions for their violation.¹²⁸ The Supreme Court has held in a similar case involving a violation of internal regulations of the IRS that suppression of evidence is an inappropriate remedy: "Here, the Executive itself has provided for internal sanctions in cases of knowing violations of the electronic surveillance regulations. To go beyond that, and require exclusion in every case, would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations. But since the content, and indeed the existence, of the regulations would remain within the Executive's sole authority, the result might well be fewer and less protective regulations."¹²⁹

All indications are that the FBI will continue aggressive use of proactive investigations.¹³⁰ Potential for abuse is great. With little or no basis to believe that a suspect may engage in criminal activity, the government may target an individual, present him with substantial incentive to commit a crime, aggressively pursue him by enlisting his friends or close associates, and reward handsomely those it enlists to do so despite their substantial culpability. In the absence of the Court's willingness to limit undercover operations, it falls to Congress to do so. Mandating the guidelines would go a long way in meeting that responsibility. The sanction ought to be suppression of evidence procured through an investigation commenced in violation of the guidelines. Despite ample criticism of the exclusionary rule,¹³¹ Congress and the courts have yet to fashion a better remedy.¹³²

I would go further and urge Congress to enact an additional requirement before a court may authorize the undercover investiga-

128. See Gershman, *supra* note 124, at 1586.

129. United States v. Caceres, 440 U.S. 741, 756 (1979).

130. Marx, *supra* note 4, at 65-66.

131. See, e.g., Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C.J. concurring); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting); Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence," 62 JUDICATURE 214 (1978); Schlesinger, "The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent To Police?," 62 JUDICATURE 404 (1979).

132. See, e.g., Wolf v. Colorado, 338 U.S. 25 (1949) (Murphy, J., dissenting); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

tion. I have argued that Brilab involved two related problems: (1) the record does not show whether the government had a reasonable basis to target Davidson and Marcello initially; and (2) the government traded substantial punishment owing to a proven swindler for possible punishment of two defendants (on this record) far less culpable. If the government were required to make a preliminary showing of its reason to suspect the targeted individual and the crime suspected, the court could make the determination whether society was better served by allowing the government to reward a con man for his services. Thus I would urge Congress to require the court to determine whether on balance, the government's proposed bargain promised probable incapacitation of suspects more culpable than the defendant, ready to trade his services for substantial rewards.

