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When Nothing is Shocking: The Ninth Circuit Degrades the Outrageous Government Conduct Defense

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WHEN NOTHING IS SHOCKING: THE NINTH CIRCUIT DEGRADES THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE

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In an October 22, 1983, escape attempt that left one inmate dead and ended in a serious collision with security roadblocks and the rearrest of the surviving escapees, six federal prisoners drove a prison garbage truck through a fence here, amid heavy gunfire from guard towers.[1]

The surviving inmates, prosecuted in federal district court in Los Angeles for the escape, filed a pretrial motion to dismiss the indictment on grounds of outrageous government conduct.[2] *Their motion, which failed, alleged that prison officials knew in advance of the escape plan, and "encouraged or assisted in" the escape.*[3]

The inmates appealed the denial of their motion to the United States Court of Appeals for the Ninth Circuit, again alleging that prison officials had been aware of and had encouraged the escape plan for several months prior to the plan's execution.[4] *The Ninth Circuit upheld the denial of the motion, agreeing with the district court that despite the possible truth of the prisoners' allegations, the government's conduct "fell 'fatally short' of the kind . . . required to sustain the outrageous government conduct defense."*[5] *The appellate court's ruling came despite allegations by the inmates that during the months preceding the escape, prison officials removed one of the escapees from mess hall duty in order to prevent his gaining access to the garbage truck but later reassigned him to that same duty.*[6]

I. INTRODUCTION

Federal, state and local law enforcement agencies regularly conduct

1. United States v. Williams, 791 F.2d 1383, 1385-87 (9th Cir.), *cert. denied*, 479 U.S. 869 (1986).

2. *Id.*

3. *Id.* (citing findings of district court).

4. *Id.*

5. *Id.* (quoting findings of district court).

6. *Id.* The inmates alleged that other than the temporary work reassignment, prison officials did nothing else to prevent the escape. *Id.*

undercover investigations designed to expose suspected criminal offenders and their operations. These undercover operations have been judicially approved as legitimate law enforcement techniques.[7] Judicial approval of undercover law enforcement operations raises questions as to the parameters of acceptable conduct by undercover law enforcement agents, and whether certain investigative tactics unconstitutionally violate suspects' rights to due process of law.[8]

Typically, federal courts in criminal cases consider the issue of whether government agents violated a defendant's due process rights during any preceding undercover investigation.[9] In these cases, defend-

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7. *See* Weatherford v. Bursey, 429 U.S. 545, 557 (1976) (citing United States v. Russell, 411 U.S. 423, 432 (1973), Lewis v. United States, 385 U.S. 206, 208-09 (1966)). The *Weatherford* Court observed: "Our cases . . . have recognized the . . . necessity of undercover work and the value it often is to effective law enforcement." *Id.*

8. The right to not be deprived of "life, liberty, or property, without due process of law" is guaranteed by the fifth and fourteenth amendments of the Constitution. U.S. CONST. amend. V and XIV. The fifth amendment guarantees protection against federal government action, and the fourteenth amendment uses similar language to protect individuals from state government action. *Id. See also* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 2.2, at 58-60 (1984). As a general rule, the fourteenth amendment's due process clause "incorporates" federal constitutional protections into state law, such that state governments must afford at least as much constitutional protection to individuals as would the federal government under the same circumstances. *Id.*

Professors LaFave and Israel note that a subject of continual debate by the Supreme Court is "the extent to which the Fourteenth Amendment imposes upon the states prohibitions identical or similar to those imposed upon the federal government by the Bill of Rights." *Id.* at 59-60. However, Professor Tribe points out that the fourteenth amendment's due process clause protects—and thus state governments must comply with minimal federal constitutional standards regarding—

> the right to just compensation; the first amendment freedoms of speech, press, assembly, petition, free exercise of religion, and non-establishment of religion; the fourth amendment rights to be free of unreasonable search and seizure and to exclude from criminal trials evidence illegally seized; the fifth amendment rights to be free of compelled self-incrimination and double jeopardy; the sixth amendment rights to counsel, to a speedy and public trial before a jury, to an opportunity to confront opposing witnesses, and to compulsory process for the purpose of obtaining favorable witnesses; and the eighth amendment right to be free of cruel and unusual punishment.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2, at 772-73 (2d ed. 1988) (citations omitted).

Thus, with regard to protections afforded individuals subject to undercover law enforcement investigations, a suspect's due process rights against federal government action flow directly from the fifth amendment, while protection from state government action flows from the fifth amendment as applied to the states by the due process clause of the fourteenth amendment. *See* W. LAFAVE & J. ISRAEL, *supra*, at 58-60. This Comment focuses on federal undercover investigations, and therefore is primarily concerned with fifth amendment due process rights.

9. For example, United States v. So, 755 F.2d 1350 (9th Cir. 1985), involved a federal undercover investigation into money laundering. *Id.* at 1352. The defendant later alleged that the government's investigative conduct violated his due process rights. *Id.* at 1353.

However, federal courts have also considered the issue of whether government conduct

ants ask courts to determine whether law enforcement authorities acted unconscionably during the operation. When a defendant asks a federal court to consider this issue, the defendant is invoking the "outrageous government conduct" defense.[10] The defendant asserts that the conduct of government agents during the investigation that led to his arrest was "conduct that shocks the conscience" and it therefore violated his due process rights.[11]

Prior to the Supreme Court of the United States' recognizing the outrageous government conduct defense in *United States v. Russell*,[12] the Ninth Circuit twice overturned convictions on grounds analogous to outrageous government conduct.[13] Since then, however, the Ninth Circuit has not honored a defense motion based on outrageous government conduct.[14] The Ninth Circuit has done more than narrowly apply the constitutional standard; the court's record suggests that the Ninth Circuit is ignoring the law and allowing the government to trample on the constitutional rights of the criminally accused.[15]

This Comment analyzes the Ninth Circuit's treatment of the outrageous government conduct defense in cases preceded by undercover in-

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violated due process protections, in the absence of a preceding undercover investigation. Huguez v. United States, 406 F.2d 366 (9th Cir. 1968), involved due process issues surrounding an unconsented rectal cavity search of the defendant by government agents, and no undercover activity had occurred.

10. United States v. Bogart, 783 F.2d 1428, 1432 n.1 (9th Cir.), *vacated on other grounds sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986). *Bogart* involved interstate real estate fraud. *Id.* at 1429-30.

11. *Id.*

12. 411 U.S. 423 (1973). For a discussion of *Russell*, see *infra* notes 152-88 and accompanying text.

13. Greene v. United States, 454 F.2d 783 (9th Cir. 1971). *Greene* involved government initiation of an illegal liquor bootlegging operation. *Id.* at 784-86. *See also* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968). That case involved an involuntary rectal cavity search, conducted when defendant fell under suspicion of smuggling narcotics into the United States from Mexico. *Id.* at 367.

14. In fact, a federal court of appeals has honored a defense motion based on outrageous government conduct only once since 1971. *See* United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978). *Twigg* involved government investigation into a methampetamine hydrochloride ("speed") manufacturing ring. *Id.* at 373-74.

15. *See, e.g.*, United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987) (motion to dismiss granted by district court and reversed, with indictment reinstated, by Ninth Circuit), *cert. denied*, 108 S. Ct. 233 (1988) (*see also infra* notes 346-80 and accompanying text); United States v. Tavelman, 655 F.2d 1133 (9th Cir. 1981) (conviction aff'd), *cert. denied*, 455 U.S. 939 (1982) (*see also infra* notes 274-301 and accompanying text); United States v. Penn, 647 F.2d 876 (9th Cir.) (en banc) (motion to dismiss granted by district court and reversed, with indictment reinstated, by Ninth Circuit), *cert. denied*, 449 U.S. 903 (1980) (*see also infra* notes 302-21 and accompanying text); United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977) (conviction aff'd), *cert. denied*, 436 U.S. 926 (1978) (*see also infra* notes 322-45 and accompanying text).

vestigation. It will demonstrate that the court has interpreted the constitutional standard much too narrowly. The Comment is divided into four parts: First, the outrageous government conduct defense is explained in detail; second, the Comment explores the origin of the defense in the Supreme Court; third, the Comment surveys Ninth Circuit case law regarding outrageous government conduct; and finally, the Comment sets forth a method for ensuring the defense's proper enforcement. The Comment also proposes congressional legislation aimed at creating a statutory outrageous government conduct defense.

II. TWO DEFENSES TO FEDERAL UNDERCOVER GOVERNMENT ACTIVITY: THE ENTRAPMENT DEFENSE AND THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE

In order to understand the outrageous government conduct defense, it is necessary to review a closely related defense—entrapment.[16] A study of entrapment is important, as the outrageous government conduct defense was developed partly in order to address entrapment's limitations.[17]

A. Entrapment

The government "entraps" a defendant when a government agent, "for the purpose of obtaining evidence of a crime . . . originates the idea of the crime and then induces another person to engage in conduct constituting such a crime when the other person is not otherwise [mentally] disposed to do so."[18] The defense of entrapment focuses on the defendant's state of mind; a defendant must show that but for inducement by

16. For a full discussion of the federal entrapment defense, see *infra* notes 18-80 and accompanying text. While this Comment focuses on the federal entrapment defense, it should be noted that the defense is also recognized by state courts. Some states do not focus on whether a defendant is predisposed to commit the crime. For example, California courts test for entrapment by examining whether "the conduct of the law enforcement agent [was] likely to induce a normally law-abiding person to commit the offense." People. v. Barraza, 23 Cal. 3d 675, 689-90, 591 P.2d 947, 955, 153 Cal. Rptr. 459, 467 (1979).

17. *See* Sherman v. United States, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring). Justice Frankfurter stated that "[t]he crucial question . . . to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards . . . for the proper use of governmental power." *Id.* (Frankfurter, J., concurring). Justice Frankfurter also suggested that "a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment." *Id.* (Frankfurter, J., concurring). See also *infra* notes 132-51 and accompanying text for a discussion of the concurring opinion in *Sherman*, and the concurrence's role in developing the outrageous government conduct defense.

18. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 48, at 36 (1972).

the government, the defendant would not have committed the crime.[19] The successful entrapment defense will demonstrate that "the Government's deception . . . implant[ed] the criminal design in the mind of the defendant."[20]

The defense of entrapment is rooted in two Supreme Court decisions, *Sorrells v. United States*[21] and *Sherman v. United States*.[22] *Sorrells* arose out of an arrest for possession and sale of whiskey in violation of the since-repealed National Prohibition Act.[23] Prior to Sorrells' arrest, an undercover federal prohibition agent, posing as a tourist and accompanied by three of Sorrells' friends, went to the defendant's home.[24] During the next few hours, the agent initiated conversation about liquor and repeatedly asked Sorrells if he could obtain liquor for the agent.[25] Sorrells refused these requests.[26] Soon, the topic of conversation turned to the war experiences of Sorrells, the agent and Jones (one of the defendant's visiting friends), all of whom had served together in the military during World War I.[27] After this conversation, the agent again asked Sorrells to get liquor for him.[28] This time, Sorrells left the house and returned with whiskey.[29]

At trial, Sorrells attempted to raise the entrapment defense, but the trial judge refused to allow the jury to consider the issue.[30] The conviction was affirmed on appeal,[31] and the Supreme Court granted certiorari.[32] In an opinion by Chief Justice Hughes, the Court reversed the conviction and held that the trial court erroneously prohibited the jury from considering the entrapment issue; the Court stated that the defendant "was an industrious and law-abiding citizen, and that the agent lured the defendant, otherwise innocent, to [the offense's] commission" by making repeated requests and by taking advantage of Sorrells' emotional

19. United States v. Russell, 411 U.S. 423, 436 (1973). For an excellent discussion of both defenses, see Note, The Need for a Dual Approach to Entrapment, 59 WASH. U.L.Q. 199 (1981).

20. *Russell*, 411 U.S. at 436.

21. 287 U.S. 435 (1932).

22. 356 U.S. 369 (1958).

23. 27 U.S.C. § 1 (1919) (repealed 1935).

24. *Sorrells*, 287 U.S. at 439.

25. *Id.*

26. *Id.*

27. *Id.* at 439-41. The three had served in the same combat unit. *Id.* at 439.

28. *Id.* at 439-41.

29. *Id.*

30. *Id.* at 438.

31. Sorrells v. United States, 57 F.2d 973 (4th Cir.), *rev'd*, 287 U.S. 430 (1932).

32. *Sorrells*, 287 U.S. at 439.

vulnerability to wartime memories.[33] The Court reasoned that Congress did not intend the National Prohibition Act to prompt punishment of defendants whose illegal behavior had been entirely induced by the government.[34] The Court determined that Sorrells should have been given the opportunity to present an entrapment defense for consideration by the trier of fact.[35] The Court's decision established that the entrapment defense is available to any defendant "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."[36]

The Supreme Court's next major decision on the entrapment defense was handed down in *Sherman v. United States*.[37] In *Sherman*, Kalchinian, the government's unpaid informant, approached the defendant at a doctor's office where both were being treated for drug addiction.[38] During subsequent unplanned meetings, Kalchinian made many requests that Sherman get drugs for him, but Sherman consistently refused.[39] Kalchinian persisted, at one point attempting to invoke Sherman's sympathy and getting Sherman to renew his own drug habit.[40] Eventually, Sherman acceded to the requests and sold drugs on several occasions to Kalchinian.[41] Federal narcotics agents observed the last three of the sales, and on that basis, arrested Sherman.[42]

At trial,[43] Sherman unsuccessfully raised the defense of entrapment,[44] and his conviction was affirmed on appeal.[45] The Supreme Court reversed the court of appeals' ruling and remanded the case to the district court with instructions to dismiss the indictment.[46] Chief Justice Warren, writing for the Court, concluded that entrapment had been es-

33. *Id.* at 441. The Court expressed anger at the attempt by the government agent to arouse sentiments among the "companions in arms." *Id.*

34. *Id.* at 448.

35. *Id.* at 452.

36. *Id.* at 451.

37. 356 U.S. 369 (1958).

38. *Id.* at 371.

39. *Id.*

40. *Id.* at 373. At various times, Kalchinian told Sherman of his own experiences as a drug abuser. *Id.*

41. *Id.*

42. *Id.* at 371.

43. Sherman was tried twice. *Id.* at 370. After being convicted at the first trial, he appealed and the conviction was reversed. *Id.* (citing United States v. Sherman, 200 F.2d 880 (2d Cir. 1952)). Upon retrial, he was again convicted. *Id.* at 372. His final appeal arrived at the Supreme Court by way of his conviction on retrial. *Id.*

44. *Id.* at 372.

45. United States v. Sherman, 240 F.2d 949 (2d Cir. 1957), *rev'd*, 356 U.S. 369 (1958).

46. *Sherman*, 356 U.S. at 378.

tablished as a matter of law.[47] The Court found it "patently clear that [Sherman] was induced by Kalchinian,"[48] and sharply disagreed with the government's contention that Sherman was predisposed to commit the charged offense.[49]

In addition to reaffirming *Sorrells'* recognition of entrapment as a valid defense to a federal criminal prosecution,[50] the *Sherman* Court resolved two other issues arising in entrapment cases. First, the Court pronounced that entrapment is a factual issue "unless [it] can be decided as a matter of law."[51] In support of its pronouncement, the Court noted that the federal courts of appeals generally reserved the entrapment issue for the trier of fact.[52] The Court thereby implied that in general, entrapment should continue to be treated as a factual issue. Also, the Court's disposition of the case[53] indicates that in the event that any court found entrapment as a matter of law, a defendant's remedy would be to have the indictment dismissed.[54]

Second, *Sherman* stands for the proposition that when the government uses an informant to help apprehend a suspect, the government must control the informant's undercover activities and bear responsibility for the informant's mistakes or misbehavior. In *Sherman*, Kalchinian illegally induced the defendant to commit the crime.[55] The defendant argued that because Kalchinian was its informant, the government had to suffer the consequences of the illegal inducement.[56] The Court agreed, holding that "the Government cannot disown Kalchinian and insist it is not responsible for his actions."[57] Also, in criticizing the government's failure to adequately monitor Kalchinian's activities,[58] the Court proclaimed that "the Government cannot make such use of an informant and then claim disassociation [from the informant's actions] through

47. *Id.* at 373.

48. *Id.*

49. *Id.* at 375.

50. *Id.* at 372. The *Sherman* Court referred to *Sorrells* as the case in which it "firmly recognized the defense of entrapment in the federal courts." *Id.* (citing Sorrells v. United States, 287 U.S. 435 (1932)).

51. *Id.* at 377.

52. *Id.* at 377 n.8.

53. *Id.* at 378.

54. *Id.*

55. *Id.* at 373.

56. *Id.* at 375-76.

57. *Id.* at 373.

58. *Id.* at 374. The Court remarked that "the federal agent in charge of the case admitted that he never bothered to question Kalchinian about the way he had made contact with [Sherman]." *Id.* at 374-75.

ignorance."[59]

This aspect of the Court's opinion had implications not only for entrapment cases, but for all cases in which government informants' undercover encounters with suspects violated constitutional or legal standards. *Sherman* established that where an informant's activities violated the rights of an accused, the government would lose the benefit of the informant's contact with the subject, or a court might dismiss the case altogether.[60]

B. Entrapment and the Outrageous Government Conduct Defense, Contrasted

The entrapment defense[61] and the outrageous government conduct defense are similar in that they are both invoked to contest the legality of undercover government conduct.[62] However, there are significant differences between them. First, they differ procedurally. Entrapment is an affirmative defense, presented at trial.[63] Technically, the outrageous government conduct defense is not a "defense" at all. Rather, as Judge Pregerson observed in *United States v. Bogart*,[64] a defendant usually makes the claim in a pretrial motion, and "if successful . . . [the motion] results in the dismissal of the indictment whatever [the indictment's] merits."[65] The defense may also be raised as a post-conviction remedy.

Another difference between the defenses is that they attach different degrees of importance to the defendant's mental state at the time of the crime. Entrapment focuses on the defendant's lack of mental predisposition to commit the offense;[66] the outrageous government conduct defense focuses solely on the nature and legality of the government's conduct

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59. *Id.* at 375.

60. *Id.* at 378.

61. See *supra* notes 18-60 and accompanying text for a detailed discussion of the entrapment defense.

62. For a full discussion of Supreme Court cases on entrapment, see Sorrells v. United States, 287 U.S. 435 (1932) (*see also supra* notes 21-36 and accompanying text); Sherman v. United States, 356 U.S. 369 (1958) (*see also supra* notes 37-60 and accompanying text). For an example of usage of the outrageous government conduct defense to contest the legality of undercover governmental activity, see, *e.g.*, United States v. Ryan, 548 F.2d 782 (9th Cir. 1976) (outrageous government conduct defense raised to contest government investigation of corruption on Clark County, Nevada, Board of Commissioners), *cert. denied*, 430 U.S. 965 (1977).

63. *See* United States v. Bogart, 783 F.2d 1428, 1432 n.1 (9th Cir.), *vacated on other grounds sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986).

64. 783 F.2d at 1432 n.1 (citing United States v. Russell, 411 U.S. 423 (1973)).

65. *Id.* (citing United States v. Russell, 411 U.S. 423 (1973)).

66. *See id.*

during the investigation.[67] Under the outrageous government conduct defense, the defendant's mental culpability is therefore *completely irrelevant* to a determination of whether the government's conduct in a particular case rose to the level of outrageousness.[68] Thus, while only a non-predisposed defendant may successfully claim entrapment, any defendant, predisposed to commit the crime or not, may invoke the outrageous government conduct defense.[69]

1. Foundation

The two defenses also differ in legal foundation. The defenses draw on different notions or doctrines in the law for prohibiting certain conduct by law enforcement officers. On the one hand, the *Sorrells* Court found that on the issue of entrapment, inducing a non-predisposed individual to commit the crime with which he or she would later be charged was "unconscionable [and] contrary to public policy . . . and to the established law of the land."[70] The Court did not cite the United States Constitution, nor did it refer to specific cases or general common-law doctrines to support its decision. The Court did refer back to the National Prohibition Act, the statute at issue in the case, and noted that prosecution of a non-predisposed individual was contrary to the intent and spirit of the legislation.[71] For the most part, however, the Court relied on a general perception of long adhered-to values and policies, and concluded that the governmental conduct at issue did not comport with American legal and moral traditions.[72]

The outrageous government conduct defense, on the other hand, has a legal foundation more tangible than that of entrapment. It is based on the due process clause of the fifth amendment of the Constitution.[73] A defendant claiming outrageous government conduct seeks to convince a

67. *Id.* *See also* Hampton v. United States, 425 U.S. 484, 497 (1976) (Brennan, J., dissenting).

68. *Bogart*, 783 F.2d 1428, 1436 n.1.

69. *See* United States v. McQuin, 612 F.2d 1193, 1196 (9th Cir.) (quoting United States v. Gonzales-Benitez, 537 F.2d 1051, 1055 (9th Cir.) ("[T]he Supreme Court left open the possibility that the conviction of a predisposed defendant may be reversed where the government [conduct] reached such an outrageous level as to violate due process."), *cert. denied*, 429 U.S. 923 (1976), *cert. denied*, 445 U.S. 955 (1980)).

70. Sorrells v. United States, 287 U.S. 435, 444 (1932).

71. *Id.* at 448.

72. *Id.* at 444-45.

73. *See* United States v. Russell, 411 U.S. 423, 432 (1973) (citing Rochin v. California, 342 U.S. 165 (1952), Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960)). The fifth amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty or property without due process of law." U.S. CONST. amend. V.

federal court that the government's behavior during the investigation violated the defendant's fifth amendment due process rights, and that prosecution should therefore be precluded or the conviction nullified.[74]

2. Justification

The defenses have developed to address different concerns. The entrapment defense exists because the Supreme Court recognized that it would be unfair to prosecute a defendant for a crime whose commission was totally induced by the government.[75] The *Sorrells* Court drew a line between using "artifice and stratagem . . . to catch those engaged in criminal enterprises"[76] and allowing the government to "catch" someone whom the government, but for its own activity, would not have had reason to arrest.[77] The *Sorrells* decision and the existence of the entrapment defense reflect basic notions of justice and fairness under law, and help define acceptable standards for undercover government conduct.[78] Additionally, the entrapment defense serves to reaffirm our society's goal of punishing only those defendants who committed the criminal act and who were mentally culpable.[79] Within the defense is the notion that punishing a person who possessed the *mens rea* only from the moment the government *gave* it to him or her would subvert the centuries-old practice of punishing only the independently culpable.[80]

Unlike the entrapment defense, an argument for the existence of the outrageous government conduct defense cannot be made in terms of the law's desire to protect non-predisposed defendants. This is because the outrageous government conduct defense has nothing to do with the defendant's mental state.[81] The outrageous government conduct defense focuses solely on the government's investigative conduct.[82] The potential result of finding outrageous government conduct is that a person who might otherwise be found clearly predisposed will not be prosecuted or punished.[83]

Why does the law recognize the outrageous government conduct de-

74. Rochin v. California, 342 U.S. 165, 170-72 (1952). The *Rochin* Court characterized due process as a legal concept "not final and fixed," but as a set of "general considerations" which the nation's courts must take into account during the judicial process. *Id.*

75. *Sorrells*, 287 U.S. at 442.

76. *Id.* at 441-42.

77. *Id.*

78. *Id.* at 452.

79. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.4, at 212 (2d ed. 1986).

80. *Id.*

81. Sherman v. United States, 356 U.S. 369, 375-78 (1958).

82. *Id.*

83. *Bogart*, 783 F.2d at 1432 n.1 (citing United States v. Russell, 411 U.S. 423 (1973)).

fense instead of giving law enforcement agencies free reign in undercover investigations? The answer is that, as eager as society may be to control crime, it will not tolerate crime's amelioration at the expense of a person's due process rights.[84] The outrageous government conduct defense rests on the proposition that, although crime control is an important goal, there are simply *limits* on how far the government may go in pursuing that goal.[85] The government goes beyond those limits when it violates "due process," or what Justice Frankfurter called the "summarized guarantee of respect for . . . personal immunities" from the government, which the individual enjoys.[86] Justice Cardozo characterized due process rights as "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[87] or "implicit in the concept of ordered liberty."[88] The outrageous government conduct defense exists to protect these rights, by allowing courts to act to contain abuse of official power.[89] The defense is important even beyond the courtroom in which it is raised. Justice Frankfurter stated that it is inextricably bound up with the "most comprehensive protection of [our] liberties, the Due Process Clause."[90] For this reason, adequate or overly narrow application of the defense affects the quantum of liberty enjoyed by the defendant raising the defense, and potentially by every person in this country.

III. THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE'S ORIGIN IN THE SUPREME COURT

Before discussing the Ninth Circuit's treatment of the outrageous government conduct defense, it is important to examine the evolution of the doctrine in the Supreme Court of the United States. Two Supreme Court decisions laid the foundation for later cases in which the Supreme Court devoted the bulk of its attention to the outrageous government

84. Professors LaFave and Scott, for example, discuss the "constitutional limitation on the boundaries of the police power." W. LAFAVE & A. SCOTT, *supra* note 79, § 2.12, at 148. For a general discussion of this area, see *id.*, §§ 2.1-2.15.

85. *See id.* § 5.2, at 430-32.

86. *See Rochin*, 342 U.S. at 169.

87. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *rev'd*, Malloy v. Hogan, 378 U.S. 1 (1964).

88. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *rev'd*, Duncan v. Louisiana, 391 U.S. 145 (1968).

89. *Id.* at 175 (Black, J., concurring). Though Justice Black referred specifically to the *Rochin* majority's opinion as it applied to the states, his words offer insight into the purpose of a due process-based defense to a federal criminal prosecution: "The Due Process Clause empowers [courts] to nullify any . . . law if its application 'shocks the conscience,' 'offends a sense of justice,' or runs counter to the 'decencies of civilized conduct.' " *Id.*

90. *Rochin*, 342 U.S. at 170.

conduct defense.[91]

Prior to recognition of the outrageous government conduct defense in *United States v. Russell*,[92] members of the Court had argued that in some criminal prosecutions judicial attention should focus solely on the government's investigative conduct.[93] The majority opinion in *Rochin v. California*,[94] and the concurring opinion in *Sherman v. United States*[95] advanced that position. In *Rochin*, the Court reversed a conviction on grounds that government investigative conduct violated the defendant's due process rights.[96] The Court, however, was careful to limit the holding and its new remedy to the facts of that case.[97] In contrast, the concurring opinion of *Sherman* did not propose reversing the defendant's conviction or dismissing the indictment on due process grounds;[98] rather, it suggested that federal courts should routinely be receptive to the due process argument.[99] Critical analysis of these earlier opinions facilitates a more thorough understanding of the due process-based remedy.

A. Rochin v. California

The Supreme Court granted certiorari[100] to hear *Rochin v. California*[101] following affirmance of the defendant's conviction by a California appellate court.[102] The case arose when Los Angeles County Sheriff's deputies were informed that Rochin was selling narcotics.[103] After going to the defendant's home to investigate, the officers found Rochin in his bedroom, and also spotted two capsules on a nearby night stand.[104] After brief interrogation concerning ownership of the capsules, Rochin stuffed the capsules into his mouth, trying to swallow them.[105] A strug-

91. These foundational decisions were Sherman v. United States, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring); Rochin v. California, 342 U.S. 165, 168 (1952). The concurrence in *Sherman* is discussed in *infra* notes 128-50 and accompanying text, and *Rochin* is discussed in *infra* notes 94-124 and accompanying text.

92. 411 U.S. 423 (1973).

93. *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring); *Rochin*, 342 U.S. at 168.

94. 342 U.S. 165 (1952).

95. 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring).

96. *Rochin*, 342 U.S. at 174.

97. *Id.* *See infra* notes 100-30 and accompanying text for a detailed discussion of *Rochin*.

98. *Sherman*, 356 U.S. at 385 (Frankfurter, J., concurring).

99. *Id.* at 383 (Frankfurter, J., concurring).

100. Rochin v. California, 341 U.S. 939 (1951).

101. 342 U.S. 165 (1952).

102. People v. Rochin, 101 Cal. App. 2d 140, 143, 225 P.2d 1, 3 (1950). The California Supreme Court denied Rochin's petition for a hearing. *Rochin*, 342 U.S. at 167.

103. *Rochin*, 342 U.S. at 166.

104. *Id.*

105. *Id.*

gle ensued, during which the officers unsuccessfully attempted to prevent Rochin from swallowing the capsules.[106] Rochin was arrested and handcuffed, and the officers took him to a hospital where his stomach was forcibly pumped.[107] The officers picked out the suspect capsules, which were found to contain morphine, from the vomitus.[108]

The question before the Supreme Court was whether the officers' bursting into Rochin's bedroom, fighting to prevent Rochin's swallowing the capsules and ordering his stomach pumped to obtain the capsules violated Rochin's due process rights.[109] The Court, in an opinion by Justice Frankfurter,[110] concluded that the events, as a whole, amounted to a due process violation and reversed Rochin's conviction.[111]

Justice Frankfurter emphasized that although the Court should not recklessly overturn state criminal convictions,[112] the Court must always make sure that a conviction was obtained in accordance with due process.[113] The Court defined "due process" as "a summarized constitutional guarantee of respect for . . . personal immunities which are 'fundamental' or 'implicit in the concept of ordered liberty.' "[114] Then, the Court admonished that, in considering whether to overturn a state court conviction on due process grounds, the high Court's decision must not be read to be rooted in "fastidious squeamishness or private sentimentalism about combatting crime too energetically."[115] The Court stated that it would overturn a conviction only where the government's investigative activities became "methods too close to the rack and the screw" to be constitutional.[116] The *Rochin* Court, analyzing the deputies' conduct in the case, found that their conduct "shocked the conscience" and most definitely crossed the line into unconstitutional territory.[117]

At first glance, the *Rochin* opinion strongly suggests that the

106. *Id.*

107. *Id.* Rochin was administered an emetic to force him to vomit. *Id.*

108. *Id.*

109. *Id.* at 168, 172.

110. *Id.* at 166. Justices Black and Douglas joined in the majority opinion. *Id.*

111. *Id.* at 174.

112. *Id.* at 168.

113. *Id.* at 169.

114. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *rev'd*, Duncan v. Louisiana, 391 U.S. 145 (1968); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *rev'd*, Malloy v. Hogan, 378 U.S. 1 (1964)).

115. *Id.* at 172.

116. *Id.*

117. *Id.* The Court noted that "due process of law is heedless of the means by which otherwise relevant and credible evidence is found." *Id.*

Supreme Court was encouraging criminal defendants to raise the due process argument frequently and against a wide variety of government conduct.[118] After finding that Rochin's rights had been infringed, the Court stated that analysis of due process issues could not rest on fixed notions of what does or does not constitute acceptable government investigative conduct.[119] The Court reasoned that the concept of due process evolves as our society evolves, and that social change makes due process unamenable to rigid definition.[120] The Court therefore refused to permanently classify certain government investigative conduct as violative of due process.[121] It offered for future reference only the general guideline that "convictions cannot be brought about by methods that offend 'a sense of justice.' "[122]

Three conclusions follow from the Court's reasoning: First, the issue of whether government conduct violated due process rights is one that needs to be determined on a case-by-case basis;[123] second, a wide range of government investigative conduct might be open to challenge on due process grounds;[124] and third, that *Rochin* was intended to be broadly interpreted and far-reaching.[125] These conclusions follow because of the Court's choice of words as to when convictions must be overturned. The admonition that a conviction would be struck down if it had been "brought about by methods that offend 'a sense of justice' "[126] can be interpreted very broadly, for a 'sense of justice' is a broad, vague concept. The language in *Rochin* opened the door to lawyers' arguments that government conduct in any number of situations was conduct requiring nullification of subsequent prosecutions or convictions.

The Court apparently anticipated, and disfavored, such broad interpretation of its language.[127] It warned lawyers and lower courts to interpret *Rochin* as applying only to the facts of that case.[128] Disapproval was expressed over future "hypothetical situations conjured up, shading im-

118. *Id.* at 173.

119. *Id.*

120. *Id.* at 170-73.

121. *Id.* at 173 (quoting Brown v. Mississippi, 297 U.S. 278, 285-86 (1936)).

122. *Id.*

123. *Id.* at 169-74.

124. *Id.* at 173. The Court remarked, "[d]ue process of law, as a [sic] historic and generative principle, precludes defining." *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 174.

128. *Id.* The Court also noted that "[i]n deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems." *Id.*

perceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions."[129]

Given the Court's essentially fluid definition of due process, and unwillingness to make enduring pronouncements on the constitutionality of certain government investigative conduct,[130] the concluding admonition seems out of place. Restricting the holding to the case's facts may have effectively stripped *Rochin* of precedential value. *Rochin* is, however, only one-half of the pre-outrageous government conduct defense story. The other half is the concurring opinion delivered in *Sherman v. United States*.[131]

B. Sherman v. United States

In *Sherman v. United States*,[132] the Supreme Court found that the defendant had not been mentally predisposed to sell narcotics to the government's informant, and that he had been induced to commit the crime.[133] The Supreme Court therefore reversed the defendant's conviction, on grounds that he had been entrapped.[134] The majority opinion in *Sherman* did not discuss the government's conduct from a due process perspective. However, Justice Frankfurter, who also wrote the majority opinion in *Rochin*,[135] discussed in a concurring opinion the defendant's due process rights.[136] The concurrence revealed that several members of the Court had wanted to expand the due process argument's applicability as early as 1958.[137] The concurring opinion also reflects Justice Frankfurter's apparent dissatisfaction with the limited holding he had propounded only six years earlier in *Rochin*.[138]

Justice Frankfurter found the due process argument to apply beyond the facts of *Rochin*: "The crucial question . . . is whether the police conduct revealed in the particular case falls below standards . . . for the proper use of governmental power."[139] Justice Frankfurter and those members joining him in his concurrence[140] expressed displeasure over

129. *Id.*
130. *Id.* at 170-73.
131. 356 U.S. 369 (1958). The majority opinion in *Sherman* is discussed in the text accompanying *supra* notes 37-60.
132. 356 U.S. 369 (1958).
133. *Id.* at 373.
134. *Id.*
135. Rochin v. California, 342 U.S. 165 (1952).
136. *Id.* at 382 (Frankfurter, J., concurring).
137. *Id.* (Frankfurter, J., concurring).
138. *Id.*
139. *Id.*
140. Justices Douglas, Harlan and Brennan joined in the concurrence. *Id.*

the Court's continuing devotion to the issue of predisposition.[141] These members criticized the majority's approach, stating that "[a] test that looks to the character and predisposition of the defendant rather than [to] the conduct of the police loses sight of the underlying reason for the defense of entrapment."[142] This passage was particularly important to the development of the outrageous government conduct defense because it expressed a belief that the law should recognize a defense distinct from the one espoused in *Sorrells v. United States*[143] and reaffirmed by the *Sherman* majority.[144] The statement did not enumerate the "underlying reason for the defense of entrapment," but articulated the notion that examination of government investigative conduct should not end with a *Sorrells*-type analysis.[145] Although the concurring opinion in *Sherman* did not propose a specific new legal doctrine, it did suggest that existing law was inadequate.[146] The concurrence held that *"[no] matter what the defendant's past record and present inclinations to criminality,* or the depths to which he has sunk in the estimation of society, *certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."*[147] The above passage illuminates a desire to move away from a narrow interpretation of *Rochin* and toward what would eventually become the outrageous government conduct defense. The reminder that "certain police conduct to ensnare [a suspect] into further crime is not to be tolerated by an advanced society"[148] sounds less like *Rochin's* narrow holding[149] and more like the *Rochin* Court's statement that "convictions cannot be brought about by methods that offend 'a sense of justice.' "[150] By deeming even predisposed defendants worthy of protection from certain government investigative conduct,[151] the *Sherman* concurrence set the stage for the eventual creation of a doctrine designed to protect precisely those defendants. It is ironic that a concurring opinion contributed more to the development of the outrageous con-

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

142. *Id.* (Frankfurter, J., concurring).

143. 287 U.S. 435 (1932).

144. *Sherman*, 356 U.S. at 372.

145. *See Sorrells*, 287 U.S. at 441-43. See also *supra* notes 21-36 and accompanying text for a discussion of the entrapment defense as applied in *Sorrells*.

146. *Sherman*, 356 U.S. at 382-83 (Frankfurter, J., concurring).

147. *Id.* (Frankfurter, J., concurring) (emphasis added).

148. *Id.* (Frankfurter, J., concurring).

149. *Rochin*, 342 U.S. at 174 (violation of due process where police entered defendant's home and forcibly pumped his stomach to obtain evidence).

150. *Id.* at 173 (quoting Brown v. Mississippi, 297 U.S. 287, 285-86 (1936)).

151. *Sherman*, 356 U.S. at 382-83 (Frankfurter, J., concurring).

duct defense than did a majority opinion that, but for its limiting language, would have been the defense's prototype.

C. United States v. Russell

The Supreme Court in *United States v. Russell*[152] established a place in federal criminal proceedings for the legacy of *Rochin v. California*[153] and of the concurring opinion in *Sherman v. United States*.[154] The *Russell* Court recognized the outrageous government conduct defense, in that "a majority of the Court accept[ed] the notion that there may well be *some* circumstances in which a due process defense would be available even to a defendant found to be predisposed."[155]

In *Russell*, the government initiated an undercover investigation of defendant Russell and various co-defendants, believing that they were running an illegal methamphetamine-manufacturing laboratory.[156] Originally, an undercover federal narcotics agent went to Russell's home, and told Russell and the co-defendants that he represented an "organization" which aspired to control methamphetamine manufacture and distribution in the Pacific Northwest.[157] The agent offered to supply phenyl-2-propanone (P2P), a necessary ingredient of methamphetamine, to the defendants on the condition that he be shown the laboratory and given a methamphetamine sample.[158] The defendants agreed, made two batches of methamphetamine using all of the government-supplied P2P and sold one batch to the agent.[159] Approximately one month later, the defendants were arrested and charged with manufacture and sale of methamphetamine.[160]

At trial, Russell unsuccessfully raised the defense of entrapment.[161] The Ninth Circuit heard his appeal and reversed his conviction, but on grounds separate from Russell's entrapment defense.[162] The court held that the conviction was unconstitutionally obtained through "an intolerable degree of governmental participation in the criminal enterprise."[163]

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152. 411 U.S. 423 (1973).
153. 342 U.S. 165 (1952).
154. 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring).
155. W. LAFAVE & A. SCOTT, *supra* note 79, § 5.2(g), at 431 (emphasis in original).
156. *Russell*, 411 U.S. at 425-26.
157. *Id.* at 425.
158. *Id.* at 425-26. The agent demanded that he be given one-half of any methamphetmaine supply the defendants produced. *Id.*
159. *Id.* at 425.
160. *Id.* at 424.
161. United States v. Russell, 459 F.2d 671, 672 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973).
162. *Id.* at 673.
163. *Id.*

The government appealed, the Supreme Court granted certiorari and reversed the court of appeals, thereby affirming Russell's conviction.[164] The Supreme Court disagreed with the Ninth Circuit's conclusion that the agent's "involvement in the manufacture of the methamphetamine was so high that a criminal prosecution for the drug's manufacture [violated] the fundamental principles of due process."[165]

Russell based the "overinvolvement" argument on the theory that since P2P was an extremely scarce material, nearly impossible to obtain, the crime could not have taken place but for the government's supplying the chemical.[166] The Court disagreed for two reasons. First, it rejected Russell's contention that P2P was tremendously scarce, pointing out that supplies of the ingredient could not be so short if the defendants' laboratory contained, as the agent testified, bottles labeled "phenyl-2-propanone."[167] Second, the Court asserted that eradication of difficult-to-expose criminal operations depended on law enforcement agents' infiltrating and supplying valuable ingredients or implements to the operations' participants.[168] The Court concluded that "the infiltration of drug rings and a limited participation in their unlawful . . . practices"[169] did not constitute law enforcement tactics violative of " 'fundamental fairness, shocking to the universal sense of justice' [and therefore impermissible under] the Due Process Clause of the Fifth Amendment."[170] The Court held that while a due process-based defense might be available to some defendants in the future, it was not available to Russell.[171] The Court stated: "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."[172]

In order to fully understand *Russell*'s implications for the outrageous government conduct defense, it is important to examine what the *Russell* Court did not say, as well as what it did say. For example, the Court recognized the outrageous government conduct defense, and said

164. *Russell*, 411 U.S. at 424-25.

165. *Id.* at 430.

166. *Id.* at 431. However, additional bottles not supplied by the government were found during a subsequent search of the laboratory. *Id.*

167. *Id.*

168. *Id.* at 432.

169. *Id.*

170. *Id.* (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960)).

171. *Id.* at 431-32.

172. *Id.*

it was not available to Russell,[173] but the Court did not elaborate as to the circumstances under which the defense *would* be available to a defendant. Also, the Court acknowledged that certain government investigative conduct would violate due process[174] and stated that the agent's conduct in *Russell* did not.[175] However, the Court did not indicate what sort of conduct would be "so outrageous" as to preclude prosecution, on due process grounds. In addition, the Court announced that because of the difficulty in detecting and gathering evidence against drug rings, such criminal operations were subject to undercover infiltration, and suspects could be, if necessary, supplied with items valuable to the criminal activity.[176] It is not clear, however, whether the Court intended to allow such practices in investigations of *all* criminal operations that are difficult to detect and eradicate. Thus, the *Russell* Court's incomplete analysis gave federal courts little guidance for determining the applicability of the outrageous government conduct defense.

It is unclear what analysis the Court wanted lower courts to adopt in assessing an outrageous government conduct defense. *Russell*, however, does suggest two possible analytical approaches lower courts could take in detecting outrageous government conduct. They are the "factual precedent" and the "sliding scale" approaches.

Under the first analysis, a lower court would compare the facts of a new case to those of previous cases in which the outrageous government conduct defense was or was not applicable. Through comparison, the court could decide whether the government conduct presently at issue violated due process. This approach can be gleaned from the *Russell* Court's conclusion that government conduct would in some circumstances violate due process.[177] Although the Court did not explicitly state that factual comparison was the proper means of analysis, this is effectively how the Court analyzed the situation in *Russell*.[178] Presumably, the Court would approve of lower courts taking a similar approach.

The second type of analysis that could be used in assessing a defendant's claim of outrageous government conduct would be to evaluate law

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 432. The Court referred to gathering evidence against drug rings as an "all but impossible task." *Id.*

177. *Id.* at 431-32.

178. The Court did not compare past cases to Russell's. Its comparison took the form of a prediction; in dictum, the Court stated that "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." *Id.*

enforcement needs and due process rights on a sliding scale: the more illicit, or serious, or difficult to detect the criminal activity under investigation is, the greater society's and the courts' need to allow the government to increase its repertoire of investigative techniques, and the fewer the number of investigative techniques would violate due process. The *Russell* Court used this sliding scale approach when it discussed Russell's case as pertaining to investigations of drug rings.[179] The Court noted the inherent difficulties faced by law enforcement agencies in breaking up drug rings,[180] and the concomitant necessity of allowing the government's "infiltration of drug rings and limited participation in their unlawful . . . practices."[181] The Court then evaluated the constitutionality of such tactics, concluding that the tactics did not violate due process.[182]

It is crucial to observe that the *Russell* Court treated the constitutionality of the government's conduct as linked to the conduct's necessity.[183] By deciding whether the conduct was necessary, and then deciding whether it was constitutional, the Court seemed to allow the degree of necessity to dictate whether the conduct violated due process.[184] In other words, the Court reasoned that the conduct was necessary, and that therefore, there was no violation of due process.[185] This approach by the Court compels the conclusion that the *Russell* Court intended to give the outrageous government conduct defense room to grow, but not too much room.[186] Logic suggests that this approach need not be confined to cases involving drug rings. On the contrary, since the sliding scale approach evaluates the constitutionality of government conduct in the context of law enforcement needs, and because those needs change and grow with new types of crime, the sliding scale approach could potentially apply to any case.

The problem with utilizing a sliding scale approach is that it potentially weakens the outrageous government conduct defense. The government could argue that the investigative tactic in question is "necessary," and seek to eliminate judicial determinations that the tactic is unconstitutional.[187] Ultimately, *Russell* was a two-sided coin: It established the

179. *Id.*

180. *Id.* at 432. The Court also discussed the problems faced by law enforcement agencies in obtaining evidence of the rings' "past unlawful conduct." *Id.*

181. *Id.*

182. *Id.*

183. *Id.* The Court expressed concern that a government agent "will not be taken into the confidence of . . . illegal entrepreneurs unless he has something of value to offer them." *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

outrageous government conduct defense on one side,[188] but on the other, its sliding scale approach forced the due process clause to take a back seat to changing law enforcement priorities.

D. Hampton v. United States

Hampton v. United States,[189] the most recent Supreme Court case regarding the outrageous government conduct defense, was decided three years after *United States v. Russell*.[190] In *Hampton*, Hutton, an informant for the federal Drug Enforcement Administration (DEA) and defendant Hampton met in a pool hall.[191] The defendant's version of the initial contact was that he noticed needle marks on Hutton's arms and told Hutton of his (Hampton's) cash shortage.[192] According to Hampton, Hutton then proposed that the two earn money quickly by obtaining imitation heroin and fooling users into buying it for the higher price of real heroin.[193] On the same issue, the government contended that the defendant approached Hutton, said he was short on cash, told Hutton of a heroin source, and that Hutton, at the defendant's suggestion, agreed to contact a buyer.[194]

Despite these discrepancies, there was no dispute as to the next events. After the initial encounter, Hutton arranged a meeting between the defendant and two DEA agents.[195] The agents were to pose as buyers of heroin.[196] Before the meeting with the agents, Hutton supplied Hampton with a sample of real heroin.[197] At the meeting, Hampton produced the sample and sold it to the agents.[198] One agent arranged a buy for the next day, and the defendant arrived for the second buy, resupplied by Hutton.[199] At the second buying meeting, the agent agreed to purchase the drug.[200] Just before execution of the sale, other agents

188. *Id.* at 431-32.
189. 425 U.S. 484 (1976).
190. 411 U.S. 423 (1973).
191. *Hampton*, 425 U.S. at 485-86.
192. *Id.*
193. *Id.* at 486-87.
194. *Id.* at 485-86.
195. *Id.* at 486.
196. *Id.*
197. *Id.* The agents tested the purity of the heroin, and negotiated a price for its purchase. Hutton supplied Hampton with real heroin, the scheme being that Hampton would present prospective buyers with real heroin, and when long-term buying arrangements had been made, the defendant would sell imitation heroin. *Id.* at 486-87.
198. *Id.*
199. *Id.*
200. *Id.*

moved in and arrested Hampton.[201]

At trial, Hampton requested a jury instruction that if the jury found that Hutton had supplied him with the heroin, the defendant must be acquitted.[202] The court denied the request, and Hampton was convicted for distribution of heroin.[203] On appeal, he argued that due process precluded his prosecution.[204] A plurality of the Supreme Court affirmed the conviction,[205] holding that Hampton's due process rights had not been violated by the government supplying the heroin.[206]

The plurality, for several reasons, held that Hampton could not invoke the outrageous government conduct defense.[207] First, the plurality believed that Hampton was interpreting *Russell* too broadly.[208] The plurality reasoned that *Russell* had not been intended "to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve."[209] Second, the plurality asserted that although "the Government . . . played a more significant role in enabling petitioner to sell contraband . . . than [the government] did in *Russell*,"[210] the due process argument did not apply because the difference between Hampton's case and Russell's was "one of degree, not of kind."[211] The third reason for the plurality's disagreement with the defendant's due process argument was its belief that due process notions "come into play only when the Government activity in question violates some protected right of the *defendant*."[212] The plurality held that since the government's conduct did not violate any of Hampton's specific federal constitutional rights, he could not raise the constitutionally rooted challenge.[213]

One segment of the plurality opinion met with strong disapproval from concurring and dissenting Justices alike.[214] The plurality concluded that defendant Hampton could not invoke the outrageous govern-

201. *Id.*
202. *Id.* at 488.
203. *Id.* at 485, 488.
204. *Id.* at 489.
205. *Id.* at 485. Justice Rehnquist wrote the plurality opinion, in which Chief Justice Burger and Justice White joined. *Id.* Justices Powell and Blackmun concurred. *Id.* at 491. Justices Brennan, Stewart and Marshall dissented. *Id.* at 495.
206. *Id.* at 490-91.
207. *Id.* at 489.
208. *Id.* at 490.
209. *Id.* (quoting United States v. Russell, 411 U.S. 423, 435 (1973)).
210. *Id.* at 489.
211. *Id.*
212. *Id.* at 490 (emphasis in original).
213. *Id.* at 490-91.
214. *Id.* at 492-95 (Powell, J., concurring); *id.* at 495-97 (Brennan, J., dissenting).

ment conduct defense, because with respect to the conduct of government agents, entrapment was the only defense available to defendants.[215] In effect, the plurality held that only non-predisposed defendants could claim a defense based on governmental conduct. In contrast, concurring Justices Powell and Blackmun,[216] and dissenting Justices Brennan, Stewart and Marshall[217] insisted that *Russell* permitted even a predisposed defendant to assert the outrageous government conduct defense, and that this aspect of *Russell* endured.[218] Thus, a majority of the *Hampton* Court would hold that even predisposed defendants are entitled to assert the outrageous government conduct defense.[219]

Despite the diversity of opinions in *Hampton*, the case yielded two undisputed implications for the outrageous government conduct defense. First, it further narrowed the variety of situations in which the defense might be honored: *Russell* prohibited application of the defense where the government merely supplied a valuable item to the criminal enterprise,[220] and *Hampton* prohibited the defense's application where the government supplied the very contraband upon which a subsequent indictment was based.[221] Second, the *Hampton* decision strongly indicated the Supreme Court's disfavor of liberal application of the outrageous government conduct defense.[222] As previously noted, the *Hampton* majority seemed eager to devise arguments to prevent a defendant from challenging government investigative conduct on due process grounds.[223]

Thus, Supreme Court jurisprudence on outrageous government conduct, from *Rochin v. California*[224] to *Hampton v. United States*,[225] reflects the Court's initial desire to establish the defense, and the Court's

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215. *Id.* at 490.

216. *Id.* at 491 (Powell, J., concurring).

217. *Id.* at 495 (Brennan, J., dissenting).

218. *Id.* at 493 (Powell, J., concurring) ("I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles."); *id.* at 497 (Brennan, J., dissenting) ("*Russell* does not foreclose imposition of a bar to conviction based upon . . . due process principles . . . even though the individuals entitled to invoke such a defense might be 'predisposed'.").

219. *Id.* at 490. The Ninth Circuit has not adopted this aspect of the *Hampton* plurality opinion. United States v. Bogart, 783 F.2d 1428, 1432 (9th Cir.), *vacated on other grounds sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (quoting United States v. Bagnariol, 665 F.2d 877, 882 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982) ("The due process outrageous government conduct defense survived the Court's review in *Hampton.*")).

220. United States v. Russell, 411 U.S. 423, 425-26 (1973).

221. *Hampton*, 425 U.S. at 485, 489-91.

222. *Id.* at 488-91 (citing United States v. Russell, 411 U.S. 423 (1973)).

223. *Id. See also supra* notes 214-19 and accompanying text.

224. 342 U.S. 165 (1952).

225. 425 U.S. 484 (1976).

subsequent deep regret over having done so. By 1976, the Supreme Court had left open only "a most narrow . . . due process channel."[226] The Ninth Circuit picked up where the Supreme Court left off, and as the following discussion shows, has narrowed the channel even more.

IV. THE NINTH CIRCUIT AND THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE

To what level must the government's conduct rise to be considered "outrageous" and therefore unconstitutional? The Ninth Circuit has sought to answer this question by evaluating whether the conduct is "so grossly shocking as to violate the universal sense of justice."[227] The court has held that under a few specific sets of circumstances, the government's conduct will automatically be held unconstitutional, and the court will honor the outrageous government conduct defense.[228] However, the better part of the court's efforts have involved deciding what does *not* constitute outrageous conduct. The court has undertaken to eliminate most government conduct from a "list" of possible violations of due process.[229] As a result, very few types of conduct currently fit within

226. United States v. Ryan, 548 F.2d 782, 789 (9th Cir. 1976), *cert. denied*, 430 U.S. 965 (1977).

227. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983) (quoting United States v. Ryan, 548 F.2d 782 (9th Cir. 1976), *cert. denied*, 430 U.S. 965 (1977)).

228. *See* United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir.), (citing Greene v. United States, 454 F.2d 783 (9th Cir. 1971) ("[T]he outrageous government conduct defense [succeeds where] the government essentially manufactured the crime."), and Huguez v. United States, 406 F.2d 366, 381 (9th Cir. 1968) ("[E]xtreme cases of police brutality [do not] define the limits of unconstitutionally outrageous governmental conduct.")), *vacated on other grounds sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986); United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983) (quoting United States v. Ryan, 548 F.2d 782 (9th Cir. 1976), *cert. denied*, 430 U.S. 965 (1977) ("Prosecution is barred . . . when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice.' ").

229. *See* United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987) (no outrageous conduct where prostitute-informant became sexually and emotionally involved with defendant for five months in order to lead defendant to FBI), *cert. denied*, 108 S. Ct. 233 (1988); United States v. Tavelman, 650 F.2d 1133 (9th Cir. 1981) (no outrageous conduct where government photographed informant with imitation cocaine, put informant in touch with middlemen, and had informant encourage defendants to travel interstate to inspect and purchase merchandise), *cert. denied*, 455 U.S. 939 (1982); United States v. Penn, 647 F.2d 876 (9th Cir.) (en banc) (no outrageous conduct where police officer bribed defendant's five-year-old child into pointing out parent's drug cache), *cert. denied*, 449 U.S. 903 (1980); United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977) (no outrageous conduct where informant threatened to kill defendant's friends unless defendant carried out proposed crime), *cert. denied*, 436 U.S. 926 (1978); United States v. Ryan, 548 F.2d 782 (9th Cir. 1976) (no outrageous conduct where government recruited informant by: (1) foretelling, as consequences of refusing to assist government, a lengthy prison sentence and serious health problems, and; (2) admonishing the informant not to retain legal counsel), *cert. denied*, 430 U.S. 965 (1977).

the court's narrow definition of "outrageousness."

The Ninth Circuit cases involving *per se* unconstitutional government conduct were decided prior to *United States v. Russell*[230] and *Hampton v. United States*.[231] The first of these cases was *Huguez v. United States*.[232] In that case, officers obtained the evidence used to try the defendant on drug smuggling charges by forcibly searching the defendant's rectal cavity.[233] Customs agents stripped the defendant, handcuffed him, threw him on a table, applied pressure to his head, shoulders and back, and forcibly spread his legs to allow a government physician to probe the defendant's rectum.[234] The Ninth Circuit dismissed the indictment, holding that: (1) the search was unreasonable under the fourth amendment; and (2) violated the defendant's fifth amendment due process rights.[235] The Ninth Circuit has interpreted *Huguez* as establishing that "extreme cases of police brutality" cannot, because of due process requirements, result in conviction.[236]

Three years later, in *Greene v. United States*,[237] the court reversed convictions for bootlegging and conspiracy on grounds that the government's investigative conduct violated due process.[238] In *Greene*, an undercover government agent contacted the defendants, posed as a gangster interested in distributing illegally distilled whiskey, supplied a still, a place of operation, an operator, sugar and containers, and was the sole purchaser of the whiskey over a period of three and one-half years.[239] The Ninth Circuit held that the governmental activity rendered the conviction "repugnant to American criminal justice."[240] *Greene* is seen as having set forth the rule that due process standards preclude prosecution or conviction where "the government essentially manufactured the

230. 411 U.S. 423 (1973).

231. 425 U.S. 484 (1976).

232. 406 F.2d 366 (9th Cir. 1968).

233. *Id.* at 367.

234. *Id.* at 372-73.

235. *Id.* at 382. The fourth amendment to the Constitution governs searches and seizures by the government, and provides:

> The right of the people to be secure in their persons, 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. U.S. CONST. amend. IV.

236. United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir.), *vacated on other grounds sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986). *Bogart* involved interstate real estate fraud. *Id.* at 1429-30.

237. 454 F.2d 783 (9th Cir. 1971).

238. *Id.* at 787.

239. *Id.* at 784-86.

240. *Id.* at 787.

crime."[241]

Aside from those two cases, the Ninth Circuit has not added any other types of government conduct to the list of unconstitutional investigative behavior. In fact, the court recently summed up the various government conduct that will *not* be considered violative of a defendant's due process rights.[242] In *United States v. Bonanno*,[243] the Ninth Circuit held that the outrageous government conduct defense is not available where:

> (1) the defendant was already involved in a continuing series of similar crimes, or the charged criminal enterprise was already in progress at the time the government's agent became involved;
>
> (2) the agent's participation was not necessary to enable the defendants to continue the criminal activity;
>
> (3) the agent used artifice and strategem to ferret out criminal activity;
>
> (4) the agent infiltrated a criminal organization; and[244]
>
> (5) the agent approached persons already contemplating or engaged in criminal activity.[245]

Although the instances in which the Ninth Circuit will honor the outrageous government conduct defense are very few indeed, the court continues to find that the defense is still viable.[246] The court has also stated that the list of outrageous conduct is not exclusive; the court has held that "extreme cases of police brutality [do not] define the limits of . . . outrageous government conduct."[247]

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241. *Bogart*, 783 F.2d at 1436 (citing Greene v. United States, 454 F.2d 783 (9th Cir. 1971)).

242. United States v. Bonanno, 852 F.2d 434 (9th Cir. 1988).

243. *Id.*

244. In light of the court's previous cases, the Ninth Circuit's test should be read in the disjunctive, despite the court's using the word "and" here. In the past, the court has not insisted that all of the types of government conduct listed in *Bonanno* occur simultaneously, to preclude application of the outrageous government conduct defense. For example, the Ninth Circuit barred application of the defense in *Reynoso-Ulloa*, 548 F.2d at 1341. In that case, the government informant did not infiltrate a criminal organization, but in effect "used artifice and strategem to ferret out criminal activity," by leading the defendants to believe that they could work with the informant to develop a heroin-smuggling ring. *Id.* at 1331.

245. *Id.* at 437 (citing United States v. Bogart, 783 F.2d 1428, 1437-38 (9th Cir.), *vacated on other grounds sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986).

246. United States v. Simpson, 813 F.2d 1462, 1465 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 233 (1988) ("Our circuit has continued to entertain complaints by defendants that their outrageous treatment by law enforcement officers warrants dismissal of their indictment.").

247. *Bogart*, 783 F.2d at 1436.

A. A Gap Between Promise and Judicial Performance

Unfortunately, these statements by the court appear empty in light of several other Ninth Circuit cases. Since the early 1970s, the court has at times wrongfully rejected claims of outrageous government conduct.[248] In these cases, the conduct at issue either clearly violated due process, according to Ninth Circuit precepts, or should have been and was not added to the court's list of what constitutes illegal behavior on the part of government agents.

1. A case in which the Ninth Circuit should have considered the conduct outrageous, according to its own precepts

The Ninth Circuit has firmly stated that it will find a due process violation and honor the outrageous government conduct defense if "the government essentially manufactured the crime."[249] This section demonstrates that the court has not always stayed true to its word.[250] It is helpful to briefly examine two cases in which the government conduct was not conclusively "manufacturing," and to compare them with a case in which the government clearly manufactured the criminal activity.

a. defendant-initiated criminal activity

In *United States v. So*,[251] "the creative inspiration for the charged crimes was provided by [the defendants]."[252] In *So*, the Internal Revenue Service (IRS) was investigating the manager and associates of a bank on suspicion of money laundering.[253] The IRS first suspected criminal activity when the bank branch manager failed to file deposit reports as

248. *See* United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987) (no outrageous conduct where prostitute-informant became sexually and emotionally involved with defendant for five months in order to lead defendant to FBI), *cert. denied*, 108 S. Ct. 233 (1988); United States v. Tavelman, 655 F.2d 1133 (9th Cir. 1981) (no outrageous conduct where government designed and facilitated initiation of interstate heroin dealing scheme), *cert. denied*, 455 U.S. 939 (1982); United States v. Penn, 647 F.2d 876 (9th Cir.) (en banc) (no outrageous conduct where police officer bribed defendant's five-year-old child into revealing whereabouts of parent's suspected drug cache), *cert. denied*, 449 U.S. 903 (1980); United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977) (no outrageous conduct where informant threatened to kill defendant's friends, in order to ensure defendant's continued participation in criminal scheme), *cert. denied*, 436 U.S. 926 (1978).

249. United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir.), *vacated on other grounds sub nom.* United States v. Wingender, 790 F.2d 802 (1986) (citing Greene v. United States, 454 F.2d 783 (9th Cir. 1971)).

250. *See infra* notes 381-98 and accompanying text.

251. 755 F.2d 1350 (9th Cir. 1985).

252. *Id.* at 1353.

253. *Id.* at 1352.

required by the Currency Reporting Act.[254] The government sent an informant, who posed as someone interested in setting up a money laundering operation, to meet with the manager.[255] At the manager's suggestion, the parties formed a fictitious corporation to launder what would be, unknown to the manager, IRS-supplied money.[256] After meeting with defendant So in Hong Kong, undercover IRS agents followed So's intricate deposit instructions and supplied $545,390 to the operation in just two weeks.[257]

Following trial and conviction, So appealed and the Ninth Circuit affirmed.[258] The court of appeals, on the basis of the manager's suggesting money laundering and So's formulating the deposit plan, rejected So's contention that the government had manufactured the criminal activity.[259] The facts of the case tied initiation of the criminal enterprise to the defendants.[260] The situation therefore did not warrant application of the outrageous government conduct defense.[261]

In other situations, though, the court has not found it as easy to determine whether the government manufactured the crime. In *United States v. Wylie*,[262] the Ninth Circuit affirmed the defendants' convictions of manufacturing and distributing LSD, and rejected their claim that the government's conduct violated due process.[263] In *Wylie*, informant Bloch, a friend of one of the defendants, told DEA agents of the defendants' scheme to make and sell LSD.[264] In late November, 1978, a defendant met with undercover DEA agents, who agreed to supply him with a necessary chemical and who asked to be paid in LSD.[265] By December 1, 1978, this defendant had sold the agents 30,400 LSD tablets.[266] The DEA, though, presumably hoping to charge multiple felonies,[267] delayed arresting the seller and the other defendants until January 18, 1979.[268] During this one-and-one-half-month period, the agents continu-

254. *Id.* (citing 31 U.S.C. §§ 5311-5322 (Supp. 1988)).
255. *Id.* at 1353.
256. *Id.*
257. *Id.* at 1352.
258. *Id.*
259. *Id.* at 1353-54.
260. *Id.*
261. *Id.*
262. 625 F.2d 1371 (9th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).
263. *Id.* at 1374.
264. *Id.*
265. *Id.* The suspect indicated his desire to produce up to one kilogram of LSD per month. *Id.*
266. *Id.*
267. *Id.* at 1377.
268. *Id.* at 1375.

ally supplied the essential ingredient for LSD, and the defendants manufactured and sold the government 282,400 more LSD tablets.[269] In appealing their convictions, the defendants argued that the government's suggesting payment in the form of LSD constituted outrageous conduct.[270] The defendants claimed that but for the government's offer, they would not have sold the drug to the agents.[271]

The Ninth Circuit rejected the defendants' claim, characterizing the government's conduct as "good, solid undercover investigative work."[272] Examination of *Wylie* does not conclusively establish that the government initiated the criminal enterprise. However, the government's urging that it be paid in LSD[273] cuts against the proposition that the agents' conduct was wholly non-initiatory.

b. government-initiated criminal activity: United States v. Tavelman

United States v. Tavelman[274] provides an example of government-initiated criminal activity. *Tavelman* arose from a DEA investigation of suspected Los Angeles narcotics distributors.[275] Baron, a Douglas County, Nevada, jail inmate, contacted a DEA agent and offered to assist the agent in undercover operations against the suspected distributors.[276] The DEA retained him as an informant, and Baron went to Los Angeles, where the DEA began the operation at issue in *Tavelman*.[277] Hoping to attract narcotics distributors, the DEA photographed Baron, portraying him with large bags of what was supposed to be cocaine.[278]

During the days that followed, Baron, playing the role of a cocaine supplier, met various middlemen.[279] Silverman was one of these middlemen. Silverman attempted to convince his friend, Job, to buy Baron's cocaine.[280] Job was reluctant at first, but after a visit from Baron, said he would bring a friend, Tavelman, the defendant, from Los Angeles to Reno, Nevada, to inspect the cocaine and put down a deposit toward its

269. *Id.* at 1374-75.
270. *Id.* at 1377.
271. *Id.*
272. *Id.* at 1377-78.
273. *Id.*
274. 650 F.2d 1133 (9th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).
275. *Id.* at 1135.
276. *Id.* The opinion says nothing about how the informant knew to contact the DEA agent. It is not clear, from the Ninth Circuit's opinion, whether the informant knew of any specific operations in progress, or whether the agents had previously dealt with the informant.
277. *Id.*
278. *Id.*
279. *Id.* The opinion does not discuss how the informant knew to contact these middlemen.
280. *Id.* at 1135-36.

purchase.[281] When Job and Tavelman arrived in Reno, Baron showed them the (imitation) cocaine, and the two suspects produced half of the purchase money.[282] After Baron, Job and Tavelman split up, DEA agents arrested Job and Tavelman separately.[283]

Both defendants were convicted of conspiracy to possess cocaine with intent to distribute[284] and of violations of the Travel Act.[285] On appeal, their due process-based contention was that the government "originat[ed], conceptualiz[ed], and engineer[ed] the entire plan,"[286] which violated their due process rights. The Ninth Circuit disagreed,[287] holding that "although the record provides a basis for defendants' argument . . . the conduct complained of here does not reach that extreme area in which it is 'outrageous' or 'grossly shocking.' "[288] The court's due process analysis stopped there.[289]

The defendants' argument, however, did not warrant such speedy dismissal. It is difficult to imagine what constitutes "originating, conceptualizing, and engineering the entire plan"[290] if the government's conduct in *Tavelman* did not. The cocaine-selling scheme was the government's idea; the DEA and its informant decided to move on narcotics distributors.[291] Also, photographing the informant with several bags of what was supposedly part of a supply of "very good cocaine"[292] would, by most accounts, amount to "conceptualizing,"[293] not to mention initiating, the criminal activity. Finally, sending the informant into the field to locate middlemen and potential customers, then arranging for the suspects' interstate travel to inspect the merchandise, seems like "engineering the entire plan."[294] It is also odd that although "the record provide[d] a basis for the defendants' argument,"[295] they did not pre-

281. *Id.* at 1136.

282. *Id.* Baron produced $24,000. *Id.*

283. *Id.*

284. *Id.* at 1135 (21 U.S.C. §§ 841(a)(1), 846 (1976)).

285. 18 U.S.C. § 1952(a)(3) (1976).

286. *Tavelman*, 650 F.2d at 1139-40.

287. *Id.*

288. *Id.* at 1140 (quoting United States v. McQuin, 612 F.2d 1193, 1196 (9th Cir.), *cert. denied*, 445 U.S. 955 (1980) and United States v. Smith, 538 F.2d 1359, 1361-62 (9th Cir. 1976)).

289. *Id.* at 1139-40.

290. *Id.* at 1139.

291. *Id.* at 1135.

292. *Id.*

293. *Id.* at 1139.

294. *Id.*

295. *Id.* at 1140.

vail.[296] The court should not have deemed the argument meritorious and then allowed the government to prevail.[297] The facts indicate a *strong* basis for the defendants' claim of outrageous government conduct.[298] The government's conduct was not nearly as limited to participation as it was in *So*,[299] and the conduct was more clearly initiatory than that in *Wylie*.[300] The court failed to adequately explain its opinion.[301] In the final analysis, *United States v. Tavelman* was wrongly decided.

2. Additional instances of governmental conduct that the Ninth Circuit should have considered outrageous

a. United States v. Penn

In *United States v. Penn*,[302] Seattle police, armed with a state search warrant, went to the defendant's home hoping to seize evidence of a heroin distribution ring.[303] The defendant, her children and others were suspected of running the ring.[304] For thirty minutes, officers searched for the quantities of heroin believed to be on the premises.[305] Then, one officer, escorting the defendant's five-year-old child, Reggie, to the bathroom, asked Reggie if he knew the heroin's location, and Reggie nodded affirmatively.[306] A few minutes later, the officer asked Reggie to lead him to the heroin.[307] Reggie hesitated, so the officer offered Reggie five dollars, and Reggie led the officer to the home's backyard and pointed to the grass.[308] The police began digging, and within minutes, found 132.9 grams of heroin.[309] By the end of the afternoon, the police had recovered 14.6 additional grams without Reggie's help.[310]

296. *Id.* at 1139.

297. *Id.*

298. See also *infra* notes 370-90 and accompanying text for a discussion of the merits of the defendants' claims.

299. *So*, 755 F.2d at 1352-53. See also *supra* notes 251-61 and accompanying text for a full discussion of *So*.

300. *Wylie*, 625 F.2d at 1374-75. See also *infra* notes 356-67 and accompanying text for a full discussion of *Wylie*.

301. *Tavelman*, 650 F.2d at 1139-40. The court's cursory discussion merely announced the holding in the case. *Id.* The bulk of the opinion was devoted to issues other than whether there was outrageous government conduct. *Id.* at 1135-39, 1140-41.

302. 647 F.2d 876 (9th Cir.) (en banc), *cert. denied*, 449 U.S. 903 (1980).

303. *Id.* at 878.

304. *Id.* at 878-79.

305. *Id.* at 879.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* This quantity of heroin had been stored in a jar. *Id.* The officer had asked Reggie if he knew the location of any heroin balloons. *Id.*

310. *Id.*

A state judge granted the defendant's motion to suppress the evidence and dismissed the case.[311] Soon thereafter, the federal government brought charges against the defendant for possession of a controlled substance with intent to distribute.[312] The defendant successfully asked the federal district court to suppress the evidence on the ground that the government's conduct in bribing Reggie violated the defendant's due process rights.[313] The government appealed the order to the Ninth Circuit.[314]

The court of appeals reversed the district court's order.[315] It disagreed with the district court's position that "the bribery of a child of tender age by a policeman in order to obtain evidence to be used against a parent represents police conduct which is shocking to the conscience and is . . . so violative of the decencies of civilized conduct to be a deprivation of due process."[316] The court of appeals decided that due process had not been violated since: (1) the government broke no law; (2) society had a compelling interest in curtailing heroin dealing; (3) this type of incident appeared to be an isolated one whose frequent recurrence was not likely; and (4) given the defendant's practice of enlisting her children's help in the heroin ring, the government's intrusion into the "circle of family confidence"[317] did not shock the conscience.[318]

The circuit court also chided the district court for what the higher court saw as an attempt to use the outrageous government conduct defense as a panacea for questionable law enforcement conduct.[319] The court emphasized that government conduct offensive to "a judge's every notion of what is morally best" was not sufficient justification for granting a due process remedy.[320] The Ninth Circuit conceded that it "disapprove[d] of the police tactic used."[321] However, even if the court's reason for expressing dissatisfaction was to alert the government to ongoing constitutional concerns, the result gave the government the choice of whether or not to listen.

311. *Id.*
312. *Id.* (citing 21 U.S.C. § 841(a)(1) (Supp. 1988)).
313. *Id.* at 879.
314. *Id.*
315. *Id.* at 885.
316. *Id.* at 879 (citing memorandum issued by district court).
317. *Id.* at 882.
318. *Id.* at 881.
319. *Id.*
320. *Id.*
321. *Id.*

b. United States v. Reynoso-Ulloa

In *United States v. Reynoso-Ulloa*,[322] the Ninth Circuit held that the United States Constitution allows an undercover government informant to rekindle a criminal suspect's enthusiasm for carrying out a proposed crime by threatening to kill the suspect's friends.[323]

In *Reynoso-Ulloa*, the defendant met the government's informant, Sheen, in California.[324] Sheen had formerly worked as an informant for the federal Drug Enforcement Administration (DEA), and had relocated to California to escape threats on his life.[325] After conversations in which Sheen and the defendant discussed the possibility of smuggling heroin into the United States from Mexico, Sheen called the Seattle DEA agents for whom he had worked.[326] At the agents' request, Sheen continued meeting with the defendant, while the Seattle agents helped develop an undercover scheme for Sheen.[327] As the scheme progressed, Sheen and the defendant traveled interstate to meet with the agents, and the suspect sold small amounts of heroin to the agents.[328] The group also developed plans for ongoing, larger operations.[329] Upon a prearranged heroin delivery in Los Angeles, DEA agents arrested Reynoso-Ulloa.[330]

The defendant was subsequently convicted of distribution of heroin, possession with intent to distribute,[331] conspiracy, and for use of the telephone to facilitate the conspiracy.[332] One of the defendant's claims on appeal was that Sheen had threatened him a few days prior to the arrest, thereby violating the defendant's due process rights.[333] Reynoso-Ulloa alleged that he had been threatened when he told Sheen of his doubts about making the delivery.[334] The defendant contended that Sheen was upset about Reynoso-Ulloa's having second thoughts, and that Sheen

322. 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

323. *Id.* at 1341.

324. *Id.* at 1331.

325. *Id.*

326. *Id.*

327. *Id.* Sheen asked the agents if they were interested "in doing a large amount of heroin in the San Diego and Tijuana areas." *Id.*

328. *Id.* at 1332.

329. *Id.* at 1331-33. The agents posed as Seattle organized crime figures interested in finding a new source of heroin for their distribution operations. *Id.* at 1331.

330. *Id.* at 1332 n.5.

331. *Id.* at 1331.

332. *Id.* at 1331-32. Reynoso-Ulloa also claimed that he had been entrapped, and that the trial court's instructions on entrapment were erroneous.

333. *Id.* at 1328.

334. *Id.*

threatened to "do," or kill,[335] Reynoso-Ulloa's friends unless the defendant agreed to complete the operation.[336]

The Ninth Circuit rejected the defendant's claim of outrageous government conduct and affirmed his conviction.[337] The court stated that given the context, the informant's threat to kill the defendant's friends did not constitute outrageous government conduct.[338] The threat, the court said, was made in the regular course of "puffing,"[339] and did not mark the first time "false claims [or] veiled threats" had been made by defendants and informants alike.[340] Moreover, the judges cautioned that such behavior had to be expected from "persons of [the] lowest caliber" who typically participated in drug trafficking.[341]

Reynoso-Ulloa is another example of the Ninth Circuit construing the outrageous government conduct defense too narrowly. The court departed from the Supreme Court's two analytical approaches that the Supreme Court seems to have suggested in *United States v. Russell*.[342] The *Reynoso-Ulloa* court allowed the minute-to-minute tone of an investigation to govern determination of the conduct's constitutionality.[343] *Reynoso-Ulloa*'s implications were twofold: First, the Ninth Circuit condoned the government's investigative activities, and thus left open the possibility that the government could constitutionally behave similarly in the future; second, the court's examination of the context in which the challenged government conduct occurred established a new means of evaluating, and most likely rejecting, future due process claims.[344] Ultimately, although the Ninth Circuit noted that it found the government's "conduct . . . by no means commendable,"[345] such conduct will not be deterred.

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335. *Id.* It was determined at trial that to "do" someone means to kill him or her. *Id.* at 1328 n.21.

336. *Id* at 1338. Testifying at trial, Sheen recounted his own words:

> I told Alfredo [Reynoso-Ulloa], I said, you know, you mother fucker, they are making it, I'm swinging right now. I mean, you know, these people are pissed. My old man ain't too happy with this whole program and I told him, I said if I'm gonna get my ass in this much shit, I'm gonna do you cocksuckin fuckin' Mexican friends, and he said okay, I don't blame you, so he said I'll put you right into it. So he did.

Id. n.21 (citing reporter's trial transcript at 320).

337. *Id.* at 1341.

338. *Id.*

339. *Id.* at 1339.

340. *Id.*

341. *Id.*

342. 411 U.S. 423 (1973).

343. *Reynoso-Ulloa*, 548 F.2d at 1339.

344. *Id.* at 1341.

345. *Id.* at 1339.

c. United States v. Simpson

In *United States v. Simpson*,[346] the Ninth Circuit reaffirmed an earlier holding[347] that "there was no due process violation when . . . a paid informant had sex with her suspect."[348] *Simpson* involved a Federal Bureau of Investigation (FBI) probe of defendant Simpson's suspected heroin dealing.[349] The FBI hired Helen Miller, a known prostitute, heroin addict and fugitive from Canadian drug charges, as an informant.[350] One day, as the defendant was leaving the Los Angeles International Airport, Miller and a female friend posed as "stranded travelers"[351] and Simpson drove them into the city.[352] Miller and the defendant soon began a sexual relationship.[353] This relationship lasted approximately five months.[354] Eventually, Miller took Simpson to meet her "friends" interested in buying heroin; the "friends" were undercover FBI agents.[355] The agents arrested the defendant after executing a drug deal,[356] and the government indicted him on drug charges.[357] He moved for suppression of wiretap evidence,[358] and for dismissal of the indictment on grounds of outrageous government investigative conduct.[359] The district court granted both motions.[360] Upon granting the defendant's motion to dismiss, the district court held that, as the Supreme Court in *United States v. Russell* had predicted, the "some day"[361] for applying the outrageous government conduct defense had at last arrived.[362] Specifically, the district court held that

> First, "the government's manipulation of Helen Miller into becoming an informant," second, "the Government's continued

346. 813 F.2d 1462 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 233 (1988).
347. United States v. Prairie, 572 F.2d 1316 (9th Cir. 1978).
348. *Simpson*, 813 F.2d at 1467 (citing United States v. Prairie, 572 F.2d 1316 (1978)).
349. *Id.* at 1464.
350. *Id.*
351. *Id.* The female friend was also a government informant. *Id.*
352. *Id.*
353. *Id.*
354. *Id.* at 1465.
355. *Id.* at 1464.
356. *Id.*
357. *Id.*
358. *Id.* The FBI had electronically surveilled Simpson's telephone conversations. *Id.*
359. *Id.*
360. *Id.*
361. *Simpson*, 813 F.2d at 1464 (citing district court's reliance on *Russell*'s reservation that a court "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." *Russell*, 411 U.S. at 431-32)).
362. *Id.*

> employment of Miller despite her known status as a heroin addict and prostitute, and despite her numerous arrests," and third, "the Government's continued use of Miller as an informant after learning of her sexual involvement with . . . Simpson"[363]

forced the court to dismiss the indictment and thereby deny the government " 'the fruits of its heinous acts.' "[364] The government appealed the order, and the Ninth Circuit reinstated the indictment.[365] The court rejected the district court's conclusion that "the Government cannot be permitted to stoop to these depths to investigate suspected criminal offenders."[366]

A study of *Simpson* suggests that the district court was incorrectly reversed. The Ninth Circuit justified, on several grounds, the government's allowing Miller to remain an informant despite her ongoing sexual relationship with Simpson.[367] First, the circuit court reasoned that *Simpson* was distinguishable from cases in which the defendant was in some way "physically or psychologically coerced."[368] Here, the court said, Simpson did not suffer this kind of abusive inducement.[369] On the contrary, "he seem[ed] . . . quite willing to become sexually and emotionally involved with [Miller]."[370] Second, the court rejected the argument that Miller's use of sex amounted to outrageous conduct.[371] The court observed that "to win a suspect's confidence, an informant must make overtures of trust and must enjoy a great deal of freedom in deciding how best to establish a rapport with the suspect."[372] Third, the circuit court understood the FBI's needs in the situation. The operation's success, the court knew, depended on Miller's eventually leading the defendant to the agents.[373] The court of appeals held that it would be unreasonable to punish the government for allowing the operation to continue unchecked.[374] The court acknowledged that such judicial action would

363. *Id.* (quoting district court's findings).
364. *Id.* (quoting district court's findings).
365. *Id.*
366. *Id.* (quoting district court's findings).
367. *Id.* at 1467-68. "At some point, the FBI became aware of Miller's sexual involvement with Simpson . . . [and] deliberately closed its eyes to Miller's ongoing conduct." *Id.* (citing reporter's transcript at 47).
368. *Id.* at 1466.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.* The court theorized that an informant "might perceive a need to establish a physical as well as emotional bond with the suspect." *Id.*
373. *Id.* at 1468.
374. *Id.*

amount to "requiring the FBI to pull out just as an informant's efforts [were] coming to fruition."[375]

Simpson seems to be a case in which the Ninth Circuit simply wanted to allow the prosecution to continue, and therefore did not find a due process violation. The Ninth Circuit's opinion followed a district court finding of outrageous government conduct.[376] The district court's finding was reached after an eight-day evidentiary hearing.[377] The district court relied on the "oft-quoted dictum"[378] in *Russell* to support its finding;[379] the Ninth Circuit relied on the same language to foreclose application of the due process-based defense.[380]

3. Understanding current Ninth Circuit case law

It is important to ponder why the Ninth Circuit did not find the government's investigative conduct outrageous in *Tavelman*,[381] *Penn*,[382] *Reynoso-Ulloa*,[383] and *Simpson*.[384] First, did the court take a particular analytical approach to evaluating the constitutionality of government investigative conduct? Was its legal reasoning similar to the Supreme Court's in *United States v. Russell*[385]—did it decide on the basis of factual precedent or law enforcement necessities? Or, did the court take a different approach? Second, could there be hidden, underlying reasons, apart from legal analysis, why the Ninth Circuit decided as it did?

The Ninth Circuit has used variations of both analytical approaches suggested in *Russell*,[386] and in other cases has constructed its own analy-

375. *Id.* The court did not fault Miller for "engag[ing] in sexual activity on her own initiative." *Id.*

376. *Id.* at 1464.

377. *Id.*

378. *Id.* The "oft-quoted dictum" referred to is the Supreme Court's statement in *Russell* that a court "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* (citing United States v. Russell, 411 U.S. 423, 431-32 (1973)).

379. *Id.*

380. *Id.* at 1464-65.

381. United States v. Tavelman, 650 F.2d 1133 (9th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

382. United States v. Penn, 647 F.2d 876 (9th Cir.) (en banc), *cert. denied*, 449 U.S. 903 (1980).

383. United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

384. United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 233 (1988).

385. 411 U.S. 423 (1973).

386. *Id.* For a discussion of these approaches, see *supra* notes 177-88 and accompanying text.

sis. For example, in *United States v. Ryan*,[387] the court held that the government's conduct in that case was not, "measured against the *Russell* standard," violative of due process.[388] However, the Ninth Circuit did not use *Russell*'s "factual precedent" approach[389] to distinguish *Ryan*'s facts from those of other cases in which the government violated due process. Instead, the court merely stated that a standard existed, and without articulating the standard, insisted that it did not bear on the present case.[390] On occasion, the court has also used the "sliding scale" approach.[391] The court used this approach in *United States v. Penn*.[392] There, one of the court's reasons for upholding an officer's bribery of the defendant's child was that effective operations against drug dealing required the use of such tactics.[393] In *United States v. Reynoso-Ulloa*,[394] the court used a different approach,[395] holding that the governmental conduct's constitutionality should be evaluated within the context of a specific undercover operation.[396]

Understanding how these approaches work explains why the Ninth Circuit so seldom finds due process violations. As previously noted,[397] the "sliding scale" analysis is fairly open-ended, in the sense that it countenances continual deference to the government. The *Reynoso-Ulloa* method of exploring due process issues in the context of the individual investigation similarly emphasizes allowing the government to complete its operations.[398] In so doing, the approach trivializes constitutional concerns. Both of these approaches virtually dictate denial of a defendant's motion, and thus their use limits, and effectively bars, application of the outrageous government conduct defense.

Why does the Ninth Circuit use these approaches if, one after the other, the approaches disfavor defendants? The court may regard law enforcement investigations so highly that it is willing to rubberstamp virtually any form of undercover government activity. Or, the judges might fear that tying the government's investigative hands in the slightest degree is tantamount to feeding America to criminals. Another reason

387. 548 F.2d 782 (9th Cir. 1976), *cert. denied*, 430 U.S. 965 (1977).
388. *Id.* at 788 (citing United States v. Russell, 411 U.S. 423 (1973)).
389. *See supra* notes 177-78 and accompanying text.
390. *Ryan*, 548 F.2d at 788.
391. *Id.; see also supra* notes 179-88 and accompanying text.
392. 647 F.2d 876 (9th Cir.) (en banc), *cert. denied*, 449 U.S. 903 (1980).
393. *Id.* at 881. *See supra* note 318 and accompanying text.
394. 548 F.2d 1329, 1339 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).
395. *Id.* at 1339. *See supra* notes 337-38 and accompanying text.
396. *Reynoso-Ulloa*, 548 F.2d at 1339.
397. *See supra* notes 179-88 and accompanying text.
398. *Reynoso-Ulloa*, 548 F.2d at 1139.

might be concern that any attempt on the court's part to enforce the defense will be struck down by the Supreme Court. Speculation aside, the fact remains that today, the Ninth Circuit sanctions virtually unlimited investigative power of government law enforcement agencies, at the expense of suspects' due process rights.

V. PROPOSAL

A. How the Court Could Implement Change

This Comment proposes broader recognition of the outrageous government conduct defense by the Ninth Circuit. The court must rigorously enforce existing doctrine, deem additional types of government conduct unconstitutional, and should approach all outrageous government conduct claims with renewed zeal toward upholding due process protections.

First, where the government conduct at issue in a case clearly violates the Ninth Circuit's previously promulgated due process standards,[399] the court should honor the outrageous government conduct defense. Thus, where the government "essentially manufacture[s] the crime,"[400] the Ninth Circuit should nullify the prosecution or reverse the conviction, on due process grounds.[401]

Second, the court should widen the range of government conduct considered unconstitutional. In this way, the court would give substance to its promise that "extreme cases of police brutality [do not] define the limits of . . . outrageous government conduct."[402] For example, to avoid

399. *See* United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir.) (citing Greene v. United States, 454 F.2d 783 (9th Cir. 1971) ("[T]he outrageous government conduct defense . . . [succeeds where] the government essentially manufactured the crime"), Huguez v. United States, 406 F.2d 366, 381 (9th Cir. 1968) ("[E]xtreme cases of police brutality [do not] define the limits of unconstitutionally outrageous governmental conduct.")), *vacated on other grounds sub nom.* United States v. Wingender, 790 F.2d 802 (1986); United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983) (quoting United States v. Ryan, 548 F.2d 782 (9th Cir. 1976) ("Prosecution is barred . . . 'when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice' "), *cert. denied*, 430 U.S. 965 (1977)).

400. United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir.), *vacated on other grounds sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (citing Greene v. United States, 454 F.2d 783 (9th Cir. 1971)).

401. United States v. Tavelman, 650 F.2d 1133 (9th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982), is a case where the government initiated the criminal activity. *Id.* at 1140. However, the Ninth Circuit in that case did not honor the outrageous government conduct defense. *Id.* The *Tavelman* decision should, in the interests of due process rights, be viewed as an anamoly, and the preexisting standard, discussed *supra* notes 237-41 and accompanying text, should continue to be the rule.

402. *Bogart*, 783 F.2d at 1436.

a recurrence of the situation in *United States v. Reynoso-Ulloa*,[403] the court should declare the government's conduct unconstitutional if the government, as a means of ensuring suspects' participation in criminal activity, threatens suspects or others with violence. Also, to prevent repetition of the problem in *United States v. Simpson*,[404] the court should honor a claim of outrageous government conduct where the informant's conduct, had it been performed by a government officer rather than the informant, would have been disapproved by the government agency.

The court should similarly scrutinize the methods by which government agencies recruit informants, and honor the outrageous government conduct defense where an officer's conduct in soliciting a person to be an informant does not comport with standard agency practice. Thus, scenarios like that in *United States v. Penn*[405] would be avoided. Policy considerations support the court's implementing these changes: (1) government agencies would be forced to better control their informants; (2) defendants' due process rights would be better protected; and (3) the court would enhance its credibility and integrity.

Another consideration is that each time the Ninth Circuit erroneously rejects a defendant's outrageous government conduct claim, it effectively condones the government conduct that precipitated the claim. For example, in *United States v. Simpson*,[406] the court rejected the defendant's argument that the government engaged in outrageous conduct by allowing a five-month sexual and emotional involvement between Simpson and an informant.[407] The court did not expressly approve of the government's methods in the case, but its decision sent a strong message that such methods were constitutionally permissible and could be used again.

One consequence, then, of so seldom honoring the outrageous government conduct defense is that more types of questionable government

403. 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). In that case, a government informant threatened to kill the defendant's friends, in order to ensure the defendant's continued participation in the criminal scheme. *Id.* at 1338 n.21. See *supra* notes 322-45 and accompanying text for a full discussion of *Reynoso-Ulloa*.

404. 813 F.2d 1462 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 233 (1988). In *Simpson*, the informant-prostitute was sexually and emotionally involved with the defendant, as part of the government's investigation, for a period of five months. *Id.* at 1465. See *supra* notes 346-80 and accompanying text for a full discussion of *Simpson*.

405. 647 F.2d 876 (9th Cir.) (en banc), *cert. denied*, 449 U.S. 903 (1980). In *Penn*, a police officer bribed the defendant's five-year-old child to gain information as to the whereabouts of a suspected drug supply. *Id.* at 879. See *supra* notes 302-21 for a full discussion of *Penn*.

406. 813 F.2d 1462 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 233 (1988); see also *supra* notes 346-80 and accompanying text for a full discussion of *Simpson*.

407. *Simpson*, 813 F.2d at 1465.

conduct are permitted, and fewer types of seemingly egregious behavior are contestable. Over time, as the due process means of attack becomes largely unavailable, persons subject to intensive government investigation lose a significant measure of constitutional protection. Furthermore, as law enforcement agencies acquire greater investigative power over suspected criminal offenders, *every* person in the Ninth Circuit's jurisdiction enjoys less freedom. Law-abiding persons might not be the targets of undercover operations, but they still must live in a society over which the government's police power casts an ever-growing shadow.

The Ninth Circuit might envision certain obstacles to implementing the suggested changes to its approach. First, it might view a request to more broadly apply the defense as a demand that the court wholly reject years of precedent. This Comment's proposal is not nearly so radical a suggestion. The Ninth Circuit is not asked to embrace an entirely new rule, but only to apply a moderate revision of the existing one. The court should adopt additional criteria for applying the defense, partly in order to lend credibility to the court's assurances that the defense still exists.[408]

Second, the Ninth Circuit still might hesitate for fear that the Supreme Court will reverse any lower court decision to honor the defense. The Ninth Circuit recognizes the Supreme Court's intention that the outrageous government conduct defense be very narrowly applied.[409] The court understandably wants to avoid frequent reversal of its decisions. However, the court should not overcautiously assume that the Supreme Court will frown upon any deviation from present practice. The logical projection is that the more abusive the government's conduct, the lower the risk of reversal. In such cases, the Ninth Circuit should take a risk and enforce the defense.

B. Remedial Legislation

Remedial legislation is an additional means of ensuring the outrageous government conduct defense's broader application. The defense is rooted in notions of due process,[410] and presently, the decision whether

408. *See id.* ("Our circuit has continued to entertain complaints by defendants that their outrageous treatment by law enforcement officers warrants dismissal of their indictment.").

409. United States v. Ryan, 548 F.2d 783 (9th Cir. 1976), *cert. denied*, Zeldin v. United States, 430 U.S. 965 (1977). The *Ryan* court said that "the due process channel which [the Supreme Court in] *Russell* kept open is a most narrow one." *Id.* at 789 (citing United States v. Russell, 411 U.S. 423 (1973)).

410. *See* United States v. Russell, 411 U.S. 423, 431-32 (1973). The "standard" required to honor the defense is whether "the conduct of law enforcement agents [was] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.*

to honor it involves discretionary application of a judicially created standard. Remedial legislation could provide for the defense's broader application, by requiring the courts to honor the defense in specific situations, and entrust the courts with discretion, in favor of application, in scenarios not listed in the statute. This legislative scheme is desirable, because it would guarantee the defense's application in some cases, and encourage it in others. While courts would still have discretion in certain instances, a congressional directive that the outrageous government conduct defense be meaningfully honored could reduce the risk of overly narrow judicial interpretation. Fashioned in this manner, national remedial legislation would go far in setting limits on acceptable government law enforcement conduct. Legislation could also address the persistent problem of judicial inattention to due process concerns in the context of undercover investigations.

Narrow application of the outrageous government conduct defense need not equal what appears to be, over time, virtual non-enforcement of an important standard in constitutional criminal procedure. As this Comment's proposal demonstrates, the Ninth Circuit may remedy the present law's shortcomings while still adhering, in form and in spirit, to the Supreme Court's mandate that the outrageous government conduct defense be narrowly applied.[411] In addition, Congress can design effective remedial legislation. The federal judicial and legislative branches should take these constructive steps.

VI. CONCLUSION

Former Supreme Court Justice Tom Clark once warned courts of the danger of "grant[ing] [a] right but in reality . . . withhold[ing] its privilege and enjoyment."[412] To this Author, the Ninth Circuit is guilty of this regarding the outrageous government conduct defense. However, a reasonable alternative to the present situation exists. The Ninth Circuit should apply the outrageous government conduct defense more broadly. Congress should also step in and enact legislation to guarantee this. The law in this area will be more settled, the protection of the criminally

411. *See* W. LAFAVE & A. SCOTT, *supra* note 79, § 5.2, at 431 (interpreting the *Russell* and *Hampton* decisions as establishing that "instances of government conduct outrageous enough to violate due process will be exceedingly rare").

412. Mapp v. Ohio, 367 U.S. 643, 656 (1961) (Clark, J.).

suspect against the government will be stronger, and a potential threat to public liberty will move farther and farther from our midst.

*Stephen A. Meister**

* This Comment is dedicated with love to my family. The Author would also like to thank Professors Marcy Strauss and Charlotte Goldberg for their assistance. This Comment is also dedicated to Scott Alan Hampton, and to the memory of Dean Thunick Hoffman.