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SEDUCING THE TARGET: SEXUAL INTERCOURSE AS OUTRAGEOUS GOVERNMENT CONDUCT

INTRODUCTION

In *United States v. Nolan-Cooper*,¹ a federal court of appeals affirmed the denial of the defendant's motion to dismiss her indictment based on a claim that the government's investigatory misconduct was so egregious that it violated her due process rights.² The alleged misconduct was sex. From the outset of an undercover money laundering investigation, the federal agent frequently wined and dined Ms. Nolan-Cooper and took her dancing into the early morning hours.³ According to plan, he succeeded in developing a close relationship with her that became romantic and culminated in sexual intercourse.⁴ Ms. Nolan-Cooper was arrested shortly thereafter.⁵ The court found that the agent's actions were not sufficiently shocking, outrageous or intolerable so as to offend her due process rights, and opined that "the mere fact that an undercover operative establishes a level of intimacy with his or her target does not alone necessarily give rise to a constitutional claim."⁶

The court fashioned and applied a three-part test to determine if an agent's sexual relationship with his target constitutes outrageous government conduct:⁷ (1) the government must consciously set out to use sex as an investigatory weapon or acquiesce in such conduct once

¹ 155 F.3d 221 (3d Cir. 1998).

² *See id.* at 214.

³ *See id.* at 226.

⁴ *See id.* at 226-27.

⁵ *See id.* at 228.

⁶ *Id.* at 234.

⁷ The outrageous government conduct defense provides defendants with constitutional protection from "certain egregious examples of government undercover work . . . violative of the Fifth Amendment's Due Process Clause." Stephen A. Miller, Comment, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 NW. U. L. REV. 305 (1996). *See also* Dana M. Todd, *In Defense of the Outrageous Government Defense in the Federal Courts*, 84 KY. L.J. 415, 427 (1995) (stating that the defense is based on the theory that government conduct can be so unreasonable and unfair that it violates the defendant's constitutional rights and "may be supported by a showing either 1) that the defendant's right to due process has been violated or 2) by appealing to the court's general supervisory powers to curtail the overreaching of law enforcement officials").

it knew or should have known it existed; (2) the agent must initiate the sexual relationship or allow it to continue to achieve governmental ends; and (3) the sexual relationship must take place during or close to the period covered by the indictment and be intertwined with the events charged in the indictment.⁸ Applying this test to the facts of the case, the court found that since the sexual relationship between Ms. Nolan-Cooper and Agent Oubre arose out of their criminal business relationship and because the indictment covered the time period both before and after the two engaged in sexual intercourse, it could not be disputed that the relationship and the events charged were intertwined.⁹ However, the court also accepted the district court's findings that the sexual intercourse was not designed to further an investigatory end,¹⁰ and concluded that the single instance of sexual misconduct alone did not constitute a due process violation under the "extremely narrow confines of the outrageous government conduct doctrine."¹¹

The court acknowledged that, under some circumstances, sexual intercourse between a federal agent and his target may constitute outrageous government conduct.¹² The problem faced by the *Nolan-Cooper* court and addressed by this Note is how to determine what those circumstances are. Unlike other courts that have considered the issue,¹³ the *Nolan-Cooper* court held that there does exist a discernable point in an agent-target relationship at which the agent's conduct becomes outrageous conduct as a matter of constitutional law.¹⁴ The court failed to articulate where this point was, but determined that a romantic relationship lasting approximately a year and culminating in sexual intercourse on only one occasion did not reach it.¹⁵

⁸ See *Nolan-Cooper*, 155 F.3d 221, 232 (3d Cir. 1998).

⁹ See *id.* at 233.

¹⁰ See *id.* at 234.

¹¹ *Id.*

¹² See *id.* at 231-33. The court cited *United States v. Cuervelo*, 949 F.2d 559 (2d Cir. 1991) and *United States v. Simpson*, 813 F.2d 1462 (9th Cir. 1987), as two cases addressing the issue of sexual or emotional intimacy in undercover operations. Both cases acknowledged that the use of sex as an investigatory tool might "shock the conscience" and give rise to a due process claim. See *Cuervelo*, 949 F.2d at 566; *Simpson*, 813 F.2d at 1468.

¹³ The Ninth Circuit, in contrast to the *Nolan-Cooper* court, found no way to discern between casual physical contact and "shocking" governmental behavior:

We see no principled way to identify a fixed point along the continuum from casual physical contact to intense physical bonding beyond which the relationship becomes "shocking" Rather, any attempt to distinguish between holding hands, hugging, kissing, engaging in sexual foreplay, and having intercourse on a regular basis in order to decide when an informant has "gone too far" would require us to draw upon our peculiarly personal notions of human sexuality and social mores.

Simpson, 813 F.2d at 1466.

¹⁴ See *Nolan-Cooper*, 155 F.3d 221, 232 (3d Cir. 1998).

¹⁵ See *id.* at 232-34.

The *Nolan-Cooper* court decided wrongly for several reasons. Recognizing the defense of outrageous government conduct but setting its standards impossibly high allows violation of a defendant's constitutional rights without effective redress. Under the three-part test, the defendant must prove both the agent's purpose and the government's knowledge of that purpose. Proving state of mind is always difficult, if not impossible. The three-prong test was incorrectly formulated and should be abandoned in favor of an absolute prohibition of sexual intercourse between federal investigator and target. Under a proper analysis, each of the first two prongs becomes superfluous, leaving a strict liability standard so long as the sexual relationship occurs during or close to the time of the indictment. Knowledge of the use of sex as an investigative weapon should be imputed to the government through its agent. Otherwise, supervisors can too easily turn a blind eye to the sexual escapades of their field agents. The usefulness and purpose of seduction as an investigation tool should be assumed. Requiring the defendant to prove the agent had a subjective intent to use the sexual relationship for government ends is overly burdensome and irrelevant. The fact that sexual intercourse occurred—regardless of who knew about it, why it happened or how often it happened—should be the point on the continuum where the courts find outrageous government conduct. The same reasoning which requires the exclusion of unlawfully seized evidence under the Fourth Amendment supports dismissal of an indictment procured with seduction and sexual intercourse: deterrence of improper conduct by government officials, maintenance of judicial integrity, restoration of the status quo, and support of the constitutional rights against self incrimination and illegal search and seizure.

The federal circuits are currently split on the issue of outrageous government conduct;¹⁶ some courts recognize the defense while others do not. The United States Supreme Court, at least in theory, recognizes the defense,¹⁷ but has never addressed the issue directly. In application, however, even circuits that recognize the defense rarely

¹⁶ See Miller, *supra* note 7, at 306 (“[T]wo federal appellate courts have repudiated the defense and created a significant split of authority among the lower courts.”) (citing *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995); *United States v. Tucker*, 28 F.3d 1420, 1424-25 (6th Cir. 1994)).

¹⁷ See *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring) (“Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction.”); *United States v. Russell*, 411 U.S. 423, 431-32 (1973) (stating that the Court “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”).

find its rigorous requirements satisfied.¹⁸ Outrageous government conduct should be recognized independent from the defense of entrapment, not dependent on the predisposition of the defendant or inducement by the government. While certain forms of misconduct, such as a sexual relationship, can be instrumental in inducing a defendant to commit or continue to commit crimes he otherwise would not commit, the focus of the outrageous government conduct inquiry should be on whether the government's conduct was wrongful, not on the defendant's state of mind.¹⁹ The remedy for outrageous government conduct should be dismissal of the indictment. This Note includes a brief discussion of the development of and rationale behind the defense of outrageous government conduct. While it is acknowledged that even the existence of the defense is controversial, for the purposes of this Note, it will be assumed that the outrageous government conduct defense does and should exist. The real question that remains is whether sexual intercourse between a federal agent and his target should qualify as outrageous government conduct justifying dismissal.

This Note calls for a change in existing law and for a new rule that any sexual relationship between a government agent and the target of an investigation which advances to the point of sexual intercourse is a per se violation of the target's due process rights.²⁰

I. BACKGROUND

The outrageous government conduct defense, first recognized in 1952, was initially widely accepted and then methodically limited almost to the point of extinction.²¹ The outrageous government con-

¹⁸ For example, the last time the Third Circuit granted a defendant relief on outrageous government conduct grounds was in 1978. *See generally* *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) (holding that extensive police involvement in the crime violated due process). The last time the Ninth Circuit did so was in 1971. *See generally* *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (holding that the government was so intertwined with the criminal activity that it was barred from prosecuting the defendant). *Twigg* and *Greene* were recently cited as the only two federal cases in which the outrageous government conduct defense was found to be applicable and its tenets satisfied. *See* *United States v. Abbit*, No. Crim. 98-208-HA, 1999 WL 1074073, at *2 (D. Or. Oct. 29, 1999).

¹⁹ *See* *United States v. Smith*, 802 F.2d 1119, 1125 (9th Cir. 1986) (stating that in evaluating a due process outrageous government conduct defense, "the court looks only to the government's conduct objectively without regard to the defendant's criminal predisposition").

²⁰ There is arguably a valid distinction between the conduct of federal agents and of paid informants. This Note is only concerned with the former, although cases involving sexual relationships between informants and defendants are also appearing with greater frequency. *See, e.g.,* *United States v. Fadel*, 844 F.2d 1425 (10th Cir. 1988); *United States v. Shoffner*, 826 F.2d 619 (7th Cir. 1987); *United States v. Simpson*, 813 F.2d 1462 (9th Cir. 1987).

²¹ For example, the Sixth Circuit initially recognized the outrageous government conduct defense and formulated a set of standards to be applied in such cases. *See* *United States v. Brown*, 635 F.2d 1207, 1212-13 (6th Cir. 1980) (listing the four factors as: (1) the need for the police conduct as shown by the type of criminal activity involved; (2) the impetus for the

duct defense originated²² in the case of *Rochin v. People of California*.²³ In that case, a sheriff and two deputies, having some information that the defendant was selling narcotics, entered the open door of his home without a warrant and forced open his bedroom door. After observing the defendant swallow two capsules, they forcibly attempted to extract them from his mouth. Failing to retrieve the capsules, they arrested the defendant, took him handcuffed to a local hospital and instructed a physician to force an emetic solution through a tube into his stomach against his will. The stomach pumping induced vomiting, and in the vomit two capsules containing traces of morphine were found.²⁴ The defendant was convicted and sentenced to sixty days of imprisonment.²⁵ The appellate court affirmed, despite its findings that the officers "were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room . . . [and] were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital."²⁶ The appropriate remedy, the court held, was in an action for damages.²⁷ It also recommended an examination of the qualifications of the officers and the physician.²⁸ The Supreme Court overruled the appellate court on the basis that the conviction was "obtained by methods that offended the Due Process Clause."²⁹ The reasoning behind the Court's ruling was that the officers' actions "shocked the conscience" to such an extent that they violated the Constitution.³⁰

scheme or whether the criminal enterprise preexisted the police involvement; (3) the control the government exerted over the criminal enterprise; and (4) the impact of the police activity on the commission of the crime). Later, however, the same circuit in *United States v. Tucker*, 28 F.3d 1420 (6th Cir. 1994), stated that "there is no authority in this circuit which holds that the government's conduct in inducing the commission of a crime, if 'outrageous' enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment." *Id.* at 1424 (emphasis in original); see also Miller, *supra* note 7, at 305-15 (discussing the background, development, and circuit split concerning the outrageous government conduct defense).

²² See *United States v. Nolan-Cooper*, 155 F.3d 221, 229 (3rd Cir. 1998) ("The notion that misconduct by the government . . . could give rise to a due process violation traces its modern roots to *Rochin v. California* . . .").

²³ 342 U.S. 165 (1952).

²⁴ See *id.* at 166.

²⁵ See *id.*

²⁶ *California v. Rochin*, 225 P.2d 1, 3 (Cal. Ct. App. 1950).

²⁷ See *id.* at 3.

²⁸ See *id.*

²⁹ *Rochin v. California*, 342 U.S. 165, 174 (1952).

³⁰ See *id.* at 172-74. The Court explained that "[t]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience . . . They are methods too close to the rack and the screw to permit of constitutional differentiation." *Id.* at 172.

Subsequent to *Rochin*, several courts reversed convictions on the basis of overreaching by the government.³¹ These cases were decided on the general principle that the government should not create crime for the sake of bringing charges against persons persuaded to participate therein.³² The outrageous government conduct defense came to be used primarily in cases of what the defendant considered to be extreme entrapment.³³

However, the concept that the government's conduct in encouraging and facilitating a defendant to commit criminal acts could rise to the level of a due process violation was put to rest in *Hampton v. United States*.³⁴ In *Hampton*, a government informant supplied the defendant with what the defendant believed was a counterfeit drug that would give the same reaction as heroin. The informant proposed selling the drug to gullible acquaintances. The informant set up a sale with federal agents. Defendant sold the counterfeit heroin procured from the informant to the agents. The heroin was real and the defendant was convicted of two counts of distribution.³⁵ The defendant argued that he was entrapped and, because the government acted as both supplier and purchaser of the drug, his predisposition was irrelevant and he should be acquitted as a matter of law.³⁶ Although the court found the government played a significant role in enabling the defendant to sell contraband,³⁷ it held that the limitations of due process only come into play when some protected right of the defendant is violated.³⁸ In *Hampton*, entrapment could be the defendant's only possible defense with respect to the conduct of the government

³¹ See, e.g., *United States v. West*, 511 F.2d 1083 (3d Cir. 1975) (reversing conviction on fundamental fairness grounds); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (reversing conviction due to government having enmeshed itself in criminal activity).

³² See, e.g., *United States v. Russell*, 411 U.S. 423, 435 (1973) ("Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government."); *West*, 511 F.2d at 1085 ("[W]hen the government's own agent has set the accused up in illicit activity . . . the role of the government has passed the point of toleration.").

³³ But see *Miller*, *supra* note 7, at 306 ("While [the defense] is invoked most frequently in conjunction with the entrapment defense, the outrageous government conduct defense is not limited to the entrapment context and may be invoked in *any* case that challenges the actions of government officials.").

³⁴ 425 U.S. 484 (1976). See *United States v. Chavis*, 880 F.2d 788, 793 (4th Cir. 1989) ("[A]ny analysis of a due process argument based on the government's conduct in a reverse sting operation begins with *Hampton* . . ."); *United States v. Beverly*, 723 F.2d 11 (3d Cir. 1983) (acknowledging the absence of a due process defense based on outrageous government conduct as established in *Hampton*); *United States v. LBS Bank-New York, Inc.*, 757 F. Supp. 496, 499 n.3 (E.D. Pa. 1990) (referring to two Third Circuit decisions which found outrageous government conduct and stating that "[t]hose opinions are of little use in defining what qualifies as 'outrageous conduct', however, because the Supreme Court's decision in *Hampton v. United States* calls into question the rationale upon which they were based") (citation omitted).

³⁵ See *Hampton*, 425 U.S. at 485-87.

³⁶ See *id.* at 487-88.

³⁷ See *id.* at 489.

³⁸ See *id.* at 490.

agents.³⁹ However, since he conceded his predisposition to commit the crime, the defense of entrapment was unavailable to him, and he was, in effect, without remedy.

*United States v. Twigg*⁴⁰ is the most recent case in which the defense of outrageous government conduct has been upheld. A government informant, as part of his plea agreement, contacted Henry Neville, a friend of twenty years, about setting up a methamphetamine laboratory. After several months of planning, Neville involved Twigg, who owed a debt to Neville, in the operations. The informant supplied the necessary equipment, raw materials and production site. He was also in charge of production. The defendants' involvement was generally limited to running errands and getting coffee.⁴¹ In reversing the convictions of illegal manufacture, the court made it clear it was not relying on the defense of entrapment.⁴² Rather, the court held that "the nature and extent of police involvement in this crime was so overreaching as to bar prosecution of the defendants as a matter of due process of law."⁴³ In so holding, the court acknowledged that no Supreme Court decision had ever reversed a conviction on this basis, but found the government misconduct to have gone "far beyond the behavior found permissible in previous cases."⁴⁴

The court's rationale in *Twigg* has been called into question.⁴⁵ *Twigg* was based in part upon *United States v. Russell*,⁴⁶ wherein the Supreme Court stated that "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."⁴⁷ So began a debate among federal circuit courts concerning the existence, scope, and application of the defense of outrageous government conduct. The result of the debate is almost universally the same: "some day" has not yet come.⁴⁸ Virtually all courts ultimately reject the defense of outrageous government conduct, but they do so on a variety

³⁹ *See id.*

⁴⁰ 588 F.2d 373 (3d Cir. 1978).

⁴¹ *See id.* at 375-76.

⁴² *See id.* at 376 (noting that "[i]t should be made clear from the outset that our reversal is not based on the entrapment defense").

⁴³ *Id.* at 377.

⁴⁴ *Id.*

⁴⁵ *See, e.g., United States v. Tucker*, 28 F.3d 1420, 1425 (6th Cir. 1994) (stating that the "holding [in *Twigg*] has been disavowed by the Third Circuit on the ground that the *Twigg* court improperly relied on *United States v. West*, which had been limited by *Hampton* and other, more recent, Third Circuit opinions") (citations omitted).

⁴⁶ 411 U.S. 423 (1973).

⁴⁷ *Id.* at 431-32.

⁴⁸ *See Tucker*, 28 F.3d at 1425 (finding "unnecessary conflict in the courts of appeals where, although the courts are all-but-unanimous in their results, contradictory standards have evolved").

of grounds: some by dismissing it as non-existent under the law,⁴⁹ others by recognizing the defense, but only as an extension of the defense of entrapment,⁵⁰ and still others by recognizing it in theory, but never in fact.⁵¹

In *United States v. Tucker*,⁵² the Sixth Circuit, after a lengthy survey of the law, completely rejected the defense of outrageous government conduct.⁵³ It interpreted all language supporting the defense as pure dicta⁵⁴ and determined the existence of the defense to be "an open question" to be addressed by the court as a matter of first impression.⁵⁵ As in most other cases where the defense is raised, the underlying government conduct in *Tucker* was inducement. The government operative, hired to catch abusers of the Tennessee food stamp program and paid a commission on each sale, contacted an old friend and claimed she was in dire financial need. Appearing at Ms. Tucker's place of business "dressed in a manner suggesting her financial distress," the operative convinced the initially resisting defendant and a co-worker to buy her foods stamps so that she would have money to give her children a "proper Christmas."⁵⁶ The defendants argued that the government's conduct in inducing them to commit the crime of purchasing food stamps by playing on lifelong friendships and human compassion was so outrageous that it violated their due process rights.⁵⁷

Holding that inducement does not violate a defendant's due process rights, no matter how outrageous it is,⁵⁸ the court dismissed out of hand the defendants' theory of outrageous government conduct.⁵⁹ In so holding, the Sixth Circuit reached the same conclusion many other courts have reached: that the defense of outrageous government conduct is nothing more than a glorified or exaggerated claim of entrapment.⁶⁰ As such, a defendant's willingness to commit the crime, char-

⁴⁹ See, e.g., *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995) (holding that the defense of outrageous government conduct "does not exist in this circuit").

⁵⁰ See, e.g., *United States v. Branham*, 97 F.3d 835, 852 (6th Cir. 1996) (stating that an outrageous government conduct defense "is nothing more than a claim of entrapment"); *Tucker*, 28 F.3d at 1422 (stating that an analysis of any outrageous government conduct defense must "begin with the law of entrapment").

⁵¹ See, e.g., *United States v. Nolan-Cooper*, 155 F.3d 221, 224 (3d Cir. 1998) ("[I]n the twenty years since *Twigg* we have not found another set of facts that satisfy [the] rigorous requirements" of the outrageous government conduct defense).

⁵² 28 F.3d 1420 (6th Cir. 1994).

⁵³ See *id.* at 1426-27 (determining that the Sixth Circuit was "not required to recognize the 'due process' defense" and concluding that it "simply does not exist").

⁵⁴ See *id.* at 1424-25.

⁵⁵ *Id.* at 1425.

⁵⁶ *Id.* at 1421.

⁵⁷ See *id.*

⁵⁸ See *id.* at 1427.

⁵⁹ See *id.* at 1428.

⁶⁰ See *id.* at 1422 (finding that "[a]ny analysis of the so-called 'due process' defense must, in our view, begin with the law of entrapment"). Other courts have reached the same conclusion.

acter and reputation, prior criminal record, and any profit made in the transaction can all render the defense unavailable.⁶¹

A. Distinguishing the Outrageous Government Conduct and Entrapment Defenses⁶²

It is easy to understand why many courts view the defense of outrageous government conduct simply as an extension of the defense of entrapment.⁶³ This new defense was initially often raised on the theory that, regardless of a defendant's predisposition to commit an offense, dismissal is mandated whenever the court determines that there has been "an intolerable degree of governmental participation in the criminal enterprise."⁶⁴ The Supreme Court eventually rejected this broadening of the entrapment defense in *Russell*.⁶⁵ However, merely because the Court declined to find outrageous government conduct based on an enlarged entrapment defense in that case, it does not necessarily follow that entrapment is the only basis on which such mis-

See, e.g., United States v. Branham, 97 F.3d 835, 852 (6th Cir. 1996) (citing *Tucker* for the proposition that an outrageous government conduct "claim is nothing more than a claim of entrapment, and may not be circumvented by couching the defense in terms of due process"); United States v. Jannotti, 673 F.2d 578, 607 (3d Cir. 1982) ("[A] successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense.").

⁶¹ As is explained below, any concession by the defendant of a criminal predisposition is fatal to an entrapment claim. *See infra* notes 71-73, 81 and accompanying text. The Ninth Circuit has listed the factors used in determining whether a criminal defendant is predisposed as:

- (1) the character or reputation of the defendant, including any prior criminal record;
- (2) whether the government initially made the suggestion of criminal activity;
- (3) whether the defendant engaged in the criminal activity for profit;
- (4) whether the defendant evidenced reluctance to commit the offense that was overcome by repeated government inducement or persuasion; and
- (5) the nature of the inducement or persuasion supplied by the government.

United States v. Smith, 802 F.2d 1119, 1124-25 (9th Cir. 1986) (citation omitted). This approach has been criticized as "a series of hunches based on circumstantial clues." Miller, *supra* note 7, at 308.

⁶² For a detailed discussion of the two defenses, see generally John David Buretta, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 GEO. L.J. 1945 (1996) (calling for an examination of the inconsistencies between the outrageous government conduct and entrapment defenses in light of growing police power and to promote consistency and fairness in their application).

⁶³ Not all courts, however, view the defense in this way. *See, e.g.,* United States v. Miller, 891 F.2d 1265, 1267 (7th Cir. 1989) (stating the Supreme Court distinguished the concept of outrageous government conduct from the defense of entrapment in *United States v. Russell*); *see also* Miller, *supra* note 7, at 306 ("Unlike its statutory cousin, the outrageous government conduct defense focuses on the procedures used by law enforcement officials to obtain a conviction; the defendant's mental state, the sole concern of the entrapment defense, is irrelevant to this determination.") (footnote omitted).

⁶⁴ United States v. Russell, 459 F.2d 671, 673 (9th Cir. 1972).

⁶⁵ 411 U.S. 423, 436 (1973) ("The Court of Appeals was wrong, we believe, when it sought to broaden the [entrapment defense].").

conduct can be established. In fact, the Court specifically left the door open for findings of outrageous government conduct in the future.⁶⁶

The entrapment defense was first recognized by the Supreme Court in *Sorrells v. United States*.⁶⁷ The focus of the majority opinion was on the defendant's intent or predisposition to commit the offense,⁶⁸ while the concurrence looked to whether the government instigated its commission.⁶⁹ The modern view of entrapment is based on the former, subjective test and is available only to defendants who can prove they would not have committed crimes absent governmental inducement.⁷⁰ Any concession by the defendant of a criminal predisposition is fatal to her claim of entrapment.⁷¹ However, in the area of outrageous government conduct, requiring a preliminary showing of entrapment unduly limits the availability of the defense. If the defense of outrageous government conduct is considered only as an extension of the defense of entrapment, it is unavailable to defendants who admit or who are proven to possess a predisposition to commit criminal acts. This should not be the case, for clearly even the predisposed retain their constitutional rights.⁷² Just as the predisposed defendant is still protected against unlawful search and seizure and self-incrimination, he should be protected against other forms of misconduct by government officials.⁷³

Viewing the defense of outrageous government conduct as an extension of entrapment, and therefore as a subjective test, relieves courts of the duty to examine a federal agent's conduct. As the Sixth Circuit said in *Tucker*, "[b]ecause we find no binding authority requiring or even authorizing this court to conduct a purely objective assessment of the government's conduct in this case, we decline to do

⁶⁶ See *id.* at 431-32 ("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, the instant case is distinctly not of that breed."); see also Donald A. Dripps, *At the Border of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261, 262 (1993) (stating that the Court has left open the possibility that demonstrably outrageous conduct might trigger a due process bar to conviction).

⁶⁷ 287 U.S. 435 (1932).

⁶⁸ See *id.* at 451.

⁶⁹ See *id.* at 459.

⁷⁰ See *Russell*, 411 U.S. at 440 (Stewart, J., dissenting).

⁷¹ See *id.* at 436; see also *United States v. Tucker*, 28 F.3d 1420, 1422 (6th Cir. 1994) (stating that the Supreme Court made it "absolutely clear that a defendant, whose predisposition to commit a particular crime was proved beyond a reasonable doubt, could not defend against prosecution on the basis that the government induced him to commit that crime, no matter how strong the inducement or 'outrageous' the government's conduct").

⁷² See *California v. Rochin*, 225 P.2d 913, 917 (Cal. Ct. App. 1950) ("The requirements of due process are just as applicable to the guilty as to the innocent.")

⁷³ See *Miller*, *supra* note 7, at 328 (stating that the entrapment defense alone "offers minimal protection to defendants because their prior crimes and even their general reputation are admissible evidence in a determination of predisposition").

so.”⁷⁴ Once the defendant’s predisposition is established, and the outrageous government conduct defense is thus unavailable, the court can turn a blind eye to any reprehensible conduct on the part of the government during the investigation.

In *Hampton*, the United States Supreme Court affirmed the defendant’s conviction by rejecting both an entrapment defense and a due process defense.⁷⁵ However, a majority of the Court, composed of three dissenting Justices and two concurring Justices, rejected the position that “the defense of entrapment necessarily is the only doctrine relevant to cases in which the Government has encouraged or otherwise acted in concert with the defendant.”⁷⁶ Thus, those circuits that do not recognize the defense of outrageous government conduct independent from the defense of entrapment are not following the law as set forth by a majority of the Court.

Common sense dictates that the defense of outrageous government conduct is not synonymous with the defense of entrapment. Clearly, there exists a wide range of government activities that can be outrageous, but are not protected by the theory of entrapment. For example, threats of prosecution, coercion, bribery, threat or use of force and torture are all prohibited as outrageous misconduct.⁷⁷ The illegality of such conduct is not dependent on whether the defendant was predisposed to commit a criminal act or even on whether she is obviously guilty. As Justice Frankfurter stated in *Sherman v. United States*,⁷⁸ “[n]o matter what the defendant’s past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct . . . is not to be tolerated by an advanced society.”⁷⁹

⁷⁴ 28 F.3d 1420, 1421 (6th Cir. 1994).

⁷⁵ See *Hampton v. United States*, 425 U.S. 484, 488-90 (1976).

⁷⁶ *Id.* at 493 n.2 (1976) (Powell, J., concurring); see also *United States v. Nolan-Cooper*, 155 F.3d 221, 229 n.4 (3d Cir. 1998) (stating that, in *Hampton*, “[a]lthough the plurality favored a *per se* rule that, in cases of police overinvolvement in the suspect’s criminal activity, there can be no due process violation when the defendant’s predisposition to commit the crime can be shown, the concurring justices joined with a two-justice dissent to validate the outrageous conduct defense”); *United States v. Jannotti*, 673 F.2d 578, 606-07 (3d Cir. 1982) (finding a clear admonition by the Supreme Court that the due process defense and the entrapment defense are “separate and distinct”).

⁷⁷ See generally L.I. Reiser, Annotation, *Coercion, Compulsion, or Duress as Defense to Criminal Prosecution*, 40 A.L.R.2d 908 (1955). Similarly, there are many forms of “troubling, and potentially abusive, police methods” which are not covered by the Fourth Amendment prohibition against unreasonable searches and seizures. See Dripps, *supra* note 66, at 263. The outrageous government conduct defense acts as a gap-filler to protect defendants from misconduct not specifically prohibited by the Constitution.

⁷⁸ 356 U.S. 369 (1958).

⁷⁹ *Id.* at 382-83 (Frankfurter, J., concurring).

The two defenses do tend to overlap,⁸⁰ mainly because the government conduct most likely to be contested is that used to induce or encourage a defendant to commit crimes or further crimes. Without a separate outrageous government conduct defense based on due process rights, when the government engages in misconduct in its investigation but can prove the defendant was predisposed to commit at least some part of the offense, the defendant is left without redress.⁸¹

However, regardless of her predisposition, a defendant should be entitled to the protection of the Constitution. Where the defense of entrapment focuses on the state of mind of the defendant, the focus of the defense of outrageous government conduct should be on the conduct of the government, viewed independently of the likelihood of the defendant's predisposition or guilt.⁸² As the Second Circuit has stated, "[t]he outrageousness of the government's conduct must be viewed 'standing alone' and without regard to the defendant's criminal disposition."⁸³

It violates our system of justice to simply state that because a defendant was clearly guilty, so it does not matter what techniques the government used to obtain the evidence required for conviction. Yet, this is essentially what courts are saying when they dismiss a claim of outrageous government conduct because of what they view as overwhelming evidence of guilt. In cases of technical violations (*i.e.*, a tardy wiretap warrant), it may be acceptable to overlook misconduct

⁸⁰ See *Jannotti*, 673 F.2d at 606 (stating that a difficulty in delineating the contours of the due process defense "lies in a tendency for the due process defense to overlap with the entrapment defense").

⁸¹ See *Hampton v. United States*, 425 U.S. 484, 488-89 (1976) (ruling out the possibility that "the defense of entrapment could ever be based upon governmental misconduct in a case . . . where the predisposition of the defendant to commit the crime was established"); *United States v. Russell*, 411 U.S. 423, 436 (1973) (holding that the defendant's "concession in the Court of Appeals that the jury finding as to predisposition was supported by the evidence [was] . . . fatal to his claim of entrapment"); *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986) ("If the defendant is predisposed to commit the crime, then the entrapment defense is unavailable.").

⁸² In *United States v. Dunn*, 608 F. Supp. 530 (W.D.N.Y. 1985), the court recognized this difference and stated:

Unlike the defense of entrapment which primarily concerns an accused's predisposition *vel non* to commit a particular offense, [the outrageous government conduct] defense involves consideration of whether the conduct of law enforcement agents, with respect to their initiation, encouragement of, and participation in a criminal transaction or attempted transaction, "is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."

Id. at 130 (citing *Russell*, 411 U.S. at 431-32); see also Conrad F. Meis, *United States v. Tucker: The Illegitimate Death of the Outrageous Governmental Conduct Defense?*, 80 IOWA L. REV. 955, 960 (1995) ("Because a court focuses only on the government's conduct when considering an outrageous governmental conduct defense, a defendant who was predisposed to commit the crime could plead outrageous governmental conduct.").

⁸³ *United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir. 1991) (citation omitted). See also *Jannotti*, 673 F.2d at 608 (stating it was proper for the district court to focus on the nature of the government conduct in finding a due process violation).

in light of strong evidence of the defendant's guilt. However, when constitutional rights are violated, no level of guilt is sufficient to allow the judiciary to look the other way. Courts may refuse to convict a defendant, "not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced."⁸⁴ To hold otherwise is to overturn the basic philosophy of our justice system.

As Justice Holmes stated in *Olmstead v. United States*,⁸⁵ "[w]e have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."⁸⁶

B. Theory v. Fact

Another way in which courts have effectively dismissed the outrageous government conduct defense is to recognize its existence, but raise the bar sufficiently high enough that no defendant can satisfy it.⁸⁷ Thus, courts recognize the theory, but consistently find it inapplicable to the facts of the particular case.⁸⁸ Typical of several courts,⁸⁹ the Seventh Circuit recognized the possibility of a finding of outrageous government conduct, distinct from the defense of entrapment,⁹⁰ but declared that "government conduct must be truly outrageous before due process will prevent conviction of the defendant."⁹¹ Only a single conviction has been overturned on outrageous government conduct grounds in over twenty years.⁹² As one judge aptly put it, the

⁸⁴ *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring).

⁸⁵ 277 U.S. 438 (1928).

⁸⁶ *Id.* at 470.

⁸⁷ In fact, one of the main criticisms of the outrageous government conduct defense is that it is an "illusory remedy." See *Miller, supra* note 7, at 334; see also *Dripps, supra* note 66, at 265 ("Because no constitutional text informs the due process inquiry . . . judges are deeply reluctant to invoke due process in actual cases . . .").

⁸⁸ See, e.g., *United States v. Tucker*, 28 F.3d 1420, 1424 (6th Cir. 1994) ("In more than two dozen cases [since the defense of outrageous governmental conduct was first addressed], this circuit has rejected 'on the facts' every attempt to invoke the so-called 'due process' defense.") (citations omitted); see also *Miller, supra* note 7, at 306 (stating that the outrageous government conduct defense "has a high threshold and has been successfully invoked in only the most shocking cases of governmental misconduct").

⁸⁹ See, e.g., *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993) (citing *United States v. Miller*, 891 F.2d 1265, 1271-73 (7th Cir.1989) (Easterbrook, J., concurring); *Moran v. Burbine*, 475 U.S. 412, 432 (1986); *United States v. Mosley*, 965 F.2d 906, 909 (10th Cir. 1992)).

⁹⁰ See *Miller*, 891 F.2d at 1267.

⁹¹ *Id.* (quoting *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983)).

⁹² See *United States v. Nolan-Cooper*, 155 F.3d 221, 224 (3d Cir. 1998) ("In *United States v. Twigg*, we sustained a defendant's claim that the government's investigatory misconduct was so egregious that the due process clause demanded dismissal of the indictment against him . . . though in the twenty years since *Twigg* we have not found another set of facts that satisfy its rigorous requirements.") (citation omitted); *Santana*, 6 F.3d at 4 ("[S]ince the Supreme Court decided *Hampton*, a federal appellate court has granted relief to a criminal defendant on the basis of the outrageous misconduct defense only once.") (citing *United States v. Twigg*, 588

"banner of outrageous misconduct is often raised but seldom saluted [I]n practice, courts have rejected its application with almost monotonous regularity."⁹³

Such stark resistance to the theory's application has led some to call for its abandonment: "When push comes to shove, we should reject the contention that the criminal must go free because the constable was too zealous. Why raise false hopes? Why waste litigants' and judges' time searching for and rejecting on the facts defenses that ought not exist as a matter of law?"⁹⁴ However, regardless of the frequency of its application or criticism of its existence, outrageous government conduct continues to be a recognized defense as a matter of law.⁹⁵ As such, until explicitly rejected by the Supreme Court, it should be made available to defendants in fact as well as in theory.⁹⁶ For the purpose of the remainder of this Note, it will be assumed that outrageous government conduct is and should be valid grounds for dismissal of an indictment distinct from the defense of entrapment.

II. ANALYSIS

A. United States v. Nolan-Cooper

In *United States v. Nolan-Cooper*,⁹⁷ the defendant's predisposition to engage in money laundering was established,⁹⁸ and, therefore,

F.2d 373, 382 (3d Cir. 1978)); *see also* *United States v. Berg*, 178 F.3d 976, 979 (8th Cir. 1999) (stating that the Eighth Circuit "has yet to see a case in which the government's conduct rose to the level of such outrageousness"); *United States v. Pedraza*, 27 F.3d 1515, 1521 n.3 (10th Cir. 1994) (noting that the Tenth Circuit has "never issued an opinion overturning a criminal conviction on the ground of outrageous government conduct").

⁹³ *Santana*, 6 F.3d at 4 (citations omitted). This practice is not inconsistent with what some view as an obvious transition in the courts "from a due process-oriented criminal justice model to a model that has placed increasing emphasis on crime control and crime prevention." Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393 (1992). The judiciary has participated in relaxing due process protections and following an "end[s] justifies the means" mentality. *Id.* at 394.

⁹⁴ *Miller*, 891 F.2d at 1271 (Easterbrook, J., concurring).

⁹⁵ *See* *United States v. Voigt*, 89 F.3d 1050, 1064 (3d Cir. 1996) ("[W]e have no reason to doubt that the [United States Supreme] Court continues to recognize a due process claim premised upon outrageous law enforcement investigative techniques."); *Santana*, 6 F.3d at 3 n.4 (stating that although the appeal was rejected, two concurring Justices in *Hampton* formed a majority "vivifying the doctrine of outrageous governmental conduct").

⁹⁶ *See* *Miller*, *supra* note 7, at 346, 373 (stating that "courts have no right to deny a constitutional protection to any defendant based on its perceived infrequent invocation," and those courts "that have repudiated this defense have therefore abdicated their constitutional responsibility to protect the citizenry from arbitrary and extreme government action").

⁹⁷ 155 F.3d 221 (3d Cir. 1998).

⁹⁸ *See id.* at 226 (finding that Ms. Nolan-Cooper was willing to assist Agent Oubre at their first meeting and that because she told him she was experienced in the art of money laundering, "[t]he evidence is overwhelming that Ms. Nolan-Cooper's criminal conduct in this case was pervasive and entirely voluntary") (citation omitted).

she was barred from raising the defense of entrapment.⁹⁹ Instead, she argued that the federal agent's sexual relationship with her during the investigation was outrageous government conduct egregious enough to entitle her to dismissal of the indictment.¹⁰⁰ The Third Circuit Court of Appeals disagreed and affirmed the denial of her motion.¹⁰¹

The case began with an Internal Revenue Service investigation of Angela Nolan-Cooper, a Philadelphia attorney suspected of laundering drug money for clients.¹⁰² Agent Oubre posed as "Louis Richard," a wealthy drug dealer from New Orleans, while Agent Jolly posed as his bodyguard "Tony Jones."¹⁰³ The investigation began in February 1994 with an initial meeting between Agent Oubre and Ms. Nolan-Cooper wherein she agreed to help him set up a sham business and hide his money in Bahamian bank accounts.¹⁰⁴ The court described the investigation that followed:

During the approximately thirteen-month undercover investigation, Agent Oubre made several trips to the Philadelphia area to meet with Nolan-Cooper. In order to maintain his cover as a wealthy drug dealer, Oubre stayed in expensive rooms at the city's best hotels, rented fancy cars, ate expensive dinners, and consumed a considerable amount of alcohol. Moreover, during these visits Oubre initiated many social get-togethers with Nolan-Cooper, typically involving dinner at pricey restaurants, drinks, and partying late into the evening at area nightclubs. They were paid for by Oubre (with funds supplied by the government) and often cost upwards of several hundred dollars per night. These social events sometimes included other individuals (some of whom were suspected co-conspirators), and sometimes involved only Oubre and Nolan-Cooper, who apparently accepted Oubre's invitations without much resistance.

Although not involving formal business discussions, Oubre used these social meetings to develop and cement a relationship with Nolan-Cooper. There is also testimony in the record (though the district court did not make reference to these facts in its opinion) that Oubre often bought Nolan-Cooper small gifts, that he addressed her with affectionate pet names,

⁹⁹ As explained above, a defendant's predisposition to commit a crime precludes the assertion of an entrapment defense. See *supra* notes 61, 71-73 and accompanying text.

¹⁰⁰ See *Nolan-Cooper*, 155 F.3d at 224.

¹⁰¹ See *id.* at 244.

¹⁰² See *id.* at 224.

¹⁰³ See *id.* at 225, 227.

¹⁰⁴ See *id.* at 226.

and that, on two occasions, he was seen being physically affectionate with her.¹⁰⁵

Ms. Nolan-Cooper argued that Agent Oubre's cultivation of a romantic relationship with her was an improper element of his investigative strategy.¹⁰⁶ However, the conduct of Agent Oubre that directly gave rise to her motion to dismiss the indictment occurred on February 17, 1995, just one month before her arrest.¹⁰⁷ On that date, Agent Oubre planned another evening of dinner and nightclubbing. He, Agent Jolly, Ms. Nolan-Cooper, and her friend Ms. Donita Nero began the evening with drinks from the mini-bar of the agents' shared hotel suite. They then had dinner at an expensive restaurant.¹⁰⁸ The group separated for approximately three hours while the agents were debriefed by their IRS supervisors.¹⁰⁹ After their debriefing, the agents "happened upon" Ms. Nolan-Cooper and Ms. Nero at a local bar the women had told the agents they were going to just before closing time.¹¹⁰ The four returned to the agents' suite and drank wine into the early morning hours.¹¹¹ Agent Oubre and Ms. Nolan-Cooper went into Agent Oubre's bedroom where they stayed for some time and engaged in sexual intercourse.¹¹² Later that morning, Agent Jolly went to Ms. Nero's home where the two also engaged in sexual intercourse.¹¹³ Ms. Nolan-Cooper was arrested March 24, 1995.¹¹⁴ She was sentenced to seventy-two months in prison, plus a fine and forfeiture of funds.¹¹⁵

The court began its evaluation of the case with an overview of the outrageous government conduct doctrine. Under the law of the Third Circuit, "a criminal defendant may raise a due process challenge to an indictment against her based on a claim that the government employed outrageous law enforcement investigative techniques."¹¹⁶ However, the court noted that because of the "extraordinary" nature of the doctrine, the judiciary has been "extremely hesitant" to uphold

¹⁰⁵ *Id.* at 226.

¹⁰⁶ *See id.* at 228.

¹⁰⁷ *See id.* at 227. Ms. Nolan-Cooper did claim that she and Agent Oubre also had sex on two prior occasions, in August and December of 1994. The trial court did not find these allegations to be supported by fact and Ms. Nolan-Cooper did not revive them on appeal. *See id.* at 228 n.2.

¹⁰⁸ *See id.* at 227.

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ *See United States v. Nolan-Cooper*, 957 F. Supp. 647, 663 (E.D. Pa. 1997), *vacated*, *United States v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998).

¹¹² *See Nolan-Cooper*, 155 F.3d at 227 (stating testimony indicated that the sexual contact lasted from forty-five minutes to two hours).

¹¹³ *See id.*

¹¹⁴ *See id.* at 228.

¹¹⁵ *See id.* at 225.

¹¹⁶ *Id.* at 229 (citing *United States v. Voigt*, 89 F.3d 1050, 1064 (3d Cir. 1996)).

claims based on outrageous government conduct.¹¹⁷ The court declined to deal specifically with Ms. Nolan-Cooper's claims that Agent Oubre's conduct violated her constitutional right to privacy.¹¹⁸ Additionally, the court noted that "trying to fit a subjective notion such as intimacy into the framework of the Due Process clause is an immensely difficult task."¹¹⁹ It held that there is a continuum between casual physical contact and intense physical bonding,¹²⁰ and at some point "physical contact and emotional intimacy between an undercover agent and his or her target suspect becomes outrageous as a matter of constitutional law."¹²¹ In the court's estimation, however, Agent Oubre had not reached that point. The court hinted at where that point might be when it stated that "[h]ad the sexual misconduct been present throughout the investigation (with the actual or constructive knowledge of supervisory personnel), a different situation would be presented."¹²²

The court reviewed *United States v. Cuervelo*,¹²³ a similar case wherein the agent admitted attempting to establish a "love interest" between himself and his target but denied the defendant's claims that he had had sexual relations with her on at least fifteen occasions.¹²⁴ The Second Circuit remanded the case for an evidentiary hearing on Ms. Gomez-Galvis's claim of outrageous government conduct.¹²⁵ In so doing, the court set forth a three-part test which, at minimum, the defendant was required to satisfy in order to have her indictment dismissed:

- (1) that the government consciously set out to use sex as a weapon in its investigatory arsenal, or acquiesced in such conduct for its own purposes upon learning that such a relationship existed; (2) that the government agent initiated a sexual relationship, or allowed it to continue to exist, to achieve governmental ends; and (3) that the sexual relationship took place during or close to the period covered by the indictment and was entwined with the events charged therein.¹²⁶

The court in *Nolan-Cooper* adopted this three-part test with one minor adjustment. Believing that a requirement that the defendant

¹¹⁷ *Id.* at 230.

¹¹⁸ *See Nolan-Cooper*, 155 F.3d. at 235 n.10.

¹¹⁹ *Id.* at 232.

¹²⁰ *See id.* at 231.

¹²¹ *Id.* at 232.

¹²² *Id.* at 224.

¹²³ 949 F.2d 559 (2d Cir. 1991).

¹²⁴ *See id.* at 561.

¹²⁵ *See id.* at 569.

¹²⁶ *Id.* at 567.

prove the government had actual knowledge of the sexual relationship might be too stringent and might encourage supervisory agents to “turn a blind eye” to their operative’s conduct, the court eliminated it.¹²⁷ Instead, a defendant alleging outrageous government conduct in the Third Circuit “need only show that the government consciously set out to use sex as a weapon in its investigatory arsenal, or acquiesced in such conduct for its own purposes *once it knew or should have known* that such a relationship existed.”¹²⁸ Additionally, the court emphasized that the test should not be applied rigidly. The ultimate determination of the merits of an outrageous government conduct claim should continue to be whether the government’s conduct was so “shocking, outrageous, and clearly intolerable” that it offends due process.¹²⁹

The *Nolan-Cooper* court erred in refusing to establish a bright line rule prohibiting sexual intercourse between agent and target. Sexual relations between a federal undercover agent and his target is and should be considered by the courts to be sufficiently shocking, outrageous, and clearly intolerable under our system of justice—mandating the dismissal of the indictment. Instead of simply holding that sexual intercourse between agent and target at any point in the investigation and for any reason sufficiently “shocks the conscience” to create a due process violation, the court adopted its three-part test. As discussed below, the first two steps can and should be re-analyzed and collapsed into a strict prohibition coupled with step three, which is merely a timing requirement.

B. A Call for the Abandonment of the Three-Part Test in Favor of a Bright Line Rule

A bright line rule that the judiciary will not condone sexual relations between agent and target should replace the three-part test set forth in *Nolan-Cooper*. As the law now stands, the government may not purposefully, knowingly or recklessly¹³⁰ allow its agents to use sex as an investigatory tool to achieve governmental ends during the time period covered in the indictment or entwined with the events therein. If the courts acknowledge that even recklessly allowing such conduct to exist violates the defendant’s due process rights, the courts should go further and impose an absolute prohibition against it.

The first part of the test requires proof that the government consciously set out to use sexual intercourse as a weapon in its investigatory arsenal or acquiesced in such conduct for its own purposes

¹²⁷ *Nolan-Cooper*, 155 F.3d at 233.

¹²⁸ *Id.* (emphasis in original).

¹²⁹ *Id.*

¹³⁰ *See id.* (explaining that the defendant can prove that the government acquiesced in the use of sexual conduct once it knew or should have known it existed).

once it knew or should have known a sexual relationship existed.¹³¹ Thus, part one contains two components: knowledge and purpose. The agent's knowledge concerning a sexual relationship should be automatically imputed to the government, which is in a much better position than the defendant to control what it knows about any given investigation. The purposeful supervisory "blind eye" is not the only situation to be feared if actual or constructive knowledge by the government must be proven. A simple "don't ask, don't tell" policy could effectively eliminate every defendant's claim of a due process violation in cases like *Nolan-Cooper*. If the defendant cannot refute the government's claim that its agent was so skilled in deception that even his supervisors had no reason to know he was having sex with his target, she will be denied relief. If it can be determined that the conduct is wrongful, why should the agent be rewarded if he can sufficiently cover his tracks?

Sexual intercourse does not happen accidentally. Federal agents are presumably well-trained and intelligent people. The cultivation of "love interests" or non-sexual romantic relationships by undercover agents with targets is a bothersome, but not necessarily reprehensible, tool used in the government's war on crime.¹³² Undercover agents must, by the very nature of their work, use deception to obtain convictions.¹³³ Every defendant who finds she has been duped by a friend-turned-informant or an undercover agent whom she trusted will feel the sting of embarrassment, humiliation and betrayal. However, when the deceit leads not merely to friendship and intimacy, but to sexual intercourse, the "sting" should "shock the conscience" and automatically give rise to an enforceable outrageous government conduct defense. While "mere distaste" for certain investigative tech-

¹³¹ See *supra* note 126 and accompanying text.

¹³² See *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991) ("[S]leazy investigatory tactics alone—unless so offensive that they amount to a violation of due process—do not provide the 'clear basis in . . . law' required for the exercise of the supervisory power.") (citations omitted); *United States v. Simpson*, 813 F.2d 1462, 1466 (9th Cir. 1987) ("[T]he deceptive creation and/or exploitation of an intimate relationship does not exceed the boundary of permissible law enforcement tactics."); *United States v. Smith*, 802 F.2d 1119, 1125-26 (9th Cir. 1986) (recognizing "that government agents may lawfully use methods that may cause concern if judged by abstract standards" but their conduct "becomes constitutionally unacceptable only when it 'shocks the conscience'") (citations omitted).

¹³³ See *Simpson*, 813 F.2d at 1466 ("To win a suspect's confidence, an informant must make overtures of friendship and trust and must enjoy a great deal of freedom in deciding how best to establish a rapport with the suspect."). But see Richard Lawrence Daniels, *United States v. Simpson: 'Outrageousness!' What Does it Really Mean—An Examination of the Outrageous Conduct Defense*, 18 Sw. U. L. REV. 105, 119 (1988) (arguing that since the underlying investigation of non-sex crimes has nothing to do with sexual intercourse, "the use of sex as a tool does not necessarily deserve similar treatment. While such trickery and deception on the part of the government has been accepted by the court in certain circumstances, there still must be a limit to what the government can do to deceive a defendant").

niques is not sufficient to find they violate due process,¹³⁴ when a federal agent, acting with all the power and resources of the federal government behind him, has sexual intercourse under manifestly fraudulent circumstances with the target of his investigation—the very person whose goal it is for him to imprison—such techniques no longer qualify as merely distasteful.

A defendant is not protected by the Due Process clause from voluntarily reposing her trust in one who turns out to be unworthy of it.¹³⁵ Similarly, she is not protected from reposing her affections in one who turns out to be feigning affections toward her. However, when a relationship between agent and target proceeds to the point of sexual intercourse, it does so on the foundation of a relationship used as a weapon in the agent's investigatory arsenal. The carefully cultivated relationship, admittedly formed and cemented to be used as a weapon, does not disappear into thin air on the occasion of sexual intercourse. If the purpose of the intimate relationship is to aid the investigation, and that intimate relationship leads to sexual intercourse, it cannot logically be claimed that the purpose of the sexual intercourse was not also to aid the investigation.¹³⁶ If sexual intercourse is a continuation of that relationship, its purpose should be assumed. Thus, if (1) the knowledge of the government is considered to be the same as the knowledge of the agent, and (2) the purpose of the culmination of the tool (sexual intercourse) is assumed to be the same as the purpose of the tool (a romantic/intimate relationship), the need for part one of the test is eliminated. What the agent knows, the government should know. If the purpose of the relationship is to facilitate the investigation, the climax of that relationship would presumably

¹³⁴ See Milton Hirsch, *Confidential Informants: When Crime Pays*, 39 U. MIAMI L. REV. 131, 154 (1984).

¹³⁵ See, e.g., *Simpson*, 813 F.2d at 1466 (explaining that the informant was sexually and emotionally involved with defendant, yet denying the defendant's due process claim); *Smith*, 802 F.2d at 1125 (explaining that the informant was defendant's brother, with whom he was attempting to establish a closer relationship, yet denying the defendant's due process claim).

¹³⁶ The district court in *Nolan-Cooper* found that the sexual intercourse "was not designed to further any investigatory end" because there was "no evidence of any discussions among the investigating agents and their superiors concerning the use of sex as an inducement, reward or lure to obtain Nolan-Cooper's participation in the conspiracy." 155 F.3d 221, 234 (3d Cir. 1998). The conclusion is faulty for two reasons. First, misconduct can be outrageous regardless of whether or not it is used to induce the target to commit additional crimes. See *supra* Part II.A (discussing entrapment and outrageous conduct defenses). Misconduct such as the unnecessary use of threat or force, torture, illegal search and seizure, or unlawful arrest can violate a defendant's due process rights regardless of whether it causes, encourages or rewards criminal activity during the investigation. Second, simply because the agents did not discuss the use of sex as a tool does not mean it was not in fact used as a tool. If this were the case, simply by avoiding discussing it beforehand, the officers in *Rochin* may have avoided violating the defendant's due process rights when they unlawfully arrested him and forcibly induced vomiting. See *supra* notes 23-30 and accompanying text. It is unlikely Agent Oubre discussed every element of his plan to create an intimate relationship with Ms. Nolan-Cooper—such as calling her pet names and being physically affectionate with her—with his partner or supervisors. Yet, it cannot legitimately be argued that these techniques were not used as investigatory tools.

facilitate the investigation all the more.¹³⁷ A sexual relationship *caused by* the investigation—in the sense that but for the agent's undercover pursuit of intimacy and trust, sexual intercourse would not have occurred—should be assumed to be a tool of that investigation.

The second part of the test requires proof that the government agent initiated a sexual relationship or allowed it to continue to achieve governmental ends.¹³⁸ The governmental ends requirement is no different from the purpose requirement in part one. Presumably, the ends sought by the government are the same as its purposes. Those ends are the accumulation of sufficient evidence to secure convictions against the maximum number of criminals. A sexual relationship which only enhances the intimacy and trust between an agent and target (at least from the target's point of view) would clearly work towards achieving those ends.¹³⁹ Thus, part two of the test should also be eliminated.

Part three of the test requires that the sexual relationship take place during or close to the period covered by the indictment and be intertwined with the events charged.¹⁴⁰ This requirement should be retained since its proof will provide adequate evidence that the sexual relationship would not have occurred but for the investigation and that the sexual relationship was used as an investigatory tool.

In *Nolan-Cooper*, the appellate court accepted the district court's finding that the sexual activity between Agent Oubre and Ms. Nolan-Cooper was not designed to serve investigatory ends.¹⁴¹ Rather, the agents' actions were considered "'shaking loose' from the oversight of their supervisors."¹⁴² Regardless of whether the specific act of sexual intercourse was authorized by IRS supervisors or not, its occurrence was based on the cultivation of an intimate, romantic relation-

¹³⁷ An additional problem with the knowledge and purpose requirements may arise in the case of an agent who truly is pursuing a sexual relationship with his target merely for his own gratification. Such conduct does not become less reprehensible simply because his superiors did not know about it or because, in addition to securing a conviction, the agent secures sexual relations with his personal "target." If the standard of a due process claim is truly to be government conduct which is "shocking, outrageous and clearly intolerable," the use by a government agent of his position and government funds to satisfy his libido on false pretenses must qualify as a violation of due process. *Nolan-Cooper*, 155 F.3d at 232. For this reason the "detour and frolic" doctrine, wherein an agent's conduct which takes him outside the scope of his employment is not imputed to his principal, should not bar a outrageous government conduct claim. The misconduct does not become the less reprehensible, shocking or deserving of sanction if the agent does it "on his own time." An undercover agent, while acting under his investigatory personae, who comes into contact with his target should not be considered to be acting outside the scope of his employment.

¹³⁸ See *supra* note 126 and accompanying text.

¹³⁹ Again, if the agent is allowing the sexual relationship to continue only for his own ends—sexual gratification—the conduct should not be condoned. See *supra* note 137.

¹⁴⁰ See *supra* note 126 and accompanying text.

¹⁴¹ See *Nolan-Cooper*, 155 F.3d at 234.

¹⁴² *Id.* at 228.

ship over 13 months which the government not only condoned, but financed.

Because Ms. Nolan-Cooper considered the romantic and sexual relationship pursued by Agent Oubre to be "part of his investigative strategy," she argued that the relationship "was an unjustifiable intrusion into the most personal aspects of her life in violation of her fundamental (due process and privacy) rights."¹⁴³ The trial court, however, found no evidence "of discussions concerning the use of sex as an inducement, reward or lure to obtain Nolan-Cooper's cooperation in the illegal activity," and therefore rejected her claim that sexual intercourse was used as an investigatory tool.¹⁴⁴

Applying the three-part test to her case denied Ms. Nolan-Cooper redress for the violation of her due process and privacy rights. She could not prove the government had constructive or actual knowledge of her sexual relationship with Agent Oubre. To the contrary, the trial court found that a series of calls in the late morning hours of February 18, 1995, between Agents Oubre and Jolly was an attempt to concoct a cover story to explain their failure to report during the time they spent with Ms. Nolan-Cooper and Ms. Nero.¹⁴⁵ It defies logic that the government may reap the rewards of a romantic relationship its agent cultivated with his target, and yet disavow knowledge or approval of the culmination of that relationship.

The court found it significant that sexual relations between Agent Oubre and Ms. Nolan-Cooper did not occur until near the end of the investigation, "well after Oubre had gathered the necessary evidence against Nolan-Cooper."¹⁴⁶ This fact arguably makes it less likely that sexual intercourse was used as an inducement for her to commit or continue to commit crimes. However, as discussed above, the defense of outrageous government conduct is not dependent on inducement.¹⁴⁷ Rather, the focus should be an objective investigation of Agent Oubre's conduct independent from its inducing effect on Ms. Nolan-Cooper. The only remedy offered to Ms. Nolan-Cooper by the court of appeals for Agent Oubre's "reprehensible"¹⁴⁸ conduct was the statement that on remand the district court was not "categorically precluded" from granting her a reduced sentence based upon the government's investigatory misconduct.¹⁴⁹ Essentially, the court found the conduct reprehensible enough that it should reduce Ms. Nolan-

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 227.

¹⁴⁶ *Id.* at 233. This statement begs the question: if the evidence was already gathered, why was the government continuing to finance Agents Oubre and Jolly's expensive evenings out?

¹⁴⁷ *See supra* notes 58-59 and accompanying text.

¹⁴⁸ *United States v. Nolan-Cooper*, 957 F. Supp. 647, 664 (E.D. Pa. 1997).

¹⁴⁹ *United States v. Nolan-Cooper*, 155 F.3d 221, 225 (3d Cir. 1998).

Cooper's jail time but not shocking enough to qualify as outrageous government conduct.

The court's reasoning on this point creates a perverse incentive for undercover agents to pursue an intimate relationship with a target just short of sexual intercourse until all or most of the evidence is gathered. Once the investigation is nearly complete, the agent is free to engage in sexual intercourse with his target before she is arrested. Because "[g]overnment agents are under no obligation to arrest a suspect or halt their investigation as soon as they have the minimum evidence necessary to establish probable cause,"¹⁵⁰ they have control over how long this period before arrest will last.

If, instead of adopting and reshaping the *Cuervelo* three-part test, the court had simply made a reasonable determination on the merits as to whether Agent Oubre's conduct was so "shocking, outrageous, and clearly intolerable"¹⁵¹ that due process was offended, its holding should and would have been different. The court cited *Twigg* as an example of governmental investigatory misconduct so egregious due process demanded dismissal of the indictment.¹⁵² In *Twigg*, the government informant provided equipment, raw materials, a production site and the majority of the labor in the manufacture of methamphetamines for which the defendants were indicted.¹⁵³ Without denying that such blatant overreaching as occurred in *Twigg* is a due process violation, how Agent Oubre's "reprehensible" conduct in *Nolan-Cooper* is more tolerable as a matter of constitutional law also defies, if not logic, common notions of decency and fair play.¹⁵⁴

Given society's current standards on the rights to privacy and bodily integrity, sexual intercourse between a federal undercover agent and the target of his investigation, under necessarily false pretenses, should be viewed as per se "shocking, outrageous, and clearly

¹⁵⁰ *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986) (citing *United States v. Leon*, 460 F.2d 299, 300 (9th Cir. 1972) (per curium)).

¹⁵¹ *Nolan-Cooper*, 155 F.3d at 230.

¹⁵² *See id.* at 224 (explaining that *Twigg* is the only time in that circuit that the facts met the test).

¹⁵³ *United States v. Twigg*, 588 F.2d 373, 376 (3d Cir. 1978). For a discussion of *Twigg*, see *supra* notes 40-44 and accompanying text.

¹⁵⁴ As commentators have noted, there are weaknesses in the outrageous government conduct defense. For example, "practices that might shock the judicial conscience in rural Idaho might not cause judges in New York City to bat an eye." Miller, *supra* note 7, at 331. *See also* Dripps, *supra* note 66, at 262 ("The shock-the-sense-of-justice approach is illegitimate and unwise In theory the test is broad enough to condemn anything that judges do not like; in practice it is so narrow that the Due Process Clause adds nothing to the limits on law enforcement" (citation omitted)). Further, Dripps posits that in the "post-Holocaustal age . . . [our] 'hardened sensibilities' are shocked by nothing." *Id.* at 271.

Though these arguments have merit, abandonment of the outrageous government conduct defense is not their necessary conclusion. Courts should simply lower the bar of what is considered shocking. If searches and seizures must be reasonable, so should all other investigatory conduct. If government conduct is not reasonable, it should shock the judicial conscience.

intolerable." In fact, society's attitudes toward sexual bodily integrity seem to be expanding to the point even of making such conduct criminal. Tennessee, Alabama, and Kansas outlaw rape or other forms of sexual misconduct by use of fraud, artifice or misrepresentation. Several other states have enacted statutes defining classes of individuals who occupy positions of trust—for example, doctors or clergy—and criminalizing sexual intercourse or contact with those to whom they owe a duty—their patients or parishioners. Obtaining sex through fraud is coming to be recognized as criminal in the same way the courts have recognized obtaining sex through force is criminal. Additionally, consent obtained through fraud or misrepresentation can be viewed as non-consent in some circumstances.¹⁵⁵ "The outrage upon the woman, and the injury to society is just as great" in cases where consent is obtained by fraud as it is where actual force is employed.¹⁵⁶ Such conduct should not be tolerated by the executive branch nor condoned by the judiciary.

C. Remedy

Several of the same reasons that justify the exclusionary rule in search and seizure law justify dismissal of an indictment based on an investigation wherein the federal agent establishes a sexual relationship with his target.¹⁵⁷ Historically, five justifications have been offered in support of the exclusionary rule. First, reading the Fourth and Fifth Amendments in tandem, courts have held that forcible and compulsory use of one's own testimony or private papers as evidence to convict him is condemned as a type of forced self-incrimination.¹⁵⁸ Second, courts have reasoned that if illegally seized evidence can be used in evidence against a defendant, "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."¹⁵⁹ Third, courts have cited the maintenance of judicial integrity as support for the exclusionary rule.¹⁶⁰ Fourth, courts have supported the defense by pointing

¹⁵⁵ See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 46-48 (1998) (reviewing case history of rape by fraud or coercion, relevant state statutes, and doctrines of force and non-consent).

¹⁵⁶ *Id.* at 45 (noting, however, that the concept of rape by fraud is "a difficult and troublesome legal development"). But see *People v. Evans*, 379 N.Y.S.2d 912, 919 (N.Y. Sup. Ct. 1975) ("Provided there is actual consent, the nature of the act being understood, it is not rape, absent a statute, no matter how despicable the fraud . . .").

¹⁵⁷ "Establishes" is not meant to connote initiation. Whether the agent initiates or merely allows a sexual relationship to continue should be irrelevant. It takes two to tango, and, as stated above, sexual intercourse does not—absent bizarre fact scenarios beyond the scope of this Note—happen by accident.

¹⁵⁸ See *Boyd v. United States*, 116 U.S. 616, 630 (1886).

¹⁵⁹ *Weeks v. United States*, 232 U.S. 383, 393 (1914).

¹⁶⁰ See *Elkins v. United States*, 364 U.S. 206, 222 (1960).

to deterrence of improper conduct by government officers.¹⁶¹ Fifth, courts have cited restoration of the status quo ante to justify application of the rule.¹⁶²

If the government is permitted to use evidence obtained during an investigation in which the target's due process and privacy rights were violated, those rights may as well be stricken from the Constitution. What meaning do guarantees of due process of law and privacy have if the fruits of their violation can be used against a defendant in a court of law? Similarly, if evidence obtained in such an investigation is admissible, federal agents will not be deterred from such misconduct. Deterrence is often cited as the primary purpose of the exclusionary rule: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."¹⁶³ The incentives for agents to engage in sexual relationships with their targets must be removed. Dismissing indictments obtained through the use of this improper tool is the most effective way to do so.¹⁶⁴

Judicial integrity is threatened if the courts condone, by implication if not by explication, such "reprehensible" tactics. The judiciary should aim to prevent crime, not promote it.¹⁶⁵ As the Supreme Court

¹⁶¹ See *id.* at 217.

¹⁶² See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). For an argument calling for the abandonment of all other justifications and the rethinking of the criteria for exclusion, see generally Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 261 (1998).

¹⁶³ *Elkins*, 364 U.S. at 217. See also *United States v. Calandra*, 414 U.S. 338, 347 (1974) ("[T]he [exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures"). But see Norton, *supra* note 162, at 262 ("Crafting measures to punish or deter unlawful conduct is not the business of the judiciary.")

¹⁶⁴ In his concurrence in *Mapp v. Ohio*, Justice Douglas discussed alternatives to the exclusionary rule:

There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the police system, including prosecution of the police officer for a crime. Yet as Mr. Justice Murphy said in *Wolf v. Colorado*, . . . "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if exclusion of evidence is not required, is an action of trespass by the homeowner against the offending officer. . . . The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Mapp, 367 U.S. at 670 (citations omitted). Similarly, our hopes may be too high if we expect federal agents to prosecute themselves for sexual relationships with targets. An action against the agent for assault, battery or rape is also likely to be an illusory remedy under the circumstances.

¹⁶⁵ See *United States v. Russell*, 411 U.S. 423, 449 (1973) (Stewart, J., dissenting) ("It is the Government's duty to prevent crime, not to promote it."); see also Miller, *supra* note 7, at 309 (stating the entrapment defense "is a tool by which a court can 'preserve the purity of its

has explained: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."¹⁶⁶ If the courts condone such violative conduct by federal agents, our whole judicial system is sullied by deceptive, fraudulent and clearly intolerable acts.

Finally, exclusion of evidence places both the government and the defendant in the same position they would have been in had the improper investigative techniques not been employed. Exclusion "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."¹⁶⁷ Similarly, dismissal of an indictment achieved through outrageous government conduct deprives the government of the fruits of misconduct and grants the defendant the constitutional protection to which she is entitled. The exclusion of evidence alone is not sufficient where the misconduct and the investigation are extensively intertwined. In addition, as discussed above, if the agent waits until all the evidence is gathered before engaging in sexual intercourse with his target, there is nothing left to exclude.¹⁶⁸

The exclusionary rule has been, since its inception, controversial.¹⁶⁹ Its most famous criticism came from Justice Cardozo, who stated that "[t]he criminal is to go free because the constable has blundered."¹⁷⁰ The same point was made at somewhat greater length in the often quoted words of Professor Wigmore:

Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man

own temple' by refusing to 'permit [its] process to be used in aid of a scheme for the actual creation of a crime by those whose duty is to deter its commission'" (citing *Sorrells v. United States*, 287 U.S. 435, 454, 457 (1932)).

¹⁶⁶ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

¹⁶⁷ *Mapp*, 367 U.S. at 660.

¹⁶⁸ See *supra* notes 146-50 and accompanying text.

¹⁶⁹ See *Elkins v. United States*, 364 U.S. 206, 216 (1960).

¹⁷⁰ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

who breaks it, but to let off somebody else who broke something else.¹⁷¹

Despite its controversial nature, the exclusionary rule has the force of law and there are valid rationales supporting it. These rationales support the dismissal of an indictment as a way to deter outrageous government conduct, and to preserve the rights of citizens and the integrity of the courts. The choice is before us, and we must choose the lesser of two evils. In cases of outrageous conduct, the criminal should go free—not merely because the agent blundered—but because to hold otherwise would give the force of law to errant libidos, and condone reprehensible acts of deceit and violation. Justice Frankfurter aptly stated: “Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.”¹⁷²

Because of its extreme nature, courts have recognized that the “power to dismiss an indictment on due process grounds . . . should be exercised sparingly.”¹⁷³ Sparing use does not, however, require “no use.”¹⁷⁴ In determining how to remedy a constitutional violation, the court should “tailor the remedy to the injury.”¹⁷⁵ While the remedy for due process violations is suppression of evidence under the exclusionary rule, defendants in outrageous government conduct cases seek—and if successful, are granted—dismissal of the indictment. This is appropriate under the rationale that suppression is the correct remedy where the evidence obtained in violation of the defendant’s rights can be identified and isolated. Where, however, the illegally obtained evidence cannot be isolated from the agent’s misconduct, dismissal is the proper remedy: “In such a situation, it is simply impossible to excise the taint of the government’s constitutional transgressions from the prosecution of the defendant.”¹⁷⁶ Where formation of an intimate relationship with the target is an integral investigatory tool and that relationship culminates in sexual intercourse, the entire investigation is tainted and the agent should be denied the reward of his target’s conviction.

D. Pragmatic Concerns

It may be argued that the agent will not be deterred by dismissal of the indictment because the case has become the responsibility of

¹⁷¹ *Elkins*, 364 U.S. at 217 (citing 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940)).

¹⁷² *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring).

¹⁷³ *United States v. Marshank*, 777 F. Supp. 1507, 1519 (N.D. Cal. 1991).

¹⁷⁴ *See id.*

¹⁷⁵ *Id.* at 1521 (citation omitted).

¹⁷⁶ *Id.* at 1522.

the prosecutor or simply because the agent does not care. If true, this is certainly an unfortunate state of affairs for our criminal justice system. If, however, the problem is that agents care too little for convictions to be deterred by dismissal, the solution certainly is not to allow the indictment and due process violations stand. Protection of judicial integrity and the rights of citizens are, on their own, sufficient justification for dismissal.

Additionally, it may be argued that practical implementation of an absolute prohibition of sexual relationships between agent and target during or close to the period covered by the indictment will be too difficult. Clearly, there will be evidentiary issues to be resolved and hearings may at times seem little more than "he said, she said" swearing contests as to whether or not sexual intercourse occurred. There are several reasons why this argument is not persuasive. First, as the law now stands, courts are required not only to determine whether intercourse occurred or not, but also whether the government knew or should have known about it and what its purpose was.¹⁷⁷ Second, ease of application is never, on its own, adequate justification for an incorrect rule of law. Third, in forcible rape¹⁷⁸ cases the same difficult evidentiary issues exist and are properly confronted. That the occurrence of misconduct is difficult to prove does not render it permissible or less deserving of our deterrent efforts.

III. CONCLUSION

The Director of the Federal Bureau of Investigation wrote in 1952:

One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the entire profession is to be found guilty of a violation of civil rights. Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.

¹⁷⁷ See Miller, *supra* note 7, at 312 (noting that whether conduct "shocks the conscience" and therefore becomes a due process violation is a question of law for the court, not a question of fact for the jury). Hearings can be held in the same manner in which judges are accustomed to holding suppression hearings.

¹⁷⁸ I include all forms of non-statutory rape prohibited by law in this category, including rape by force, threat of force, coercion, through the use of drugs or alcohol, etc.

Civil rights violations are all the more regrettable because they are so unnecessary

Complete protection of civil rights should be a primary concern of every officer. These rights are basic in the law and our obligation to uphold it leaves no room for any other course of action.¹⁷⁹

Federal investigators should be held to the same high standards today. As government agents, their conduct should be exemplary rather than not "clearly intolerable." While subterfuge and artifice may be necessary evils in the investigatory arsenal, the line can and should be drawn at conduct so blatantly reprehensible and absolutely unnecessary.

Sexual intercourse between federal agent and target can serve no valid purpose. The costs of sending a clear message that such violative conduct will not be countenanced—dismissing the indictment—are outweighed by the far greater costs of allowing government agents to violate a suspect's constitutional rights. If the government agencies have been unsuccessful in their self-governance, the courts must apply their most effective deterrent tool—dismissal.

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¹⁷⁹ *Elkins v. United States*, 364 U.S. 206, 220 n.8 (1960) (citing *FBI Law Enforcement Bulletin*, September, 1952, pp. 1-2).

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