

Sting Operations and the Separation of Powers

by Joseph S. Fulda

To detect and prosecute laws prohibiting victimless crimes, government typically curtails civil liberties and, by standing in for a real victim, creates opportunities for abuse and corruption in sting operations. Sometimes, prosecution of these crimes is furthered by offering various considerations to one member of the conspiracy at the expense of the others. This would normally be called *bribery* and *subornation of perjury* and is likely illegal, although commonplace.¹

The easiest and most effective way to present a case against a criminal conspiracy to a jury is to capture the whole thing on tape; that way no one need turn state's evidence, and the direct participation of the officers performing the sting can be kept to a minimum. Unfortunately, this, too, has its problems: It undermines the separation of powers mandated by the U.S. Constitution and most state constitutions. "Were the power of judging . . . joined to the executive power, *the judge* might behave with all the violence of *an oppressor*," wrote "The oracle who is always consulted and cited on this subject [the separation of powers] . . . the celebrated Montesquieu."²

Let us see how this applies to the common sting operation where the partici-

pants' behavior is captured on tape. The fundamental search-and-seizure principle is that an executive officer is to give evidence of probable cause to a "neutral" and "detached" judicial officer, after which the magistrate will decide whether the evidence warrants search or seizure.³ Thus, the U.S. Supreme Court overturned a conviction in which a warrant had been issued by the state's attorney general—who also happened to be a justice of the peace—since he could not possibly be and, in the facts of that particular case, was not a neutral and detached judicial officer, but rather the chief law-enforcement officer of the state.⁴

This provision, however, is rendered a dead letter under federal law and in those states—and there are many—that permit one-party taping; that is, where it is legal to record a conversation provided just one party gives consent and to introduce the resultant recording in court. Why? Since one party to the conversation is a law-enforcement agent and, of course, he permits—indeed, he arranges—his conversations with the suspects to be recorded. Out goes the necessity of a warrant, and the executive branch is thus able to act as both prosecutor and judge, thereby trampling on suspects' Fourth Amendment rights. In every sting operation involving tapes, probable cause before a judicial officer is not required. All that is required is for the executive-branch officer—a detective or an undercover

Contributing Editor Joseph Fulda (fulda@acm.org) is the author of *Eight Steps towards Libertarianism* (Free Enterprise Press). Copyright Joseph S. Fulda 2002.

police officer, typically—to approve the taping, entirely on his own accord. This throws out the basic principle of a judicial check on executive arrogance, which Montesquieu thought so important to the constitutions of free states everywhere.

1. See my "The Pernicious Nature of Victimless Crime Laws," *Ideas on Liberty*, April 2002, and "The Courageous Decision That Lasted But Nine Days," *Ideas on Liberty*, May 2002.

2. James Madison, Federalist 47.

3. The language is from *Johnson v. United States*, 333 U.S. 10 (1947).

4. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

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The Economics of Infantilism

by Thomas E. Woods Jr.

While this year's Winter Games were still going on, the website of the National Organization for Women was complaining that with all the Olympic coverage, the press had neglected to notice the 400-person rally, dubbed the "March for Our Lives," held simultaneously in Salt Lake City. Led by organizations from the Poor People's Economic Human Rights Campaign, part of something called the Kensington Welfare Rights Union (KWRU), the event sought to call attention to the countless violations of "economic justice" that exist throughout the country. Eventually, the organization hopes to submit to the United Nations a list of "human rights abuses" throughout the United States and then to file "a formal suit against the United States through international legal channels."

What exactly constitute "economic human rights"? The KWRU website points to Articles 23, 25, and 26 of the United Nations' Universal Declaration of Human Rights in support of "the rights due every human being." They include food, clothing, housing, medical care, "necessary social services," education, work, favorable conditions of work, "just and favorable remuneration," and the like. Naturally, no one at the organization bothers to justify the grounds

on which "every human being" possesses these "rights" other than by this argument from authority.

The closest the site comes to an "argument" is the assertion that the people for whom the organization speaks want things, and some other people have lots of things, so these latter people should be required to give up some of them. Never raised is the question of whether these people with lots of things acquired them honestly or, if so, on what precise grounds the KWRU is justified in demanding that these goods be violently seized from peaceful and honest people.

That so-called "welfare rights" are philosophically fraudulent can be demonstrated by imagining everyone exercising them simultaneously. Surely a *right* that belongs to human beings qua human beings, such as life itself, ought to be able to be exercised without difficulty by every human being at the same time. If everyone demanded the same welfare right at the same time, no one would get anything, as everyone simultaneously attempted to coerce everyone else.

The libertarian philosopher Frank van Dun recently offered a helpful example. Imagine two people on a desert island: "One can imagine what will happen if they sit there insisting on their 'right' of being employed by the other at a just and favorable wage, or to receive unemployment compensation high enough to allow them an existence worthy of their dignity. One can also imagine what will happen if, instead of

Thomas E. Woods Jr. (woodst@sunysuffolk.edu), holds a Ph.D. in history from Columbia University and is assistant professor of history at Suffolk Community College (SUNY) in Brentwood, New York.