

# NOTE

## What Is Outrageous Government Conduct? The Washington State Supreme Court Knows It When It Sees It: *State v. Lively*

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*Inability to describe in general terms just what makes tactics too outrageous to tolerate suggests that there is no definition—and “I know it when I see it” is not a rule of any kind, let alone a command of the Due Process Clause.<sup>1</sup>*

For the first time ever, the Supreme Court of Washington in *State v. Lively*<sup>2</sup> overturned a criminal conviction because of outrageous government conduct.<sup>3</sup> This decision employed a rarely-used, and even more infrequently successful, defense to achieve an apparently just result. Indeed, courts and scholars disagree on whether the defense, based on the Due Process Clause of the U.S. Constitution, actually exists and, if it does, how it applies to the facts of a given case. The U.S. Supreme Court has neither expressly and conclusively acknowledged nor disavowed the defense and has never employed it to overturn a criminal conviction. The existence of the outrageous government conduct defense has been acknowledged by most federal and state courts. Two federal circuits, however, have expressly

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1. *United States v. Miller*, 891 F.2d 1265, 1273 (7th Cir. 1989) (Easterbrook, J., concurring).

2. 130 Wash. 2d 1, 921 P.2d 1035 (1996).

3. The terms “outrageous government conduct defense” and “due process defense” mean the same thing in this context and will be used interchangeably throughout this Note.

repudiated it.<sup>4</sup> Thus, a conflict in interpreting the U.S. Constitution's Due Process Clause exists, and the U.S. Supreme Court is the only place to resolve it.

A representative body of literature has recently evolved discussing the outrageous government conduct defense; the majority of this literature favors and advocates its preservation.<sup>5</sup> A detailed review of relevant case law, however, will lead to confusion. Many cases that address the outrageous government conduct defense cite *United States v. Russell*'s dicta<sup>6</sup> in recognizing that the defense exists, but refuse to hold the conduct at issue sufficiently outrageous to bar the defendant's conviction. In rejecting a defendant's due process claim, some courts have subjected their facts and precedents to greater scrutiny by engaging in lengthier analysis.<sup>7</sup> Nevertheless, the end result is the same—a successfully asserted due process claim based on outrageous government conduct is extremely rare.<sup>8</sup>

So why was the defense successful in *State v. Lively*? Because while a precise definition of "outrageous government conduct" is

4. *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995); *United States v. Tucker*, 28 F.3d 1420 (6th Cir. 1994); see *infra* text accompanying notes 39-53.

5. Stephen A. Miller, Comment, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 NW. U. L. REV. 305 (1996); Jason R. Schulze, Note, *United States v. Tucker: Can the Sixth Circuit Really Abolish the Outrageous Government Conduct Defense?*, 45 DEPAUL L. REV. 943 (1996); John David Baretta, Note, *Reconfiguring the Entrapment and Outrageous Conduct Doctrines*, 84 GEO. L.J. 1945 (1996); Mark Jarod Meyers, Note, *United States v. Tucker: The Sixth Circuit Takes Aim at Due Process*, 56 OHIO ST. L.J. 1571 (1995); Conrad F. Meis, Comment, *United States v. Tucker - The Illegitimate Death of the Outrageous Governmental Conduct Defense*, 80 IOWA L. REV. 955 (1995); Dana M. Todd, Note, *In Defense of the Outrageous Government Conduct Defense in the Federal Courts*, 84 KY. L.J. 415 (1995); Damon D. Camp, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055 (1993); Fred Ward Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses*, *In Federal Court*, 27 WAKE FOREST L. REV. 829 (1992); Gail M. Greaney, Note, *Crossing the Constitutional Line: Due Process and the Law Enforcement Justification*, 67 NOTRE DAME L. REV. 745 (1992); Stephen A. Meister, Comment, *When Nothing Is Shocking: The Ninth Circuit Degrades the Outrageous Government Conduct Defense*, 22 LOY. L.A. L. REV. 843 (1989); Karen Mausser Poole, Note, *When Use of the Entrapment Defense is Barred: Is There a Viable Alternative Defense?* *United States v. Simpson*, 5 COOLEY L. REV. 203 (1988); Richard Lawrence Daniels, Note, *United States v. Simpson: 'Outrageousness!' What Does It Really Mean?—An Examination of the Outrageous Conduct Defense*, 18 SW. U. L. REV. 105 (1988).

6. 411 U.S. 423, 431-32 (1973); see also *infra* text accompanying notes 26-29.

7. See *United States v. Santana*, 6 F.3d 1 (5th Cir. 1993); *United States v. Barger*, 931 F.2d 359 (6th Cir. 1991); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980); *State v. Van Winkle*, 864 P.2d 729 (Kan. 1993); *State v. Johnson*, 606 A.2d 315 (N.J. 1992).

8. Danny A. Veilleux, Annotation, *Actions by State Officials Involving Defendant as Constituting 'Outrageous' Conduct Violating Due Process Guarantees*, 18 A.L.R. 5TH 1 (1995); Tim A. Thomas, Annotation, *What Conduct of Federal Law Enforcement Authorities in Inducing or Co-Operating in Criminal Offenses Raises Due Process Defense Distinct from Entrapment*, 97 A.L.R. FED. 273 (1996).

difficult to articulate, five out of the nine justices hearing the case apparently felt that the government agent's conduct, in light of all the surrounding circumstances, was repugnant enough to justify overturning the defendant's conviction.

The *Lively* case addresses several questions of law concerning the defense of entrapment and denial of due process.<sup>9</sup> Because the court was in general agreement on the entrapment issues and sharply divided on due process, this Note will address exclusively the due process defense, which was dispositive. The *Lively* majority attempts to clarify the judicial approach to this issue while reaching a just result. The dissent,<sup>10</sup> on the other hand, is skeptical of the existence of the due process defense and the majority's analysis.

Given the amorphous state of the outrageous government conduct defense, and with little guidance from the U.S. Supreme Court as to its existence or applicability, courts will continue to apply it as they see fit in particular cases. If and when the issue is ever considered by the high Court, it should perhaps look to the *Lively* case to explicitly define the doctrine for the benefit of other courts.

Part I of this Note will discuss the background of the outrageous government conduct defense; Part II will examine the facts of the *Lively* case; Part III will analyze the court's decision in *Lively*; and Part IV will discuss the policy considerations which precipitated the outcome. This Note concludes that the outrageous government conduct defense should continue to be recognized. Courts doing so should employ a "totality of circumstances" analysis and consider relevant public policy issues to determine whether a defendant's due process rights were violated.

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9. The entrapment issue centered around which party has the burden of persuasion when the entrapment defense is asserted. The *Lively* court held that there was neither a due process requirement that the state prove the absence of entrapment beyond a reasonable doubt nor error as a result of the trial court instructing the jury that the defendant was required to prove entrapment by a preponderance of the evidence. *State v. Lively*, 130 Wash. 2d at 10-13, 921 P.2d at 1040-42. The court also considered, but did not decide, whether the defendant's constitutional right of free exercise of religion was violated. *Id.* at 27, 921 P.2d at 1048. See also *infra* note 135.

10. The opinion was actually a concurrence in part and dissent in part. Because the concurrence was regarding the entrapment issue and the dissent was directed toward the outrageous government conduct issue, this Note will simply refer to the opinion as a dissent.

## I. BACKGROUND INFORMATION ABOUT THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE

### A. Historical Background

The defense of outrageous government conduct has a close relationship to the defense of entrapment, as both are products of the same U.S. Supreme Court case law<sup>11</sup> and appear to be inextricably intertwined. Thus, to examine the defense of outrageous government conduct, one must first examine the defense of entrapment.

Of the many available definitions of entrapment, the most enduring is that offered by Justice Roberts in *Sorrells v. United States*: "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."<sup>12</sup> The entrapment defense, born in 1932 in *Sorrells*,<sup>13</sup> matured in 1958 in *Sherman v. United States*.<sup>14</sup> While the justices in both cases agreed on the results, they could not agree on the method to reach them. Thus, from these opinions came the "objective" and "subjective" views of the entrapment defense.

The subjective view<sup>15</sup> of entrapment, the majority view, employs

11. *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Rochin v. California*, 342 U.S. 165 (1952); *Sorrells v. United States*, 287 U.S. 435 (1932).

12. *Sorrells*, 287 U.S. at 454. The *Lively* court cites a line of Washington cases stating that the defense of entrapment occurs when

the accused is lured or induced by an officer of the law or some other person, a decoy or informer, to commit a crime which he had no intention of committing. Such defense is not available when the criminal intent originates in the mind of the accused and the police officers, through decoys and informers, merely afford the accused an opportunity to commit the offense.

*Lively*, 130 Wash. 2d at 9, 921 P.2d at 1039.

13. In *Sorrells*, an undercover prohibition agent had asked the defendant to obtain a prohibited alcoholic beverage for him. Despite the defendant's initial refusal, the agent persisted with several more requests. Also, the agent appealed to the defendant's sense of camaraderie, as both men were World War veterans. Eventually the defendant sold the agent a half-gallon of whiskey and was indicted for violating the National Prohibition Act. 287 U.S. at 439-41.

14. In *Sherman*, the defendant met a government informer in a doctor's office, where both men were seeking treatment for their narcotics addictions. The informer asked Sherman if he knew where to find a source of narcotics, claiming that he was not responding to treatment. Sherman repeatedly sought to avoid the issue, but the informer persisted and claimed to be in significant pain. Through repeated pleas, the informer induced Sherman to obtain narcotics for him and led Sherman to resume his own drug habit. Shortly thereafter, Sherman was arrested when supplying narcotics to the informant. 356 U.S. at 371-72.

15. Also known as the "majority view," "federal approach," or "Sherman-Sorrells doctrine." See 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW*, § 5.2, at

a two-step inquiry: A court first looks at whether the offense was induced by a government agent and, second, whether the defendant was predisposed to commit the type of offense charged.<sup>16</sup> A defendant is considered to be predisposed if he or she is "ready and willing to commit the crimes such as are charged in the indictment, whenever the opportunity was afforded."<sup>17</sup> If the defendant is predisposed, a defense of entrapment will fail.

On the other hand, the objective view<sup>18</sup> of entrapment, employed in a small minority of cases, focuses on the inducements used by government agents. Entrapment is established if police induced or encouraged the offense by "employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."<sup>19</sup> In applying the test, it is necessary to consider the surrounding circumstances, such as evidence of the manner in which the particular criminal activity is usually conducted. While some practices may be impermissible in certain instances, each case must be judged on its own facts.<sup>20</sup>

There are three key distinctions between the entrapment and the outrageous government conduct defenses. First, entrapment is a question of fact for the jury while outrageous government conduct is a question of law for the court.<sup>21</sup> Second, the doctrines emanate from two different sources. Entrapment is a common law doctrine at the federal level but is based upon statutes at the state level.<sup>22</sup> Outrageous government conduct, however, is a constitutional question at either the state or federal level, though some state constitutions could

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599 (1986).

16. See *id.* at 600.

17. *Id.* at 600 (citing 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 13.09 (3d ed. 1977); *Harrison v. State*, 442 A.2d 1377 (Del. 1982)).

18. Also known as the "hypothetical person approach" or the "Roberts-Frankfurter approach." See 1 LAFAVE & SCOTT, *supra* note 15, at 600-01.

19. 1 LAFAVE & SCOTT, *supra* note 15, at 601 (citing Model Penal Code § 2.13).

20. See *id.*

21. *State v. Lively*, 130 Wash. 2d at 19, 921 P.2d at 1044 (citing *United States v. Dudden*, 65 F.3d 1461, 1466-67 (9th Cir. 1995)).

22. The entrapment defense is codified in Washington as title 9A, chapter 16, section 070, of the Washington Revised Code [hereinafter RCW § 9A.16.070], which states:

(1) In any prosecution for a crime, it is a defense that:

(a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and

(b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

have more expansive definitions of "due process of law."<sup>23</sup> Third, and most significantly, the focus of inquiry for an entrapment defense is a defendant's predisposition to commit the crime charged, while the focus of an outrageous government conduct defense is the conduct or role of a law enforcement agent in the commission of the crime.<sup>24</sup> This final distinction is the most controversial—it is the "subjective" versus "objective" debate on the entrapment defense that has been waged by courts and commentators for years. In fact, one of the chief arguments advanced by critics of the due process defense is that it is merely the objective view of entrapment disguised as a different defense.<sup>25</sup>

The outrageous government conduct defense was born with Justice Rehnquist's dicta in *United States v. Russell*.<sup>26</sup> In *Russell*, Justice Rehnquist began his opinion with the following: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed."<sup>27</sup> He later added: "The law enforcement conduct here stops far short of

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23. The language of the Due Process Clauses of the federal and Washington state constitutions are substantially the same. Compare U.S. CONST. amend. V ("... nor shall any person . . . be deprived of life, liberty, or property, without due process of law"), and U.S. CONST. amend. XIV, § 1 ("... nor shall any State deprive any person of life, liberty, or property, without due process of law"), with WASH. CONST. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law"). See generally PAUL MARCUS, *THE ENTRAPMENT DEFENSE*, § 7.11 (2d ed. 1995).

24. See *supra* text accompanying notes 15-20.

25. *United States v. Tucker*, 28 F.3d at 1421; *United States v. Santana*, 6 F.3d at 3 ("Outrageous misconduct is the deathbed child of objective entrapment, a doctrine long since discarded in the federal courts"). But see *Rivera v. State*, 846 P.2d 1, 7 (Wyo. 1993).

26. 411 U.S. 423 (1973) (An FBI agent convinced Russell and his codefendants that he represented a Pacific Northwest organization interested in controlling the manufacture and distribution of methamphetamine. The agent agreed to provide them with phenyl-2-propanone, a difficult-to-obtain chemical essential to the manufacture of methamphetamine, in exchange for one-half of the drug produced in the defendant's Whidbey Island laboratory. After the completion of this and one other transaction, the defendants were arrested upon execution of a search warrant. Despite the contention that supplying the chemical made the government an active participant in the crime, the Court held that the defendants were clearly predisposed, as they had already been producing methamphetamine before the FBI agent's involvement, and thus the criminal design had not been implanted in the minds of the defendants.)

27. *Id.* at 431-42 (comparing *Rochin v. California*, 342 U.S. 165 (1952), a case in which deputy sheriffs, having information about the defendant selling narcotics, broke into his home and forcibly attempted to extract from him a capsule he had swallowed. After the defendant's stomach was pumped in the hospital, two capsules of morphine were eventually found and subsequently presented at trial to obtain a conviction. The U.S. Supreme Court overturned the conviction, holding that the action of the law enforcement officers was "conduct that shocks the conscience.").

violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment."<sup>28</sup> Justice Rehnquist did caution, however, that

[s]everal decisions of the United States district courts and courts of appeals have undoubtedly gone beyond this Court's opinions in *Sorrells* and *Sherman* in order to bar prosecutions because of what they thought to be, for want of a better term, "overzealous law enforcement." But the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve.<sup>29</sup>

Two years later, in *Hampton v. United States*,<sup>30</sup> Justice Rehnquist tried to recant his dicta in *Russell*.<sup>31</sup> While the Court's likely motive in granting certiorari in *Hampton* was clarification of its position in *Russell*, the *Hampton* decision instead created more confusion. The case was decided by a plurality, with a minority siding with Rehnquist's recantation but the majority of justices agreeing that they did not want to foreclose the possibility of a due process defense by state and federal courts.<sup>32</sup>

In the twenty years since *Russell* and *Hampton*, the doctrine of outrageous government conduct has been applied haphazardly by state and federal courts. The U.S. Supreme Court appears reluctant,

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28. *Russell*, 411 U.S. at 432 (quoting *Kinsellar v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

29. *Id.* at 435.

30. 425 U.S. 484 (1976) (The defendant was convicted for distributing narcotics when he sold heroin, which had been supplied to him by a government informant, to a government agent. The defendant conceded that he was predisposed to commit the crime, so the entrapment defense was unavailable to him.).

31. *Id.* at 490.

The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the [d]efendant. Here, as we have noted, the police, the Government informant, and the defendant acted in concert with one another. If the result of the governmental activity is to "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . ." the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with the defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law. *Id.* (citations omitted).

32. *Id.* at 491, 495 (Justices Powell and Blackmun concurred in the result, but maintained that a due process defense based on outrageous government conduct would be available in the appropriate case. Justices Brennan, Stewart and Marshall dissented, restating their support of the objective view of entrapment and asserting that the police conduct in the case was sufficiently offensive to bar Hampton's conviction.).

however, to resume the "objective" versus "subjective" entrapment debate, which would invariably arise if it were to consider a claim of outrageous government conduct.

*B. Application in Practice and Recent Treatment by the Courts*

Since its birth in 1974, the outrageous government conduct defense has seen very limited practical application. A vast majority of cases where it is raised are narcotics-related prosecutions.<sup>33</sup> In many of these cases the government has used informants, and it is generally the informants' conduct in the course of the investigation that is challenged by the defendant on due process grounds.<sup>34</sup> The "war on drugs" is a high government priority. Therefore, there has been great judicial reluctance to interfere with law enforcement efforts to combat drug-related activity.<sup>35</sup>

The use of informants is a necessary method of law enforcement and unquestionably sanctioned by the judiciary.<sup>36</sup> The clandestine nature of drug crime demands that law enforcement agencies use informants to infiltrate ongoing narcotics activity to help arrest and prosecute drug manufacturers and dealers.<sup>37</sup> Informants, however, often have self-serving motives for providing authorities with information and, because they are largely unsupervised, will go to great lengths to detect illegal activity to report.<sup>38</sup> Courts have stated that they do not approve of particular law enforcement methods and used phrases such as "reprehensible," "repugnant," and "offensive" to describe them, but nonetheless have upheld the convictions.<sup>39</sup>

While the outrageous government conduct defense is predominately asserted in narcotics prosecutions, it has been asserted in other contexts.<sup>40</sup> In fact, it was within the context of cases involving food

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33. See Veilleux, *supra* note 8, at 1; 1 LAFAVE & SCOTT, *supra* note 15, at 598.

34. See Veilleux, *supra* note 8, at 27.

35. See *State v. Pleasant*, 38 Wash. App. 78, 83, 684 P.2d 761, 764 (1984) ("... the Supreme Court has stated that it is unlikely a due process violation will ever be found in the context of contraband offenses: the detection of such offenses requires law enforcement officials to resort to covert methods which would be unacceptable in other contexts.").

36. See Veilleux, *supra* note 8, at 101-17; Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 83-86, 105 (1994).

37. See Veilleux, *supra* note 8, at 90-95.

38. See Zimmerman, *supra* note 36, at 99-102, 116, 138-39.

39. See Veilleux, *supra* note 8, at 30-31.

40. Other examples of crimes that authorities use undercover agents or informants to investigate include: prostitution, child pornography, insurance fraud, credit card fraud, counterfeiting, weapons transportation, transportation of illegal aliens, possession and transportation of stolen goods, bribery, corrupt influencing, witness tampering and official



stamp trafficking and prosecutorial misconduct that two federal circuit courts specifically repudiated the outrageous government conduct defense.<sup>41</sup> These decisions have thus altered the nature of the conflict between the circuits. Where once the federal courts disagreed on the application of the defense, they now disagree on its very existence.

### 1. Federal Courts

In *United States v. Tucker*,<sup>42</sup> the two defendants were arrested for food stamp trafficking during a government sting operation. The government employed an agent, who worked on "'commission' of sorts,"<sup>43</sup> where she kept half the money she collected from the sale of food stamps. She was not told whom to approach, merely that she should find people willing to buy the food stamps below face value and secretly record the transactions.<sup>44</sup> The agent contacted Tucker, a friend of more than ten years, and claimed that she was in dire financial need.<sup>45</sup> She claimed that she was selling her food stamps so that she could provide a "proper Christmas" for her children.<sup>46</sup> Tucker initially resisted, but eventually purchased the stamps when the agent came to her workplace "dressed in a manner suggesting extreme financial distress."<sup>47</sup> The agent then convinced Hancock, an employee of Tucker's and the other defendant in this case, to buy stamps after telling her "tales of ill-health and financial need."<sup>48</sup> The defendants convinced the district court to dismiss the case based on the government's aggressive overinvolvement in the crime.<sup>49</sup>

The Sixth Circuit reversed, stating that outrageous government conduct defense was nothing more than a claim of entrapment. In doing so, the court rejected all previous Sixth Circuit precedent that had considered the defense: "In our view . . . there is no authority in this circuit which holds that the government's conduct in inducing the commission of a crime, if 'outrageous' enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of

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misconduct. See Veilleux, *supra* note 8, at 144-86; Thomas, *supra* note 8, at 303-41.

41. *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995); *United States v. Tucker*, 28 F.3d 1420 (6th Cir. 1994).

42. 28 F.3d 1420 (6th Cir. 1994).

43. *Id.* at 1421.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

the Fifth Amendment.”<sup>50</sup> One of the concurring judges disagreed with the majority’s total disregard for its precedents by no longer recognizing the due process defense, stating: “It seems clear to me that this Circuit has recognized outrageous government conduct as a valid due process defense, and, as the majority concedes, the Supreme Court has not clearly held otherwise.”<sup>51</sup>

One year later, in *United States v. Boyd*, the government appealed a district court’s order granting new trials for members of the “El Rukns,” an infamous Chicago street gang, based upon prosecutorial misconduct.<sup>52</sup> The government had knowingly allowed two of their witnesses to perjure themselves at trial and had withheld from the defense evidence that all six witnesses had used illegal drugs and received unlawful favors from the government prosecutors and their staffs.<sup>53</sup> Prosecutors had also allowed the prisoner witnesses to entertain their visitors in the U.S. Attorney’s office in the federal building, as well as the Bureau of Alcohol, Tobacco, and Firearms offices across the street.<sup>54</sup> During these unsupervised visits, the witnesses had consumed alcohol and illegal drugs (brought by their predominantly female guests), had engaged in sexual intercourse, had utilized unlimited telephone privileges, and had stolen numerous documents.<sup>55</sup> The trial court granted new trials because the outrageous prosecutorial conduct was uniquely egregious.

Writing for the Seventh Circuit which considered the defendant’s appeal, Judge Posner stated:

Prosecutorial misconduct may precipitate a reversible error, but it is never in itself a reversible error. In great tension with this principle, there are intimations that “outrageous government misconduct” is an independent ground for ordering a new trial in a federal criminal case; but we agree with the First Circuit that “the doctrine [of outrageous government misconduct] is moribund.” “Stillborn” might be a better term, for it never had any life; and it certainly has no support in the decisions of this court, which go out of their way to criticize the doctrine. Today we let the other shoe drop, and hold that the doctrine does not exist in this circuit.<sup>56</sup>

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50. *Id.* at 1424.

51. *Id.* at 1429-30.

52. 55 F.3d 239 (7th Cir. 1995).

53. *Id.* at 241.

54. *Id.* at 244.

55. *Id.*

56. *Id.* at 241 (citations omitted).

While the outrageous government conduct defense was repudiated by two federal circuits in nondrug offenses, the consideration of its viability in the Washington courts has occurred in both drug and nondrug cases.

## 2. Washington Courts

Prior to the legislative adoption of the entrapment defense in 1975, the Washington Court of Appeals considered the *Russell* decision and held in two separate cases that the majority view of entrapment was controlling.<sup>57</sup> Thus, in *State v. Emerson*, the court held that the police conduct during the course of its investigation, in which an undercover officer engaged in sex with several prostitutes which he paid for with public funds, was not conduct that violated the "fundamental sense of fairness, shocking to the universal sense of justice."<sup>58</sup> The same court examined the entrapment and due process defenses several months later in *State v. Walker* and held that the entrapment defense was properly rejected by the jury where there was insufficient evidence of government inducement and that the due process defense did not apply where there was no showing of outrageous police misconduct.<sup>59</sup>

After the adoption of the entrapment defense in 1975, a line of appellate decisions repeatedly rejected claims of outrageous government conduct.<sup>60</sup> While not recognizing a due process violation in the cases

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57. *State v. Emerson*, 10 Wash. App. 235, 517 P.2d 245 (1974); *State v. Walker*, 11 Wash. App. 84, 521 P.2d 215 (1974).

58. *Emerson*, 10 Wash. App. at 242, 517 P.2d at 249.

59. *Walker*, 11 Wash. App. at 88-90, 521 P.2d at 218-19.

60. *State v. Brooks*, 30 Wash. App. 280, 633 P.2d 1345 (1981) (defendant convicted of burglary and possession of stolen property in connection with a federally-funded sting operation); *State v. Keller*, 30 Wash. App. 644, 637 P.2d 985 (1981) (case remanded because trial court erred in refusing to give defendant's proposed entrapment instruction to the jury holding that evidence of police officer's inducement of defendant to sell marijuana was proper in consideration of entrapment defense and not necessary to prove a violation of due process, where no such constitutional claim had been raised); *State v. Putnam*, 31 Wash. App. 156, 639 P.2d 858 (1982) (holding that the police investigatory technique of planting a civilian agent and telling her to do whatever was necessary to gather evidence of prostitution was not so outrageous as to require dismissal or suppression of evidence, and that illegal conduct by the police or its agents was not sufficient by itself to justify dismissal on due process grounds, although it could reach such a level of outrageousness that dismissal of resulting criminal charges would be required); *State v. Jessup*, 31 Wash. App. 304, 641 P.2d 1185 (1982) (where the defendant had been convicted of charges arising out of the same criminal enterprise as *Putnam*, the court examined the conduct of the police agent in greater detail, holding that the police tactics used to obtain evidence were not so shocking to the universal sense of justice as to require dismissal or suppression of state agent's testimony); *Playhouse Corp. v. Washington State Liquor Control Bd.*, 35 Wash. App. 539, 667 P.2d 1136 (1983) (holding that the conduct of the board's investigating officers, who never

before them, the courts did not foreclose the possibility of dismissing a prosecution based on outrageous government conduct.<sup>61</sup>

In 1984, the outrageous government conduct defense was first considered by the Washington Supreme Court in *State v. Myers*.<sup>62</sup> The defendant appealed his conviction of heroin possession with intent to manufacture and deliver, where the police had gained entry into his home using a fictitious arrest warrant to execute a valid search warrant.<sup>63</sup> In its decision, the court adhered to Justice Rehnquist's recantation language in *Hampton*, holding that to show a due process violation, it must be shown that the challenged government activity violated a specific constitutional right of the defendant.<sup>64</sup> The court then examined whether the defendant's constitutional right to privacy was violated.<sup>65</sup> Although the majority expressed concern over the tactics used, it nevertheless held that no due process violation had occurred.<sup>66</sup>

The Court of Appeals next analyzed the outrageous government conduct defense in *State v. Rundquist*.<sup>67</sup> The defendant was prosecuted for knowingly purchasing unlawfully taken salmon and steelhead from an undercover agent. The trial court interrupted the state's case in chief and dismissed all charges, based on its supervisory powers, finding that the government agents had deprived the defendant of his right to due process of law.<sup>68</sup> The appellate court cited several analogous situations in which courts had refused to find a due process

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identified themselves as board investigators to defendant's tavern management, purchased "table dances" with public funds, and did not inform tavern's management of violations prior to the initiation of a complaint, was not conduct "shocking to the universal sense of justice."); *State v. Pleasant*, 38 Wash. App. 78, 684 P.2d 761 (1984) (where the defendant had been convicted of selling marijuana to an undercover police officer participating in a "sting" operation, in which the police department set up a bogus construction employment operation and applicants were solicited for drug purchases by the interviewer, the court held that the mere instigation of crime was not outrageous in the context of contraband offenses and compared the activity with that in *Hampton* in concluding that the conduct of the Tacoma Police Department was not sufficiently outrageous to bar prosecution of the defendant).

61. See cases cited *supra* note 60.

62. 102 Wash. 2d 548, 689 P.2d 38 (1984).

63. *Id.* at 549-51, 689 P.2d at 39-40.

64. *Id.* at 551, 689 P.2d at 40-41.

65. *Id.* at 551-56, 689 P.2d at 40-43.

66. *Id.* at 557, 689 P.2d at 44. See also *id.* at 558-59, 689 P.2d at 44-45 (Rosellini, J., concurring). But see *id.* at 559-60, 689 P.2d at 45-46 (Dimmick, J., concurring).

67. 79 Wash. App. 786, 905 P.2d 922 (1995), *rev. denied*, 129 Wash. 2d 1003, 914 P.2d 66 (1996). This opinion was cited with approval by the dissent in *State v. Lively*, 130 Wash. 2d at 30-31, 921 P.2d at 1050.

68. *Myers* at 788, 905 P.2d at 923.

violation based on outrageous government conduct.<sup>69</sup> The court also cited several Washington cases that declined to find a due process violation.<sup>70</sup> In following *Hampton* and *Myers*, the court stated that its inquiry “must focus on the issue of the defendant’s rights, not on [its] evaluation of police conduct.”<sup>71</sup> Without concluding whether the outrageous government conduct defense actually existed, the court held that, if it did, it should be applied sparingly under only the most egregious circumstances and that the facts in the present case were not sufficiently outrageous to bar prosecution.<sup>72</sup>

Prior to *Rundquist*, the court of appeals considered the outrageous conduct defense in *State v. Valentine*.<sup>73</sup> The *Valentine* defendant’s conviction for third degree assault was affirmed over a vigorous dissent, which claimed that the facts strongly suggested Valentine was provoked into a confrontation by the police officers who arrested him.<sup>74</sup> The appeal was argued before the Supreme Court prior to the *Lively* decision, but the opinion was rendered after *Lively*.<sup>75</sup> The outrageous government conduct defense was raised by Valentine before the Supreme Court, even though it had been raised neither at trial, nor on appeal.<sup>76</sup> The issue of outrageous government conduct, in fact, had been identified by the dissenting judge in his appellate court opinion.<sup>77</sup> The Supreme Court, after engaging in an exhaustive analysis on the issue of resistance to unlawful arrest, briefly reviewed and rejected the outrageous government conduct claim before concluding that there was not an adequate factual record to evaluate the police conduct.<sup>78</sup> While opinions may differ as to the existence and viability of the outrageous government conduct defense, those who

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69. *Id.* at 795, 905 P.2d at 926. The court cites as examples: *State v. DeAngelo*, 830 P.2d 630, 632-33 (Or. App. 1992) (due process defense rejected where police sold allegedly illegal fish to a restaurant); *Vaden v. Alaska*, 768 P.2d 1102, 1103, 1108 (Alaska 1989) (denying due process defense when a federal agent illegally shot foxes from the defendant guide’s aircraft); *United States v. Ivey*, 949 F.2d 759, 762-63, 769 (5th Cir. 1991) (denying due process defense where federal agents sold illegally imported bobcat hides and provided false forms intended to show that the hides were legal); *United States v. Stenberg*, 803 F.2d 422, 430-31 (9th Cir. 1986) (denying due process defense where agents were actively involved in killing wildlife).

70. *Rundquist*, 79 Wash. App. at 795-96, 905 P.2d 926-27 (citing *Jessup*, *Emerson*, *Brooks*, and *Pleasant*, *supra* note 60).

71. *Id.* at 796, 905 P.2d at 926.

72. *Id.* at 797-98, 905 P.2d at 927-28.

73. 75 Wash. App. 611, 879 P.2d 313 (1994).

74. *Id.* at 621-25, 879 P.2d at 319-21 (Schultheis, J., dissenting); *see also id.* at 619-21, 879 P.2d at 318-19.

75. *State v. Valentine*, 132 Wash. 2d 1, 935 P.2d 1294 (1997).

76. *Id.* at 22, 25, 935 P.2d at 1304, 1306 (Smith, J., concurring).

77. *Id.*

78. *Id.* at 22-24, 935 P.2d at 1304-05.

have acknowledged its existence agree that it should only be considered in the rarest of circumstances; indeed, the *Lively* case presents a unique factual scenario.

## II. THE FACTS OF THE *LIVELY* CASE

In November 1992, Amy Lively was tried and convicted of two counts of delivery of a controlled substance. She did not deny making deliveries of cocaine but asserted the defense of entrapment.<sup>79</sup> Upon direct review, the Washington Supreme Court was in general agreement that the defendant had the burden of proving that she was entrapped and that, when viewing the evidence presented at trial in a light most favorable to the state, a reasonable jury could have found that the defendant was not entrapped.<sup>80</sup> In a 5-4 decision, however, the court held that the actions of the state constituted outrageous government conduct violating Lively's due process rights, and on this basis overturned her conviction.

Despite having no criminal record, Lively had led a troubled life. She started using cocaine and drinking alcohol at the age of fourteen. At fifteen, she stopped using cocaine because she was pregnant. By eighteen, she had two children, a husband stationed in Korea, and she began to drink heavily. After attempting to quit drinking on her own, Lively admitted herself into a detoxification program. Upon completing the program, she began attending Alcoholics Anonymous/Narcotics Anonymous meetings (hereinafter AA/NA). In March 1991, Lively voluntarily admitted herself into a 28-day inpatient treatment program after relapsing on alcohol.<sup>81</sup> After completing the program, Lively was emotionally distraught and attempted suicide. Shortly thereafter, she met Kamlesh "Koby" Desai.

In early 1991, Desai was hired as an informant by the Walla Walla City/County Drug Unit. In exchange for his work, Desai was provided with an apartment, car, and other living expenses. The terms of his employment contract were that he not break any criminal laws, not use narcotics and that he stay in daily communication with the drug unit. With the knowledge and approval of the drug unit detectives, Desai began attending AA/NA meetings in an effort to

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79. *State v. Lively*, 130 Wash. 2d at 5, 921 P.2d at 1037-38 (1996).

80. *Id.* at 18, 921 P.2d at 1044 ("Despite this considerable evidence of entrapment, however, a review of all the evidence presented in the light most favorable to the State leads us to conclude that a rational trier of fact could have found that the Defendant failed to prove entrapment by a preponderance of the evidence.").

81. *Id.* at 5-6, 921 P.2d at 1036.

identify repeat drug addicts who continued to sell illegal drugs.<sup>82</sup> It was at an AA/NA meeting in mid-April that Desai and Lively met for the first time.

According to Lively, Desai asked her out on a date two weeks after their initial meeting.<sup>83</sup> She subsequently maintained a relationship with him "because he was very supportive and responsive to her emotional needs."<sup>84</sup> Shortly thereafter, according to Lively, they began a sexual relationship, they started cohabitating, and, in late June, Desai proposed marriage to her.<sup>85</sup> It was during this time that Desai first asked her if she could get cocaine for his good friend "Rick," who was actually a detective. Lively testified that Desai repeated this request a dozen times a day for two weeks until she eventually agreed to purchase cocaine, and that she had done so only because of her emotional reliance on him.<sup>86</sup>

Desai, however, disagreed with much of Lively's testimony at trial, denying asking her to buy cocaine for his friend and asserting that it was Lively who initially brought up the subject of obtaining drugs, volunteering to do so through one of her connections.<sup>87</sup> Furthermore, Desai claimed that he and Lively never dated nor engaged in sex. He admitted allowing her to stay at his apartment in a separate room. He claimed that Lively had initiated the topic of marriage, but he had never proposed to her nor had he offered to help her obtain a divorce from her husband.<sup>88</sup> While Lively testified that she was not using drugs at the time of the offenses, Desai claimed that he saw her use cocaine on three separate occasions.<sup>89</sup>

Before submitting the case to the jury, the defendant Lively proposed an instruction that the absence of entrapment was an element of the offense which the State had to prove beyond a reasonable doubt. The court disagreed and instructed the jury that the defendant had to prove the existence of entrapment by a preponderance of the evidence.<sup>90</sup> The defendant then moved for a directed verdict, contending that no rational trier of fact could fail to find that she was entrapped. The court denied her motion.<sup>91</sup> After the jury returned a guilty

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82. *Id.* at 6, 921 P.2d at 1036.

83. *Id.* at 7, 921 P.2d at 1036.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 7-8, 921 P.2d at 1038-39.

88. *Id.* at 8, 921 P.2d at 1039.

89. *Id.*

90. *Id.*

91. *Id.*

verdict on both counts, the defendant filed motions for an arrest of judgment and for a new trial. The court also denied these motions.<sup>92</sup>

At sentencing, however, the trial judge departed from the standard sentence range and gave Lively an exceptionally lenient sentence.<sup>93</sup> In support of this exceptional sentence, the judge made several findings of fact and conclusions of law. Chief among these were that Desai lacked credibility as a witness and that Lively, lacking any apparent predisposition to do so, was induced by Desai to commit a criminal offense.<sup>94</sup>

### III. ANALYSIS OF MAJORITY AND DISSENTING OPINIONS IN *LIVELY*

In evaluating whether the government agent's conduct violated the defendant's due process rights, the majority analyzed the facts based on several factors, which were a hybrid of tests previously employed by several state and federal courts.<sup>95</sup> The *Lively* court examined the following factors:

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92. *Id.*

93. *Id.*

94. *Id.* at 15-16, 921 P.2d at 1042-43 (Judge Reser made the following findings of facts in support of the exceptional sentence:

1. The defendant Amy Lively has no criminal history prior to the events of this case.
2. The defendant had previously had a cocaine problem and had attended an inpatient treatment program to eliminate that problem.
3. The State's confidential informant, Kamlesh Desai, met the defendant at an NA meeting. Desai is a clever, deceitful person, having passed approximately 30 bad checks. The informant lied in court and showed no remorse.
4. Prior to the alleged incidents herein the defendant and the State's confidential informant lived together.
5. The State's confidential informant requested the defendant to obtain cocaine for him on a number of occasions.
6. The defendant did not seek anyone to whom to sell cocaine, but was sought out. The two deliveries were made at the request of Desai and were 1 gram each.
7. After the deliveries herein, the State's confidential informant asked the defendant to marry him.
8. The defendant would be subject to a clearly excessive sentence in . . . light of the purpose of chapter 9.94a.

[9.]

10. The court finds as fact that the defendant, with no apparent predisposition to do so, was induced by others specifically Kamlesh Desai to participate in the crime of delivery of a controlled substance.

Clerk's Papers at 146-47.).

*Id.*

95. See *infra* notes 96-100.



- (1) whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity;<sup>96</sup>
- (2) whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation;<sup>97</sup>
- (3) whether the government controls the criminal activity or simply allows for the criminal activity to occur;<sup>98</sup>
- (4) whether the police motive was to prevent crime or protect the public;<sup>99</sup> and
- (5) whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."<sup>100</sup>

This analysis examines the totality of the government conduct in light of the surrounding circumstances, rather than viewing each distinct government act by itself. The court then reviewed the facts of the *Lively* case and held that the conduct of the police, via their informant, satisfied all five elements.<sup>101</sup>

The dissent reasonably questioned the notion of applying a bright-line rule or standard to purposefully vague constitutional notions like due process of law.<sup>102</sup> The dissent also claimed that the majority "concoct[ed] a five-part test to determine if police conduct is so outrageous as to require reversal of conviction based on a violation of due process."<sup>103</sup> However, the majority merely outlined *factors* for a court to consider in evaluating such conduct, none of which is

96. *Lively*, 130 Wash. 2d at 22, 921 P.2d at 1045 (citing *United States v. Harris*, 997 F.2d 812, 816 (10th Cir. 1993)).

97. *Id.* at 22, 921 P.2d at 1046 (citing *People v. Isaacson*, 378 N.E.2d 78, 83 (N.Y. 1978); *State v. Shannon*, 892 S.W.2d 761, 765 (Mo. 1995)).

98. *Id.* (citing *United States v. Corcione*, 592 F.2d 111, 115 (2d Cir. 1979)).

99. *Id.* (citing *Isaacson*, 378 N.E.2d at 83; *Shannon*, 892 S.W.2d at 765.)

100. *Id.* (citing *Isaacson*, 378 N.E.2d at 83; *United States v. Jensen*, 69 F.3d 906, 910-11 (8th Cir. 1995)).

101. The court found that all five factors were satisfied: (1) in describing the informant's attendance at AA/NA meetings as "trolling for targets," the court held that with no information linking *Lively* to criminal activity the police conduct amounted to instigating crime; (2) finding that the emotional reliance of the defendant on the informant was an integral part of the informant's control of the situation, the court held that the trial court's findings of fact clearly supported a conclusion that the defendant's reluctance to commit a crime were overcome by the state; (3) the court found that the conduct of the informant was so closely related to the actions of the defendant that the informant controlled the criminal activity from start to finish; (4) the facts supported the conclusion that the police motive was not to prevent crime or protect the public; and (5) the court found that the informant's conduct was repugnant to a sense of justice, asserting that the police conduct was "contrary to public policy and to basic principles of human decency." *Lively*, 130 Wash. 2d at 22-26, 921 P.2d at 1046-48.

102. *Id.* at 31, 921 P.2d at 1050.

103. *Id.*

dispositive.<sup>104</sup> Employing this method provides substantially more guidance to potential prosecutors, defendants, and courts than vague and abstract definitions like “shocking to universal sense of justice.”<sup>105</sup> The identification of significant factors can only serve to aid consistent analysis and rulings. Further, these factors at least put government actors on notice as to the sort of examination to which their conduct could be subjected. Previously, a defendant asserting a due process claim could only hope that the facts were sufficient to “shock the conscience” of the court, so shocking that the court would ignore the laundry list of questionable conduct that was found not to be “outrageous.”<sup>106</sup>

While the list of factors may not be exhaustive, the factors are sufficient in light of the factual circumstances of many cases in which the defendant asserts a due process defense.<sup>107</sup> To be sure, the court makes several disclaimers, stating, for example, that the court “should evaluate the conduct based on the ‘totality of the circumstances,’” and that “each case must be resolved on its own unique set of facts;”<sup>108</sup> and “[d]ismissal based on outrageous conduct is reserved for only the most egregious circumstances,” and “is not to be invoked each time the government acts deceptively.”<sup>109</sup>

Indeed, the court’s treatment of the factual record provides a controversial aspect of this decision. The dissent levels a justifiable criticism that the majority has essentially retried the case.<sup>110</sup> A

104. *Id.* at 22, 921 P.2d at 1046.

105. *See supra* text accompanying note 28.

106. *See State v. Valentine*, 132 Wash. 2d 1, 38, 935 P.2d 1294, 1313 (1997) (Sanders, J., dissenting).

[T]he conscience of many jurists is not easily shocked. Many courts have set the bar so high that only giants may leap to state a due process claim based on outrageous police misconduct, which is not established merely upon a showing of . . . even flagrant misconduct on the part of the police . . .

*Id.*

This generalized acceptance by the judiciary of law enforcement excesses threatens to undermine the integrity upon which our criminal justice system is based. The fact that other courts have developed a high shock threshold in the face of reprehensible law enforcement conduct does not persuade me that this court should sanction what transpired here.

*Valentine*, 75 Wash. App. at 625, 879 P.2d at 321 (Schultheis, J., dissenting).

107. *See State v. Pollard*, 941 S.W.2d 831, 834 (Mo. 1997); *State v. Houston*, 475 S.E.2d 307 (W. Va. 1996).

108. *Lively*, 130 Wash. 2d at 21, 921 P.2d at 1046.

109. *Id.* at 20, 921 P.2d at 1045.

110. In reversing *Lively*’s conviction, the dissent claims that “the majority substitutes its judgment for that of the jury” and that “the majority necessarily anoints itself factfinder while usurping the role of the jury.” *Id.* at 28, 33, 921 P.2d at 1049, 1051.

skeptic reading the court's decision may wonder if the oft-quoted maxim of "tough facts make bad law" is at work in this decision. Clearly, the majority and dissenting opinions disagree on which facts should be considered. In reviewing the defendant's claim of insufficient evidence to support a determination that she was not entrapped, the majority refused to take the trial judge's findings of fact into consideration.<sup>111</sup> On the due process claim, however, the majority relied on these findings of fact to resolve disputed facts, much to the dismay of the dissent.<sup>112</sup>

However, it would seem the majority's use of the facts is justified considering the question of law and question of fact distinctions between the entrapment and outrageous government conduct defenses. Thus, the court was forced to evaluate the conflicting accounts of the facts in a light most favorable to the State for reviewing the entrapment defense claim, while it was free to use the trial judge's findings of fact for evaluating the due process claim, which is a question of law.<sup>113</sup> Nevertheless, in a subsequent opinion, the Washington Supreme Court questioned the propriety of resolving disputed facts in this manner.<sup>114</sup>

In criticizing the majority opinion, the *Lively* dissent arguably misstates case law in one instance, while failing to utilize case law in another. In the process, it claims the majority failed to develop facts of cited cases, stating:

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111. *Id.* at 16, 921 P.2d at 1043.

112. *Id.* at 28, 33, 921 P.2d at 1049, 1051.

113. Also, this controversy highlights one of the primary criticisms of the subjective view of entrapment: A defendant asserting an entrapment defense must admit that he or she committed the crime charged, and then affirmatively prove that they were entrapped. In proving entrapment, the defendant must show that they were not "predisposed" to committing the crime and put their own character at issue. Thus, once the entrapment defense is asserted, many of the rules of evidence concerning prior bad acts or reputation are ignored and the State is then able to present highly prejudicial evidence against the defendant that may or may not outweigh its probative value. See *United States v. Russell* 411 U.S. 423, 443-44 (1973) (Stewart, J., dissenting); 1 LAFAVE & SCOTT, *supra* note 15, at 606-07.

114. The majority opinion in *State v. Valentine* states:

At this level, that question [whether a prosecution should be dismissed for outrageous conduct] should be viewed as a question of law that is to be based on the facts of the case. Those facts, however, are not to be resolved at the appellate court, nor should we view them in a light most favorable to the defendant. Resolution of factual disputes is a task for the trier of fact, not this court. . . .

*Valentine*, 132 Wash. 2d at 23, 935 P.2d at 1305. Additionally, a concurring opinion states: "We are committed in appellate courts to following established rules of procedure and law. This sometimes results in 'blindness' which obscure the reality of circumstances in cases before us. This is one such case." *Id.* at 25, 935 P.2d at 1306 (Smith, J., concurring). See also *State v. Jeannotte*, 133 Wash. 2d 847, 854-55, 947 P.2d 1192, 1196 (1997) (citing *Lively* in its discussion of the propriety of a trial court using a failed entrapment defense as a mitigating factor in imposing an exceptional sentence).

While the majority relies on *Harris*,<sup>115</sup> *Shannon*,<sup>116</sup> *Corcione*,<sup>117</sup> *Jensen*,<sup>118</sup> and *Isaacson*<sup>119</sup> to further its analysis, it fails to discuss these cases in any detail. This omission probably stems from the fact that these cases lend little or no support for the majority's five-

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115. *United States v. Harris*, 997 F.2d 812 (10th Cir. 1993) (The defendant was charged with two counts of aiding and abetting and distribution of crack cocaine. The charges were dismissed sua sponte, on outrageous government conduct grounds, by the District Court. On appeal, the Court of Appeals for the Tenth Circuit held that, because the undercover officer gave the defendant, who acted as a middleman between the officer and the defendant's drug dealer, a relatively small amount of cocaine as compensation for three transactions was not "outrageous government conduct" barring defendant's prosecution on due process grounds; the court nevertheless remanded the case to determine whether the government violated the defendant's due process rights by relying on a known addiction to carry out multiple transactions with the primary purpose of stacking charges.)

116. *State v. Shannon*, 892 S.W.2d 761 (Mo. 1995) (Defendant set up a drug transaction for an informant and an undercover agent. During the course of the transaction, the agent told the defendant to attempt to negotiate a better deal for the drugs, allowed the defendant to try some of the drugs they had just obtained (while the agent declined to try them, claiming he would do some later, and the informant "simulated" taking the drug), and gave the defendant a small portion of the drug as payment for setting up the transaction. The court held that the actions of the agent were reasonable, as they were done to maintain his "cover" and keep his true identity as a police officer concealed.)

117. *United States v. Corcione*, 592 F.2d 111 (2d Cir. 1979) (Defendants were convicted of possession of heroin with intent to distribute, and one codefendant was convicted of attempting to import heroin into the United States. On appeal, the Court of Appeals for the Second Circuit affirmed, holding that the government was not over-involved in the crime and thus did not violate due process. Although the government, once the informer had enlisted in the defendants' arrangement for purchase, smuggling and possession of heroin, became extensively involved, its role was simply facilitating what the defendants had started and were executing.)

118. *United States v. Jensen*, 69 F.3d 906 (8th Cir. 1995) (Defendant was convicted of laundering money derived from illegal distribution of drugs, and willfully failing to file a report of cash payments of over \$10,000 received in trade or business. The Court of Appeals for the Eighth Circuit affirmed, holding that the government did not commit a due process violation in investigating the defendant, who was an automobile sales representative, for money laundering and failing to report cash transaction of over \$10,000. The applicable federal statute permitted the government agent to tell the defendant that the money being offered for an automobile was drug money, and defendant's sales to drug dealers and advice to agent on structuring of purchase undermined any argument that the agent created defendant's criminal design.)

119. *People v. Isaacson*, 378 N.E.2d 78 (N.Y. 1978) (State police officers arrested a man for possession of a controlled substance. The police realized, however, that he was innocent when the substance proved to be merely caffeine. Nevertheless, the police physically brutalized this man and convinced him that he was facing a stiff prison sentence unless he became an informer. He agreed to this demand and called Isaacson, a former drug supplier in Pennsylvania. The informer cried and pled with Isaacson to help him arrange a drug sale that would enable him to hire an attorney and make bail. Isaacson initially refused, but the informer persisted and repeatedly made urgent pleas for help. Once the informer lured Isaacson across the New York state line for a meeting, the police made the arrest. Isaacson asserted the entrapment defense but was convicted at his bench trial. His conviction was affirmed on appeal over a strenuous dissent. The N.Y. Court of Appeals reversed based on the "reprehensible police action" involved in Isaacson's arrest.)

part test. In fact, these cases by and large reject the outrageous conduct defense.<sup>120</sup>

This statement, along with the dissent's attempt to distinguish the cases, is flawed. The courts in these cases did not reject the *existence* of the defense; they merely declined to find a due process violation based on the facts of the case before them. The *Lively* dissent states that the *Shannon* court rejected the outrageous conduct defense when the police had actively participated in the defendant's drug transaction.<sup>121</sup> The *Shannon* case, however, was decided by a Missouri appellate court, and thirteen years earlier another Missouri appellate court overturned a criminal conviction based on outrageous government conduct.<sup>122</sup> In addition, the same court that decided *Shannon* recently reaffirmed its recognition of the outrageous government conduct defense and set out a test to evaluate police conduct similar to that of the *Lively* majority's.<sup>123</sup>

In citing *Harris*, the dissent fails to mention the fact that the case was remanded to determine whether the police conduct in "stacking charges" against the defendant was a denial of due process.<sup>124</sup>

120. *State v. Lively*, 130 Wash. 2d at 31-32, 921 P.2d at 1050-51.

121. *Id.* at 32, 921 P.2d at 1051.

122. *State v. Hohensee*, 650 S.W.2d 268 (Mo. Ct. App. 1982) (The defendant was convicted of second degree burglary when he acted as a "lookout" during the break-in of a building. The other members of the conspiracy were an undercover police officer and two paid informants with substantial criminal records. The defendant was the only member of the group who did not know that the police were sponsoring the crime. Further, the owner of the building was unaware of, nor had he consented to, the break-in. On appeal, the court overturned the defendant's conviction, holding that the break-in was outrageous based on the illegality of the conduct of the police officer and informants.)

123. Four factors are used to determine whether government conduct is outrageous: (1) the manufacture by police of a crime which would not otherwise have occurred, (2) engagement by police themselves in criminal conduct, (3) use of appeals to humanitarian instincts, temptation of exorbitant gain or persistent solicitation to overcome the defendant's unwillingness to engage in the illegal activity, and (4) a desire on the part of the police to obtain a conviction of the defendant without motive to prevent further crime or to protect the public. One or more of these factors may be enough to brand the law enforcement conduct as outrageous.

*State v. Pollard*, 941 S.W.2d at 834.

124. *United States v. Harris*, 997 F.2d at 818.

Any definitive rule of law concerning whether a government agent's sale of narcotics to a known addict constitutes outrageous government conduct would necessarily be flawed. On many occasions, a government agent might not be able to infiltrate a drug ring and be taken into the confidence of the illegal entrepreneurs unless he has the authority to distribute contraband. Necessarily, many of the transactions with dealers are also transactions with addicts and disallowing such transactions would severely inhibit the undercover operation (citation omitted).

Therefore, it would be nonsensical to promulgate a rule holding outrageous government conduct each and every time the government distributed narcotics to a

Further, the dissent made no mention of the following dicta from the *Harris* decision: “[W]e speculate that if a government agent entered a drug rehabilitation treatment center and sold heroin to a recovering addict, and the addict was subsequently prosecuted for possession of a controlled substance, the outrageous government conduct defense might properly be invoked.”<sup>125</sup> The hypothetical example offered by the *Harris* court is significantly analogous to the facts of the *Lively* case.

The dissent also fails to cite *Tucker* or *Boyd* to garner support for an outright rejection of what it terms “the so-called doctrine of outrageous government conduct.”<sup>126</sup> This apparent oversight is particularly striking considering that one of the chief arguments advanced by the *Tucker* court in repudiating the due process defense is a similar argument advocated by the *Lively* dissent concerning separation of powers.<sup>127</sup> The *Tucker* court methodically sets out to answer the question it posits: “The issue has always been: What to do about this conduct and which branch of the government should do it?”<sup>128</sup> Because the police are part of the executive branch, it would follow that they are constrained by limitations set out by the legislature and ultimately held accountable by the electorate.<sup>129</sup> Additionally, determining a defendant’s subjective predisposition marks the border at which the courts may determine if government misconduct has occurred.<sup>130</sup> The *Tucker* court states:

This line, established by Congress and articulated by the Supreme Court beginning in *Sorrells*, is not subject to circumvention on a case-by-case basis. The mere invocation of the phrase “due process” does not give the courts license to conduct its [sic] own “oversight” of police practices . . . because entrapment and predisposition are ordinarily questions for the jury, the line drawn by Congress and articulated by the Supreme Court ensures that the

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known addict.

Conversely, any rule that permits unlimited sales of narcotics to known addicts would also lack merit. At a certain threshold, the government’s conduct would violate due process.

*Id.*

125. *Id.* at 818.

126. *State v. Lively*, 130 Wash. 2d at 29, 921 P.2d at 1049.

127. *United States v. Tucker*, 28 F.3d at 1428; *Lively*, 130 Wash. 2d at 30-31, 921 P.2d at 1050.

128. *Tucker*, 28 F.3d at 1428.

129. *Id.*

130. *Id.*

jury, as the traditional "defense against arbitrary law enforcement," operates as the ultimate check on abuses of executive power.<sup>131</sup>

In similar fashion, the *Lively* dissent states:

The judiciary does not have carte blanche to define appropriate police conduct . . . . [T]he Legislature codified the entrapment defense in response to public concern over potential law enforcement abuses. Moreover, "[t]he execution of federal laws under our Constitution is confined primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." The judiciary must be circumspect as it wields its power to shape police conduct. Where police conduct violates explicit rights, such as the Fourth Amendment protection against unwarranted searches and seizures, it is highly appropriate for the judiciary to proscribe the behavior. However, notions of "fundamental fairness" are debatable, and we should act cautiously when overturning convictions on this principle.<sup>132</sup>

These two views are very similar and lend themselves to Justice Rehnquist's recantation language of *Hampton*,<sup>133</sup> specifically, that a defendant claiming a due process violation at the hands of the police must demonstrate that a specific right was violated. This view is adhered to in *Rundquist*, a decision which the *Lively* dissent cites.<sup>134</sup>

The requirement of identifying a specific constitutional right violated in order to assert a due process claim, however, was explicitly disavowed by the *Lively* majority opinion.<sup>135</sup> As the majority pointed out, claiming a violation of a specific constitutional right would obviate the need for a defendant to claim a violation of his or her right to due process.<sup>136</sup> In addition to claiming a due process violation, *Lively* asserted a claim that her right to free exercise of religion was violated by the government when it planted an informant in her AA/NA meetings.<sup>137</sup> The court declined to address this issue. As a practical matter, suggesting that a defendant can somehow vindicate herself via a civil action against the government is somewhat idealistic and ignores

131. *Id.*

132. *Lively*, 130 Wash. 2d at 30-31, 921 P.2d at 1050-51.

133. *See supra* note 31.

134. *State v. Rundquist*, 79 Wash. App. at 796-97, 905 P.2d at 927-28.

135. *Lively*, 130 Wash. 2d at 20, 921 P.2d at 1045.

136. *Id.* This was based on the fact that only three justices concurred with Justice Rehnquist's assertion that the government must violate a specific right of the defendant in *Hampton*. *See supra* note 32.

137. Appellant's Brief at 61-65, *Lively* (No. 60389-8); Respondent's Brief at 22-32, *Lively* (No. 60389-8).

the reality that such a person may not have the financial resources to retain counsel to pursue such claims against the government wrongdoer who is furnished a taxpayer-funded defense.<sup>138</sup>

The *Lively* dissent attempts to distance the conduct of the police from that of their informant by implying that the police were not culpable for the informant's actions. The dissent boldly concludes that "the police investigation in this case was entirely on the level."<sup>139</sup> The dissent also contends that "[t]he police here had limited knowledge of the informant's activities" and cites testimony by detectives that they "had very little information regarding the nature of the informant's relationship with the Defendant."<sup>140</sup>

However, as the majority states:

[T]he detectives were in contact with Desai as many as six to twelve times a day to check on his progress. Desai began attending AA/NA meetings with the knowledge and approval of the detectives from the drug unit. He attended these meetings in order to identify repeat drug addicts continuing to sell illegal drugs.<sup>141</sup>

Further, the majority notes that, while the informant also testified that "the detectives approved of the living arrangement," both detectives testified that "they did not approve and advised Desai not to develop a close personal relationship with the defendant."<sup>142</sup>

What is undisputed is that the Walla Walla Drug Task Force Unit entered into a contract with Desai. It would appear that, regardless of how one would view the conduct of the detectives, they were responsible for the actions of their informant. Therefore, they were responsible for Desai's actions.<sup>143</sup> This situation is not unlike that of an employer being held liable for the tortious conduct of its employee committed within the scope of the employment.

The dissent also presents an argument which is at the heart of the public policy considerations in this case. The dissent argues that police presence at AA/NA meetings is reasonable because of "repeaters" who are merely attending meetings without any intention of staying sober and ceasing their criminal activities.<sup>144</sup> This argument could have some general validity, except that, in the present case, the State failed

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138. See *Valentine*, 132 Wash. 2d at 39, 935 P.2d 1313 (Sanders, J., dissenting).

139. *Lively*, 130 Wash. 2d at 33, 921 P.2d at 1051.

140. *Id.*

141. *Id.* at 6, 921 P.2d at 1038.

142. *Id.* at 7, 921 P.2d at 1039.

143. See *Sherman v. United States*, 256 U.S. at 373 ("The government cannot disown [the informant] and insist it is not responsible for his actions.").

144. 130 Wash. 2d at 33, 921 P.2d at 1046.



to show how such suspected criminal conduct related to Lively in any way.<sup>145</sup> Without any information concerning Lively's knowledge of or participation in criminal activity, the wisdom and propriety of continuing to target her as a criminal suspect is questionable.

#### IV. PUBLIC POLICY CONSIDERATIONS

The determinative factor in this decision was public policy, and the factual element of the AA/NA program was a unique one that justified the court's holding. This argument is supported by the willingness of the legislature and judiciary to allow some defendants to receive drug/alcohol treatment as part of, or in lieu of, their sentences.<sup>146</sup> This decision recognizes and affirms the importance of efforts by citizens to recover from chemical dependency. In fact, the *Lively* case marks a rare instance when the harm to an individual citizen's rights was found to significantly outweigh the public interest of curbing drug traffic.

It is rather ironic that the factual circumstances of *Lively* bear a resemblance to those in one of the leading U.S. Supreme Court entrapment cases, *United States v. Sherman*.<sup>147</sup> Both cases concerned the battle of recovering addicts who, while trying to change their ways, eventually succumbed to the unsolicited persuasion of an informant, whose motives and level of supervision varied substantially from those of an undercover police officer. One particularly striking passage in Chief Justice Warren's *Sherman* opinion describes the nature of the association between the defendant Sherman and the police informant: "From mere greetings, conversations progressed to a discussion of mutual experiences and problems, including their attempts to overcome addiction to narcotics."<sup>148</sup> It is precisely this sort of activity that occurs in AA/NA and forms one of its foundations—members sharing their "experience, strength and hope" with one another to help their recovery.<sup>149</sup> In *Sherman*, as well as in *Lively*, the informant's repeated requests played upon the defendant's emotions and brought about

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145. *Lively*, 130 Wash. 2d at 23, 921 P.2d at 1046.

146. 130 Wash. 2d at 26, 921 P.2d at 1048 (Lawmakers in this state have indicated a strong preference for treatment of drug and alcohol addiction as demonstrated by the deferred prosecution law, title 10, chapter 05, of the Washington Revised code, State Funding for Treatment Alternatives to Street Crime (TASC), and treatment alternatives such as community placement options in the sentencing laws, to list but a few examples.).

147. *Sherman*, 356 U.S. at 369.

148. *Id.* at 371.

149. ALCOHOLICS ANONYMOUS XXII (A.A. World Services, Inc., 3rd ed. 1976 [hereinafter ALCOHOLICS ANONYMOUS]).

acquiescence, which is a far cry from "ready and willing" targets of undercover drug investigations.

The *Lively* court balanced the competing interests of (1) the reasonable suspicion that criminal activity may exist at AA/NA meetings (or that certain attendees may be involved in criminal activity) with (2) the reasonable expectation of members making a sincere effort to recover from chemical dependency to be free of undue influence by government agents. Citizens not involved in criminal activity and making a good-faith effort to recover from chemical dependency should reasonably expect that the government will not interfere with their efforts.

The dissent notes that the government was acting on information that there may have been criminal activity at the meetings.<sup>150</sup> In such circumstances, government investigation of a meeting where criminal activity was occurring may be justified.<sup>151</sup> It is also clear, however, that if such criminal activity were occurring, *Lively* was not involved. It is equally clear that the informant's continued contact with *Lively* was inappropriate and overreaching.

One can argue that those sincerely trying to recover from chemical dependency are entitled to protection from those not-so-motivated members who are engaged in criminal activity in the midst of the fellowships. The fact that AA/NA fellowships prohibit drugs or alcohol at meetings does not negate a reasonable belief that such elements may periodically exist. There is no mechanism by which the fellowships could enforce their policies upon their voluntary membership. Ironically, the most probable source of "potential offenders" in the meetings are those who are compelled to attend AA/NA by the courts.

Nonetheless, one could legitimately argue that the government has an interest in monitoring the conduct of those who are ordered by a court to attend AA/NA, and, presumably, to follow the fellowship's policies and procedures. Such monitoring occurs in the form of signed verification of meeting attendance, which is submitted to the defendant's treatment facility (if he or she is enrolled in one) or probation officer, which in turn, informs the court that the defendant is complying with its orders. The practice of planting an informant in an AA/NA meeting, if at all justifiable, should be restricted to the

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150. *Lively*, 130 Wash. 2d at 33, 921 P.2d at 1051.

151. The majority decision stated that had *Desai* attended AA/NA meetings for the purpose of befriending a person previously targeted as a suspect in an investigation, the conduct could be considered an appropriate police procedure. *Id.* at 23, 921 P.2d at 1046.

specific and explicit purpose of investigating ongoing criminal activity by known persons. It should not be used to establish relations with random persons and create crime which would otherwise not occur.<sup>152</sup> Certainly, as Lively asserted, there was no compelling interest in the government's presence at the meetings for the purpose of establishing a relationship with a member and later inducing her to commit a crime.<sup>153</sup>

The ultimate justification for the court's holding in *Lively* is that self-help groups such as AA/NA serve a valid public purpose in helping those who suffer from chemical dependency to achieve and maintain sobriety. Self-help groups such as AA/NA have been recognized by the courts as a successful means of treating those suffering from chemical dependency.<sup>154</sup> Affording the opportunity for citizens to recover from chemical dependency is also significant when one considers the amount of crime, physical injury, and property destruction directly or indirectly traceable to drugs and alcohol. These crimes include the manufacture and sale of drugs, driving while intoxicated, crimes committed by addicts seeking money to support their drug habits, and crimes committed by persons while under the influence of drugs or alcohol.

Judicial approval of the conduct of the informant in *Lively* would be a threat to the integrity of self-help groups, and could result in a "chilling" effect on their attendance if members were aware that police agents were free to attend meetings for law enforcement purposes. While the *Lively* case only addressed a situation where AA/NA provided a forum for an informer to establish a relationship with a

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152. The State had asserted that:

[T]he informant's attendance at NA or AA meetings in order to locate individuals who are violating criminal drug laws or who are predisposed to violate criminal drug laws may not be behavior that should be emulated. The investigative technique, however, is not unreasonable since AA and NA meetings are attended by numerous people pursuant to court order, probation officer directive, or merely to make one's spouse, family, or bosses happy. . . . This group of people may not have a sincere desire to become abstinent and to maintain sobriety. . . . To the extent that this group of individuals continue to illegally abuse controlled substances, they endanger our communities and those individuals who are attending AA and/or NA out of a fervent desire to improve their lives.

Respondent's Brief at 34-35, *Lively* (No. 60389-8).

153. See *Lively*, 130 Wash. 2d at 22-23, 921 P.2d at 1046 ("In this case, the informant's attendance at AA/NA meetings could best be described as 'trolling for targets' for the police undercover operation.").

154. See *Henson v. Employment Security Dept.*, 113 Wash. 2d 374, 386-87, 779 P.2d 715, 721-22 (1989) (Durham, J., dissenting); *Aripa v. Dept. of Social and Health Services*, 91 Wash. 2d 135, 141, 588 P.2d 185, 189 (1978). See also *Jones v. Smid*, 1993 WL 719562, at 7 (S.D. Iowa 1993).

group member, there have been cases where AA members have been compelled to testify against defendants who made incriminating statements to them while in recovery.<sup>155</sup> Some commentators have advocated that the law even recognize a privilege for members of self-help groups, much like it does for other confidential relationships, such as doctor-patient, attorney-client, priest-penitent and spouses.<sup>156</sup> In fact, one author asserted that

[i]f Twelve Step Groups do not enjoy a confidential communications privilege, there is nothing to prevent the police from sending 'moles' to AA, Narcotics Anonymous, and Al-Anon meetings to identify present and former drug dealers, spousal abusers or bad check artists in order to obtain incriminating information from meetings. Such moles could pose as experienced members willing to be sponsors for newcomers to gain new members' confidence.<sup>157</sup>

One of the fundamental components of the AA/NA program is its autonomy.<sup>158</sup> It is not affiliated with any other organization, law enforcement or otherwise. The government has already involved itself in the AA/NA program to a certain extent by compelling citizens to become members. That it can compel citizens to attend meetings is a proposition that has been debated.<sup>159</sup> Nevertheless, it is clear that citizens trying to recover from chemical dependency have the right to pursue their recovery free from government influence, and the *Lively* decision reinforces this notion.

155. *State v. Boobar*, 637 A.2d 1162, 1168-69 (Me. 1994); Thomas J. Reed, *The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members*, 70 ST. JOHN'S L. REV. 693, 693-700 (1996) (discussing the facts of the *Boobar* case, as well as an unreported New York case, *People v. Cox*); Jessica G. Weiner, Comment, "And The Wisdom To Know the Difference": Confidentiality vs. Privilege in the Self-Help Setting, 144 U. PA. L. REV. 243, 243-46 (1995) (discussing the facts of the *People v. Cox* case).

156. See Reed, *supra* note 155, at 693; see Weiner, *supra* note 155, at 243.

157. See Reed, *supra* note 155, at 753.

158. ALCOHOLICS ANONYMOUS, *supra* note 147, at XIII-XIV, 563-68; see also Ethan G. Kalett, *Twelve Steps, You're Out (of Prison): An Evaluation of "Anonymous Programs" as Alternative Sentences*, 48 HASTINGS L.J. 129, 140 (1996).

159. See Michael G. Honeyman, Jr., Note, *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does It Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437 (1997); Christopher K. Smith, Note, *State Compelled Spiritual Revelation: The First Amendment and Alcoholics Anonymous as a Condition to Drunk Driving Probation*, 1 WM. & MARY BILL RTS. J. 299 (1992); *Kerr v. Puckett*, 967 F. Supp. 354 (E.D. Wis. 1997); *Arnold v. Tennessee Bd. of Paroles*, 956 S.W. 478 (Tenn. 1997); *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996); *Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996), *cert. denied*, 117 S. Ct. 681 (1997); *Feasel v. Willis*, 904 F. Supp. 582 (N.D. Tex. 1995); *O'Conner v. California*, 855 F. Supp. 303 (C.D. Cal. 1994); *Warner v. Orange County Dept. of Probation*, 870 F. Supp. 69 (S.D.N.Y. 1994); *Scarpino v. Grossheim*, 852 F. Supp. 798 (S.D. Iowa 1994); *Stafford v. Harrison*, 766 F. Supp. 1014 (D. Kansas 1991).

It would appear as though the Washington Supreme Court was forced into a difficult position by a different "totality of circumstances." This case reached the high court because one or more of the parties involved did not exercise proper discretion. The lack of discretion of the state's informant was self-evident. What is not as clear from the facts is the extent of the knowledge that police and prosecutors had concerning the methods employed by the informant as he targeted Lively. Nevertheless, the police and prosecutors, in an exercise of their discretion, chose to proceed in obtaining a conviction against Lively.

While the trial judge could have overruled the finding of the jury as a matter of law, the due process defense was not presented at trial—the entrapment defense was and it failed. While the trial judge declined to nullify the jury's verdict by dismissing the charges under the court's supervisory power, he instead made findings of fact to support his departure from the sentencing guidelines in passing an exceptionally lenient sentence. It would appear that the trial judge, who obviously disagreed with the jury's evaluation of the evidence and subsequent verdict, was taking the opportunity to put findings of fact in the record that would support Lively's case if an appeal was made. To that end, he was successful.

The dissent seems to imply that the defendant should have just taken her conviction and lenient sentence and been happy with it.<sup>160</sup> Instead of reversing Lively's conviction, the court could have remanded her case to a lower court for further proceedings. However, given the amount of judicial resources already expended on this case, the Supreme Court's action was appropriate.

## V. CONCLUSION

Undoubtedly, "outrageous" is likely to be what average, taxpaying citizens would exclaim if they heard a recitation of the facts of this case.<sup>161</sup> In light of common governmental claims of scarce resources to fight crime, many citizens would find devoting resources toward convincing a recovering addict to obtain drugs for the purpose of arresting her to be "outrageous." They would be outraged to know that their tax dollars went toward the compensation of the informant,

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160. *Lively*, 130 Wash. 2d at 34, 921 P.2d at 1052.

161. Not unlike a definition of conduct constituting the tort of outrage, stating that "the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

whose activities led to further expenditure of judicial resources for the prosecution and appeal of this case.

Judicial recognition of the defense of entrapment was a response to the assertion that a defendant should have recourse against overzealous police practices, and enough cases had shown that such practices were actually occurring. While codifying an entrapment statute may have signified a legislative recognition of the same principle, the emergence of a due process-based defense of outrageous government conduct demonstrates that there are practical limitations on the entrapment defense. Specifically, the government may employ any method it chooses in investigating "predisposed" defendants because his or her rights cannot be vindicated in court.<sup>162</sup>

Until the U.S. Supreme Court clarifies its position on the outrageous government conduct defense, state and federal courts can handle such claims as they deem appropriate in particular situations. Thus, while these courts may not define "outrageous government conduct" with any sort of precision or consistency, they may be confronted with a case, as the Washington Supreme Court was, when they will "know it when they see it."

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162. *Russell*, 411 U.S. at 443-44 (Stewart, J., dissenting).