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Sexual Misconduct and the Government: Time to Take a Stand

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SEXUAL MISCONDUCT AND THE GOVERNMENT: TIME TO TAKE A STAND

I. INTRODUCTION

In today's society, crime has become exceptionally prevalent and uncontrollable at times. Recent political campaigns have been filled with promises to continue the war on crime. However, this reality does not permit law enforcement officials to use any means necessary to catch criminals. Some limitations are needed to control the government's actions. The outrageous government conduct defense is one such limitation that the courts have developed. It is possible that some government conduct may be found to have violated the due process clause of the Fifth Amendment.[1] If the government engages in conduct that is declared to be

[1]No person shall "be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law …" U.S. CONST. amend. V.

outrageous and "shocking to the conscience,"[2] dismissal of the indictment may be appropriate. One problem is that some nontraditional methods of investigating crime currently in use have not been declared outrageous enough to warrant use of the defense; as a result, law enforcement officials have gotten away with some extremely reprehensible conduct.

This Note analyzes law enforcement's use of one particularly troublesome tactic—the use of sexual acts or romantic promises to encourage a defendant to participate in illegal activities or to obtain information that can be used against the defendant at trial.[3] The use of sex as an investigative tactic should constitute one type of outrageous government conduct. Perhaps more than any other tactic used in the law enforcement arena, the use of sex to persuade individuals to commit criminal acts violates our society's beliefs about the powers of the police and the importance of sexual intimacy in citizens' lives. These types of intimate acts have serious moral implications and fall extremely short of the acceptable standards of police investigative conduct.[4] The use of sex as an investigative tool leads to a violation of the right to privacy and exploits intimate relations and trust. The public cannot tolerate the exploitation of such relations without lessening their own respect for their contact with others. There must be a limit as to what the undercover agents/informants can usually do to deceive a defendant,[5] especially with respect to sexual liaisons.

The first part of this Note gives a brief history of the outrageous government conduct defense, including its distinction from entrapment, its origin and its lack of success in the courts. Although the entrapment defense and the outrageous conduct defense have some similarities, they are in fact quite different. The second section of this Note discusses the perception of sex and intimacy in the United States, and why according to this perception and the Constitution, the use of sex/intimacy is not an appropriate investigative tool. Section three of this Note examines police ethics and demonstrates that they do not and should not include using sex or intimacy during investigations. Part four analyzes federal and state sexual misconduct cases, and explains why the decisions reached by the courts are incorrect and immoral

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[2]Rochin v. California, 342 U.S. 165, 172 (1952) (holding that forcible entry into defendant's room by law enforcement officials, and then transportation to a hospital to have morphine capsules removed from his stomach, was conduct that "shocks the conscience").

[3]Barry Tarlow, Column, *RICO Report: Fertile Ground for Entrapment Defense*, 23 CHAMPION 38 (1999). Barry Tarlow is a nationally prominent criminal defense lawyer practicing in Los Angeles, California. He is a frequent author and lecturer on criminal law. Tarlow's column discusses how sexual misconduct by undercover agents and informants is becoming more frequent, though not being recognized as outrageous enough to warrant dismissal of an indictment.

[4]*Id.* at 39.

[5]Richard Lawrence Daniels, Note and Comment, 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). This note and comment discusses the origin of the outrageous conduct defense and how it is different than entrapment. Daniels also examines United States v. Simpson and how the use of sexual misconduct by a government informer should have been declared as outrageous by using the totality of circumstances approach.

according to the Constitution and the views of sex and intimacy expressed in the United States.

Finally, this Note concludes that the use of sexual or emotional intimacy by undercover agents/informants as an investigative tool is unconstitutional, outrageous and should be forbidden. There is no possible way to draw a line or develop a proper standard to apply when undercover agents use sexual conduct. This type of conduct is outrageous across the board and will lead to a lack of trust in law enforcement by all people in society. The solution is that this conduct should be prohibited altogether.

II. HISTORY OF THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE

A. Distinguishing Entrapment from Outrageous Government Conduct

The courts developed the outrageous government conduct defense to protect the due process rights guaranteed by the Constitution.[6] Due process of law has been summarized as "a constitutional guarantee of respect for those personal immunities which … are so rooted in the traditions and conscience of our people as to be ranked as fundamental, … or are implicit in the concept of ordered liberty."[7] If the conduct of law enforcement officers and informants rises to a proscribed level of outrageousness, these due process principles will bar the government/prosecution from using the judicial system,[8] and hence, the indictment will be dismissed. To protect the values that exist in the Constitution, the courts have developed the due process defense "to limit government conduct that brutalizes, abuses, or harasses, invades privacy, or in other ways unreasonably intrudes into people's lives."[9] In order to raise a due process claim, the government activity must violate some protected right of the defendant,[10] violate the sense of "fundamental fairness" found in the due process clause of the Fifth Amendment, and "shock the universal sense of justice."[11] Dismissal based on outrageous conduct is reserved for only the most egregious circumstances, and "…is not to be invoked each time the government acts

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[6]Catherine Baker Stetson, *Outrageous Conduct: A Fifth Amendment Due Process Defense*, 5 CRIM. JUST. J. 55, 67 (1981). This comment discusses the existence of the outrageous conduct defense and how it has been established and viewed by the courts. Stetson also argues that there is a distinction between outrageous conduct and entrapment, and that the courts should be careful not to confuse them. *See also supra* note 1.

[7]*Rochin,* 342 U.S. at 169.

[8]United States v. Russell, 411 U.S. 423, 431-32 (1973) (first recognized the possibility of a defense based on due process).

[9]Bennett L. Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 597 (1982). The author argues that courts who do recognize the outrageous conduct defense declare rulings which fail to guide subsequent courts, thus causing the defense to be unpredictable and inadequate.

[10]Hampton v. United States, 425 U.S. 484, 490 (1976) (plurality opinion upholds recognition of the due process defense).

[11]*Russell*, 411 U.S. at 432.

deceptively."[12] The defense requires more than a mere demonstration of flagrant police conduct.[13] Additionally, whether the government's conduct is sufficiently outrageous to violate due process is a question of law and unlike the entrapment defense, is not an issue for the jury.[14]

Entrapment, a judicially created affirmative defense, is not based on any constitutional right.[15] Entrapment occurs whenever the police plan, suggest, instigate or aid in the commission of a crime that would not have otherwise occurred.[16] Even though the defendant committed the crime, the entrapment defense states that he/she should not be punished if the crime was instigated by the government.[17] The entrapment defense consists of two elements: (1) the use of persuasion, trickery, or fraud by law enforcement officers or their agents to induce a defendant to commit a crime;[18] and (2) the origin of the criminal design in the minds of the government rather than that of the innocent defendant.[19] The entrapment defense and the outrageous conduct defense are frequently raised together; however, they are distinctly different.[20]

The important question asked in entrapment cases is whether the defendant was predisposed to commit the crime before any government instigation.[21] If the defendant is found to have been predisposed to commit the crime, and if the idea originated with the defendant, then no entrapment exists even if the government was involved in the commission of the offense.[22] By contrast, the key inquiry that must

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[12]United States v. Sneed, 34 F.3d 1570, 1577 (10th Cir. 1994) (quoting United States v. Mosley, 965 F.2d 906, 910 (10th Cir. 1992)).

[13]State v. Myers, 689 P.2d 38, 41 (1984).

[14]*See* United States v. Nunez-Rios, 622 F.2d 1093 (2nd Cir. 1980) (arguing that it is for the trial court and not the jury to decide whether outrageous government conduct has occurred); *See also* United States v. Sotelo-Murillo, 887 F.2d 1093 (9th Cir. 1989) (arguing that a prosecution barred on due process grounds is a legal question to be determined by the court, not the jury).

[15]Stetson, *supra* note 6, at 55.

[16]B. Grant Stitt & Gene G. James, *Entrapment: An Ethical Analysis*, *in* MORAL ISSUES IN POLICE WORK 129, 130 (1985).

[17]Gail M. Greaney, Note, *Crossing the Constitutional Line: Due Process and the Law Enforcement Justification*, 67 NOTRE DAME L. REV. 745, 748 (1992). Greaney discusses the existence of the due process defense and how the predisposition of the defendant is irrelevant. She then argues that law enforcement officials should be subject to the same laws as normal citizens, and that the means used must justify the ends.

[18]*See* Sherman v. United States, 356 U.S. 369, 376-78 (1958).

[19]*Id.*

[20]Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457, 458 (1990). The author argues that the lines between the objective test of entrapment and the due process defense are hazy, and that the due process defense is only reserved for the most intolerable government conduct.

[21]Sorrells v. United States, 287 U.S. 435, 448 (1932).

[22]*Id.* at 451.

be made in an outrageous conduct defense is whether the government's conduct was outrageous and violated some due process right of the defendant.[23] Therefore, according to the outrageous conduct defense, even if the defendant was predisposed to commit the crime, the indictment should be dismissed if the government conduct is found to be outrageous. This inquiry focuses on an objective approach to the government's conduct; whereas the entrapment inquiry focuses on a subjective approach or the predisposition of the defendant.[24] A few state courts have criticized the generally accepted "subjective" test of entrapment and have adopted instead an "objective" test in which the court considers only the nature of the police conduct involved, without reference to the predisposition of the particular defendant.[25] Additionally, the Fifth Circuit Court of Appeals attempted to distinguish between the subjective approach (predisposition) and the objective approach (government conduct) of entrapment.[26] Hence, the subjective approach was the traditional entrapment approach, and the objective approach of entrapment was basically identical to the new outrageous conduct defense.[27] Because objective entrapment and the outrageous conduct defense are so similar, under an objective entrapment theory, even a predisposed defendant cannot be convicted if the government's conduct amounts to a violation of due process. However, when defendants use this defense, it usually falls under the outrageous government conduct name and not objective entrapment.

In 1932, the first case to recognize the entrapment defense, *Sorrells v. United States*, involved a defendant charged with violating the National Prohibition Act.[28] A prohibition agent requested liquor from the defendant three times, appealing to their common experiences in World War I, before the defendant acquiesced and obtained the alcohol for the agent.[29] The Court began its analysis of the possible entrapment defense by stating: "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises."[30] Nonetheless, the entrapment defense should be granted if the criminal design originates with the government and induces an otherwise innocent person into committing a crime purely to obtain a conviction.[31] The Court recognized the defense of entrapment and

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[23]*See supra* text accompanying notes 10-11.

[24]Marcus, *supra* note 20, at 458; *see also* Molly K. Nichols, Note, *Entrapment and Due Process: How Far Is Too Far?*, 58 TUL. L. REV. 1207, 1212 (1984) (discussing the similarities between objective entrapment and the due process defense).

[25]*See*, *e.g.*, People v. Jamieson, 461 N.W.2d 884 (Mich. 1990) (noting that it has been suggested that the "outrageous government conduct" defense is merely the objective theory of entrapment under a different name).

[26]United States v. Webster, 649 F.2d 346, 349 n.3 (5th Cir. 1981).

[27]Stetson, *supra* note 6, at 63; *see also Jamieson*, 461 N.W.2d at 890-91.

[28]287 U.S. 435 (1932).

[29]*Id.* at 439.

[30]*Id.* at 441.

[31]*Id.* at 442.

reversed the conviction, explaining that the controlling question in entrapment cases is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."[32] The Court seems to have defined entrapment primarily in terms of the defendant's predisposition to commit the crime (the subjective standard), rather than focusing on the actual conduct of the government (the objective standard). Nevertheless, the language above does not actually address what role the government's actions should play in deciding whether or not the defense of entrapment will be applicable.[33] Moreover, the concurring opinion argued that entrapment should focus on the government's conduct and not on the predisposition of the defendant.[34]

Sherman v. United States, a case decided twenty-six years later, addressed the conflict between the subjective and objective standards of entrapment.[35] In this case, a government informant met the defendant during rehabilitation treatments and asked the defendant if he could supply him with narcotics.[36] The defendant refused several times, but eventually supplied the informant with the narcotics primarily because of the informant's description of the suffering he was enduring due to his withdrawal.[37] The defendant was arrested on narcotics charges and successfully raised the defense of entrapment.[38] The Court reasoned that the mere affording of opportunities to commit an offense is not entrapment, but that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."[39] The conviction was reversed on the basis that the defendant was not predisposed to commit the crime;[40] nevertheless, the concurring opinion once again argued that the focus of the entrapment defense should be on the conduct of the government and not on the defendant.[41] Because of this tension between subjective and objective views

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[32]*Id.* at 451.

[33]Greaney, *supra* note 17, at 757.

[34]*Sorrells*, 287 U.S. at 459 (Roberts, J., concurring) (The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy).

[35]356 U.S. 369 (1958).

[36]*Id.* at 371.

[37]*Id.*

[38]*Id.* at 370.

[39]*Id.* at 372.

[40]*Sherman*, 356 U.S. at 373-78.

[41]The *Sherman* concurrence stated:

> "The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of the 'creative activity' of law-enforcement officials."

Id. at 382 (Frankfurter, J., concurring).

of the entrapment defense, the Supreme Court would later address more cases concerning entrapment and what standard should be used.

B. Origin of the Outrageous Government Conduct Defense

The classic case first addressing due process concerns about the conduct of law enforcement officials was *Rochin v. California* in 1952.[42] In *Rochin*, three deputy sheriffs forced their way into Rochin's room and found him sitting on the side of the bed.[43] The officers asked him about the morphine pills on his nightstand, but instead of responding Rochin swallowed the capsules.[44] After a struggle, the officers took Rochin to a hospital and directed a doctor to pump his stomach to obtain the swallowed capsules; the pills were used as the principle evidence to convict him.[45] The Supreme Court reversed the conviction on due process grounds, rather than on an analysis of illegal search and seizure.[46] The Court stated: "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."[47] The Court concluded that the way this conviction was obtained did "… more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience."[48] This language of the Court provided the basis for which the due process defense would be recognized and defined in the future.

Some years later, the Supreme Court decided *United States v. Russell* on entrapment grounds.[49] However, this case first recognized and laid the groundwork for the future of the outrageous government conduct defense.[50] In *Russell*, an undercover government agent assigned to locate a suspected methamphetamine lab approached Russell by offering to supply an essential and rare chemical used in the production of the drug.[51] Russell was convicted after asserting an entrapment defense and argued on appeal that even though a jury could have found him predisposed to commit the crime, entrapment existed as a matter of law.[52] The Ninth Circuit Court of Appeals reversed the conviction on the grounds that a government

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[42]342 U.S. 165 (1952).

[43]*Id.* at 166.

[44]*Id.*

[45]*Id.*

[46]*Id.* at 174. "This Court granted certiorari because a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the states." *Rochin*, 342 U.S. at 168.

[47]*Id*. at 173.

[48]*Id.* at 172.

[49]411 U.S. 423 (1973).

[50]*Id.* at 431-32.

[51]*Id.* at 425.

[52]*Id.* at 427.

agent supplied an essential ingredient to the manufacturing of the drug.[53] Additionally, the court held that a defense to a criminal charge exists if the government's participation in a criminal offense is excessive.[54]

The Supreme Court reversed the court of appeals and held that the defendant could have obtained the ingredient from another source and had done so before the government became involved.[55] The Court decided the case on entrapment grounds and found that the defense was inapplicable because the defendant had been predisposed to commit the crime, and the government had not induced him to become involved.[56] However, the Court did recognize the possible existence of the outrageous government conduct defense in dicta by stating 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."[57] Even though the focus of this case concentrated on the subjective approach to entrapment (predisposition of the defendant), the dissent noted that there existed both a subjective and objective approach to entrapment.[58] Furthermore, the dissent argued that because of the inadequacies of the subjective approach, the due process defense was needed.[59]

Due to the persistence of this split in analysis between the subjective and objective theories of entrapment, the Supreme Court addressed the issue again in *Hampton v. United States*.[60] In this case, a government informant supplied drugs to the defendant who then sold the drugs to government agents.[61] The jury rejected the defendant's assertion that he did not know the substance was heroin and found him guilty of distribution.[62] The defendant's alternative defense of entrapment eventually reached the Supreme Court. Unfortunately, the Court was unable to reach a majority opinion, and a three-member plurality of the Court found that predisposition renders both the entrapment defense and due process defense unavailable under *Russell*.[63] The two concurring members found that *Russell* did not preclude a due process defense when defendants were predisposed, but that *Hampton* did not require reversal based on this conclusion because the government's conduct here was not overreaching.[64] While the dissent agreed with the concurrence that a due process defense should be available to defendants based upon outrageous government

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[53]*Id.*

[54]*Russell,* 411 U.S. at 431.

[55]*Id.*

[56]*Id.* at 433.

[57]*Id.* at 431-32.

[58]*Id.* at 440-43 (Stewart, J., dissenting).

[59]*Russell,* 411 U.S. at 440-45 (Stewart, J., dissenting).

[60]425 U.S. 484 (1976).

[61]*Id.* at 485.

[62]*Id.* at 487.

[63]*Id.* at 488-90 (opinion of Rehnquist, J., with Burger, C.J., & White, J.).

[64]*Id.* at 492-95 (Powell & Blackmun, JJ., concurring).

conduct, they disagreed with both the plurality and the concurrence that entrapment should be defined in terms of predisposition instead of the nature of the government's conduct.[65] In summation, a total of five members of the Court held that a defense based on the due process clause, though not relevant here, had not been overruled by the Court's holding in *Russell* and still permitted predisposed defendants to take advantage of the defense.[66] Although this decision seemed like a positive one for defendants, the courts continued to look harshly on the use of the defense.

C. The Lack of Success of the Outrageous Government Conduct Defense

The status of the law has remained the same.[67] Most courts continue to reject a defense of outrageous government conduct. The Supreme Court has left the door open for the defense of outrageous government conduct; however, it has never been presented with facts that support it.[68] Most lower federal courts and state courts recognize the defense.[69] Nonetheless, one circuit has chosen to reject any possibility of the defense.[70] The defense is raised frequently, yet rarely successfully.[71] One of the main reasons for the lack of success of this defense is that the Supreme Court has never provided any concrete guidelines on which to define outrageous government conduct.[72] Concepts such as "fundamental fairness" and "universal sense of justice" are difficult to measure; thus, "[n]o federal court has defined with any sort of precision the contours of the outrageous conduct defense."[73] Although Justice Frankfurter proceeded to suggest in *Sherman v. United States*[74] that appeals to "sympathy, friendship and the possibility of exorbitant gain" cannot be tolerated,[75] he

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[65]*Hampton*, 425 U.S. at 496-47 (Brennan, Stewart, & Marshall, JJ., dissenting).

[66]Dana M. Todd, Note, *In Defense of the Outrageous Government Conduct Defense in the Federal Courts*, 84 KY. L.J. 415, 430 (1995/1996) [hereinafter Todd] (discussing the origin of the outrageous conduct defense, how the different courts have viewed the defense, and certain types of conduct that defendants argue should warrant dismissal of their indictment, but are unsuccessful in the courts) (citing PAUL MARCUS, THE ENTRAPMENT DEFENSE 277-78 (1989).

[67]Todd, *supra* note 66, at 430.

[68]*Id.*

[69]*Id*.

[70]United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994) (holding that the defense could not prevail for three reasons: *Hampton* effectively overruled the dictum in *Russell*; the court lacked the authority to exercise its supervisory powers where no independent constitutional right was violated; and there were constitutional separation of powers concerns).

[71]Todd, *supra* note 66, at 430 (Tim A. Thomas, Annotation, *What Conduct of Federal Law Enforcement Authorities in Inducing or Co-operating in Criminal Offense Raises Due Process Defense Distinct from Entrapment*, 97 A.L.R. Fed. 273, 285 (1990)). *Id.*

[72]United States v. Bogart, 783 F.2d 1428, 1435 (9th Cir. 1986), *vacated sub nom*, United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (outrageous conduct cannot be defined by set standards).

[73]*Id.*

[74]356 U.S. 369 (1958).

[75]*Id.* at 383 (Frankfurter, J., concurring).

concluded that "[w]hat police conduct is to be condemned … must be picked out from case to case as new situations arise involving different crimes and new methods of detection."[76] Instead of defining outrageous conduct and then analyzing the facts of the cases according to the definition, "the courts characteristically recite a litany of facts and then cast their votes against the defendant."[77] This method lacks any type of analytical structure, and it is influenced by social and political pressures that are continuously changing because of the "inherent flux in socio-political norms."[78] The lack of applicable judicial standards has caused the defense to rarely be successful as lower courts have no guidance to follow in making their decisions. As a result, a plethora of lower court decisions have been produced that lack any type of sound judicial analysis whatsoever.

Because the Supreme Court has never approved a defense based on due process violations resulting from outrageous government conduct, the lower federal courts have been extremely sparing in their approval of the defense.[79] The defense has been raised in a multitude of offenses involving drugs;[80] bribery;[81] mail and wire fraud;[82] escape from prison;[83] bootlegging;[84] child pornography;[85] credit card fraud;[86] counterfeiting;[87] sale, possession, transportation, or exportation of explosives or firearms;[88] food stamp fraud;[89] theft, burglary and conversion;[90] fish and game violations;[91] extortion;[92] criminal contempt;[93] illegal transportation of aliens;[94] and

[76]*Id.* at 384.

[77]Greaney, *supra* note 17, at 773.

[78]*Id.*

[79]Todd, *supra* note 66, at 432.

[80]*See*, *e.g.*, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).

[81]*See*, *e.g.*, United States v. Roland, 748 F.2d 1321 (2d Cir. 1984).

[82]*See*, *e.g.*, United States v. Leroux, 738 F.2d 943 (8th Cir. 1984).

[83]*See*, *e.g.*, United States v. Williams, 791 F.2d 1383 (9th Cir. 1986).

[84]*See*, *e.g.*, Greene v. United States, 454 F.2d 783 (9th Cir. 1971).

[85]*See*, *e.g.*, United States v. Boffardi, 684 F. Supp. 1263 (S.D.N.Y. 1988).

[86]*See*, *e.g.*, United States v. Zambrano, 776 F.2d 1091 (2d Cir. 1985).

[87]*See*, *e.g.*, United States v. Russo, 540 F.2d 1152 (1st Cir. 1976).

[88]*See*, *e.g.*, United States v. Caron, 615 F.2d 920 (1st Cir. 1980).

[89]*See*, *e.g.*, United States v. Parisi, 674 F.2d 126 (1st Cir. 1982).

[90]*See*, *e.g.*, United States v. Brown, 635 F.2d 1207 (6th Cir. 1980).

[91]*See*, *e.g.*, United States v. Engler, 806 F.2d 425 (3d Cir. 1986).

[92]*See*, *e.g.*, United States v. Haimowitz, 725 F.2d 1561 (11th Cir. 1984).

[93]*See*, *e.g.*, United States *ex rel*. Vuitton et Fils S.A. v. Karen Bags, Inc., 602 F. Supp. 1052 (S.D.N.Y.), *aff'd*, 780 F.2d 179 (2d Cir. 1985), *rev'd on other grounds sub nom*, Young v. United States, 481 U.S. 787 (1987).

[94]*See*, *e.g.*, United States v. Valdóvinos, 588 F. Supp. 551 (N.D. Cal.), *rev'd on other grounds*, 743 F.2d 1436 (9th Cir. 1984).

arson.[95] However, only two circuits have reversed convictions based on the outrageous government conduct defense. The Ninth Circuit in *Greene v. United States*[96] addressed the issue of outrageous government conduct as a defense and found it to be successful. In *Greene*, a government agent pressured the defendants into re-establishing their bootlegging operation.[97] The agent was involved in the operation for over a two-year period and was the defendants' only customer in their operation.[98] The defendants were convicted of conspiracy, possession of an unlawful still, and unlawful sale of distilled spirits.[99] The Court looked at the totality of the circumstances and decided that the government's conduct had reached a level of outrageousness that warranted reversal of the conviction.[100] The court reasoned that although this case was not the typical entrapment case, "the same underlying objections which render entrapment repugnant to American criminal justice are operative."[101] Additionally, the court stated that the conduct of the government rose to a level of "creative activity" that was more intense and aggressive than the activity found against the government in numerous entrapment cases that it had examined.[102]

The Third Circuit in *United States v. Twigg*[103] also addressed the due process issue. In *Twigg*, a government informant contacted one of the defendants to set up an illegal drug laboratory for which he provided the equipment, materials and site needed to manufacture speed.[104] The informant also proceeded to produce the drug with minimal assistance from the defendants.[105] The court analyzed the permissible range of government conduct by noting that while infiltration of criminal operations via undercover agents and informants is acceptable, the tactics used in this case were not.[106] The court stated that "[u]nlike other cases rejecting this defense, the police investigation here was not concerned with an existing laboratory; the illicit plan did not originate with the criminal defendants; and neither of the defendants were chemists, an indispensable requisite to this criminal enterprise."[107] The court concluded that the governmental involvement in the criminal activities of this case

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[95]*See*, *e.g.*, United States v. Beverly, 723 F.2d 11 (3d Cir. 1983).

[96]454 F.2d 783 (9th Cir. 1971).

[97]*Id.* at 787.

[98]*Id.* at 785, 786.

[99]*Id.* at 783.

[100]*Id.* at 787.

[101]*Greene*, 454 F.2d at 787.

[102]*Id.*

[103]588 F.2d 373 (3rd Cir. 1978).

[104]*Id.* at 375-76.

[105]*Id.* Twigg's actions were at the specific direction of the government's informant, and "Twigg contributed nothing in terms of expertise, money, supplies, or ideas." *Id.* at 382.

[106]*Id.* at 380.

[107]*Twigg*, 588 F.2d at 381 (citations omitted) (footnote omitted).

had reached "… a demonstrable level of outrageousness and mandated reversal of the conviction."[108]

Other than *Twigg* and *Greene*, very few cases exist in which the outrageous government conduct claim has prevailed.[109] Some courts have attempted to develop factors or compile lists of what type of government conduct has been proven acceptable.[110] Examples of acceptable behavior that have been listed include: using "artifice and stratagem" to combat crime;[111] using paid informants;[112] supplying contraband to defendants to gain their confidence;[113] providing necessary and valuable items to help further a conspiracy already in existence;[114] infiltrating a criminal organization;[115] and approaching those already engaged in or contemplating criminal actions.[116] The listing of unacceptable behavior, however, proved to be more difficult. The court in *United States v. Bogart* defined these activities as the use of "unwarranted physical, or perhaps mental, coercion."[117] But then the question of what actually constitutes physical and mental coercion must be asked. Drawing lines between acceptable and unacceptable police conduct may seem helpful, although ultimately every case must be decided on its own facts.[118] Additionally, "haziness surrounding the type of conduct that will not be tolerated leaves the due process defense open to the possibility that its parameters will be determined by the fears and concerns of society at the time the defense is raised, rather than by the

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[108] *Id.*

[109] *See*, *e.g.*, United States v. West, 511 F.2d 1083 (3rd Cir. 1975) (holding a "full circle" narcotics sting intolerable and reversing the defendant's conviction, but failing to label the rationale as one based on due process); United States v. Gardner, 658 F. Supp. 1573 (W.D. Pa. 1987) (dismissing an indictment on due process grounds where an undercover agent persuaded a non-predisposed, fellow postal worker to obtain cocaine by using their friendship and repeatedly asking for the favor); United States v. Valdóvinos, 588 F. Supp. 551 (N.D. Cal. 1984) (holding INS service recruiting Mexican nationals in Mexico to enter U.S. illegally outrageous); United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981) (dismissing the indictment because of government over-involvement in drug operation); People v. Isaacson, 378 N.E.2d 78 (N.Y. 1978) (holding police overreaching outrageous).

[110] *See*, *e.g.*, United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986) (where defendant claimed that a government informant had coaxed him to accept narcotics as payment for posters, the court remanded the case back for findings of fact on the nature of and motivation for the government's conduct).

[111] *Id.* at 1438 (quoting Sorrells v. United States, 287 U.S. 435, 441 (1932)).

[112] *Id.* (referencing United States v. Wylie, 625 F.2d 1371, 1378 (9th Cir. 1980)).

[113] *Id.* (referencing United States v. Russell, 411 U.S. 423, 432 (1973)).

[114] *Id.* (referencing United States v. Lomas, 706 F.2d 886, 890-91 (9th Cir. 1983)).

[115] *Bogart*, 783 F.2d at 1438 (referencing United States v. Marcello, 731 F.2d 1354, 1357 (9th Cir. 1984)).

[116] *Id.* (referencing United States v. O'Connor, 737 F.2d 814, 817-18 (9th Cir. 1984)).

[117] *Id.*

[118] *Id.*

boundaries of the Constitution."[119] This lack of a concrete standard has compromised the viability of the defense because courts have no guidance or specific standards to look to when deciding cases that involve overreaching government conduct. Moreover, a concrete standard is needed to show that the use of sexual acts and romantic intimacy by the government as a type of investigative tool is unacceptable and outside the boundaries of the Constitution because it violates fundamental due process and privacy rights of the defendant. Additionally, it involves government acts that fall short of the acceptable standards of police investigative conduct.

III. THE CULTURE/NORMS OF SEX AND INTIMACY IN THE UNITED STATES AND THE CONSTITUTIONAL IMPLICATIONS

Sexual misconduct/romantic intimacy is an investigative method that law enforcement officials have recently been using that contains serious moral and constitutional implications. This type of conduct rarely meets the stringent requirements needed for dismissal based upon outrageous governmental conduct,[120] although defendants make a strong case that "… legitimate undercover operations can be conducted without federal agents acting like modern day Mata Haris."[121] Before exploring the federal and state cases dealing with sexual misconduct, it is wise to examine how the United States views sex and intimacy. According to popular, public views, sex and intimacy should not be used by law enforcement officials in investigating crime today. Police ethics do not condone these relatively new methods for combating crime, which may lead to negative results in society.

A. Sex, Intimacy, and Morality

Human beings are sexual beings, with sex being one of the motivating forces in their lives.[122] "Sexual experience is for human beings, … a profoundly personal, spontaneous, and absorbing experience in which they express intimate fantasies and vulnerabilities which typically cannot brook the sense of an external, critical observer."[123] Humans use sexuality for many different purposes—to express intimacy or love, for recreation or for procreation.[124] No one purpose constantly dominates. Instead, human self-control chooses among the purposes depending on the context of the situation and the type of person involved.[125] Intimacy is a major

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[119]Greaney, *supra* note 17, at 778-79.

[120]Tarlow, *supra* note 3, at 38.

[121]United States v. Cuervelo, 949 F.2d 559, 564 (2d Cir. 1991). Mata Hari was the stage name adopted by Margaretha Zell, a dark and beautiful Dutch woman born in 1876. She became an exotic dancer and then a World War I spy for the Germans. Her spying began through a series of wealthy lovers. *Experience the Internet's Most Powerful Search Agent: Name and Logo, Who was Mata Hari?*, *at* http://www.thewebtools.com/aboot/namelogo.htm (last visited Oct. 25, 2001).

[122]LEONARD V. RAMER, YOUR SEXUAL BILL OF RIGHTS: AN ANALYSIS OF THE HARMFUL EFFECTS OF SEXUAL PROHIBITIONS 13 (1973).

[123]THOMAS C. GREY, THE LEGAL ENFORCEMENT OF MORALITY 75-76 (1983).

[124]*Id.* at 76.

[125]*Id.*

part of sex and relationships between human beings. Intimacy often "… involves bringing another person within one's soul or being, not for any independently personal or instrumental objective, but for the sake of the other person or for the sake of the bond and attachment between the persons."[126] No other kind of relationship touches so centrally the core of one's being, and nothing else constitutes such an important resource for dealing with the problems of the world.[127]

"Vulnerability" and "unenforceable trust" exist in intimate relationships and is not evident in other types of social or business relationships.[128] One court has remarked that "[i]t should be common knowledge that sex involves physical and psychological desires so strong as to readily foster fantasies and to anesthetize or supplant normal rational reasoning and will."[129] Exploitation of this physical desire and trust is both harmful and degrading to the person involved, as well as to all persons who have respect for intimate relationships.[130] Additionally, "like our ancestors in the Garden of Eden, no one is completely impervious to seductive temptations."[131] It certainly may be true that not every person in society has his/her price or can be tempted. Yet certain investigative conduct (mostly sexual) does prove able to produce offenses a good portion of the time.[132] This type of conduct is "deeply subversive of the possibility of friendship, love, and trust,"[133] and its use in law enforcement is "morally equivalent to the decision to use violence; indeed it is a kind of torture."[134]

"Intimate relationships involve potential transformations of moral duties."[135] In morals, as in daily life, knowing certain features of a situation is pertinent to one's act being regarded as voluntary.[136] Having control over what certain persons know

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[126]Ferdinand Schoeman, *Privacy and Police Undercover Work*, *in* MORAL ISSUES IN POLICE WORK 147, 156 (Frederick A. Elliston & Michael Feldberg eds., Rowman & Allenheld 1985).

[127]*Id.*

[128]*Id.*

[129]State v. Banks, No. 85-1715, 1986 Fla. App. LEXIS 11526, at *3 (Fla. 5th Dist. Ct. App. Aug. 28, 1986) (where government informer used kissing and romantic teasing to convince defendant to buy drugs).

[130]Schoeman, *supra* note 126, at 156.

[131]Bennett L. Gershman, *Toward a Common Law for Undercover Investigations—a Book Review of ABSCAM Ethics: Moral Issues and Deception in Law Enforcement*, 52 GEO. WASH. L. REV. 166, 168 (1983).

[132]Gary T. Marx, *Who Really Gets Stung? Some Issues Raised By The New Police Undercover Work*, *in* ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT 65, 74 (Gerald M. Caplan ed., The Police Foundation 1983).

[133]Sanford Levinson, *Under Cover: The Hidden Costs of Infiltration*, *in* ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT 43, 50 (Gerald M. Caplan ed., The Police Foundation 1983).

[134]*Id.* at 50-51.

[135]Schoeman, *supra* note 126, at 156.

[136]*Id.*

or learn about us is vital to our lives and the relationships we form.[137] Similarly, a person has an interest in "… knowing all relevant characteristics of those with whom he forms any personal relationships and of those to whom he discloses information concerning relationships with others."[138] People need to assume a level of good faith as being present in the relationship or encounter.[139] Additionally, people are entitled to the belief that those who present themselves will not be wishing harm or using the situation as a means of furthering their "malevolence."[140] Although "American law is generally unconcerned with protecting intimate relationships, it does recognize the existence of legal privileges that seek to protect the intimacy of certain relationships by barring autonomous choices to betray specific confidences."[141] To the extent that people are unable to trust normal appearances, "social disorder is created," and morality is disturbed.[142]

The term "moral" has been interpreted broadly. Morality has been associated with such things as sexual conduct, honesty, truthfulness and religion.[143] Morality has always implied a higher and nobler level of behavior.[144] In addition, many diverse types of behavior have been evaluated according to moral standards.[145] Litigating morality is not a recent occurrence. "Americans have inherited from the English legal culture an extensive record of litigation of moral issues."[146] "The legal process that has documented this litigation includes numerous elements that have individually and collectively influenced the course of moral disputes."[147] The right to privacy goes hand in hand with the concept of litigating morality. Privacy becomes essential for sexual conduct and other intimate relations. By examining the roots of the constitutional right to privacy and how morality relates to this right, it becomes evident that abuse of these privacy rights through sexual investigative tools used by law enforcement officials disturbs morality and violates these rights.

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[137] *Id.*

[138] Levinson, *supra* note 133, at 57.

[139] *Id.*

[140] *Id.* at 57-58.

[141] Gershman, *supra* note 131, at 173.

[142] *Id.*

[143] WAYNE C. BARTEE & ALICE FLEETWOOD BARTEE, LITIGATING MORALITY: AMERICAN LEGAL THOUGHT AND ITS ENGLISH ROOTS xi (1992).

[144] *Id.*

[145] *Id*

[146] *Id.* at xi-xii. Litigation of moral issues includes abortion, marriage, sodomy, pornography, and contraception. *Id.*

[147] BARTEE & BARTEE, *supra* note 143, at xi-xii. Among these elements are written laws (statutory and constitutional) which have recorded past moral choices; judges and juries who apply and interpret the laws and precedents; and the legal scholars and attorneys who have the job of explaining and defending moral choices. *Id.*

B. Constitutional Implications

The constitutional right to privacy was developed in *Griswold v. Connecticut*.[148] The Court based its conclusion of a right to privacy on a number of constitutional provisions that could be violated by governmental intrusion into people's lives.[149] The most common of these constitutional provisions are the due process clauses of the Fifth and Fourteenth Amendments and the Fourth Amendment Search and Seizure Clause.[150] The most dramatic extension of the constitutional right to privacy came in 1973 when the Court struck down a number of restrictive abortion laws in several states.[151] These privacy rights used in the abortion cases are often viewed as or reduced to liberty rights.[152] Even if this view is not accepted, a strong connection or bond exists between the two sets of rights.[153] It is the norm or standard of individuality and personal autonomy that provides the reason for liberty, the recognition of a domain of self-regarding conduct, and a sphere of privacy of personal information and knowledge that should remain within a person's control.[154] Additionally, the gaining of this knowledge by unauthorized persons is usually considered a serious breach.[155]

The demand for privacy is founded on the need for moral space, that is "… for conditions under which we can be, and can feel ourselves to be, acting authentically and independently."[156] Moral space is needed for the development and maintenance of individuality, and liberty is one condition for ensuring moral space.[157] However, not all relationships exhibit moral space. If no relationship of mutual intimacy exists, moral space can be secured only if privacy is respected.[158] Business relationships, for example, do not commonly exhibit moral space; therefore, privacy needs to be respected in order for a person to feel as if he/she is acting independently.

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[148]381 U.S. 479 (1965) (declaring unconstitutional a Connecticut statute that prohibited to married couples as to others the use of contraceptives).

[149]GREY, *supra* note 123, at 7.

[150]*See supra* note 1; *see also* U.S. CONST. amend. XIV, § 2 (No state shall "deprive any person of life, liberty, or property, without due process of law …"); *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[151]Roe v. Wade, 410 U.S. 113 (1973).

[152]JOHN KLEINIG, THE ETHICS OF POLICING 190 (1996).

[153]*Id.*

[154]*Id.* at 191. Information such as one's sex life, medical history, and financial status is usually considered private. *Id.*

[155]*Id.* at 191.

[156]KLEINIG, *supra* note 152, at 192.

[157]*Id*. at 192.

[158]*Id.* That is, only if one is permitted to have control over one's self-preservation. *Id.*

Due process becomes intertwined with privacy and liberty rights. Every citizen must be afforded due process of law, that is, "… a discrete concept which subsists as an independent guaranty of liberty and procedural fairness …"[159] Due process has not been reduced to any formula; it represents the balance which our country has struck between respect for the liberty of individuals and the demands of organized society.[160] This liberty is a "rational continuum" which includes freedom from arbitrary and purposeless restraints, and which recognizes that a reasonable judgment requires careful scrutiny of state and individual needs.[161] Deprivations of liberty are textually illegal unless accompanied by due process of law.[162] Privacy and liberty rights seem to involve a trend of the government respecting people's private lives. The problem becomes the distinction between what is public and what is private. When law enforcement officials use investigative methods that amount to deprivations of liberty and privacy rights, the government has stepped out of the public sphere and into the private one. The Constitution has been violated when the government engages in sexual conduct that is reserved for only the private sphere and hence, these methods should be forbidden. The exploitation of trust and intimate relations is harmful and degrading to not only the person involved, but also to all persons who have respect for intimate and personal relationships. By examining the history and boundaries of police ethics and behavior, it should be relatively easy to conclude that the use of sexual conduct and romantic intimacy by law enforcement officials is unjustifiable and unconstitutional.

IV. POLICE ETHICS/MORALS DURING INVESTIGATIONS

Society's treatment of those people who fail to conform to its chosen standards of behavior has raised moral questions. These moral questions are not just concerned with rules and principles, but also with virtues, character, reasons and attitudes.[163] The due process clause "… is a dominant constitutional force to protect the moral values related to undercover police work, particularly the freedom and integrity of the individual's will from governmental intrusion and deception."[164] Police activity must be regulated by more than the law--it must respect the most deeply held moral values of the community.[165] Laws can be amended quickly; however, "public

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[159]Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (earlier Connecticut birth control case).

[160]*Id.*

[161]*Id.* at 543.

[162]Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261, 278 (1993) (arguing that police tactics need to be regulated, and the use of reasonable suspicion as a safeguard for all invasions of liberty is the solution).

[163]KLEINIG, *supra* note 152 at 7.

[164]Gershman, *supra* note 131, at 184. "As such, the due process clause mirrors the equitable principle that courts will not tolerate governmental oppression, particularly oppression that seeks to undermine an individual's free will." *Id.*

[165]Schoeman, *supra* note 126, at 158.

notions of respect for persons and their privacy is less subject to fluctuations."[166] Government cannot ignore what is so important to human beings. People need to be involved in trusting and intimate relationships and when respect for these types of relationships is abandoned, the worth of the social order is severely diminished.[167] The use of sex as an investigative tool violates this trust and preys on the respect that people have for intimate relationships. Without the trust and privacy needed in intimate affairs, social order is disturbed and people begin to think and act differently. Codes of ethics have been developed to combat the abuse of government power.

A. Codes of Ethics

Professionals are usually governed by a "code of ethics." Law enforcement officials are no different. A professional code is a sign of an occupation's true professionalization.[168] The code comprises a public set of constraints under which the members promise to operate, and it is intended to provide "a tangible basis for public trust."[169] These codes are for the benefit of the public, as well as the professional. They act not only as a guarantee to those who use professional services that certain standards will be observed, but when violated, they may jeopardize the standing of certain recognized members of a particular profession.[170]

Police organizations have always promulgated codes of ethics. The first code for United States police was developed in 1928.[171] The Federal Bureau of Investigation published its FBI Pledge for Law Enforcement Officers in 1937.[172] Then in 1956, a code of ethics prepared by the Police Officer's Research Association of California was adopted by the National Conference of Police Associations, and in 1957 it was adopted by the International Association of Chiefs of Police.[173] This Law Enforcement Code of Ethics (with changes made to it in 1991) is still used today.[174]

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[166] *Id.*

[167] *Id.*

[168] KLEINIG, *supra* note 152, at 33.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 235. The history of the 1928 code is interesting. On the recommendation of an architect of the professionalization movement in American policing, August Vollmer, a young protégé, O. W. Wilson, was appointed as Chief of the Wichita Police Department. This young protégé put into practice what he had learned from his mentor and wrote a code that assured the citizens that the police department was now there for them. Additionally, he rewrote the department's manual stressing strict lines of authority, clear and efficient procedures, and rigid standards of conduct. *Id.*

[172] KLEINIG, *supra* note 152, at 235. Printed in the December 1937 issue of the *FBI Law Enforcement Bulletin*, the director introduced the Pledge as being for the "voluntary consideration, acceptance, execution and adherence by all law enforcement officers." *Id.* Police departments would get their employees to sign and forward the pledges to the FBI, which then used the *Bulletin* to update the readers about its adoption throughout the United States. *Id.*

[173] *Id.* at 235.

[174] *Id.* at 236.

Law enforcement officers promise to serve mankind; guard the lives and property of all people; protect the innocent against deception and the weak against oppression; respect the Constitutional rights of all people; keep private and public life separate; etc.[175] A code of ethics should set standards beyond ordinary morality if it is to operate as an effective code of ethics.[176] Similarly, something more must be demanded of those to whom the code of ethics applies; yet, if a code is to be realized in practice, it cannot ask more than most of those people subject to it are willing to give.[177] However, it has been argued that police ethics may be the exception—that police are only subject to the ethical and moral standards of normal people.[178] The reason for this discrepancy may be due to the kind of work in which police are engaged. Likewise, "[b]ecause some police work seems to be inherently corrupting, police departments need to be more careful than they are about the work they do."[179]

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[175]KLEINIG, *supra* note 152, at 236. The complete Law Enforcement Code of Ethics, including the 1991 changes to the italicized parts noted in brackets, is as follows:

> As a Law Enforcement Officer, my fundamental duty is to serve *mankind* [the community]; to safeguard the lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all *men* [ ] to liberty, equality and justice.
>
> I will keep my private life unsullied as an example to all; [, and will behave in a manner that does not bring discredit to me or my agency. I will] maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed, in both my personal and official life, I will be exemplary in obeying the laws *of the land* [ ] and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.
>
> I will never act officiously or permit personal feelings, prejudices, [political beliefs, or aspirations,] animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.
>
> I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of *the law enforcement* [police] service. [I will never engage in acts of corruption or bribery, nor will I condone such acts by other police officers. I will cooperate with all legally recognized agencies and their representatives in the pursuit of justice.
>
> I know that I alone am responsible for my own standard of professional performance and I will take every reasonable opportunity to enhance and improve my level of knowledge and competence.] I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession…law enforcement.

Id. at 236-37.

[176]Michael Davis, *Do Cops Really Need a Code of Ethics*, 10, 2 CRIM. JUST. ETHICS 20 (1991).

[177]KLEINIG, *supra* note 152, at 240. *See also* Davis, *supra* note 171, at 20.

[178]KLEINIG, *supra* note 152, at 240.

[179]Davis, *supra* note 176, at 25.

For example, police may need to work fewer and less irregular hours and become involved in less undercover work than they are currently. Nevertheless, the use of certain investigative methods by law enforcement officials do not conform to a code of ethics, are not fit to be engaged in by a normal person, and can be corrected through the use of the outrageous government conduct defense.

B. Use of Deception in Undercover Investigative Techniques

The Constitution and codes of ethics are imperfect. They do not "forbid every political evil under the sun."[180] However, in the struggle between law enforcers and the criminal world the use of guile and clever tactics is within reason.[181] Even the use of some deception is acceptable to combat those criminals using the same type of trickery when committing offenses.[182] Included in this practice of deception is the use of undercover agents and government informants. The use of these two types of investigators is not per se unlawful,[183] but there is certainly a limit to allowing governmental involvement in criminal acts. Undercover agents should not be allowed to do by secrecy what they are not permitted by the Constitution to do openly.[184] Hence, law enforcement officials cannot violate a person's due process and privacy rights because the Constitution forbids this type of violation.

Prior to 1977, undercover techniques were used infrequently and only in certain circumstances.[185] Today the range of criminal activities under investigation by this technique is broad, and the costs for such techniques have become astronomical.[186] Nevertheless, the "allure and power" of undercover tactics makes them irresistible.[187] To some people the use of questionable or deceptively bad undercover means is justified because the means serve just ends.[188] After all, undercover agents are detecting crimes, and in today's world crime seems to be overtaking our society. The strong social and political mandate for combating criminal activity provides a strong disincentive for a judge to hold that a defendant, who has been proven guilty, be set free because of a police tactic used to obtain the conviction.[189] But what if the bad means do not obtain good ends? What if civil liberties are compromised because of deceptive law enforcement techniques?

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[180]Dripps, *supra* note 162, at 264. *Cf.* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 33 (1981).

[181]Greaney, *supra* note 17, at 771.

[182]KLEINIG, *supra* note 152, at 133. *See also* Schoeman, *supra* note 126, at 147.

[183]Greaney, *supra* note 17, at 789.

[184]Schoeman, *supra* note 126, at 147.

[185]SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 98TH CONG., 2D SESS., EXECUTIVE SUMMARY OF REPORT ON FBI UNDERCOVER OPERATIONS 1 (Comm. Print 1984).

[186]*Id.* For example, in 1977 the budget was $1 million, and by 1984 the budget had grown to a total of over $12 million. *Id.*

[187]Marx, *supra* note 132, at 92.

[188]*Id.*

[189]Greaney, *supra* note17, at 746.

Investigative methods that amount to deprivations of life, liberty, property and privacy violate the Constitution unless accompanied by due process and sufficient justification.[190] The investigative method of establishing a phony sexual or emotionally intimate relationship with the defendant violates fundamental due process and privacy rights. In distinguishing between which tactics are justifiable it is the "… human significance of the activity that demarcates the permissible from the impermissible."[191] Central to any standard of public morality is the acceptance of limitations on what can and cannot be done; this statement is true even when the intention and expectation of a greater good or the prevention of an evil is evident.[192] No matter what the greater good may be, "sex is much too strong and effective an inducement to be used as bait" to catch even predisposed defendants.[193] An offense is no less criminal when it is committed in response to temptation than if it is committed without any sort of temptation. Instead, the questions raised are whether the technique was fair and what assumptions the tactic was based on when used.[194]

The use of sex as an investigative tool leads to a violation of the right to privacy and exploits intimate relations and trust. This lack of trust leads to suspicions in everyday dealings with other people.[195] The use of too much deception and disguise in such private areas cause even innocent people to fail to rely on their surroundings. It changes how these innocent people think and act. The trust betrayed in these types of phony sexual relationships "falls too harshly on mankind's capacity for forming important relationships."[196] The public cannot tolerate the exploitation of such relations without at the same time devaluing their own respect for their connections with others.[197] The undercover use of sex denies the individual the "… right to be left alone—the most comprehensive of rights and the right most valued by civilized man."[198] The only possible result is a decline in social order that is brought about by the exploitation of "… the cognitive and behavioral aspects of intimate relations by using them for purposes beyond the relationship itself."[199] Intimate relations involve

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[190]Dripps, *supra* note 162, at 278. "In the context of police practices, that means supported by a reasonable connection with the effort to prevent criminal activity or punish it through the regular course of adjudication." *Id.* at 278-79.

[191]Schoeman, *supra* note 126, at 157.

[192]*Id.*

[193]State v. Banks, No. 85-1715, 1986 Fla. App. LEXIS 11526, at *4 (Fla. Ct. App. Aug. 28, 1986).

[194]Marx, *supra* note 132, at 73.

[195]KLEINIG, *supra* note 152, at 137. "To say that only those tempted to do wrong would have anything to fear underestimates the possibilities for, and evidence of, mistake and abuse in this area." *Id.*

[196]Schoeman, *supra* note 126, at 160.

[197]*Id.*

[198]Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[199]Gary T. Marx, *Under-the-Covers Undercover Investigations: Some Reflections on the State's Use of Sex and Deception in Law Enforcement*, 11 CRIM. JUST. ETHICS 13 (1992).

trust that eventually leads to the exchange of confidences.[200] As a result, "[a]nything that debases that trust must be viewed as undesirable."[201]

Law enforcement officers enjoy wide latitude and flexibility in their use of techniques. There simply exists no real check on the discretion held by law enforcement agents and their informants,[202] and the use of manipulation and deceit to investigate is largely unfettered by judicial control.[203] The due process/outrageous government conduct defense does create outer limits on appropriate law enforcement techniques if it is used correctly.[204] The defense should not be cast aside merely because it presents some analytical problems.[205] Sexual misconduct by law enforcement officials and their agents falls outside any sort of law enforcement justification.[206] In determining the point at which government agents lose the law enforcement justification, the point at which the due process defense should be used is simultaneously discovered.[207] The "moral shabbiness" of this form of police deception is so threatening to a social self-image that we should be willing to endure a higher level of the criminal activity in question.[208]

Zeal in tracking down crime is not always wrong; but experience has taught us that safeguards must be provided against the dangers of over-zealous law enforcement.[209] Government should not be allowed to increase the risks associated with ordinary social relationships.[210] The government is unable to search or invade a person's private home without a judicial warrant. Why should the government be allowed to invade a person's body without that person being fully informed of the

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[200] *Id.*

[201] *Id.*

[202] Todd, *supra* note 66, at 442. *See also* Gershman, *supra* note 131, at 169.

[203] Gershman, *supra* note 131, at 169. *See also* Todd, *supra* note 66, at 442.

[204] Greaney, *supra* note 17, at 781. *See also* Marcus, *supra* note 20, at 465. Marcus argues that there will be fact situations where reasonable people could agree that the law enforcement behavior was utterly outrageous. *Id.*

[205] Greaney, *supra* note 17, at 781.

[206] *Id.* at 782. The law enforcement justification is a subset of the larger defense of justification. The Model Penal Code states:

> (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

MODEL PENAL CODE § 3.02 (Official Draft 1962).

[207] Greaney, *supra* note 17, at 782.

[208] KLEINING, *supra* note 152, at 137.

[209] Gershman, *supra* note 131, at 184.

[210] *Id.*

circumstances? Is the use of sex even so different than the use of unwarranted physical or mental coercion?[211] The argument can be made that sex is a type of physical or mental coercion. When law enforcement agencies and their confidential informants utilize sex as an investigative tool, "… there is no way for the courts or anyone else to determine whether such inducement served only to uncover an existing propensity or created a new one."[212] Regardless of the defendant's predisposition to commit the offense, the use of sex falls extremely short of an acceptable standard of police conduct, and it is repugnant to use such tactics to lure any person into crime. Nevertheless, federal and state courts have almost always failed to declare this type of conduct outrageous.

V. AN ANALYSIS OF CASES CONCERNING GOVERNMENT SEXUAL MISCONDUCT

Limited law exists on the government's use of sex in criminal investigations. Because no definite standard is available as to what constitutes outrageous government conduct, courts have been reluctant to dismiss indictments based on a few isolated episodes of sexual activity by the undercover agent or informant during the investigative process. According to a review of the limited existing law, it is somewhat clear that defendants who succumbed to the government's sexual inducements were allowed to present entrapment defenses and obtain an entrapment jury charge.[213] However, because many of these defendants have also been predisposed to commit the crimes, the entrapment defense is almost always unsuccessful. The proper defense in these types of situations should be the outrageous government conduct defense because predisposition of the defendant is not required. The use of sex by a government agent/informant definitely "shocks the conscience,"[214] and deprives the defendant of fundamental due process and privacy rights which is the basis for the outrageous conduct defense.[215]

A. Federal Cases

The use of government informants has become a popular tactic in combating crime today. The government seeks out an informant, usually someone the defendant knows or someone who will receive less prison time or immunity for helping the government,[216] and then gives the informant instructions on what he or she is to accomplish. The acts of the informant, just as the acts of undercover agents, should be attributed to the government through normal agency principles. The

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[211]*See* United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir. 1986), *vacated*, United States v. Wingender, 790 F.2d 802 (9th Cir. 1986).

[212]State v. Banks, No. 85-1715, 1986 Fla. App. LEXIS 11526, at *4 (Fla. Ct. App. Aug. 28, 1986).

[213]Tarlow, *supra* note 3, at 38. *See also* United States v. Prairie, 572 F.2d 1316 (9th Cir. 1978) (though unsuccessful, defendant presented entrapment defense to jury where informer emotionally and sexually seduced him).

[214]*Rochin*, 342 U.S. at 172.

[215]*See* U.S. CONST. amend. IV, V, & XIV.

[216]Mark H. Moore, *Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement*, *in* ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT 17, 27 (1983).

government should be responsible for the actions of its agents, whether they are actual agents or informants. However, one court has opined that they would be less sympathetic to the prosecution where an actual law enforcement agent engages in sex or sex-related conduct with a defendant, as opposed to an informer.[217] In this case, *United States v. Simpson*, the FBI employed the services of an informant whom they knew was a prostitute, heroin user and a fugitive from Canadian authorities.[218] The defendant argued that his due process rights and constitutional right to privacy were violated because the FBI knew she was a prostitute, directed her to become close to him and continued to use her as an informant after they learned that the two were having sexual relations.[219] The Ninth Circuit relied on a number of factors in determining that the government's conduct did not violate the defendant's due process rights.[220]

The Ninth Circuit used the factor derived from the *United States v. Bogart* decision[221] stating that outrageous government conduct only bars prosecution in cases where the law enforcement officials have been "brutal" or used "physical or psychological coercion" on the defendant.[222] Relying on the decision in *Rochin v. California* to determine what kind of conduct was outrageous enough to qualify,[223] the Ninth Circuit decided that the use of an informant who became sexually intimate with the defendant was not analogous to the pumping of a defendant's stomach to find illegal drugs.[224] The court limited the outrageous conduct defense to physical or psychological abuse. However, it can be argued that a phony sexual relationship is a type of physical or psychological abuse.[225] The court also stated that an informant must enjoy a great deal of latitude in making and deciding how to establish rapport with the suspect, and that it would be impossible to identify a fixed point at which a causal relationship turned into something more "'shocking.'"[226] Courts worry about drawing upon their personal notions of "human sexuality and social mores;"[227] however, they have previously used personal notions of morality in their decisions, and this type of case would prove no different. Informants do enjoy an enormous amount of flexibility during undercover operations; however, when an informant engages in sexual relations, the line has been crossed and the conduct should be declared outrageous.

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[217]United States v. Simpson, 813 F.2d 1462, 1468 n.4 (9th Cir. 1987).

[218]*Id.* at 1464.

[219]*Id.* at 1465.

[220]*Id.* at 1465-69.

[221]783 F.2d 1428 (9th Cir. 1986).

[222]*Id.* at 1435.

[223]342 U.S. 165 (1952).

[224]*Simpson*, 813 F.2d at 1465-66.

[225]*See supra* notes 117-57 and accompanying text.

[226]*Simpson*, 813 F.2d at 1466.

[227]*Id.*

The *Simpson* court additionally decided that the FBI was not responsible for the informant's sexual conduct with the defendant. The court found "the government's passive tolerance here of a private informant's questionable conduct to be less egregious than the conscious direction of government agents typically present in outrageous conduct challenges."[228] At some point, though, the FBI had to become aware of the informant's sexual involvement with the defendant. The government just chose to look the other way and not compromise the investigation in progress. The decisions of the FBI and this court are reprehensible and morally offensive. As noted above, according to agency principles the acts of the informant should be imputed to the FBI leading to the conclusion that the FBI is responsible for the acts of its informants. Nonetheless, the court failed to classify the conduct as outrageous and also noted that it need not decide whether the use of sex by an actual agent would shock the conscience.[229] However, other circuits would be given the opportunity to address that question.

The Second Circuit was given a chance to decide whether the use of sex by an undercover agent constituted outrageous conduct.[230] In *United States v. Cuervelo*, the defendant was a subject of a government operation designed to ferret out a drug conspiracy.[231] An undercover agent conducting the investigation testified that he tried to establish a "'love interest'" with the defendant, and according to the defendant they had sexual relations on at least fifteen occasions.[232] Additionally, the agent allegedly gave the defendant gifts of money, clothes, jewelry and numerous love letters to convince her to take part in a major drug sale.[233] Based on its review of *Simpson*, the court developed three criteria that the defendant must show in order to make out a successful outrageous conduct claim:

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.[234]

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[228]*Id.* at 1468.

[229]*Id.* at 1468 n.4.

[230]United States v. Cuervelo, 949 F.2d 559 (2d Cir. 1991).

[231]*Id.* at 561.

[232]*Id.* at 561-63.

[233]*Id.* at 563.

[234]*Id.* at 567. *See also* United States v. Nolan-Cooper, 155 F.3d 221 (3d Cir. 1998). "[T]here is little doubt that Cuervelo envisioned these criteria as the standard to be applied on the merits since the court noted that, at the merits stage, the district court would have to consider the following questions (which essentially address the same issues)."

Ultimately, the court remanded the case back to the district court for an evidentiary hearing because certain facts had not been adequately discovered.[235]

The establishment of these factors was at least an attempt by a federal court to determine some type of concrete standard by which to judge sexual misconduct by a government agent/informant. The problem with these factors is that they allow some leeway for government agents/informants to use sex and not be punished. What if the sexual relations occurred before the investigation took place or towards the end of the investigation? What if the government always insisted that it did not know about the relationship that was taking place at the time of the investigation? With questions like these, the government and the courts are sure to avoid having to find sexual misconduct by agents/informants outrageous enough to warrant use of the due process defense. Therefore, these types of sexual investigative techniques must be outlawed totally in order to avoid the government using excuses for this type of behavior.

In *United States v. Nolan-Cooper*,[236] the court used the factors in *Cuervelo* and decided that outrageous government conduct was not present in this case. In *Nolan-Cooper*, the defendant became a target of the IRS when the government obtained information that she was involved in the laundering of illegal drug proceeds.[237] The government set up an investigation using an undercover agent who posed as a drug dealer, and the defendant readily accepted the chance to launder money for the agent.[238] However, during the course of the thirteen-month investigation, the relationship between the agent and the defendant became socially close, and on one occasion, sexual.[239] The agent gave the defendant gifts, "wined and dined" her and invited her to his plush hotels; additionally, another agent accompanied him one night and had sex with one of the defendant's friends.[240] *Cuervelo*[241] was used as the focus of the court's opinion.

(a) To what extent is the undercover agent's conduct attributable to the government (i.e. did the government actively or passively acknowledge or encourage the sexual relationship)?
(b) What purpose(s) did the agent's sexual conduct serve, if any?
(c) Did the agent act on his own initiative or under the direction (or with the approval) of his agency?
(d) Who initiated the relationship?
(e) When did the alleged sexual relations end?

Nolan-Cooper, 155 F.3d at 232-33 (quoting *Cuervelo*, 949 F.2d at 568).

[235]*Cuervelo*, 949 F.2d at 569. "On remand, the district court should make findings of fact regarding the conduct alleged by [defendant] and based upon what those findings are, if indicated, should proceed to determine whether the government engaged in conduct that was sufficiently outrageous to constitute a violation of [defendant's] constitutional rights." *Id.*

[236]155 F.3d 221 (3rd Cir. 1998).

[237]*Id.* at 224.

[238]*Id.*

[239]*Id.*

[240]*Id.* at 226-27.

[241]949 F.2d 559 (2d Cir. 1991).

The court examined the factors developed in *Cuervelo*,[242] and adopted that standard with one modification as the law of the Third Circuit. The court recognized that the guidelines in *Cuervelo* required that the defendant introduce evidence demonstrating that the government knew its undercover agent had engaged or was engaging in sexual conduct with him/her.[243] The court decided that this standard was too strict and would encourage the government to "turn a blind eye" to the actions of their agents.[244] Hence, the court changed the standard to only requiring that the defendant show "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."[245] Using this formulation, in addition with the other two factors in *Cuervelo*, the court concluded there was no evidence of any "'nexus or connection'" between the sexual conduct and the investigation,[246] and that this "… one instance of sexual misconduct alone does not give rise to a due process violation within the extremely narrow confines of the outrageous government conduct doctrine."[247] The fact that the sexual misconduct occurred within a month before the investigation was completed, and after the agent had gathered the necessary evidence, was also important to the court.[248]

The fact that the agent did not set out to use sex as a weapon, or that the sexual misconduct only occurred once, should not make a difference in the analysis. The agent still engaged in sexual misconduct during the investigation, and used romance and seduction throughout the investigation that led up to the gathering of information and the sexual encounter. Although the court believed that these facts (that the agent did not set out to use sex as a weapon and the sexual misconduct occurred only once) made a difference, the judge did take into account other facts during the sentencing of the defendant. The judge decided to depart downward from the federal sentencing guidelines due to the circumstances. The judge thought that the defendant performed a public service for the government by "… 'ferreting' out sexual misconduct in one of its agents."[249] Notwithstanding the departure in sentencing, the defendant was still physically and emotionally affected by the misconduct of the agent. Although the sex acts did not seem to be directly related to the criminality of the defendant, "they were part of the façade created by the government agent and as such the agent was acting as the government."[250]

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[242]*See supra* note 229 and accompanying text.

[243]*Nolan-Cooper*, 155 F.3d at 233.

[244]*Id.*

[245]*Id.*

[246]*Id.* at 234.

[247]*Id.*

[248]*Nolan-Cooper*, 155 F.3d at 234-35.

[249]Shannon P. Duffy, *For Lawyer Seduced By Government Agent, Sentence Reduced By Federal Judge*, THE LEGAL INTELLIGENCER, Feb. 17, 1999, at 1.

[250]*Id.* The façade included dinners, nightclubbing, expensive hotels and other socializing. The agent spent more than $50,000.00 in connection with this investigation. Shannon P. Duffy, *Due Process Was Not Violated When Investigator Had Sex With Target, But Resentencing Ordered*, THE LEGAL INTELLIGENCER, Sept. 3, 1998, at 1.

The single incident of sex should be viewed as a total picture of using romance to further the investigation. There was a "bodily intrusion" of the government into this defendant's body, and as such, "the defendant did not agree to have sex with the United States government."[251] As was noted above, sex and intimacy require privacy and cause one to become vulnerable.[252] Human beings need to be informed about the people with whom they become intimate; they need to know relevant characteristics about the person and the situation.[253] To destroy these private realms of intimacy and love is the moral equivalent to torture with the capacity to destroy all aspects of honesty and good.[254] It is in this regard that the use of sex and seduction in undercover investigations "… is the moral equivalent of rape because they both deny the dignity and freedom of the individual."[255]

Other federal courts have dealt similarly with sexual misconduct by a government agent or informant by finding that the sexual conduct which occurred was neither outrageous nor violative of due process or privacy rights.[256] The only court that has actually reversed a conviction due to sexual misconduct by a government agent is the United States Court of Military Appeals.[257] In that case, agents of the Air Force Office of Special Investigation targeted the defendant who had just become a member of the Air Force.[258] The defendant was emotionally unstable, an alcoholic and her husband and children had just recently left her.[259] The agents used an informant who was a Staff Sergeant at the base where the defendant was located, and this informant engaged in adulterous and sodomous behavior with

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[251]Duffy, *supra* note 249, at 1.

[252]*See supra* text accompanying notes 117-57.

[253]*See supra* text accompanying notes 132-37.

[254]*See supra* text accompanying notes 128-29.

[255]Marx, *supra* note 199, at 14.

[256]*See*, *e.g.*, United States v. Miller, 891 F.2d 1265, 1267-69 (7th Cir. 1989) (rejecting outrageous government conduct defense even though government employed cocaine addict and previous sexual partner of defendant as informant); United States v. Restrepo, 930 F.2d 705, 707 (9th Cir. 1991) (rejecting outrageous government conduct defense when the government employed one of the defendant's previous sexual partners); United States v. Fadel, 844 F.2d 1425, 1427-34 (10th Cir. 1988) (rejecting outrageous government conduct defense, but remanding the case for an issue of entrapment, when the government employed a long time friend of the defendant as an informant who engaged in sexual conduct with the defendant throughout the investigation); United States v. Cole, 807 F.2d 262, 265-66 (1st Cir. 1986) (rejecting outrageous government conduct defense when the investigating officer obtained incriminating information while carrying on an affair with the defendant's live-in companion); United States v. Shoffner, 826 F.2d 619, 626 (7th Cir. 1987) (rejecting outrageous government conduct defense when informant used sexual and family relationships to obtain information and when government paid for an abortion arising from the informant's sexual relationship with the defendant); United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978) (rejecting outrageous government conduct defense because the informant's sexual relationship with the defendant was not carried on at the request of the government agents).

[257]United States v. Lemaster, 40 M.J. 178 (C.M.A. 1994).

[258]*Id.* at 179.

[259]*Id.*

the defendant in order to entice her to possess cocaine.[260] However, the decision was not outwardly based on the outrageous government conduct defense. Instead the court held that the targeting of the defendant in this case constituted improper inducement of a servicemember, and at a minimum it violated the fundamental norms of military due process and was the equivalent to entrapment.[261] The court did mention that the defendant was predisposed, and that it was unreasonable for an agent to induce an emotionally unstable alcoholic to participate in crimes and then arrest her because she was unable to resist his love and affection.[262]

Military courts do not act as precedents for other federal courts; nevertheless, it is useful to analyze the decision to determine what the court really meant in its opinion. Because the court admitted that the defendant was predisposed, the entrapment defense is unavailable to her. The outrageous government conduct defense is the only defense left, and the court does say that the conduct of the agent was reprehensible and violative of military due process.[263] Perhaps this case should act as a guide for other federal courts in their dealings with sexual misconduct by government agents. The use of sexual misconduct should be declared reprehensible, morally offensive and outrageous. Sexual misconduct should not be tolerated during undercover investigations; hence, once it has been determined that sexual misconduct occurred, the outrageous government conduct defense should apply.

B. State Cases

The state courts seem to take "… a less forgiving approach to law enforcement agents, including confidential informers straying into forbidden sexual territory."[264] However, most state court decisions are not directly on point. In a Florida case,[265] a confidential informant who knew the defendant previously, re-established her connections and asked him on several occasions to get her cocaine.[266] When he told her that he had stopped using drugs, she started kissing him and telling him that they could "fool around and party" if he would just get her some drugs.[267] The informant later admitted that the police officers told her "… to push it because they were sure that I could take him into it."[268] The court noted that "… sex involves physical and psychological desires so strong as to readily foster fantasies and to anesthetize or supplant normal rational reasoning and will."[269] The court concluded that the

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[260]*Id.* at 180.

[261]*Id.* at 181. "Esprit de corps, good order and discipline, and high morale are not, in any way enhanced or maintained by this type of police work." *Lemaster*, 40 M.J. at 181.

[262]*Id.* at 180-81.

[263]*See supra* note 256 and accompanying text.

[264]Tarlow, *supra* note 3, at 39.

[265]State v. Banks, No. 85-1715, 1986 Fla. App. LEXIS 11526 (Fla. Ct. App. Aug. 28, 1986).

[266]*Id.* at *1.

[267]*Id.*

[268]*Id.* at *2 n.1.

[269]*Id.* at *3. *See also supra* text accompanying notes 117-57.

defendant had been entrapped by the talk of sex, and was induced into committing a crime that he would not otherwise commit.[270] Even though the defendant used entrapment here instead of the outrageous conduct defense, the court still based its conclusion on the fact that sex is too strong and effective an inducement to be used as bait. Actual sexual relations had not even occurred, and the court still found that the defendant was induced into committing the crime.

Similarly, in *People v. Martinez*,[271] California seemed to be focused on the intensity of the sexual talk and insinuations. An attractive, young female undercover agent, posing as an unemployed Las Vegas card dealer, was introduced to the defendant.[272] The agent acted the part of a "loose woman" who might trade sexual favors for narcotics.[273] Even though this conduct may seem relatively tame compared to that discussed above, the court concluded that the conduct "... falls far short of an acceptable standard of police conduct and constitutes entrapment."[274] Once again, the court used the entrapment defense and not the outrageous government conduct defense. If the defendant is found not to be predisposed, then the entrapment defense is applicable. However, if the defendant is predisposed to committing the crime, the outrageous government conduct defense is appropriate, and the analysis should proceed according to due process principles. One could argue that the appropriate solution would be to eliminate the requirement of predisposition with the entrapment defense. However, the outrageous government conduct defense is a separate defense based on constitutional principles, and is also needed to combat over-reaching government behavior that entrapment cannot stop. Entrapment has been widely used and known to be applicable when the defendant had no predisposition to commit the crime. It would be foolish to eliminate one defense and change entrapment to encompass the outrageous government conduct defense. Two separate defenses are needed in order to deal with misconduct by the government. The two defenses address evils in different situations, and the outrageous government conduct defense can be specifically tailored to combat sexual misconduct of the government even when the entrapment defense is unavailable.

The state of Washington has found outrageous government conduct when sexual misconduct is engaged in by a government agent/informant.[275] In this case, a government informant engaged in a sexual relationship with an alcoholic defendant

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[270]*Banks*, 1986 Fla. App. LEXIS 11526, at *3. "Accordingly, where sex is involved as the inducement … the case does not depend on the subtlety of the sexual suggestion, who initiated it, … or the strength of the logical inductive reasoning process that causes a defendant to believe there is an implication of future sexual favors …" *Id.*

[271]203 Cal. Rptr. 833 (Cal. Ct. App. 1984).

[272]*Id.* at 839.

[273]*Id.*

[274]*Id. See also* People v. Hillary, 28 Cal. Rptr. 2d 415, 419-21 (Cal. Ct. App. 1994) (where undercover agent offered highly alluring sexual pleasures in exchange for narcotics, the court found sufficient evidence for entrapment). "Police inducements which play on 'base' emotions are no less reprehensible than those which appeal to more altruistic feelings." *Id.* at 419.

[275]Washington v. Lively, 921 P.2d 1035 (Wash. 1996).

and even proposed marriage in an effort to persuade the defendant to sell cocaine.[276] Even though the informant denied having any sexual relations with the defendant, the court found that "… the emotional reliance of the [d]efendant on the informant was an integral part of the informant's control,"[277] and this type of conduct was sufficient for a defense of outrageous government conduct.[278] This case recognizes the intensity of emotions that accompany sexual conduct and romantic intimacy. Sexual conduct becomes an unfair investigative technique and surpasses the limits of any type of decency.

Ohio's view of governmental sexual misconduct seems to be parallel to that of the federal cases discussed above. In an unpublished decision, an Ohio appellate court did not find the use of sex by a government informant to be outrageous conduct.[279] In this case, the informant eventually persuaded the defendant to sell drugs by saying that she needed the money for her children.[280] Additionally, she engaged in sexual intercourse with the defendant, "…thereby greatly endearing herself to him and making his refusal to sell her drugs extremely difficult, if not impossible."[281] Nonetheless, the court commented that even though it may look with disdain on the informant's use of sexuality to influence the defendant, the sexual activity with the defendant had ceased well before the sale of the drugs.[282] As was noted above, just because the sexual activity was not occurring at the exact time of the offense does not mean that it did not influence and persuade the defendant to commit the crime. Some actions are taken in response to what others have said or done; sex is no different. In fact, it is even more powerful than other types of persuasion or inducements.[283] The use of sex influences people to act a certain way. Additionally, when people are intimately involved, they do not want to disappoint their partners and will usually succumb to what they are asked to accomplish. For that reason, when the government engages in sexual misconduct with a person who is under investigation, it may be extremely difficult for that person to resist the temptations and say no to the request. On the other hand, even when sex is a part of the crime to be investigated, deception is still involved when the agent/informant takes it upon himself/herself to become too engrossed in the investigation.

Arguments have been made concluding that the use of sex in the enforcement of laws requiring sexual conduct (specifically prostitution) can be justified.[284] Most

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[276]*Id.* at 1038-39.

[277]*Id.* at 1047.

[278]*Id.* at 1049.

[279]Ohio v. Doran, No. 1965, 1984 WL 5130, at *3 (Ohio Ct. App. June 6, 1984) (unpublished).

[280]*Id.* at *1.

[281]*Id.*

[282]*Id.* at *3.

[283]State v. Banks, No. 85-1715, 1986 Fla. App. LEXIS 11526, at *4 (Fla. Ct. App. Aug. 28, 1986).

[284]Marx, *supra* note 199, at 16.

state courts have taken this approach.[285] Although prostitution usually involves only sexual intimacy and not emotional closeness, there is a difference when deception is used.[286] In this sense sexual acts are "personal" even in the absence of psychological intimacy, and betrayal of another's body is extremely violative.[287] Additionally, prostitution is a relatively minor misdemeanor charge, and to spend so much time and money on the investigation does not seem right. Courts have found that at times, unorthodox investigatory methods are necessary to obtain certain types of criminals. This statement may be true; yet, it is not right to specifically instruct an agent or informant to engage in sexual activity if necessary to obtain evidence.[288] If the undercover agent must solicit a prostitute in order to obtain evidence or make an arrest, the arrest should be made before any type of sexual activity occurs. If the prostitute agrees to perform services, this agreement is enough to make an arrest. The conduct does not need to proceed any further. If the conduct does proceed further than the agreement to engage in sexual relations, then the agent/informant has crossed the line and the conduct should be declared outrageous.

VI. A SOLUTION

Since the courts have not specifically defined what constitutes outrageous government conduct that "shocks the conscience,"[289] and because all cases must be decided on their own facts to determine whether a defendant's due process rights have been violated, a standard of uniformity will never be reached. In addition, cases involving sexual misconduct by government agents/informants have even less of a chance of reaching uniformity based on the current federal and state case law.[290] Without any solid standard on which to base instances of governmental sexual misconduct, the limits of decency and morality are surpassed without a chance of return. Courts have found that one sexual episode is not enough to constitute

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[285]*See, e.g.*, People v. Johnson, 462 N.E.2d 948 (Ill. Ct. App. 1984) (rejecting outrageous government conduct when undercover agents engaged in acts of prostitution to catch the defendant with drugs); Anchorage v. Flanagan, 649 P.2d 957 (Ala. Ct. App. 1982) (rejecting outrageous government conduct when a police officer permitted the defendant to engage in sexual contact with him); State v. Emerson, 517 P.2d 245 (Wash. Ct. App. 1973) (rejecting outrageous government conduct when an undercover agent engaged in sexual intercourse five times with five different women); State v. Jessup, 641 P.2d 1185 (Wash. Ct. App. 1982) (rejecting outrageous government conduct when police informant participated in acts of prostitution for over three weeks).

[286]Marx, *supra* note 199, at 16.

[287]*Id.*

[288]*See*, *e.g.*, State v. Tookes, 699 P.2d 983 (Haw. 1985) (rejecting outrageous government conduct where civilian agent was specifically instructed to engage in sexual intercourse if necessary to obtain evidence sufficient for a conviction); State v. Putnam, 639 P.2d 858 (Wash. Ct. App. 1982) (rejecting outrageous government conduct where undercover civilian agent was told to do what was necessary to gather evidence of prostitution, and specifically authorized her to "turn tricks").

[289]*Rochin*, 342 U.S. at 172.

[290]*See supra* notes 208-83 and accompanying text.

outrageous behavior,[291] and that sexual relations that occurred too long before or after the important information was gathered do not violate due process or privacy rights.[292] Courts have also reasoned that when the government is found not to have known about the sexual conduct, outrageous conduct does not exist.[293]

Taking into account how sex is perceived in today's world, along with agency principles, this reasoning is flawed. Furthermore, if one sexual misconduct episode is allowed, then further along down the road two, three or even more episodes will be allowed. The government will continue to argue that it knew nothing about the sexual encounters, that it in no way encouraged them to occur, and that the sexual relations had nothing to do with the investigation. This common slippery slope argument fits perfectly into this problem. Who is going to draw the line between permissible government sexual misconduct and impermissible conduct? The courts cannot even agree on what outrageous government conduct actually looks like. The only way to solve this problem is to develop a uniform rule that the courts must adopt when determining whether the government's use of sexual conduct was outrageous and violative of due process and privacy rights.

Because no possible way exists to draw a line between permissible and impermissible sexual misconduct by the government, the only solution is to forbid all types of sexual activity by the government throughout the entire investigation. This solution does not mean that the use of deception or other clever tactics may not be used. What it means is that if and when romantic intimacy or sexual conduct occurs, the outrageous government conduct defense is satisfied. The Constitution leaves it to the political branches of government to decide whether to regulate law enforcement conduct which may "… offend some fastidious squeamishness or private sentimentalism about combating crime too energetically."[294] The federal and state legislatures should pass laws forbidding any type of sexual or intense romantic conduct to be used by the government in undercover investigations. The law should be written into all law enforcement codes of ethics and behavior guides so that the agents are aware of what type of conduct they cannot use in investigating crimes. All government informants must be made aware of the law and the penalties for disobeying it. If a government agent/informant engages in this type of newly forbidden behavior, the indictment against the defendant must be dismissed or if the defendant has already been convicted, the conviction must be reversed. Additionally, the government may choose to have the agent suspended or even terminated, and the guilty informant may never be used again in a law enforcement investigation.

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[291] *See*, *e.g.*, United States v. Nolan-Cooper, 155 F.3d 221 (3rd Cir. 1998) (finding that only one incident of sexual intercourse did not constitute outrageous conduct).

[292] *See*, *e.g.*, *Nolan-Cooper*, 155 F.3d 221 (finding that the only incident of sexual intercourse occurred within a month before the investigation was completed); United States v. Miller, 891 F.2d 1265 (7th Cir. 1989) (finding that sexual relations occurred too soon before the actual investigation had begun).

[293] *See*, *e.g.*, United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987) (finding that the use of sex in the investigation was not attributable to the government); United States v. Prairie, 572 F.2d 1316 (9th Cir. 1978) (finding that the sexual conduct was not carried out as a request from the government).

[294] *Rochin*, 342 U.S. at 172.

Because people need to assume a level of good faith and trust in intimate relations, and because privacy is an essential constitutional right,[295] this type of law is the only one that makes sense. Even if the defendant was predisposed to committing the crime, it is not fair to allow law enforcement officials to use any type of means necessary to catch the defendant. The use of sex and intimate romance is a technique that is so distasteful,[296] its use should be prohibited. Police activity must be regulated by something more than the law—it must respect the values of a community, and by forbidding this type of "intimate surveillance" this goal is accomplished.[297] Government cannot afford to ignore what is important to human beings (trusting and intimate relationships). Abandonment of respect for such relationships "… will seriously diminish the worth of the social order to people."[298] Moreover, privacy has become an important constitutional right that has continuously been litigated, and the current trend leans toward ruling in favor of the individual's privacy. If the courts continue to recognize sex and intimacy as an appropriate investigative tool, then this recognition may actually serve as an incentive for sexual misconduct in the United States. In order to promote morality and decency in the world, sexual misconduct by government agents/informants must be forbidden. No other alternatives are available.

VII. CONCLUSION

Government agents and informants must not be permitted to use any type of investigative tool necessary to gather important information from a defendant or to obtain a conviction. By allowing law enforcement officials to engage in immoral and unethical conduct, society is given the impression that sex can be used and relationships exploited as long as the courts do not disagree. The time has come to change this impression. Courts have noted previously that by attempting to draw some kind of line as to what constitutes permissible or impermissible sexual behavior would require them to draw on their personal and private notions of human sexuality and social mores.[299] However, courts have previously used their personal notions of sexuality and morality time and again.[300] Moreover, the legislature would draw the line and pass the law regaining the abolition of all sexual conduct used by the government in undercover investigations. The courts would merely apply the law to each set of facts that came before it.

In a world that is so sexually advanced, we must not lose sight of our morals and all elements of governmental decency. An outrageous government conduct defense should be successful whenever sexual or intense intimate relations occur between an undercover agent/informant and a defendant. This type of conduct violates a

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[295] *See supra* notes 117-57 and accompanying text.

[296] KLEINIG, *supra* note 152, at 135.

[297] Schoeman, *supra* note 126, at 158.

[298] *Id.*

[299] *Simpson*, 813 F.2d at 1466-67.

[300] *See*, *e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (finding state abortion statutes illegal); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding the regulation of contraceptives illegal).

person's fundamental due process and privacy rights and should not be tolerated. The only solution is to forbid this type of conduct regardless of the circumstances or the severity of the crime. Some people argue that a need exists for flexibility and variety in law enforcement situations and that "categorical prohibition" is inappropriate.[301] These people continue to opine that each case must be examined separately on the basis of its own facts.[302] However, this solution is not morally or constitutionally acceptable. Undercover agents/informants can be successful in using other types of deception in their investigations that are morally acceptable without engaging in sexual or romantic relationships. If the government cannot catch a "criminal" with permissible and constitutionally proper methods, then that "criminal" should not be caught. Sex is much too strong and effective an inducement to be used as bait.[303] If this kind of conduct is permitted to persist, the constitutional rights of citizens will continue to be jeopardized.

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[301]Marx, *supra* note 199, at 20.

[302]*Id.*

[303]State v. Banks, No. 85-1715, 1986 Fla. App. LEXIS 11526, at *4 (Fla. Ct. App. Aug. 28, 1986).