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Crossing the Constitutional Line: Due Process and the Law Enforcement Justification

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Crossing the Constitutional Line: Due Process and the Law Enforcement Justification

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[1]

I. INTRODUCTION

Undercover operations such as reverse stings[2] contribute substantially to the detection, investigation, and prosecution of crime.[3] Nevertheless, these operations may also create serious risks to private persons' property, privacy, and civil liberties, and may compromise law enforcement itself.[4] Accordingly, courts must apply standards that will achieve the proper balance between effective law enforcement techniques and the preservation of civil liberties.[5] The due process defense[6] has the potential to provide this

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

2 A reverse sting is a narcotics operation in which law enforcement agents sell drugs to private citizens and then arrest the purchasers. A buy and bust operation involves the same concept, but in these cases the agents purchase the drugs from private citizens and then arrest the sellers. For the purposes of this Note, both techniques will be referred to as reverse stings.

3 *See* SENATE SELECT COMM. ON UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEP'T OF JUSTICE, FINAL REPORT, S. REP. No. 682, 97th Cong., 2d Sess. at 11, 54 (1982) [hereinafter SENATE REPORT].

4 *Id.*

5 *Id.*

6 The due process defense stems from the Fifth Amendment mandate that every citizen must be afforded due process of law. In the reverse sting context, this principle has been interpreted to mean that a defendant may not be punished if the government

necessary protection. The vagueness of the doctrine, however, and the reluctance of the Supreme Court to delineate its parameters with any kind of certainty, has rendered the due process defense largely ineffective. Although it is admittedly necessary for the due process defense to remain a flexible tool with which to judge unique circumstances, the almost complete lack of structure of the defense has undermined its viability.

The due process doctrine has been vexed by the fact that typically the issue arises in the context of aggravated narcotics or corruption cases, in which incredible pressure is exerted on courts to sustain convictions. Most courts examine due process from the point of view of the defendant, judging the defense as a method whereby an otherwise guilty person is spared punishment. The strong social and political mandate for combatting criminal activity provides a strong disincentive for a judge to hold that a defendant must be set free, even though his guilt has been proven. Accordingly, the due process defense is basically a nullity.

Some type of standard is needed to determine when conduct becomes so outrageous that the due process defense is available to a defendant. This standard can be found by tying the due process defense to the law enforcement justification. Both doctrines are predicated on the belief that a democratic society cannot condone methods of law enforcement which are themselves lawless.[7] Accordingly, the point at which government officers so exceed their official duties that they are stripped of the law enforcement justification is also the point at which government conduct can be termed outrageous enough to warrant the due process defense. Analyzing due process from the other side—via the law enforcement justification—would allow courts to objectively judge the government's actions without the strong bias against granting the defense no matter what the underlying factual circumstances. Such an approach would provide a principled basis for the delineation of the due process defense.

This Note will begin by providing a brief overview in Part II of the due process defense in the reverse sting context. The evolution of the due process defense will be analyzed in Part III. Part III will examine the four Supreme Court cases, beginning with

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acted in an outrageous manner when combatting the crime for which the defendant was charged.

7 *See* Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta.*").

Sorrells v. United States,[8] that dealt with the entrapment defense and ultimately led to the due process defense, followed by the circuit courts' approach to due process claims in reverse sting cases. Part IV will analyze the various attempts to define the precise parameters of the due process defense and the meaning of outrageous government conduct. Finally, Part V will examine the law enforcement justification and propose a methodology for utilizing the law enforcement justification to define the contours of the due process defense.

II. OVERVIEW

Reverse sting operations are becoming an increasingly popular mode of combatting narcotics offenses in the United States. A reverse sting is an undercover operation in which law enforcement officers sell drugs that have previously been confiscated. The agents arrange drug deals with potential buyers, monitor these deals, and then arrest the purchasers after the sale has been completed.[9] In many of these situations, the purchasers, after being arrested and charged, have attempted to assert the defenses of entrapment[10] or due process.[11]

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8 287 U.S. 435 (1932) (8-1 decision).

9 United States v. Walther, 867 F.2d 1334, 1335 (11th Cir.), *cert. denied*, 493 U.S. 848 (1989); *accord* Owen v. Wainwright, 806 F.2d 1519, 1520 (11th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1071 (1987).

10 *See generally Sorrells*, 287 U.S. at 454 (Roberts, J., concurring) ("Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.").

Professor Webster of the Walter F. George School of Law, Mercer University, discussing the origins of the entrapment defense, observes "the entrapment defense is recent and peculiarly American. Because English common law generally rejects the concept, the origin of entrapment is novel and limited to American jurisprudence." Laura G. Webster, *Building a Better Mousetrap: Reconstructing Federal Entrapment Theory from* Sorrells *to* Mathews, 32 ARIZ. L. REV. 605, 614 (1990) (footnotes omitted). Professor Webster also remarks: "Neither legislative enactment nor constitutional compulsion empowered the Court to act [in the entrapment area]." *Id.* at 616 (footnote omitted).

11 *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960) ("[Due process] has to do . . . with the denial of that 'fundamental fairness, shocking to the universal sense of justice.'" (quoting Betts v. Brady, 316 U.S. 455, 462 (1942))). This basic definition has been narrowed by Justice Rehnquist's interpretation that a violation of due process "come[s] into play only when the Government activity in question violates some protected right of the *defendant*." Hampton v. United States, 425 U.S. 484, 490 (1976) (plurality decision).

As noted in *United States v. Bogart*: "Strictly speaking, an assertion of outrageous conduct against the government is not a 'defense' because, if successful, it results in the dismissal of the indictment whatever its merits. Since most courts identify it as a 'de-

The due process defense arises from the Fifth Amendment of the United States Constitution, which states: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."[12] By contrast, the entrapment defense is a judicially-imposed exception to statutory criminal prohibitions. The entrapment defense is premised on the notion that a defendant, even though he committed a crime, should not be punished if the crime was instigated by the government. Thus, while the due process and entrapment defenses are often raised together, they should be "distinctly and significantly different."[13] First, the entrapment defense looks to the defendant's predisposition to commit the crime before any government instigation, while the due process claim examines whether the actions of government officers violated those standards "'implicit in the concept of ordered liberty.'"[14] Second, entrapment is normally a question of fact for the

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fense,' that nomenclature is used here." United States v. Bogart, 783 F.2d 1428, 1432 n.2 (9th Cir.), *vacated sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (remanded for further findings of fact).

12 U.S. CONST. amend. V.

13 Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457, 458 (1990). *See also* United States v. Jannotti, 673 F.2d 578, 607-08 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982):

> We must be careful not to undermine the Supreme Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense. While the lines between the objective test of entrapment favored by a minority of the Justices and the due process defense accepted by a majority of the Justices are indeed hazy, the majority of the Court has manifestly reserved for the constitutional defense only the most intolerable government conduct.

See also Molly K. Nichols, Note, *Entrapment and Due Process: How Far Is Too Far?*, 58 TUL. L. REV. 1207, 1212 (1984) (defining due process as a "test of entrapment similar to the objective approach, but with constitutional dimensions . . ."). The article asserted:

> The suggestion in *Russell* that a conviction might be precluded because government actions constituted a denial of the defendant's right to due process created an anomaly. The Court emphatically touted the subjective view of entrapment, with its strict focus on the defendant's state of mind. It then proceeded to suggest a defense of constitutional dimensions, based on judicial scrutiny of the government's investigatory conduct. The theory of barring prosecutions on the latter ground initially appeared to be suspiciously akin to the objective view of entrapment that was so vehemently rejected by the *Russell* plurality. This apparent contradiction can best be explained by the fact that, although the due process defense in the area of entrapment was novel, the Court had previously recognized a similar defense in other areas of criminal law.

Id. at 1213.

14 Marcus, *supra* note 13, at 458 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

jury, while due process is a question of law for the judge since it involves examining constitutional limitations.[15]

Although a consistent minority has advocated that entrapment be judged by looking at the quality of the government's conduct,[16] this view has never been adopted by the Court. The Court's position regarding the due process defense is not quite as clear. Unlike entrapment, due process is grounded in the Constitution, yet no specific criteria for the defense has been formulated by the Court. From the dicta in *United States v. Russell*[17] and *Hampton v. United States*[18] it appears that, unlike the majority view of entrapment, even if a defendant were predisposed to commit the crime, he may still assert a due process defense if he can demonstrate that government conduct was outrageous.[19] Outrageous government conduct has been defined as including "situations where the police conduct involved unwarranted physical, or perhaps mental, coercion,"[20] as well as "cases where the crime is fabricated *entirely* by the police to secure the defendant's conviction rather than to protect the public from the defendant's continuing criminal behavior."[21] While this language indicates that a

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15 *Id.* at 459.

16 *See infra* notes 49, 57, 72, 86 and accompanying text.

17 411 U.S. 423 (1973) (5-4 decision).

18 425 U.S. 484 (1976) (plurality decision).

19 *See Hampton*, 425 U.S. at 497 (Brennan, J., dissenting):

> I agree with Mr. Justice Powell [concurring] that *Russell* does not foreclose imposition of a bar to conviction—based upon our supervisory power or due process principles—where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be "predisposed."

See also Russell, 411 U.S. at 431-32 (noting that law enforcement conduct could be so outrageous that principles of due process would bar conviction).

20 United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir.), *vacated sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (remanded for further findings of fact).

21 *Id. See also* United States v. Jannotti, 673 F.2d 578, 607 (3d Cir.) (en banc) ("It is plain from the Court's opinions in *Russell* and the separate opinions in *Hampton*, however, that a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense."), *cert. denied*, 457 U.S. 1106 (1982); Dennis Franks, Note, *Constitutional Law—Entrapment and Due Process of Law—The Efficacy of ABSCAM Type Operations*, 5 CAMPBELL L. REV. 377, 405 (1983) (attempting to distinguish which factors determine when government behavior becomes "outrageous"); Karen M. Poole, Note, *When Use of the Entrapment Defense Is Barred; Is There a Viable Alternative Defense?*, 5 COOLEY L. REV. 203, 217 (1988) (after discussing factors courts examine to determine if government conduct was "outrageous," concludes that "the behavior of the government has to be brutal or psychologically coercive to qualify as a due process violation; governmental informants can use 'artifice and

due process defense is available to a defendant in a reverse sting, circuit court decisions have revealed that such a defense is available more in theory than in reality.[22] Although due process is clearly grounded in a constitutional mandate against lawlessness, beyond the generalized prohibitions against violence and complete fabrication of crime, neither the Supreme Court nor the lower courts have provided any objective criteria for the defense.

Due to the policy considerations underlying narcotics cases, very few courts have reversed convictions based on entrapment or due process grounds. While the defenses of entrapment and due process are theoretically available to a defendant in the United States, courts have uniformly declined to accept such defenses in the vast majority of reverse sting cases.[23] Apart from the current policy reasons attendant to the "war on drugs,"[24] and the conse-

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stratagem' to gain the suspect's confidence; and the informant's activity, if unknown to the governmental agency, cannot be directly attributable to it.").

22 *See* United States v. Panitz, 907 F.2d 1267, 1272 (1st Cir. 1990) (citations omitted):

> The Supreme Court has not foreclosed the possibility that the government's active participation in a criminal venture may be of so shocking a nature as to violate a defendant's right to due process, notwithstanding the defendant's predisposition to commit the crime. While acknowledging the possibility that the government might in some hypothetical circumstances go too far, we have yet to review a situation where official conduct crossed the constitutional line; rather, an unbroken string of First Circuit cases has repulsed attempts to win dismissal of criminal charges on such a theory.

See generally Marcus, *supra* note 13, at 457 ("Defendants claiming due process violations in entrapment cases have not fared well in federal or state courts.").

23 *United States v. Bogart* in 1986 stated that only two circuits had dismissed indictments based upon the due process outrageous governmental conduct defense. 783 F.2d at 1434 (footnote omitted).

The issue of the due process defense is also applicable to other types of "sting" operations, such as ABSCAM. However, because of the complexity of the issues involved, this Note primarily addresses the due process defense in the context of reverse sting operations.

24 *See* Hampton v. United States, 425 U.S. 484, 495-96 n.7 (1976) (plurality decision) (Powell, J., concurring) ("One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic, which is one of the major contributing causes of escalating crime in our cities. Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity." (citations omitted)); *Panitz*, 907 F.2d 1267; *see also* United States v. Twigg, 588 F.2d 373, 380 (3d Cir. 1978) (2-1 decision) ("We are mindful of the difficulties of defining specific limits on law enforcement techniques. Recognition must be given to the many challenges confronting police agencies today, especially in the drug law enforcement area."); *Id.* at 389 (Adams, J., dissenting):

> Although there is reason to question this sort of law enforcement, I cannot say that it shocks my conscience or that it reaches a demonstrable level of outrageousness beyond my toleration. This is so in part because I recognize the diffi-

quent reluctance to allow a defense to persons involved with narcotics,[25] one underlying reason that courts have not afforded defendants a due process defense in sting operations is the inability to delineate precisely what conduct amounts to that level of outrageousness which violates due process.[26] Numerous courts and commentators have struggled with this problem, and most analyses result in a case-by-case examination of which factors have previously been found to violate due process.[27] It is widely agreed the due process defense involves a difficult area of the law, and that "[t]he point of division at the margins between police conduct that is just acceptable and that which goes a fraction too far probably cannot be usefully defined in the abstract."[28]

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culties faced by the DEA in combatting the spread of illegal drugs.

This attitude toward criminality is by no means reserved only for narcotics defenses. In 1932 Justice Roberts in *Sorrells v. United States* acknowledged that "[s]ociety is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime." 287 U.S. 435, 453-54 (1932) (8-1 decision) (Roberts, J., concurring). In 1981, commenting on the ABSCAM tactics, Judge Pratt stated:

> The cynicism and hippocracy displayed by corrupt officials, pretending to serve the public good, but in fact furthering their own private gain, probably pose a greater danger to this country than all the drug traffickers combined. Corrupt leaders not only betray their constituents, but also contribute to a moral decay in American society that many view as the forerunner of economic, political and social disaster.

United States v. Myers, 527 F. Supp. 1206, 1229 (E.D.N.Y. 1981), *aff'd in part and rev'd and remanded in part on other grounds*, 692 F.2d 823 (2d Cir. 1982).

25 *See* United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973) ("Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.").

26 *See Bogart*, 783 F.2d at 1435 ("As the Third Circuit has aptly observed, the determination of when the government's behavior reaches such a 'demonstrable level of outrageousness' to constitute a due process violation is 'at best elusive.'"); United States v. Tobias, 662 F.2d 381, 391 (5th Cir. 1981) (Johnson, J., dissenting) ("Although providing a rudimentary framework for analysis, neither *Russell* nor *Hampton* delineated with clarity the point at which Government involvement becomes shocking and outrageous."), *cert. denied*, 457 U.S. 1108 (1982); *Twigg*, 588 F.2d at 385 (Adams, J., dissenting) ("Admittedly, it is difficult to know what standards to apply in order to conclude that a given course of action is 'outrageous.'"). *See generally* Nichols, *supra* note 13.

27 *See generally Tobias*, 662 F.2d 381; Franks, *supra* note 21; Nichols, *supra* note 13; Poole, *supra* note 21; Maura F. J. Whelan, Note, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193 (1985).

28 *Bogart*, 783 F.2d at 1438. The court continued: "As a matter of general principle, we have recognized that, in order to apprehend those engaged in serious crime, government agents may lawfully use methods that are neither appealing nor moral if judged by abstract norms of decency." *Id.*

Unfortunately, this type of ad hoc approach has prevented due process from becoming a truly viable defense. Yet, courts appear reluctant to countenance any type of line-drawing, preferring to leave the boundaries of due process hazy, at best.[29] Judge Easterbrook expressed this concern in *United States v. Miller*.[30] In *Miller* the defendant protested the government's use of a paid informant—who was both addicted to drugs and had previously been sexually involved with the defendant—to orchestrate the defendant's sale of cocaine to a narcotic enforcement agent. Concurring in the court's decision not to reverse the conviction, Judge Easterbrook called into question the necessity and effectiveness of the due process defense. The recognition of such a defense, he asserted, poses problems of consistency because the circuits which do acknowledge its existence cannot agree on its application.[31] Finally, Judge Easterbrook posited:

> Any line we draw would be unprincipled and therefore not judicial in nature. More likely there would be no line; judges would vote their lower intestines. Such a meandering, personal approach is the antithesis of justice under law, and we ought not indulge it. Inability to describe in general terms just what makes tactics too outrageous to tolerate suggests that there is no definition—and "I know it when I see it" is not a rule of any kind, let alone a command of the Due Process Clause.[32]

The end result has been not only to protect the due process defense from "unprincipled" line-drawing, but to render the defense impotent.[33]

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29 As one Note has suggested:

> [Due process] should properly remain flexible, allowing a court discretion to determine whether to invoke due process in a given case. To attempt to strictly define the concept of due process would lead to constrainment of the doctrine itself. The issue of due process must be examined, as the court has directed, in light of the totality of the circumstances of the case, with no one element being determinative.

Nichols, *supra* note 13, at 1234-35.

30 891 F.2d 1265 (7th Cir. 1989).

31 *Id.* at 1272 (Easterbrook, J., concurring).

> How much is "too much"? The nature of the question exposes it as (a) unanswerable, and (b) political. What, if anything, could separate stirring up of crime in unpalatable ways here from the Operation Greylord methods [we] sustained? From the "creative" endeavors in Abscam? From any of the "sting" operations? From the rest of the sordid drug business, so dependent on caitiff assistants?

Id. at 1272-73 (Easterbrook, J., concurring) (citations omitted).

32 *Id.* at 1273 (Easterbrook, J., concurring).

33 But see Marcus, *supra* note 13, at 458, which asserts that "the due process

Yet this result is not necessary. If approached in Judge Easterbrook's manner, from the defendant's vantage point rather than the law enforcement officer's side, the problems he outlines will inevitably arise because of the extra-judicial policy concerns attendant to combatting crime. The option remains, however, to analyze due process with an eye to the acceptability of the law enforcement officer's conduct rather than the desirability of setting a guilty defendant free. This methodology would provide a principled and judicial framework for due process, while at the same time allowing law enforcement officers the necessary latitude in formulating the means to combat crime. A workable compromise between the need for some type of concrete standard and the equally compelling need for ad hoc determinations can be found by tying the due process defense to the law enforcement justification. An examination of the entrapment/due process cases and the law enforcement justification cases reveals that there exists a nexus where the law enforcement justification fails and the due process defense should be awarded. By focusing on the point at which government activity exceeds the protections of the law enforcement justification, courts can arrive simultaneously at the point at which they should allow defendants' due process claims. This approach provides a workable standard that would enable the due process defense to become more than just a constitutional theory.

III. THE EVOLUTION OF THE DUE PROCESS DEFENSE

A. General Background

The due process defense, although distinct from the entrapment defense, is inexorably tied to it. Accordingly, an analysis of the due process defense must begin with an overview of entrapment. Although the courts have struggled with the precise definition of entrapment, it has generally been agreed that entrapment may be used as a defense when the defendant demonstrates he was not predisposed to commit the crime, but rather was induced by government actions.[34] Once the defendant makes this showing,

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claim—while not thriving—is alive and beginning to be considered seriously . . . ."

34 *See* Sherman v. United States, 356 U.S. 369, 372 (1958) (9-0 decision) ("To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."); Greene v. United States, 454 F.2d 783, 786 (9th Cir. 1972) ("Entrapment is shown where government agents go beyond the mere affording of opportunities or facilities for the commission of

the burden rests with the government to prove that the defendant did in fact have a predisposition to commit the crime charged.[35] If the government shows that the defendant was predisposed to commit the crime, the entrapment defense is not available.[36] At this point, however, the defendant may raise the due process defense.[37]

Generally, for a defendant to prove that he has been denied due process, he must show that the government's conduct was outrageous. *United States v. Russell*[38] defined such outrageous conduct as that which violates "that 'fundamental fairness, shocking to

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the offense and exert persuasion or pressure of one kind or another which induces the commission of a crime by one who had no predisposition to do so."); *but see Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring) ("[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.").

35 *See* United States v. Tobias, 662 F.2d 381, 384 (5th Cir. 1981) (citations omitted), *cert. denied*, 457 U.S. 1108 (1982):

> [A] defendant who wishes to assert an entrapment defense must initially come forward with evidence 'that the Government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.' Once the defendant has carried this burden, the government must, if it is to prevail, prove beyond a reasonable doubt that the defendant was predisposed to commit the crime charged.

36 *See* Hampton v. United States, 425 U.S. 484, 488-89 (1976) (plurality decision) ("We ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established."); United States v. Russell, 411 U.S. 423, 440 (1973) (5-4 decision) (Stewart, J., dissenting) ("[I]f [the defendant] had the 'predisposition' to commit the crime, or if the 'criminal design' originated with him, then—regardless of the nature and extent of the Government's participation—there has been no entrapment."); United States v. Twigg, 588 F.2d 373, 376 (3d Cir. 1978) ("The entrapment defense requires an absence of predisposition on the part of the defendant to commit the crime."); *but see Russell*, 411 U.S. at 445 (Stewart, J., dissenting):

> [W]hen the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice.

37 *See* United States v. Bradley, 820 F.2d 3, 7 (1st Cir. 1987) ("Even a willing defendant may claim a violation of due process if the government's conduct has reached a 'demonstrable level of outrageousness.'" (quoting United States v. Porter, 764 F.2d 1, 8 (1st Cir. 1985)) (citations omitted)); *Twigg*, 588 F.2d at 378-79 ("The rule that is left by *Hampton* is that although proof of predisposition to commit the crime will bar application of the entrapment defense, fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was 'outrageous.'").

38 411 U.S. 423 (1973) (5-4 decision).

the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment."[39] Most courts that have upheld the due process defense have done so only on the grounds that the government manufactured the crime in question or that the government in some way threatened the defendant with serious physical injury.[40] Due to the serious nature of drug offenses and the difficulty of prosecuting such crimes, few courts have upheld either the entrapment or the due process defense in cases involving narcotics violations. Courts have generally held that in order to find a violation of due process, "extreme circumstances of outrageous government conduct must be shown."[41] Furthermore, government infiltration of crime, oftentimes entailing the furnishing of some item of value to the criminal enterprise, is almost uniformly accepted.[42] Thus, while courts have paid lip service to the due process defense in reverse sting cases, they have generally allowed anti-narcotic policy considerations to control the final determination of whether to grant a defendant the defense.

B. Sorrells *Through* Hampton: *The Supreme Court Entrapment/Due Process Cases*

The issue of entrapment and due process as defenses to reverse sting operations was developed in a line of Supreme Court cases dating from 1932 to 1976. The entrapment defense is premised on the notion that a defendant, even though he committed a crime, should not be punished if the crime was instigated by the government. As such, entrapment provides a statutory exception to

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39 *Id.* at 432 (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960)).

40 *See Bradley*, 820 F.2d at 7 ("Mainly these cases involve alleged overinvolvement on the government's part in manufacturing the crime . . . . But, of course, outrageous conduct may take other forms, and might well be found in a threat of serious physical harm."); United States v. Bogart, 783 F.2d 1428, 1435-36 (9th Cir. 1986) (citations omitted), *vacated sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (remanded for further findings of fact):

> [A] number of courts have read Supreme Court precedent to confine the broad due process check on the conduct of law enforcement officers only to that slim category of cases in which the police have been brutal, employing physical or psychological coercion against the defendant . . . . This narrow definition of what constitutes outrageous government behavior relies on the *Russell* Court's citation to *Rochin v. California* as an example of the type of government activity that would so "shock the conscience" that it would violate due process.

41 Owen v. Wainright, 806 F.2d 1519, 1522 (11th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1071 (1987).

42 *Id.*

criminal punishment. In general, the Supreme Court has found entrapment only in those cases where the government was responsible for the creation of the crime itself, and then persuaded the defendant to participate in this ready-made crime. Typical characteristics of a successful entrapment claim include either repeated importunings by the government agent that the defendant participate in the criminal activity, or a lack of necessary knowledge or expertise on the part of the defendant, thus requiring the specialized assistance of the government agent to complete the crime. Since the majority view of entrapment requires that a defendant not be predisposed to commit the crime in question, the defense is unavailable to a large number of defendants in reverse sting cases. Yet it is important to look at due process in light of entrapment because many of the same policy considerations are at play in both defenses, and because the due process defense has largely gained prominence as a doctrine that originates from the point at which the entrapment defense ends.

The first case to recognize the entrapment defense, *Sorrells v. United States*,[43] involved a defendant charged with violating the National Prohibition Act.[44] A prohibition agent requested liquor from the defendant three times, appealing to their common experiences in World War I, before the defendant acquiesced and procured $5.00 worth of alcohol for the agent.[45] When subsequently indicted for possessing and selling one-half gallon of whisky in violation of the Act, the defendant raised the defense of entrapment.[46] The Court began its analysis of the possible defense by stating: "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises."[47] Moreover, the entrapment defense should be granted if the criminal design originates with government officials and "they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[48] The Court ultimately granted the defendant's defense of entrapment

43 287 U.S. 435 (1932) (8-1 decision).
44 *Id.* at 438.
45 *Id.* at 439.
46 *Id.* at 438.
47 *Id.* at 441.
48 *Id.* at 442.

and reversed the conviction, noting that though the predisposition of the defendant must be taken into consideration, the controlling question in an entrapment inquiry is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."[49] Therefore, the Court defined the entrapment defense primarily in terms of the predisposition of the defendant to commit the crime (generally referred to as the subjective standard), rather than the propriety of the government's actions (referred to as the objective standard).[50] Nevertheless, the language quoted above leaves open the question of precisely what role the government's actions should play in determining the applicability of the entrapment defense. Furthermore, the concurring opinion stated that entrapment should focus on the government's actions, not on the defendant's predisposition.[51]

The conflict between the objective and subjective standards was addressed again twenty-six years later in *Sherman v. United States*.[52] In this case, a government informant met the defendant during drug rehabilitation treatment and asked the defendant to supply him with narcotics.[53] After initially refusing, the defendant eventually supplied the informant with the drugs, partially because the defendant desired to alleviate the informant's apparent suffering due to withdrawal.[54] The informant then alerted the govern-

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49 *Id.* at 451.

50 "The subjective or majority view focuses on the defendant's state of mind and his predisposition to commit the crime. The objective or minority view focuses on the level of governmental involvement in soliciting the crime." Webster, *supra* note 10, at 607 (footnotes omitted). *See generally* B. Grant Stitt & Gene G. James, *Entrapment and the Entrapment Defense: Dilemmas for a Democratic Society*, 3 LAW & PHIL. 111 (1984); Franks, *supra* note 21; Cindy M. Harris, Note, *Entrapment: A Source of Continuing Confusion in the Lower Courts*, 5 AM. J. TRIAL ADVOC. 293 (1981).

Professor Marcus observes that "[t]he federal system and about three-quarters of the states use [the] 'subjective' approach. About a dozen states follow an 'objective' approach to determine whether the government's conduct was inappropriate." Marcus, *supra* note 13, at 458 n.9.

51 The *Sorrells* concurrence stated:

> The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy.

Sorrells v. United States, 287 U.S. 435, 459 (1932) (8-1 decision) (Roberts, J., concurring).

52 356 U.S. 369 (1958).

53 *Id.* at 371.

54 *Id.*

ment to the defendant's illegal activities, at which point the defendant was arrested on narcotics charges.[55] Upon the defendant's raising the defense of entrapment, the Court affirmed the decision in *Sorrells*, asserting that the function of law enforcement is to prevent crime and apprehend criminals, not to manufacture crime.[56] The Court recognized that the police must be allowed to use stealth and strategy to combat crime, and that the mere affording of opportunities or facilities to commit an offense does not constitute entrapment. Nevertheless, the Court admonished that Congress could not have intended its statutes to be enforced by a government that implanted criminal designs in the minds of innocent citizens for the sole purpose of procuring criminal prosecutions.[57] In the situation at hand, the Court determined that the defendant was not predisposed to commit the crime, and thus the entrapment defense should have been available to him.[58] The Court reversed the conviction on this basis. Nevertheless, once again the concurring opinion stated that the focus of the entrapment defense should be on the government, not the defendant,[59] and that the conviction should have been reversed because of the impropriety of the government's actions.[60]

Because of the tension between these two views—the subjective standard employed by the majority opinions in *Sorrells* and *Sherman*, and the objective standard advocated by the concurrences

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55 *Id.*

56 *Id.* at 372.

57 *Id.*

58 *Id.* at 373.

59 The *Sherman* concurrence posited that:

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

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

60 The concurrence continued:

> 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. And in the present case it is clear that the Court in fact reverses the conviction because of the conduct of the informer Kalchinian, and not because the Government has failed to draw a convincing picture of petitioner's past criminal conduct.

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

in these two cases—the Court addressed the entrapment issue for a third time in *United States v. Russell*.[61] A government agent went to the defendants' home in an effort to locate a laboratory that was illegally manufacturing methamphetamine.[62] The agent offered to supply the defendants with an essential ingredient (phenyl-2-propanone) for one-half of the drug produced.[63] After the drug was manufactured, the agent received his portion and then bought part of the remaining one-half from the defendants.[64] The defendants were later arrested, charged, and found guilty of various drug-related offenses.[65] The circuit court held that the defendants should have been allowed to assert an entrapment defense due to the fact that the agent had supplied a scarce ingredient essential to the manufacture of the drug.[66] The Supreme Court began its review of the circuit court decision by noting the disagreement between the majority and concurring opinions concerning entrapment in *Sorrells* and *Sherman*: "The difference in the view of the majority and the concurring opinions is that in the former the inquiry focuses on the predisposition of the defendant, whereas in the latter the inquiry focuses on whether the government 'instigated the crime.'"[67] The Court in *Russell* for a third time defined entrapment in terms of the defendants' predisposition to commit the crime,[68] and thus reversed the circuit court, upholding the original convictions of the defendants.[69] Though the Court refused to recognize the entrapment defense in this case because the defendants were clearly predisposed to commit the crimes charged, it did propose that such predisposition might

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61 411 U.S. 423 (1973) (5-4 decision).

62 *Id.* at 425.

63 *Id.*

64 *Id.* at 426.

65 *Id.* at 424.

66 *Russell* characterized the circuit court's analysis in the following terms:

> [T]he court in effect expanded the traditional notion of entrapment, which focuses on the predisposition of the defendant, to mandate dismissal of a criminal prosecution whenever the court determines that there has been "an intolerable degree of governmental participation in the criminal enterprise." In this case the court decided that the conduct of the agent in supplying a scarce ingredient essential for the manufacture of a controlled substance established that defense.

Id. at 427.

67 *Id.* at 429.

68 "It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *Id.* at 436.

69 *Id.*

not always prove a complete bar to any type of defense. In so doing, *Russell* inaugurated the due process defense:

> 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. . . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process clause of the Fifth Amendment.[70]

Although the Court appeared to be opening the door to a new defense in cases where entrapment was not available, at the same time it emphasized the policy considerations that would mandate a drastic narrowing of either defense.[71] The Court remarked that it does not seem "particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed."[72] Thus, the Court acknowledged that an entrapment defense is available to a defendant who is not predisposed to commit the crime in question, and that even if the defendant is so predisposed, there may be instances when a due process defense can be raised, it construed both of these defenses extremely narrowly. The Court stated that the defense of entrapment "was not intended to give the federal judiciary a 'chancellor's foot' veto over law

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70 *Id.* at 431-32 (citations omitted).

71 Such policy considerations were described by *Russell* in the following manner:

> The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or [be] "shocking to the universal sense of justice . . . ."

Id. at 432.

72 *Id.* at 434.

enforcement practices of which it [does] not approve . . . . It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."[73] In light of the difficulty in combatting narcotics offenses, the Court apparently was willing to stretch the bounds of due process to accommodate questionable law enforcement techniques. While the majority in *Russell* clearly reiterated the position taken in *Sorrells* and *Sherman* that the proper focus of the entrapment defense is on the predisposition of the defendant to commit the crime charged, the dissent in *Russell*, following the concurrences in *Sorrells* and *Sherman*, asserted that the focus should be on the government's conduct.[74] Because this split in analysis persisted, the Supreme Court addressed the issue of entrapment for a fourth time in *Hampton v. United States*.[75] The case arose out of a sale of heroin by the defendant to undercover drug enforcement agents.[76] The sale was arranged by a Drug Enforcement Administration (DEA) informant, who was a pool-playing acquaintance of the defendant.[77] According to the government, the defendant noticed needle marks on the informant's arms and consequently confided that he needed some money and had a source for heroin.[78] The informant then arranged a sale to the undercover DEA agents, which ultimately resulted in the defendant's arrest and subsequent conviction for distributing heroin.[79] The defendant's story, however; was quite different. He claimed that upon remarking that he was short of money, the informant told him he had a pharmacist friend who could manufacture a non-narcotic counterfeit drug that would produce the same reaction as heroin.[80] According to the defendant, he and the in-

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73 *Id.* at 435, 436.

74 The *Russell* dissent asserted:

> In my view, this objective approach to entrapment advanced by the Roberts opinion in *Sorrells* and the Frankfurter opinion in *Sherman* is the only one truly consistent with the underlying rationale of the defense. Indeed, the very basis of the entrapment defense itself demands adherence to an approach that focuses on the conduct of the governmental agents, rather than on whether the defendant was "predisposed" or "otherwise innocent."

Id. at 441 (Stewart, J., dissenting) (footnote omitted).

75 425 U.S. 484 (1976) (plurality decision).

76 *Id.* at 485.

77 *Id.*

78 *Id.* at 486.

79 *Id.* at 485-86.

80 *Id.* at 486-87.

formant had successfully fooled one buyer before the fateful sale of the counterfeit drug to the DEA.[81] The jury rejected the defendant's assertion that he did not know that the substance was heroin, and found him guilty of distribution.[82] The defendant's alternative defense of entrapment eventually reached the Supreme Court. Unfortunately, rather than ending the predisposition versus government conduct debate, the Court was unable to reach a clear majority, and ultimately handed down a plurality opinion that reaffirmed the prior holdings that entrapment should be determined according to the predisposition of the defendant rather than the outrageousness of the government's conduct.[83] While a majority apparently agreed on the entrapment issue,[84] the court was not able to reach a consensus concerning the viability of a due process defense. The plurality stated: "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."[85] The concurrence, however, did not agree that a predisposed defendant should have no recourse to a due process defense, asserting that they were "unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition."[86] While the dissent agreed with the concurrence that a due process defense should be available to defendants based upon outrageous government conduct,[87] they disagreed with both the plurality and the concurrence that entrapment should be defined in terms of the defendant's predisposition rather than the nature of the government's conduct.[88] Consequently, rather than resolving the

81 *Id.* at 487.

82 *Id.*

83 *Id.* at 488-89.

84 *See Id.* at 490 ("If the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . . ,' the defendant is protected by the defense of entrapment." (citation omitted)); *Id.* at 492 n.2 (Powell, J., concurring) ("I agree with the plurality that *Russell* definitively construed the defense of 'entrapment' to be focused on the question of predisposition.").

85 *Id.* at 490.

86 *Id.* at 495 (Powell, J., concurring) (footnote omitted).

87 *Id.* at 496-97 (Brennan, J., dissenting).

88 Justice Brennan agreed with the views expressed in Justice Stewart's dissent in *Russell*, Justice Frankfurter's concurrence in *Sherman*, and Justice Roberts' concurrence in

issue of the proper defenses to reverse sting operations, *Hampton* left the lower courts more confused than ever.

C. *Post-*Hampton: *Overview*

Because the Supreme Court's guidance concerning the proper use of entrapment and due process as defenses to reverse sting operations has been ambiguous, the lower courts have been reluctant to permit either defense.[89] Particularly since none of the four Supreme Court cases addressing the issue held that a predisposed defendant could assert the entrapment defense, the vast majority of convictions based upon reverse stings have been upheld.[90] In general, courts seem to adhere to the reasoning in *United States v. Bradley*[91] that narcotics offenses are difficult to investigate, and "are increasingly recognized as one of the nation's most serious problems . . . . They do not present a situation where courts should be quick to recognize excuses."[92]

A brief overview of recent appellate cases addressing the possible defenses to reverse sting operations indicates that such police activity is generally not subject to either the entrapment or due process defense.[93] While the Court after *Hampton* seemed firmly

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Sorrells, that "'courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced.'" *Id.* at 496 (Brennan, J., dissenting) (citation omitted). He would have reversed the conviction, holding that "conviction is barred as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by a Government agent." *Id.* at 500 (Brennan, J., dissenting).

89 *See* United States v. Panitz, 907 F.2d 1267, 1272 (1st Cir. 1990), which stated that the First Circuit has yet to dismiss a case based on a due process claim. Similarly, United States v. Walther, 867 F.2d 1334, 1339 (11th Cir.), *cert. denied*, 493 U.S. 848 (1989) and Owen v. Wainwright, 806 F.2d 1519, 1522 (11th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1071 (1987), both noted the reluctance of the Eleventh Circuit to overturn convictions resultant from reverse sting operations.

90 After mentioning that only two cases, Greene v. United States, 454 F.2d 783 (9th Cir. 1971) and United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), have reversed convictions on due process grounds, the court in *United States v. Bogart* acknowledged that "'the due process channel which *Russell* kept open is a most narrow one.'" United States v. Bogart, 783 F.2d 1428, 1434 (9th Cir. 1986) (quoting United States v. Ryan, 548 F.2d 782, 789 (9th Cir. 1976), *cert. denied*, 430 U.S. 965 (1977)), *vacated sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (remanded for further findings of fact).

91 820 F.2d 3 (1st Cir. 1987).

92 *Id.* at 8.

93 Although numerous circuit courts have discussed the due process defense in the reverse sting context, the cases discussed in this Note offer a representation of the most recent cases to specifically address the issues analyzed herein.

entrenched in its view that entrapment turns upon the predisposition of the defendant, it never clearly defined due process. As a result, the lower courts were left the task of determining what types of government behavior should be considered lawless, so as to trigger the due process defense. The lines drawn in these cases appear strikingly similar to those employed in the entrapment analyses. Although the courts have questioned government activity that actively encourages the defendant to commit the crime, they have not upheld a due process claim in such cases. Instead, the courts have typically stated that either the government had not totally manufactured the crime in question, or that the defendant's rights were not violated because he was already participating in ongoing criminal activities, thus due process was not compromised. These criteria are substantially the same as those used in analyzing entrapment cases. Although the due process defense is theoretically available to a defendant who loses an entrapment claim, under the current analysis employed by the courts he will almost unfailingly lose his due process claim as well, because the court is merely examining the same factors under a different heading. Although due process purportedly protects a defendant from outrageous government conduct, while entrapment protects a non-predisposed defendant who has been induced to commit a crime, an examination of some of the fact patterns found in reverse sting/due process cases indicates that the courts are upholding criminal sanctions largely without completing a thorough analysis of due process as distinct from entrapment. Accordingly, the precise contours of due process have remained as hazy as when the defense was first introduced in *Russell.*

*D. Post-*Hampton: *The Lower Courts' Approach to Entrapment and Due Process Defenses in Reverse Sting Cases*

The lower courts have taken to heart the cautionary language in *Russell* that a due process defense should only be granted in the most outrageous cases.[94] Such circumstances, it appears, are nearly impossible to find. The courts have uniformly refused to grant the defense, citing numerous policy-related justifications and drawing seemingly endless distinctions between the facts before the court and the facts necessary to rise to the level of government manufactured crime. Repeated instructions regarding the

94 United States v. Russell, 411 U.S. 423, 432 (1973) (5-4 decision).

production of drugs,[95] elaborate ruses involving the breaking of oral contracts so as to induce the defendant to accept drugs in lieu of cash,[96] and even the staging of a car accident and posting of bail to free the target so he could complete a narcotics transaction,[97] have been held to not violate a defendant's due process rights. With each case, it appears that the line of intolerable police conduct is being pushed further toward the outlandish. Moreover, since the lower courts agree that the defense must be evaluated in light of the totality of the circumstances, oftentimes the predisposition of the defendant figures in the evaluation. The blurring of entrapment and due process evidenced in Supreme Court decisions has permeated lower court decisions as well. A sample of recent reverse sting/due process cases illustrates that due process is faring no better in the lower courts than it has fared in the Supreme Court.

The Fifth Circuit in *United States v. Tobias*[98] affirmed the conviction of a defendant who purchased chemicals from a government (DEA) operated supply company in order to manufacture PCP (angel dust).[99] The defendant answered an ad the DEA had placed in a magazine, *High Times*, and requested more information about the chemicals the government had available.[100] After the defendant received the DEA's catalog, he ordered the chemicals necessary to produce cocaine. Before the supplies were shipped, however, the defendant called the supply company to cancel the order because he realized he did not have the skill necessary to manufacture the drug.[101] The DEA agent who answered the call suggested that the defendant try manufacturing PCP instead because it was simpler.[102] The defendant then changed his order, and eventually, after calling the supply company thirteen times for advice about the specifics of the manufacturing process, produced PCP.[103] At this point the DEA searched the defendant's home, and he was ultimately arrested and convicted of various narcotics

95 United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982).

96 United States v. Bogart, 783 F.2d 1428 (9th Cir.), *vacated sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (remanded for further findings of fact).

97 United States v. Marino, 936 F.2d 23 (1st Cir. 1991).

98 662 F.2d 381 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982).

99 *Id.* at 384.

100 *Id.* at 383.

101 *Id.*

102 *Id.* at 383-84.

103 *Id.* at 384.

charges.[104] Citing *United States v. Williams*,[105] a previous Fifth Circuit case, the court held that "[a] prosecution may not be defeated because the government provides the accused with the opportunity to commit the crimes charged."[106] While the court admonished that "the government may not instigate the criminal activity, provide the place, equipment, supplies and know-how, and run the entire operation with only meager assistance from the defendants without violating fundamental fairness,"[107] the court also asserted that in order for undercover law enforcement work to be successful, agents must be allowed to discuss the particulars of the criminal enterprise with the targeted criminals.[108] Stating that outrageous involvement must be examined in light of the totality of the circumstances with no one factor controlling,[109] the court proceeded to review the particular facts before it.[110] The fact that the agents had not contacted the defendant regarding the manufacturing process, but rather that the defendant and his wife had been the ones to contact the DEA was crucial.[111] It was this distinction that distinguished *Tobias* from *Hampton v. United States*[112] and other cases which had found due process violations.[113] Because the defendant was a predisposed *active* participant, rather than a predisposed *inactive* participant, the court ulti-

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104 *Id.*

105 613 F.2d 560, 562 (5th Cir. 1980).

106 *Tobias*, 662 F.2d at 385.

107 *Id.* at 386.

108 *Id.* at 385. In this instance, the court noted that "[s]uggestions regarding the particulars of manufacturing one drug or another did not vitiate the predisposition which is best shown by Tobias' continuance of the conversation." *Id.*

109 *Id.* at 387.

110 The *Tobias* court stated:

> The DEA, in this case, did not initiate contact with Tobias. May the government be held to have involved itself in outrageous conduct by placing the ad in *High Times*? Similarly, may the government be condemned for shipping the necessary chemicals, even at cut-rate prices? Or, was it outrageous for DEA to deliver the chemicals to Tobias's home? We think not. The crucial factor in this total fact picture is the step-by-step advice given by the DEA agents. This advice was given to Tobias or his wife on more than thirteen occasions. On each occasion, however, Tobias or his wife contacted the DEA. This would be a more difficult case if the DEA had pursued Tobias by repeated phone calls and encouragement. But here, the drug transaction would have stopped at any time that Tobias made no further calls.

Id.

111 *Id.*

112 425 U.S. 484 (1976) (plurality decision).

113 *Tobias*, 662 F.2d at 387.

mately held that due process had not been violated.[114] The court noted, however, that "this case does set the outer limits to which the government may go in the quest to ferret out and prosecute crimes in this circuit."[115]

Five years later, in 1986, the Ninth Circuit in *United States v. Bogart*[116] analyzed both the entrapment defense and the due process defense as they pertained to a defendant who traded presidential campaign posters in exchange for cocaine in a deal arranged by a government informant.[117] The government informant, at the instructions of a law enforcement agent, arranged to buy a quantity of posters from the defendant, and then at the time of shipment informed the defendant that his only method of payment was cocaine.[118] The defendant initially refused to complete the transaction, but, needing the proceeds to pay bail, eventually agreed to accept the cocaine as payment for the posters.[119] After first stating that the defendant's predisposition to commit the crime barred him from asserting the entrapment defense,[120] the court observed that "[o]nly two circuits have dismissed an indictment in response to a due process outrageous governmental conduct defense."[121] The court expanded upon its analysis by grouping the cases addressing reverse stings and the due process defense into two categories: those where the defense has succeeded, and those where the defense has failed. In the cases where the due process argument has been successful, *Bogart* noted that the reviewing courts have determined that the government essentially manufactured the crime in question.[122] The *Bogart* court found

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114 *Id.*

115 *Id.*

116 783 F.2d 1428 (9th Cir.), *vacated sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (remanded for further findings of fact).

117 *Id.* at 1430.

118 *Id.*

119 *Id.*

120 *Id.* at 1432 n.1 ("Here the predisposition of all three defendants to narcotics trafficking and use is apparent from the record, and thus bars any entrapment defense.").

121 *Id.* at 1434 (referring to Greene v. United States, 454 F.2d 783 (9th Cir. 1971), which predated *Hampton* and *Russell*; and United States v. Twigg, 588 F.2d 373 (3d Cir. 1978)).

122 *Id.* at 1436.

> Criminal sanction is not justified when the state manufactures crimes that would otherwise not occur. Punishing a defendant who commits a crime under such circumstances is not needed to deter misconduct; absent the government's involvement, no crime would have been committed. Similarly, a defendant need

that in those cases where the due process defense was not successful, courts had "invariably conclude[d] that when the government conduct occurred the defendant was involved in a continuing series of similar crimes, or that the charged criminal enterprise was already in progress at the time the government agent became involved."[123] Because it was unclear in *Bogart* whether the government had wholly manufactured the crime charged, or whether the government had merely infiltrated a continuing criminal enterprise, the court remanded the case to determine whether the government's conduct was sufficiently outrageous under the guidelines set forth to uphold a due process defense.[124] The Ninth Circuit, therefore, shed no new light on the due process analysis, but was content to conduct the due process inquiry using the guidelines previously employed in due process cases.

The First Circuit followed a similar path in two recent reverse sting/due process cases. *United States v. Panitz*[125] evaluated government involvement in a drug distribution ring. The government seized a shipment of marijuana from Colombia and informed the suspected smuggler (Goldin) that his shipment had arrived.[126] At this point, federal and state police officers posed as accomplices and assisted Goldin in delivering the marijuana to the targeted customers.[127] Once the delivery was made, other officers stopped the customers' cars, conducted searches of the vehicles, and then arrested the customers for possession of drugs.[128] The defendant (Panitz) was one of these customers.[129] In order to address the defendant's contention that the government activity violated due process,[130] the court first reviewed the idea that "[t]he Supreme Court has not foreclosed the possibility that the government's active participation in a criminal venture may be of

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> not be incarcerated to protect society if he or she is unlikely to commit a crime without governmental interference. Nor does the state need to rehabilitate persons who, absent governmental misconduct, would not engage in crime. Where the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punishment ceases to be a response, but becomes an end in itself . . . .

Id.

123 *Id.* at 1437.
124 *Id.* at 1433, 1438.
125 907 F.2d 1267 (1st Cir. 1990).
126 *Id.* at 1268.
127 *Id.* at 1269.
128 *Id.*
129 *Id.*
130 *Id.* at 1270.

so shocking a nature as to violate a defendant's right to due process, notwithstanding the defendant's predisposition to commit the crime."[131]

Nevertheless, the court then observed that while it acknowledged "the possibility that the government might in some hypothetical circumstances go too far, we have yet to review a situation where official conduct crossed the constitutional line; rather, an unbroken string of First Circuit cases has repulsed attempts to win dismissal of criminal charges on such a theory."[132] Thus, like the Ninth Circuit, the First Circuit's analysis of the due process defense was largely based upon precedent, rather than an application of the principles of due process to the facts before it. When the court examined the case at hand, it held that since the agents had not invented the crime and enticed Goldin and his compatriots to participate in it (the intercepted shipment of marijuana was the third the agents had traced to Goldin), but rather had merely afforded the defendant the opportunity to participate in a preplanned crime, due process had not been violated.[133] The court then focused on the underlying policy reasons for denying a defendant either an entrapment or due process defense in all but the most egregious cases:

> In the ongoing struggle between law enforcers and the underworld, the use of ingenuity is not foreclosed to the government. The police may, within reason, employ guile and clever tactics. When investigating narcotics enterprises, such stratagems are frequently the option of choice; by their very nature, drug rings are extremely difficult to penetrate and detect without undercover intrusion. Not surprisingly, then, courts have consistently recognized that greater government involvement is allowable in such cases . . . . Law enforcement need not play the panty-waist when drug smuggling is afoot: the government may feint and weave, masking its intentions before striking hard—but not foul—blows.[134]

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131 *Id.* at 1272.

132 *Id.*

133 *Id.* at 1273. "In sum, the law enforcement practices utilized in this case were neither fundamentally unfair nor offensive to principles of due process . . . . The DEA's elaborate ruse, acting out the script that Goldin authored, fails to shock—or even to vellicate—our collective conscience." *Id.*

134 *Id.* (citation omitted).

Unfortunately, the court's conclusion that these blows did not violate due process was based solely upon the ends they achieved; the court failed to evaluate the propriety of the tactics themselves.

One year later the First Circuit re-affirmed its position regarding defenses to reverse sting operations in *United States v. Marino*.[135] In *Marino*, a Florida sheriff's department imported marijuana and acted as a storage and transportation facility for the senders.[136] Undercover officers then delivered the drugs to a customer (Chabot, one of the co-defendants), and after he had left the warehouse, other undercover officers staged a car accident with him.[137] This "accident" enabled officers to "discover" the drugs, and arrest Chabot.[138] A government informant then posted bail for Chabot so that Chabot would be able to complete the planned drug transaction.[139] At this point Chabot contacted the undercover agents for another supply of drugs which were to be delivered to Rhode Island. The Florida police then contacted the Rhode Island DEA, who were able to videotape the subsequent meetings between Chabot and the intended buyers (one of whom was the other defendant).[140]

The court refused to acknowledge a due process defense, reiterating the policy considerations asserted in *Panitz*.[141] The court ultimately held that "[w]hile police involvement could be so outrageous as to violate a defendant's due process rights even where the defendant was predisposed to commit the crime, this is not such a case."[142] Just why this was not such a case, or what elements need be present to constitute such a case, was never articulated. Once again, police tactics came close, but didn't cross the constitutional line delineating due process. Thus, although the Supreme Court appeared in *Russell* and *Hampton* to leave open the opportunity for a defendant to assert a due process defense to reverse sting operations, decisions by the lower courts, as represented by recent cases in the Fifth, Ninth, and First Circuits, indicate that such a defense is seldom going to be successful.

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135 936 F.2d 23 (1st Cir. 1991).
136 *Id.* at 25.
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.* at 27.
142 *Id.*

IV. ATTEMPTS TO DEFINE THE DUE PROCESS DEFENSE

As discussed in Part II, one reason that the lower courts are reluctant to grant a due process defense is the courts' inability to determine with precision when due process has been violated.[143] Recent cases dealing with reverse stings illustrate that this issue is especially acute when analyzing narcotics-related offenses. The cases examined above indicate that, due to public policy reasons, judges often will allow law enforcement agents significant leeway in combatting narcotics offenses.[144] An inherent tension exists between combatting crime and controlling the means used to wage the war. While we want to censure government tactics, we also want to ensure that if a person commits a crime he will be duly punished. When these two concerns conflict, as they do when a proven criminal is caught via lawless means, judges are placed in a difficult position. Do the ends never justify the means, as Justice Brandeis asserted in *Olmstead v. United States*,[145] or do some ends justify some means? Certainly these types of policy considerations have contributed immensely to the courts' reluctance to grant due process claims in reverse sting cases.

Aside from the inevitable policy concerns in narcotics cases, due process has further been hampered because the Supreme Court has failed to define it with precision. The Supreme Court has provided sketchy guidance for defining outrageous government conduct pursuant to the due process clause.[146] Although Justice Frankfurter, discussing the entrapment defense in *Sherman v. Unit-*

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143 *See* United States v. Bogart, 783 F.2d 1428, 1435 (9th Cir.) (discussing the courts' inability to define precisely the "contours of the outrageous conduct defense."), *vacated sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (remanded for further findings of fact).

144 *See* United States v. Panitz, 907 F.2d 1267 (1st Cir. 1990) (addressing the need for special law enforcement tactics when investigating narcotics enterprises); *accord* United States v. Marino, 936 F.2d 23 (1st Cir. 1991); United States v. Bradley, 820 F.2d 3 (1st Cir. 1987) (discussing the difficulty of investigating contraband offenses).

145 277 U.S. 438 (1928) (Brandeis, J., dissenting)

146 *See generally* Nichols, *supra* note 13, at 1234:

> The due process defense is more nebulous than the predisposition test. The threshold issue in the due process defense is whether the police techniques employed were so outrageous that they denied the defendant his right of fundamental fairness inherent in due process of law. The defense is problematic in its application in view of the inability to define such terms as "outrageous" and "fundamental fairness." Additionally, it rests on the concept of due process, an area of the law that the Court has persistently and purposefully left hazy.

ed States,[147] pronounced that the courts "have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice . . . ,"[148] he provided little concrete guidance concerning precisely what means are to be considered "lawless" or in violation of "rationally vindicated standards of justice." While he proceeded to suggest that appeals to sympathy, friendship, and the possibility of exorbitant gain cannot be tolerated,[149] Justice Frankfurter concluded by stating that "[w]hat police conduct is to be condemned . . . must be picked out from case to case as new situations arise involving different crimes and new methods of detection."[150]

The conclusion that the entrapment defense must be examined on an ad hoc basis carried over into the delineation of the due process defense in *United States v. Russell*[151] and *Hampton v. United States*.[152] Justice Rehnquist expressed doubt in *Russell* that the notion of "due process of law can be embodied in fixed rules."[153] He further stated in *Hampton* that the proper remedy for police conduct that goes beyond the scope of police duties lies not in the application of the due process defense, but rather in a separate prosecution of the agents under federal or state law.[154] Moreover, Justice Rehnquist would only afford a defendant a due process defense if the police methods violated a protected right of that defendant.[155] Justice Brennan's dissent attempted to provide a little more help in determining what type of police conduct is acceptable: "Where the Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser, the Government's role has passed the point of toleration."[156] Yet, this guidance is of little value, since it voices the opinion of the dissent, and the plurality in *Hampton* affirmed the conviction based on a determination that due process had not been violated in this case.[157]

147 356 U.S. 369 (1958).
148 *Id.* at 380 (Frankfurter, J., concurring).
149 *Id.* at 383 (Frankfurter, J., concurring).
150 *Id.* at 384 (Frankfurter, J., concurring).
151 411 U.S. 423 (1973) (5-4 decision).
152 425 U.S. 484 (1976) (plurality decision).
153 *Russell*, 411 U.S. at 431.
154 *Hampton*, 425 U.S. at 490.
155 *Id.*
156 *Id.* at 498 (Brennan, J., dissenting) (citation omitted).
157 *Id.* at 490-91.

The holdings in these Supreme Court cases provided little specific instruction for the lower courts about the parameters of the due process defense.[158]

As the lower courts have attempted to analyze the meaning of "outrageous" as it pertains to the due process defense, they have encountered the same difficulties faced by the Supreme Court. Since no precise definition exists for the term, the lower courts have typically allowed policy considerations to prove determinative. Moreover, the courts generally work backwards from the facts to conclude that conduct either was or was not outrageous, rather than working forward from a definition of the concept. Instead of defining outrageous conduct and then analyzing the cases in light of this definition, the courts characteristically recite a litany of facts and then cast their votes against the defendant. This methodology not only lacks any type of analytical structure, but, because it is so strongly influenced by social and political pressures, is also susceptible to anomalous results due to the inherent flux in sociopolitical norms. Without a standard to support the courts' decisions, the due process defense is too malleable to prove useful. Furthermore, the lower courts, like the Supreme Court, appear to use the usual entrapment factors—that the government completely manufactured the crime and that the defendant was previously involved in criminal activity—to evaluate outrageousness. The resultant meld of entrapment and due process only adds to the confusion surrounding the definition of outrageousness in the due process context. As exemplified below, these factors taken together have resulted in a plethora of lower court due process decisions which are marked by a striking lack of sound judicial analysis.

Two years after *Hampton*, the Third Circuit in *United States v. Twigg*[159] addressed the due process issue. In *Twigg* a government informant procured the equipment, raw materials, and site needed to manufacture speed, and then proceeded to produce the drug with minimal assistance from the defendants.[160] The court began

158 A similar problem exists concerning the entrapment defense. As one writer has noted, "the Court's failure to expand the [entrapment] defense so that it is consistent with excuse theory and its refusal to admit that the defense is based on public policy grounds prevents articulation of a consistent and understandable rationale which would provide guidance to lower courts." Mary M. Ross, Note, *Entrapment Reconsidered: A Nonexculpatory Defense Based on the Need for Reciprocity Between the Government and the Governed*, 35 WAYNE L. REV. 99, 113 (1988).

159 588 F.2d 373 (3d Cir. 1978).

160 *Id.* at 375-76.

its analysis by looking to Justice Powell's concurrence in *Hampton*, and agreed with him that, in order to determine if government conduct has been outrageous, the court must "consider the nature of the crime and the tools available to law enforcement agencies to combat it."[161] In so doing, the *Twigg* court asserted that a distinction must be made between investigation of manufacturing operations and investigation of narcotics distribution.[162] The court continued to analyze the permissible range of government conduct, by first noting that while infiltration of criminal operations via undercover agents and informers is acceptable,[163] the tactics employed in the instant case were not: "Unlike other cases rejecting [the due process] defense, the police investigation here was not concerned with an existing laboratory; the illicit plan did not originate with the criminal defendants; and neither of the defendants were chemists—an indispensable requisite to this criminal enterprise."[164]

To this guidance the court added the admonition of *United States v. Archer*[165] that "there is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums."[166] Taken as a whole, the *Twigg* court did develop a somewhat more concrete framework within which to analyze due process claims, but the delineation was far from precise. In fact, the court itself was not unanimous in its decision that *Twigg* presented a case in which due process had been violated. Judge Adams in dissent stated that he did not believe that government incitement to crime could "be seen as the crucial element establishing the level of outrageousness necessary to find a violation of the due process clause."[167] Moreover, the fact that the

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161 *Id.* at 378 n.6.

162 The *Twigg* court stated:

> *Hampton* was concerned with the sale of an illegal drug, a much more fleeting and elusive crime to detect than the operation of an illicit drug laboratory. In such a situation the practicalities of combating drug distribution may require more extreme methods of investigation, including the supply of ingredients which the drug ring needs.

Id. at 378 (footnote omitted).

163 *Id.* at 380.

164 *Id.* at 381 (citations omitted) (footnote omitted).

165 486 F.2d 670 (2d Cir. 1973).

166 *Twigg*, 588 F.2d at 381 n.10 (quoting United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973) (footnote omitted)).

167 *Id.* at 387 (Adams, J., dissenting). Furthermore, Judge Adams stated that "instiga-

court began its analysis in *Twigg* by asserting that the type of crime being combatted must be considered when analyzing a due process claim revealed that the Third Circuit was willing to let social policy considerations override faithfulness to the constitutional mandate of due process.

As the lower courts continued to struggle for a workable standard to apply to the due process defense, the Fifth Circuit addressed the issue in 1980 and 1981.[168] Unfortunately, while the circuit did directly address the question of how to determine the level of "outrageousness" needed to constitute a due process defense, it failed to provide much practical guidance. Instead, it preferred to revert to open-ended terms and ad hoc determinations. In *United States v. Williams*,[169] the defendants repeatedly met with undercover DEA agents to discuss and plan the manufacturing and distribution of quaaludes (and the DEA agents allegedly supplied the defendants with a list of necessary ingredients).[170] The court stated that due process is not violated by the government's providing the defendant with the opportunity or facilities needed to commit a crime.[171]

United States v. Tobias,[172] in which DEA agents ran a chemical supply company and counselled the defendant over the phone regarding the manufacture of PCP,[173] added that the examination of outrageous conduct does not depend on any one factor, but rather that the court must look to the totality of the circumstances of the case at hand.[174] Judge Johnson, dissenting, attempted to consolidate the teachings of other due process cases. He began by commenting that while government involvement is sometimes necessary to combat crime, the "degree of Government involvement is not, however, boundless."[175] Conduct that is so outrageous that it shocks the conscience constitutes a due process

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tion of a crime may be 'outrageous' in the context of some forms of criminal activity but acceptable in the context of others . . . . To place so heavy an emphasis on instigation as an important element of 'outrageous' conduct might well make effective enforcement of our drug laws most difficult." *Id.* at 387-88 (Adams, J., dissenting).

168 United States v. Williams, 613 F.2d 560 (5th Cir. 1980); United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982).

169 613 F.2d 560 (5th Cir. 1980).

170 *Id.* at 561-62.

171 *Id.* at 562.

172 662 F.2d 381 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982).

173 *Id.* at 383-84.

174 *Id.* at 387.

175 *Id.* at 390 (Johnson, J., dissenting).

violation.[176] Also, if the government activity reaches a certain level of pervasiveness, the due process defense should be available: "[W]hen the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative."[177] He concluded that while courts should recognize that law enforcement agents need wide latitude in devising appropriate methods and tactics for combatting crime, and thus judges should be reluctant to overturn convictions based on government overinvolvement in crime, "judicial tolerance of Governmental involvement in criminal activity should not constitute a *carte blanche*; there is still a point beyond which law enforcement officials cannot go."[178] Precisely where this point lay, however, still remained hazy. While Judge Johnson would have found the facts in *Tobias* outrageous enough to constitute a violation of due process, the majority of the court disagreed, and upheld the convictions.[179] Again, the holdings and dicta of the Fifth Circuit cases shed little light on the practical application of the due process defense.

The Eleventh Circuit has fared little better in defining the contours of the due process defense. In *Owen v. Wainwright*[180] a deputy sheriff asked an informant to notify him if the informant learned of anyone desiring to purchase a large quantity of

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176 Discussing *United States v. Russell* and *Hampton v. United States*, Judge Johnson concluded:

> These decisions make clear that as a general rule infiltration and "limited involvement" by Government agents in a drug related enterprise do not run afoul of the due process clause and in fact constitute a legitimate method of apprehending offenders. The Supreme Court also admonished that due process is not meant to provide federal courts with a "chancellor's foot" veto over investigatory techniques that lack judicial approbation. The two cases read in tandem demonstrate that only extreme and outrageous Government involvement in the commission of a crime will justify reversing for that reason a conviction under the due process clause.

Id. (Johnson, J., dissenting).

177 *Id.* at 391 (Johnson, J., dissenting) (quoting Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971)). Additionally, Judge Johnson observed that the "direct, continual involvement by Government agents in the creation, maintenance and commission of a crime, to the extent reflected in this case, goes beyond the perimeter of permissible conduct and should not be countenanced by this Court." *Id.* at 393 (Johnson, J., dissenting).

178 *Id.* (Johnson, J., dissenting).

179 *Id.* at 389.

180 806 F.2d 1519 (11th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1071 (1987).

narcotics.[181] The informant complied with this request and eventually arranged a meeting between the defendants and police officers, during which the defendants were arrested and ultimately convicted for drug trafficking.[182] The defendants raised the due process defense, based upon the allegation that the informant had been promised payment on a contingent fee basis.[183] The Eleventh Circuit looked at the totality of the circumstances, and, balancing the minimal activity of the government informant against the "substantial contribution to the criminal activity"[184] of the defendant, held that due process was not violated.[185] Furthermore, the court addressed the contention that the government's use of an informant paid on a contingent fee basis constituted a per se violation of due process, and asserted that "[c]ontingent fee arrangements with informants have been upheld in this circuit where the fee is contingent on a successful investigation in general rather than the successful prosecution of a particular individual."[186] While this statement at least provided specific guidance concerning the use of paid informants as related to the due process defense, it represents only a small step toward delineating just what conduct is to be considered "outrageous" enough to warrant reversal of a criminal conviction on due process grounds.

Finally, the Ninth Circuit in 1986 took another step toward defining the due process defense by compiling a listing of what specific activities have proven acceptable governmental conduct. In *United States v. Bogart*,[187] where the defendant claimed a government informant had coaxed him to accept narcotics as payment for posters the informant had ordered,[188] the court recognized the difficulty of drawing the line between acceptable and unacceptable law enforcement tactics. Drawing some general conclusions from previous cases, the court determined that the government may: use "artifice and stratagem" to combat crime;[189] use paid informants;[190] supply contraband to defendants to gain

181 *Id.* at 1520.
182 *Id.* at 1520-21.
183 *Id.* at 1521.
184 *Id.* at 1522.
185 *Id.* at 1524.
186 *Id.* at 1522 (citations omitted).
187 783 F.2d 1428 (9th Cir.), *vacated sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986) (remanded for further findings of fact).
188 *Id.* at 1430.
189 *Id.* at 1438 (quoting Sorrells v. United States, 287 U.S. 435, 441 (1932)).
190 *Id.* (referencing United States v. Wylie, 625 F.2d 1371, 1378 (9th Cir. 1980), *cert.*

their confidence when working undercover;[191] provide necessary and valuable items to help further a conspiracy that is already in existence;[192] infiltrate a criminal organization;[193] and approach those already engaged in, or contemplating, criminal action.[194]

The listing of unacceptable behavior, unfortunately, was not nearly as precise. The court merely stated that tactics that "shock the conscience" are unacceptable.[195] These types of activities were defined as the use of "unwarranted" physical or mental coercion,[196] and cases in which the police entirely fabricated the crime in question in order to procure the defendant's conviction.[197] While at first glance the listing of acceptable law enforcement techniques appears to provide significant guidance regarding the definition of "outrageous" behavior warranting the due process defense, the court prefaced this listing with the statement that "[u]ltimately, every case must be resolved on its own particular facts."[198] Accordingly, this listing is in no way dispositive. Moreover, no guidance was given regarding the effect of using these activities in combination, or whether the use of these techniques could of itself constitute "unwarranted" mental coercion, and thus violate due process. These concerns, combined with the vague assertion of what types of conduct cannot be countenanced by the courts, detract significantly from the helpfulness of the listing in delineating the due process defense.[199] Additionally, the haziness

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denied, 449 U.S. 1080 (1981)).

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

192 *Id.* (referencing United States v. Lomas, 706 F.2d 886, 890-91 (9th Cir.), *aff'd per curiam on remand*, 723 F.2d 649 (9th Cir. 1983), *cert. denied*, 464 U.S. 1047 (1984)).

193 *Id.* (referencing United States v. Marcello, 731 F.2d 1354, 1357 (9th Cir. 1984)).

194 *Id.* (referencing United States v. O'Connor, 737 F.2d 814, 817-18 (9th Cir. 1984)), *cert. denied*, 469 U.S. 1218 (1985).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 The court also noted in a footnote the four-factor test used by the New York Court of Appeals in examining due process defenses:

> (1) whether the crime would not have occurred but for the government's assistance in manufacturing the crime or whether the defendants were already involved in ongoing criminal activity; (2) whether the government agents committed crimes or otherwise acted improperly; (3) whether the government agents persisted with their inducements to overcome the defendant's reluctance to commit the crime; and (4) whether the government agents' sole motive was to obtain a conviction.

Id. at 1435 n.7. *See People v. Isaacson*, 378 N.E.2d 78, 83 (1978).

surrounding the type of conduct that will not be tolerated leaves the due process defense open to the possibility that its parameters will be determined by the fears and concerns of society at the time the defense is raised, rather than by the boundaries of the Constitution.

While the listing of acceptable police tactics provided in *Bogart* does provide perhaps the most concrete guidance concerning the parameters of the due process defense, it is in reality little more than an overview of those practices that have been deemed tolerable in the past.[200] Even in *Bogart* the court primarily relied on an ad hoc determination of whether or not the facts presented a case shocking enough to be deemed outrageous. This type of hindsight methodology is of little practical guidance to a court reviewing a unique case, or to a law enforcement agency attempt-

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However, the court did not adopt this test, and prefaced its notation by stating that "the precise parameters of such concepts as 'fundamental fairness' and 'universal sense of justice' are probably indefinable. Perhaps because of these very considerable problems of philosophy and semantics, no federal court has defined with any sort of precision the contours of the outrageous conduct defense." *Id.* at 1435.

200 Various law review articles have also compiled listings of acceptable and unacceptable police behavior. *See* Franks, *supra* note 21, at 405 (footnotes omitted):

> Perhaps then, a distinction can be made. On the one hand the government provides: (1) the body of the crime itself—the chemicals needed to manufacture illegal drugs or the illegal drugs alone; (2) the means by which to accomplish an otherwise practically improbable act; and (3) the temptations to commit the crime. On the other hand, the government provides the temptations alone or in addition provides the body of the crime, without having to provide the means. The former can be characterized by *Twigg* as being outrageous. But the latter, such as supplying the *corpus delicti* itself or supplying only a portion of the means by which to accomplish the illegal task, does not amount to outrageous behavior. Furthermore, merely supplying the fruits, such as bribe money, to one who already possesses the means, acts of corrupt influence, amounts to even less.

See also Poole, *supra* note 21, at 221:

> So, even though the due process defense focuses on the government's conduct, the defendant should not have been too involved in the crime if due process is to be a viable alternative defense. For instance, the criminal activity cannot have already been in existence, the defendant cannot have been in a key organizational capacity or too active in the crime itself, the defendant cannot have initiated the contact and the defendant must have been the direct recipient of the outrageous conduct.
>
> Although the government cannot manufacture crime, there are a number of things it can do. The government can infiltrate an existing criminal organization, use undercover tactics to gain acceptance, supply contraband and other materials in order to establish a trust relationship, offer inducements, approach those who are contemplating crime, recruit criminal informants, pay criminal informants and provide an opportunity to commit the crime.

ing to formulate policy. The courts tend to define outrageousness as one of three things: impermissible importuning of the defendant to commit a crime; recourse to violence on the part of the government officials; or the total manufacture of the crime in question. These are the entrapment factors being used to determine when government conduct is deemed outrageous, thus triggering the due process defense. The reiteration of this same criteria has hindered the courts from distinguishing due process from entrapment, and in turn has prevented courts from adequately developing the due process defense. When this problem is combined with the pressures of the underlying policy considerations which surface in narcotics cases, it is of little wonder that due process has not fared well in the reverse sting context. Consequently, there remains a need for a workable, prospective standard by which to objectively evaluate due process claims.

V. THE LAW ENFORCEMENT JUSTIFICATION: A PROPOSED METHODOLOGY FOR DELINEATING THE DUE PROCESS DEFENSE

A. Introduction

Justice Powell in *Hampton v. United States*[201] acknowledged that defining the proper limitations of police involvement in particular situations is a difficult task.[202] Yet, he also asserted that he did not "despair of [the Court's] ability in an appropriate case to identify appropriate standards for police practices without relying on the 'chancellor's' [sic] 'fastidious squeamishness or private sentimentalism.'"[203] Nevertheless, questions still arise concerning the viability and even the appropriateness of the due process defense.[204] Professor Marcus has noted that some critics of the due

201 425 U.S. 484 (1976) (plurality decision).

202 *Id.* at 494-95 n.6 (Powell, J., dissenting).

203 *Id.* at 495 n.6 (Powell, J., dissenting) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)) (citations omitted).

204 In analyzing the objective entrapment defense, Professors Stitt and James asserted:

> The objective test would immunize chronic offenders from future prosecution because if the police were issued clear and unambiguous rules to follow in potential entrapment situations, these rules would inevitably become known to criminals as well. They could then protect themselves by making sure that anyone with whom they dealt broke at least one of those rules . . . .
>
> Another related argument is that it would be impossible to formulate a set of rules that would work . . . . It is also argued that one cannot formulate a criterion of just and reasonable action apart from the circumstances of particular cases.

process defense have called for its abolition.[205] Countering Judge Easterbrook's assertion that the due process defense should be abandoned, Professor Marcus stated that the significance of the defense is not found in the fact that it will often be successful, because it will not. Rather, "it is important because it creates outer limits on appropriate law enforcement techniques and because it clearly demonstrates to the legal and law enforcement communities, and to society at large, that courts are indeed willing to draw some lines that cannot be crossed even in pursuit of criminals."[206] Just because defining these limits is not an easy task does not mean that the due process defense should be abandoned, either in theory or in practice. As exemplified by the cases analyzed above, the problems attendant to defining the contours of the due process defense have rendered it impotent in practice. As Professor Marcus explained, however, the due process defense is a necessary and vital part of the criminal law. It should not be cast aside merely because it presents some analytical difficulties. While drawing the line delineating acceptable and unacceptable police conduct is admittedly difficult, it is not impossible, and only when such a line is drawn will the due process defense become a viable element of the criminal law.

In 1855, in *Den* ex dem. *Murray v. Hoboken Land & Improvement Co.*,[207] the Court instructed that in England the concept of

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Stitt & James, *supra* note 50, at 121. Due to the similarities between the objective entrapment standard and the due process defense, these concerns could also be applied to due process.

205 One such critic that Professor Marcus discusses is Judge Easterbrook:

> Judge Easterbrook [in *United States v. Miller*] offered two reasons why the court should reject the due process contention. First, he looked to the "false hope" dilemma. The Seventh Circuit has never reversed a conviction on the basis of the "outrageous governmental conduct" defense . . . .
>
> Second, and more forcefully, he wrote that the defense is not appropriate where narrow standards cannot be fashioned for law enforcement officials . . . . . Moreover, he wrote, even if such a defense were to be viewed as good policy, it is simply impossible to apply in specific cases.

Marcus, *supra* note 13, at 464 (footnote omitted).

206 *Id.* at 465. Professor Marcus countered Judge Easterbrook's second argument that "if reasonable people could not possibly agree on the application of the defense, doesn't that prove that it is a defense that itself 'is not a rule of any kind, let alone a command of the Due Process Clause'?" with the statement that "[t]he initial response to this argument must be that it is not factually accurate. There will be fact situations where reasonable people could agree that the law enforcement behavior was utterly outrageous." *Id.* (footnote omitted).

207 59 U.S. (18 How.) 272 (1855).

due process was intended to convey the same meaning as "by the law of the land."[208] Consequently, due process is inexorably tied to the concept of lawfulness. That which is lawless[209] violates due process. That which is lawless also falls outside the law enforcement justification. As a result, a nexus exists between the concepts of due process and the law enforcement justification. By ascertaining the point at which officers of the law lose the defense of the law enforcement justification, we simultaneously discover the point at which a criminal defendant should be entitled to the due process defense. Approaching the due process defense via the law enforcement justification is an attractive alternative to analyzing the due process defense directly. Not only does this approach provide more concrete guidelines regarding what tactics are unacceptable, but it also removes the analysis somewhat from the socially and politically charged narcotics arena by focusing on the conduct of the law enforcement agents rather than on the drug offender.

B. The Law Enforcement Justification

The law enforcement justification is a subset of the larger defense of justification. The *Model Penal Code* states:

> (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.[210]

The comment to the section explains "a principle of necessity, properly conceived, affords a general justification for conduct that would otherwise constitute an offense."[211] Accordingly, contrary

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208 *Id.* at 276.

209 Black's Law Dictionary defines "lawless" as "[not] subject to law; not controlled by law; not authorized by law; not observing the rules and forms of law." BLACK'S LAW DICTIONARY 886 (6th ed. 1990).

210 Model Penal Code § 3.02 (Official Draft 1962).

211 Model Penal Code and Commentaries, Comment to § 3.02 at 9-14 (1985); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.4(a) at 441 (2d ed. 1986)

to the opinion of Justice Brandeis,[212] the law accepts the principle that at times the ends do justify the means. Wayne R. LaFave and Austin W. Scott, Jr., two leading scholars in the area of criminal law, relate the doctrine of justification to the choice of evils: "When the pressure of circumstances presents one with a choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil."[213] This exception to criminal culpability is borne out in the doctrines of self-defense[214] and defense of others.[215] Similarly, the doctrine provides the underpinnings for the law enforcement justification.

LaFave and Scott describe the law enforcement justification as a defense to what would "otherwise [be] criminal conduct of a police officer, or a private person acting on behalf of an officer, . . . pursuing law enforcement purposes at the time."[216] Accordingly, law enforcement agents are privileged to engage in certain conduct, without criminal sanctions, that would be criminal if engaged in by private persons.[217] This doctrine does not, of course, provide *carte blanche* to police officers to engage in any

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("One who, under the pressure of circumstances, commits what would otherwise be a crime may be justified by 'necessity' in doing as he did and so not be guilty of the crime in question.").

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

213 LAFAVE & SCOTT, *supra* note 211.

214 Self-defense is sanctioned if the following conditions are fulfilled:

> One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.

Id. at § 5.7.

215 Defense of others is allowed under the following circumstance:

> The prevailing rule is that one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger.

Id. at § 5.8.

216 *Id.* at § 5.11(d); *see also* United States v. Murphy, 768 F.2d 1518, 1528 (7th Cir. 1985) ("In many categories of cases it is necessary for the agents to commit acts that, standing by themselves, are criminal . . . . The agents' acts merely *appear* criminal; they are not, because they are performed without the state of mind necessary to support a conviction."), *cert. denied*, 475 U.S. 1012 (1986).

217 2 G. ROBERT BLAKEY, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME: MANUALS OF LAW AND PROCEDURE ¶ 40 (1980). This principle also disproves Justice Brandeis' assertion in *Olmstead v. United States* that government agents and private citizens must be treated identically with regard to criminal conduct and the resultant sanctions. *Olmstead v. United States* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

type of police conduct. Professor G. Robert Blakey explains that the law enforcement justification only applies if "the conduct is within the reasonable exercise of the policeman's duty . . . ."[218] The question then becomes what constitutes a "reasonable" exercise. Reasonableness is not merely a nebulous standard proposed to replace the indefinite outrageousness standard currently used in the due process defense.

Unlike the outrageousness inquiry, courts have been successful in drawing a bright line in justification cases regarding what type of conduct is unreasonable. This line essentially separates the violent from the non-violent criminal offense. Acts that are merely *malum prohibitum*[219] are allowed in any number of circumstances without penal sanction. Accordingly, if a law enforcement officer engages in such conduct in the performance of his official duties, he is typically given the law enforcement justification. Acts that are *malum in se*,[220] however, are only permitted in a very limited number of instances. Such occasions occur when the defendant is faced with imminent physical violence and there is no alternative (as in self-defense and the defense of others). If a law enforcement officer engages in violence, he will have to meet these two

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218 BLAKEY, *supra* note 217, at ¶ 41. Professor Blakey also noted:

> Law enforcement officers are permitted, of course, to violate the literal terms of certain penal statutes. No one seriously doubts, for example, that they may possess narcotics, number slips, etc. The issue is one of kind and degree. Some conduct of law enforcement officers in undercover roles is clearly illegal; at some point feigned participation in a crime bears such resemblance to the crime itself that society cannot tolerate the conduct. No one doubts that they could not work in an undercover role in the investigation of a juvenile rape gang and actually participate in a rape. On the other hand, courts have been tolerant in permitting extensive police participation in certain illegal activities. The question is how far may police and prosecutors go in engaging in conduct that would otherwise be a crime?

Id. at ¶ 35.

219 Such an act is defined as: "A wrong prohibited; a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law; an act involving an illegality resulting from positive law." BLACK'S LAW DICTIONARY 960 (6th ed. 1990).

220 Black's Law Dictionary defines *malum in se* as:

> A wrong in itself; an act or case involving illegality from the very nature of the transaction . . . . An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute) . . . .

BLACK'S LAW DICTIONARY 958 (6th ed. 1990).

requirements before he will be afforded the defense of the law enforcement justification. Reasonable conduct is thus judged in terms of whether the law enforcement agent's conduct involved an act that is thought to be evil without regard to the circumstances, or whether the act merely violated a mandate of positive law. This analytical framework provides significant guidance to courts attempting to determine whether a law enforcement officer's conduct was reasonable so as to warrant the invocation of the law enforcement justification.

Since the question of reasonableness is ultimately a matter of law, numerous courts have analyzed the types of police conduct that can be considered reasonable, and thus deserving of the law enforcement justification. When evaluating the reasonableness of law enforcement tactics, courts generally look to either codes of professional ethics or clearly established, independent rules of law.[221] While the Supreme Court has asserted that it does not have the authority to "mandate a code of behavior for state officials wholly unconnected to any federal right or privilege,"[222] lower courts have been willing to dismiss indictments based on various forms of prosecutorial misconduct.[223] The rationale generally invoked is that such a dismissal will act as a deterrent to similar misconduct in the future.[224] Although *United States v.*

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221 *See In re* Friedman, 392 N.E.2d 1333 (Ill. 1979); *see also* United States v. Archer, 486 F.2d 670, 676-77 n.6 (2d Cir. 1973) ("[L]aw enforcement practices . . . remain subject to 'constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations.'" (quoting Russell v. United States, 411 U.S. 423, 432 (1973))); Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276-77 (1855):

> To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

222 Moran v. Burbine, 475 U.S. 412, 425 (1986).

223 *See* United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978) ("Under its inherent supervisory powers, a federal court is empowered to dismiss an indictment on the basis of governmental misconduct.").

224 *Id.* ("[D]ismissal is used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature."); *see also* United States v. Lopez, 765 F. Supp. 1433, 1464 (N.D. Cal. 1991) ("[T]he court is convinced that no remedy short of dismissal will have any significant deterrent effect on future government misconduct of the type found in this case.").

Owen[225] stated that "these supervisory powers 'remain a harsh, ultimate sanction [which] are more often referred to than invoked,'"[226] courts have invoked them when warranted.

For example, in 1991, the United States District Court for the Northern District of California dismissed an indictment based on the prosecutor's failure to follow state disciplinary rules.[227] In reaching this conclusion, the court held that "[a]t a minimum, . . . government prosecutors must scrupulously obey ethical rules adopted by the court."[228] This sentiment was followed in *In re Friedman*.[229] In *Friedman*, a prosecutor violated the Disciplinary Rules of the Code of Professional Responsibility by instructing police officers to testify falsely in court if necessary, and to accept bribes from corrupt attorneys, in order to gather evidence for a future prosecution of those attorneys.[230] The task before the court was to determine if disciplinary measures were warranted, and if so, what the proper nature of those sanctions should be.[231] Analyzing these issues, the court emphatically stated that "[t]he integrity of the courtroom is so vital to the health of our legal system that no violation of that integrity, no matter what its motivation, can be condoned or ignored."[232] The court thus stated that engaging in activity that jeopardized that integrity, in this case by creating and using false evidence in court to investigate corrupt attorneys, not only violated ethical norms of the legal profession, but could also have resulted in criminal sanction. While the court in *Friedman* did not discipline the respondent, it did send out a warning to other government officials that such conduct would be sanctioned in the future.[233] This result necessarily followed from the fact that the court in *Friedman* was, like Justice Brandeis, unwilling to accept that at times the ends may

225 580 F.2d 365 (9th Cir. 1978).

226 *Id.* at 367 (quoting United States v. Baskes, 433 F. Supp. 799, 806 (N.D. Ill. 1967)).

227 *Lopez*, 765 F. Supp. at 1464.

228 *Id.* at 1463.

229 392 N.E.2d 1333 (Ill. 1979).

230 *Id.* at 1333-34.

231 *Id.* at 1334.

232 *Id.* at 1335. The court applied this concept to the case at hand, and concluded that "even if no other ways existed to ferret out bribery [by corrupt attorneys], the respondent would still not be privileged to engage in unethical (and perhaps illegal) conduct." *Id.* at 1336.

233 "Because respondent acted without the guidance of precedent or settled opinion and because there is apparently considerable belief . . . that he acted properly in conducting the investigations, we conclude that no sanction should be imposed." *Id.*

justify unique means. Because the court refused to recognize the existence of areas of the law that allow the justification of otherwise unacceptable means in light of compelling circumstances, the analysis stopped before reaching the actual issue in controversy. The court never really discussed the possible applicability of the law enforcement justification beyond the fact that codes of professional ethics may play a role in determining when criminal conduct by government officials will be sanctioned.

Moreover, the court in *Friedman* held the prosecutor to ethical standards designed to govern conduct among private attorneys. Just as the conduct of law enforcement agents is not judged by the same standards as that of private citizens, the actions of prosecutors should not be judged by standards formulated to guide private attorneys. Although the court rightly asserted that codes of professional ethics constitute one method of determining reasonableness in the context of the law enforcement justification, it used the wrong code of professional ethics. Because *Friedman* did not properly evaluate the ethical propriety of the prosecutor's actions, and thereby concluded that he had acted unreasonably, the court failed to correctly apply the law enforcement justification.

Besides ethical standards, courts also look to an officer's adherence to state and federal laws when examining the reasonableness of the officer's conduct in the context of the law enforcement justification. To be eligible for a federal law enforcement justification, an officer's conduct must be authorized under federal law and be sanctioned by the appropriate state authorities.[234] *Cunningham v. Neagle*[235] was one of the first cases to analyze the law enforcement justification as applied to a federal officer (in this case a marshall) who violated state law. The case came to the Supreme Court on an appeal by a California sheriff, who protested the circuit court's order that he discharge the defendant from his custody.[236] The sheriff had imprisoned the defendant for murder because the defendant had killed a man who allegedly was

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234 *See* Baucom v. Martin, 677 F.2d 1346, 1350 (11th Cir. 1982) (relying on Cunningham v. Neagle, 135 U.S. 1 (1890)):

> That a deliberate violation of state law may render federal law enforcement more convenient is insufficient to shield the agent from state prosecution . . . . *Neagle* requires first that the federal officer be in the performance of an act which he is authorized by federal law to do as part of his duty.

235 135 U.S. 1 (1890).

236 *Id.* at 3.

about to attack Justice Field.[237] The defendant had been instructed by the Attorney General of the United States to accompany Justice Field, in anticipation of a violent attack upon the Justice.[238] Justice Miller wrote the opinion for the Court, and, concluding that the marshall was properly discharged from the state's custody by the circuit court,[239] determined that the duty of the marshall was to be "derived from the general scope of his duties under the laws of the United States . . . ."[240] Accordingly, the marshall was justified in committing homicide in order to ward off an attack on the Supreme Court Justice he was assigned to protect, even though this action was not specifically sanctioned anywhere.[241]

Nearly one hundred years later, Judge Wood, in *Baucom v. Martin*,[242] addressed the federal law enforcement justification and the interplay between federal agents and state laws. The defendant, a federal agent investigating alleged bribery by a district attorney, was himself charged with bribery when the targeted district attorney turned the tables and had the local authorities arrest the informants.[243] This arrest led to the revelation that the federal agent had authored the bribery attempt,[244] resulting in his being charged with attempted bribery as well.[245] Discussing the breaking of state law in a federal investigation, Judge Wood stated that "[o]nce any degree of illegal state activity is sanctioned as a means of federal law enforcement, unavoidable problems may be anticipated as to where to draw the line in each case."[246] He also noted that a federal officer does not receive absolute state immunity simply because of his status and the fact that the conduct was undertaken as part of a federal investigation.[247] To determine

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237 *Id.* at 4.
238 *Id.*
239 *Id.* at 76.
240 *Id.* at 59.
241 *Baucom* analyzed the decision in *Neagle* in the following terms:

> In *Neagle*, it was held that the necessary authority could be derived from the general scope of the officer's duties. The duty of the executive branch to enforce the laws of the United States and to employ agents to assist in that purpose by detecting and prosecuting crimes against the United States, as provided by statute, requires no elaboration.

Baucom v. Martin, 677 F.2d 1346, 1350 (11th Cir. 1982) (footnote omitted).
242 677 F.2d 1346 (11th Cir. 1982).
243 *Id.* at 1347-48.
244 *Id.* at 1348.
245 *Id.* at 1347.
246 *Id.* at 1350.
247 *Id.*

when such immunity should be granted, Judge Wood looked to the two-prong test set forth in *Neagle*.[248] The first factor requires that the officer claiming the law enforcement justification be performing an act that he is authorized by federal law to perform as part of his duties.[249] The second prong requires that the officer carefully circumscribe his actions so as to do no more than is necessary and proper.[250] After examining these requirements, Judge Wood did not rule out the possibility that a federal officer, in good faith, could receive immunity via the law enforcement justification when he broke state laws. Nevertheless, "[d]eliberate violations of state law for federal purposes must be the rare exception, and be clearly seen to be reasonable, necessary, and proper."[251] The court held that in this case, especially in light of the fact that the investigation was a joint effort involving both federal and state agents, the officer should not be held criminally liable for bribery.[252]

Various courts have, like *Baucom*, made determinations regarding what types of law enforcement tactics can be employed while still affording the officers the law enforcement justification.[253] Also, like *Baucom*, most look at the two factors outlined in *Neagle*, often incorporating an additional good faith requirement.[254] In

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248 *Id.*

249 *Id.*

250 *Id.* Judge Wood also commented:

> The use of undercover agents is not *per se* unlawful. It is a recognized technique commonly utilized in narcotic cases. Cases are often made by the purchase of narcotics by undercover agents from peddlers. The purchase as well as sale of narcotics may constitute a state violation, but seldom gives rise to state objections.

Id. (citations omitted).

251 *Id.* at 1351.

252 *Id.*

253 *But see* United States v. Simpson, 813 F.2d 1462, 1468 (9th Cir.) ("[O]ur Constitution leaves it to the political branches of government to decide whether to regulate law enforcement conduct which may 'offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically . . . .'"(quoting Rochin v. California, 342 U.S. 165, 172 (1952))), *cert. denied*, 484 U.S. 898 (1987).

254 *See Baucom*, 677 F.2d at 1350; *but see* United States v. Miller, 891 F.2d 1265, 1269 (7th Cir. 1989) ("The Constitution does not require the government to have a preexisting good faith basis for suspecting criminal activity before initiating an undercover investigation . . . .").

One method of determining whether or not objective good faith has been met would be to evaluate the officer's conduct in light of applicable administrative guidelines. For example, F.B.I. agents would be held to strict compliance with the Attorney General's Guidelines on F.B.I. Undercover Operations that involve what would otherwise be illegal

some instances these requirements will not be met, resulting in successful prosecution of the officer who engaged in the illegal activity. It is at this point that the defendant should receive the protection of the due process defense. As stated above, to successfully invoke the law enforcement justification, the court must determine not only that the agent's authorization to commit the act was clear,[255] but also that the agent's conduct was reasonable. Besides looking to codes of professional conduct and federal and state laws when analyzing reasonableness, it is also helpful to look to the analysis employed in civil immunity cases.

Powers v. Lightner[256] illustrated this concept when addressing a claim of qualified immunity by F.B.I. agents who devised a sting operation that involved dealing in stolen property.[257] The agents sold valid auto titles to suspects who ran a "retagging" business.[258] These suspects then sold the retagged cars to auctioneers, who in turn sold them to used car dealers.[259] The appellee was a used car dealer who had innocently sold one of these retagged cars to a customer.[260] When the sting operation terminated, the car was seized and returned to its proper owner, and the woman who had purchased the car from the appellee sued him.[261] The appellee in turn sued the two F.B.I. agents, who claimed the affirmative defense of qualified immunity.[262] The court balanced the interest of the government in successfully maintaining the sting operation against the interest of the injured party in receiving indemnification for his loss. In weighing the competing interests, the court stated that the "'facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability . . . .'"[263] Since there was no closely related case law to indicate to the appellants that their actions in the sting operation were unreasonable, the court

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activity. *See* SENATE REPORT, *supra* note 3.

255 *See* United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976) (holding that the defendant had violated 18 U.S.C. § 241 by committing burglary, and that there was no justification premised on national security grounds, via authorization of the President or the Attorney General.), *cert. denied*, 429 U.S. 1120 (1977).

256 820 F.2d 818 (7th Cir. 1987) (per curiam), *cert. denied*, 484 U.S. 1078 (1988).

257 *Id.* at 820.

258 *Id.*

259 *Id.*

260 *Id.*

261 *Id.*

262 *Id.* at 820-21.

263 *Id.* at 822 (quoting Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.), *cert. denied* 479 U.S. 848 (1986)).

held that they were entitled to qualified immunity.[264] While this case specifically addressed the defense of qualified immunity, not the law enforcement justification, it provides helpful guidance for determining when a law officer's conduct is to be deemed reasonable, so as to afford him the protection of the law enforcement justification.

The Illinois Appellate Court in *Chaney v. Department of Law Enforcement*[265] and the Federal District Court for the Northern District of Illinois in *Stokes v. City of Chicago*[266] have discussed the issue of reasonableness in both the criminal and civil contexts. In *Chaney*, two Illinois Bureau of Investigation agents had been ordered to open and operate a tavern as part of an undercover operation.[267] Concerned about the legality of the project, the agents refused to return to the tavern, and consequently were dismissed from the Bureau.[268] Observing that the agents' superintendent directed them to violate several laws,[269] the court admonished that the objective of obtaining a criminal conviction did not justify the use of criminal conduct by government officials—in this case the illegal acts of opening and operating the tavern with an unlawful liquor license.[270] The court fully endorsed the Brandeis view of means-ends: "It is illegal, and indeed totally inappropriate, that law enforcement officers be ordered to break the law. The total learning available to guide us in our conduct teaches that an illegal or immoral means cannot be utilized to reach a legal or 'desirable' end."[271] The court concluded that if such illegal means are needed to successfully enforce the law, it is the duty of the legislature to validate those means.[272] Accordingly, the officers were justified in their concern that they would not be protected from either state criminal prosecution by the law enforcement justification, or civil suits by qualified immunity, since

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264 *Id.* at 823. Moreover, the court stated that "[q]ualified immunity shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 821 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); *accord* Stokes v. City of Chicago, 744 F. Supp. 183 (N.D. Ill. 1990).

265 393 N.E.2d 75 (Ill. App. Ct. 1979).

266 744 F. Supp. 183 (N.D. Ill. 1990).

267 *Chaney*, 393 N.E.2d at 76-77.

268 *Id.* at 78.

269 *Id.* at 80.

270 *Id.*

271 *Id.*

272 *Id.* at 80-81.

the court ultimately found their actions to have been unreasonable.

In *Stokes v. City of Chicago*[273] the issues of law enforcement justification and civil liability were addressed in the context of officers who suborned perjured testimony for use before a grand jury.[274] The plaintiffs contended that the perjured testimony resulted in an illegal indictment, arrest, and prosecution.[275] The court began its discussion by reciting that the law has never granted civil immunity in this context.[276] Moreover, the court expressly stated that "[a] police officer who allegedly knowingly obtains an indictment or makes an arrest in violation of an individual's constitutional rights can be sued under [42 U.S.C. sec. 1983] for damages."[277] Finally, in holding that the officers were not entitled to qualified immunity, the court asserted that even in the absence of a judicial decision or a specific statutory enactment pertaining to this precise situation, a reasonable officer would have known that knowingly using false evidence is illegal.[278] Where, as in *Chaney* and *Stokes*, the court finds an officer's actions so unreasonable as to deprive him of qualified immunity in the civil context, he should also be denied the law enforcement justification in the criminal context. The *Stokes* court itself tied the issue of civil immunity to the law enforcement justification concept, stating in a footnote that:

> State and federal law generally prohibit assault, battery, use of deadly force, criminal damage to property, weapons possession, and so forth; all of these prohibitions contain exceptions for police officers on terms not applicable to ordinary citizens. There are no such general exceptions for police officers in those laws which prohibit false testimony or its subornation before courts and juries. At most are found exceptions permitting police officers to provide false information on such things as license application forms and corporation reports in the performance of undercover work, with explicit approval of

273 744 F. Supp. 183 (N.D. Ill 1990).

274 *Id.* at 184.

275 *Id.* at 185.

276 *Id.* at 186.

277 *Id.* The court also commented: "In *Malley v. Briggs* [475 U.S. 335 (1986)], the Supreme Court specified that issuance of an arrest warrant only provides police officers with qualified immunity and qualified immunity does not protect from liability an officer who acts on warrant where that reliance is not objectively reasonable." *Id.* at 187-88.

278 *Id.* at 188.

superiors, prosecutors or courts . . . .[279]

While the footnote in *Stokes* appears to modify the *Chaney* position that there is no law enforcement justification available for falsifying an application for a liquor license, etc., the concerns raised in *Chaney* are still valid. There is a point at which "enough is more than enough—it is just too much."[280] It is at this point that the law enforcement justification fails, and the due process defense should prevail.

C. Summation of the Law Enforcement Justification

Because the law recognizes that in certain situations otherwise unlawful means are justified by the ends they serve, the law enforcement justification will provide government officials with immunity for actions related to their official duties if they acted in a reasonable manner. The acts that fall into this category are to be derived from the general duties of the officer, and do not necessarily have to be specifically enumerated.[281] To determine reasonableness, the above analysis indicates that a number of factors must first be met. To begin, the violent character of the act in question must be taken into account. If the act is *malum in se*, the officer must prove that he was faced with imminent physical violence and had no reasonable alternative in order to invoke the law enforcement justification. If the act is merely *malum prohibitum*, exceptions to criminal sanction are more common, and the officer need not show the two additional factors required for acts *malum in se*. Once this threshold inquiry is made, courts may also examine a number of other factors when evaluating the reasonableness of an officer's conduct. As exemplified in *United States v. Owen*,[282] *United States v. Lopez*,[283] and *In re Friedman*,[284] an officer who violates the applicable code of professional ethics[285] will most likely be deemed to have acted unreasonably. Also, *Cunningham v.*

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279 *Id.* at 188, n.4.

280 Williamson v. United States, 311 F.2d 441, 445 (5th Cir. 1962) (Brown, J., concurring), *cert. denied*, 381 U.S. 950 (1965).

281 *See* Cunningham v. Neagle, 135 U.S. 1 (1890).

282 580 F.2d 365 (9th Cir. 1978).

283 765 F. Supp. 1433 (N.D. Cal. 1991).

284 392 N.E.2d 1333 (Ill. 1979).

285 For example, the MODEL RULES OF PROFESSIONAL CONDUCT (1983) would apply to attorneys, judges, etc.; the SENATE REPORT, *supra* note 3, would apply to FBI agents; Drug Enforcement Agency (DEA) guidelines would apply to DEA agents; Immigration and Naturalization Service (INS) guidelines would apply to INS agents.

Neagle[286] and *Baucom v. Martin*[287] instruct that an act that violates state law and is not properly authorized, narrowly tailored to the objective, and performed in good faith, will not be reasonable, and thus will fall outside the law enforcement justification. Reasonableness is also evidenced if the officer strictly complied with the appropriate administrative guidelines[288] and acted in conformity with the standards clearly set forth in existing case law.[289] Analogizing to civil cases, while an officer will be granted qualified immunity if he has not violated clearly established constitutional or statutory rights,[290] *Stokes v. City of Chicago*[291] indicates that, even in the absence of a judicial decision or a specific statutory enactment, action which a reasonable officer would know violates a person's constitutional rights will not receive even qualified immunity.[292] Such a finding would provide evidence that the agent failed to act reasonably, and thus should be denied the law enforcement justification if applicable. If the officer is found to have acted unreasonably as determined by the above requirements, he will not be eligible for the law enforcement justification. As a result, his actions are deemed lawless, and consequently should constitute a violation of due process.

VI. CONCLUSION

Evaluating due process cases in light of the law enforcement justification would provide a structured, yet flexible, standard by which a court could evaluate government conduct. This method is preferable to the open-ended outrageousness standard currently employed by the Supreme Court in evaluating the due process defense because the law enforcement justification is evaluated in the context of applicable administrative guidelines and statutes, constitutional rights, and existing case law. These norms provide an analytical framework that is objectively structured, yet capable of the flexibility required to evaluate specific fact situations. Such an analysis would provide government officials with guidelines to

286 135 U.S. 1 (1890).

287 677 F.2d 1346 (11th Cir. 1982).

288 *See* United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991); *Friedman*, 392 N.E.2d 1333.

289 *See* Powers v. Lightner, 820 F.2d 818 (7th Cir. 1987) (per curiam), *cert. denied*, 484 U.S. 1078 (1988).

290 *See Id.*

291 744 F. Supp. 183 (N.D. Ill 1990).

292 *Id.* at 188.

which they can conform their conduct so that due process could be evaluated both prospectively and retroactively. Moreover, analysis grounded in the law enforcement justification would alleviate the current blurring of the entrapment and due process defenses resulting from the use of the same factors to distinguish each defense. Such a methodology would not only provide law enforcement agencies clearer guidelines so that they could proceed confidently with narcotics investigations, but would also insulate the court system from haphazard judicial decisions. While successful due process claims would most likely be small in number, they would at least be in accord with the Constitution.

Whenever a nation is faced with an evil that threatens the underpinnings of society, it is tempting to compromise personal liberties to combat the threat. Such is the case regarding the current fight against narcotics in the United States. Senator Edward M. Kennedy, in a recent address to the American Bar Association, discussed the role of the Constitution in the nation's battle against drugs.[293] Recognizing that the war on drugs is beginning to exert pressure on the Fifth Amendment right to due process,[294] he admonished: "The Constitution is perfectly capable of accommodating the legitimate interests of law enforcement—but end runs around the Bill of Rights are unacceptable, and it is irresponsible for any administration committed to the rule of law to try them."[295] It appears from analyzing many of the reverse sting cases that have rejected the due process defense, that courts are coming dangerously close to ignoring a defendant's due process rights in the face of public policy concerns regarding the war on drugs. "Our constitutional rights do not contribute to the drug problem, and compromising them will not solve it. We do not need to trample the Bill of Rights to win the war on drugs."[296] The fact that our nation is faced with a social problem that is daily approaching tragic proportions does not mean that due process rights need no longer be protected. The Constitution has endured for two centuries because the courts have not sacrificed its protections in the face of current social problems.[297] Judge

293 Edward M. Kennedy, *Fight Evil, Forget Freedom*, HUM. RTS., Fall/Winter 1990, at 36, 36.

294 *Id.* at 37.

295 *Id.*

296 *Id.* at 46.

297 As Justice McKenna observed:

Zagel in *Stokes v. City of Chicago*[298] eloquently expressed the enormity of the problem facing law enforcement officers in combatting crime:

> Policing is a lofty calling, vital to the public weal, often heroic in action. The grace and worth of the work usually remains unseen and unappreciated by those it serves. In grime and squalor, facing danger and fury, bearing witness to what is worst in men and women—even police officers sometimes lose sight of the dignity of their service.[299]

Nevertheless, these problems, and the gravity of the social harms resulting from narcotics offenses in the United States, do not justify violating the due process rights of individuals. Although the law recognizes that at times ends may justify means, the essence of constitutional due process is that lawlessness will not be tolerated, no matter how socially desirable the goal. As Justice Brandeis cautioned:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

Weems v. United States, 217 U.S. 349, 373 (1910).

298 744 F. Supp. 183 (N.D. Ill. 1990).

299 *Id.* at 188.

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[300]

Gail M. Greaney

300 Olmstead v. United States, 277 U.S. 438, 479 (1928) (5-4 decision) (Brandeis, J., dissenting).