OUTRAGEOUS CONDUCT: THE THIRD CIRCUIT'S TREATMENT OF THE DUE PROCESS DEFENSE

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I. INTRODUCTION

In *United States v. Twigg*,[1] the Third Circuit became the first federal court of appeals to reverse a conviction under the "outrageous government conduct" or "due process" defense[2] recognized by the Supreme Court in *United States v. Russell*[3] and *Hampton v. United States*.[4] Specifically, the *Twigg* court found that the government's involvement in the defendants' criminal activities was so extensive as to violate due process.[5]

Although its application of the due process defense was completely faithful to settled precedent, *Twigg* has neither furthered the development of the defense nor discouraged outrageous police work. Nearly twelve years hence, it remains the only post-*Hampton*[6] federal appeals decision to invalidate a conviction pursuant to the due process defense.

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1 588 F.2d 373 (3d Cir. 1978).

2 As more fully explained below, that "defense" is not really a defense at all. Rather, it is a constitutional doctrine that requires invalidation of a conviction secured through outrageous government conduct, irrespective of the defendant's guilt or innocence. *See* Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973). *See also* United States v. Bogart, 783 F.2d 1428, 1432 n.2 (9th Cir. 1986) ("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.").

3 411 U.S. 423 (1973).

4 425 U.S. 484 (1976).

5 *Twigg*, 588 F.2d at 380.

6 Prior to *Russell* and *Hampton*, the Ninth Circuit invalidated a conviction secured through outrageous government conduct. *See* Greene v. United States, 454 F.2d 783 (9th Cir. 1971). Indeed, *Greene* remains good law in the Ninth Circuit. *See infra* text accompanying notes 177-88. Similarly, the Third Circuit reversed a conviction on fundamental fairness grounds in United States v. West, 511 F.2d 1083 (3d Cir. 1975), a case decided after *Russell* but before *Hampton*. For a discussion of the continued significance of *West*, see *infra* notes 117-22 and 150-53 and accompanying text.

On closer examination, the reason for *Twigg*'s dead-letter status quickly reveals itself. Stated simply, *Twigg*'s failure to take root is the direct result of its subsequent history within the Third Circuit. Although approved by the court sitting in banc,[7] *Twigg* was later rejected by a three-judge panel of the Third Circuit.[8] Given that inhospitable—and indeed, unauthorized[9]—treatment by the very court that penned it, *Twigg*'s moribund condition is hardly surprising.

What is surprising is the Third Circuit's retreat from the fundamental principles announced in *Twigg*. Through that retreat, the Court has placed its imprimatur on increasingly egregious law enforcement techniques. With the court's blessing, the government has masked its inability to thwart existing crime by creating new crimes to solve and new criminals to punish.

This article begins by distinguishing the due process or outrageous government conduct defense from its poor relation, formal entrapment theory. It then traces the development of the defense in the Supreme Court and addresses its rapid evolution and devolution in the Third Circuit. Finally, the article offers a simple prescription for revitalizing the due process defense in accordance with the teachings of the Supreme Court.

II. ENTRAPMENT VS. THE DUE PROCESS DEFENSE

While decidedly not entrapment cases, *Twigg* and its Third Circuit progeny must be understood in terms of the ongoing philosophical debate between proponents of the objective and subjective theories of entrapment. That debate has its genesis in the Supreme Court's 1932 decision in *Sorrells v. United States*,[10] the Court's seminal entrapment case.

In *Sorrells*, a prohibition agent posing as a tourist called on the defendant at his home, accompanied by two of the defendant's local acquaintances.[11] During that visit, the parties discovered that Sorrells and the agent had served in the same division

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[7] *See* United States v. Jannotti, 673 F.2d 578 (3d Cir.) (*in banc*), *cert. denied*, 457 U.S. 1106 (1982).

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

[9] Significantly, under the Third Circuit's Internal Operating Procedures, the court's panel opinions, like that in *Twigg*, are binding on subsequent panels unless overruled by the court sitting in banc. *See Horsey v. Mack Trucks, Inc.*, 882 F.2d 844, 846 (3d Cir. 1989) ("Our Internal Operating Procedures flatly prohibit a Panel of this court from overruling a published opinion of a previous panel.") (citing 3D CIR. INTERNAL OPERATING PROC. ch. 8(c)).

[10] 287 U.S. 435 (1932).

[11] *Id.* at 439.

of the service in World War I. While they were discussing their mutual past, the agent asked Sorrells for some liquor. Sorrells replied that he had none. The visit continued and somewhat later, the agent again requested that Sorrells get him liquor. Again, Sorrells told the agent that he had none, and the men resumed their war reminiscence. After still more time had passed, the agent requested liquor for a third time. On that third request, Sorrells left his home and returned several minutes later with a half gallon of liquor, which he sold to the agent for five dollars.[12]

Sorrells was subsequently indicted for possessing and selling liquor, in violation of the National Prohibition Act.[13] At trial the prohibition agent testified that he was the first and only person at Sorrells's home to mention liquor. He further stated that his sole purpose in going to Sorrells's home was to prosecute him for procuring and selling liquor. Despite those admissions, the jury convicted Sorrells and the Fourth Circuit affirmed.[14]

The Supreme Court, however, reversed Sorrells's conviction on entrapment grounds.[15] In Justice Hughes's majority opinion, the Court made clear that "the defense of entrapment is not simply that the particular act was committed at the instance of government officials."[16] Instead, the Court held that "[t]he predisposition and criminal design of the defendant are relevant"[17] in determining whether he has been entrapped. Thus "the controlling question,"[18] said the Court, 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."[19] Answering that question affirmatively, the Court declined to punish Sorrells for committing a crime " 'of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.' "[20]

Justice Hughes's majority opinion in *Sorrells* embodies what has come to be known as the subjective theory of entrapment. It

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12 *Id.*
13 *Id.* at 438.
14 Sorrells v. United States, 57 F.2d 973 (4th Cir.), *rev'd*, 287 U.S. 435 (1932).
15 Sorrells v. United States, 287 U.S. 435 (1932).
16 *Id.* at 451.
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.* at 444-45 (quoting Butts v. United States, 273 F. 35, 38 (8th Cir. 1921)).

is so named because of its focus on the individual defendant's predisposition to commit the crime with which he is charged.[21] Under that theory, if the defendant has previously committed the specific crime charged or one similar to it, he is deemed to have been predisposed to commit the present crime. Accordingly, though he may have committed the crime at the instance of a government agent, the crime is not regarded as the "product of the [agent's] creative activity."[22] Stated differently, once the defendant is found to have been criminally predisposed, it is irrebuttably presumed that his predisposition, and not the government's inducement, was the efficient producing cause of his criminal conduct.[23]

In his now famous concurring opinion in *Sorrells*, Justice Roberts adopted the majority's general definition of entrapment.[24] Echoing Justice Hughes's view that entrapment is procuring a crime that otherwise would not have occurred, Justice Roberts described entrapment as "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."[25] Thus, the majority and concurring opinions in *Sorrells* shared a common and central refusal to sanction government-induced crime.

Justice Roberts sharply disagreed, however, with the majority's predisposition-focused, subjective theory of entrapment. As Justice Roberts explained, one who commits crime at the government's instance has done so "by supposition, only because of instigation and inducement by a government officer."[26] Accordingly, Justice Roberts refused "[t]o say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed."[27] He concluded, instead, that "the ap-

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21 *See* Whelan, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense With a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1203-04 (1985) (discussing the development of the entrapment defense).

22 *Sorrells*, 287 U.S. at 451.

23 As one commentator explained, "[e]ntrapment is a defense because seductive police practices render the commission of the act involuntary. If the actor is 'predisposed' to commit the offense, however, the defense does not apply, since someone already inclined to commit the offense is not effectively 'seduced' by the inducement." Fletcher, *Paradoxes In Legal Thought*, 85 COLUM. L. REV. 1263, 1280 (1985).

24 *Id.* at 453 (Roberts, J., concurring).

25 *Id.* at 454 (Roberts, J., concurring).

26 *Id.* at 458-59 (Roberts, J., concurring).

27 *Id.* at 459 (Roberts, J., concurring).

plicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents."[28]

Although Justice Roberts's concurrence in *Sorrells* is often associated with the objective theory of entrapment,[29] it actually rejects the subjective theory without offering an alternative. Despite defining entrapment as government inducement that causes crime, Justice Roberts did not address the basic premise in the majority's causation analysis: that a crime committed by one criminally predisposed was necessarily caused by that person's predisposition. Instead, Justice Roberts simply rejected predisposition as an unsatisfactory justification for inducing predisposed individuals to commit crime. Thus, although he clearly focused on the government's conduct, he did not propose the objective theory of entrapment.[30] That theory, which does address the causation issue central to the predisposition-focused analysis, was first voiced some twenty-six years hence, in Justice Frankfurter's concurrence in *Sherman v. United States*.[31]

In *Sherman*, a government informant met the defendant at a doctor's office where both were being treated for drug addiction. Over a period of time, the informant repeatedly implored Sherman to help him secure narcotics because, he claimed, he was not responding to treatment. After many requests and constant appeals to his sympathy, the defendant sold the informant drugs on three occasions.[32] Sherman was subsequently convicted of selling narcotics and his conviction was affirmed on appeal.[33]

On certiorari, the Supreme Court reversed Sherman's conviction on the entrapment grounds announced in *Sorrells*.[34] Finding that the defendant was not predisposed to selling drugs, the Court held that his conviction was instead the product of govern-

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28 *Id.*

29 *See, e.g.*, Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1014 (1987); Whelan, *supra* note 21, at 1209.

30 As explained below, the objective theory of entrapment holds that the government's conduct should be assessed not according to its effect on the defendant, but in terms of its expected effect upon the average law abiding citizen. If sufficient to induce a law-abiding person to commit crime, that conduct constitutes entrapment. *See* Carlson, *supra* note 29, at 1014. While Justice Roberts plainly deplored government inducement of crime, he did not propose assessing the government's conduct in terms of its expected effect on an average law-abiding individual.

31 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring).

32 *Id.* at 371.

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

34 Sherman v. United States, 356 U.S. 369 (1958).

ment inducement.[35] In so finding, the Court reaffirmed the predisposition-focused, subjective entrapment theory articulated by the majority in *Sorrells*.[36] As the Court explained, "[t]o 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."[37]

In a concurring opinion joined by Justices Douglas, Harlan and Brennan, Justice Frankfurter—like Justice Roberts in *Sorrells*—decried the majority's focus on the defendant's predisposition.[38] Unlike Justice Roberts, however, Justice Frankfurter took specific issue with the majority's postulate that predisposition necessarily supplants inducement as the cause of a defendant's crime. He addressed that premise by noting: "[T]he possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements . . . must not be ignored."[39]

While disapproving the informant's extreme inducement of Sherman, Justice Frankfurter was careful to note his approval of police detection of those engaged in, or ready and willing to commit, crime. Specifically, he wrote:

> In holding out inducements [the police] should act in such a manner as is likely to induce to the commission of crime only those persons [,] and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits, and will give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised.[40]

Despite Justice Frankfurter's eloquent argument in favor of the objective theory of entrapment, the *Sherman* majority did not abandon the subjective theory articulated in *Sorrells*. Though many commentators have since endorsed—and, indeed, several states

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35 *Id.* at 375-76.

36 *See id.* at 376-78.

37 *Id.* at 372-73.

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

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

40 *Id.* at 384 (Frankfurter, J., concurring).

presently embrace—the objective approach,[41] the Supreme Court majority has adhered to a predisposition-focused theory of entrapment since *Sorrells*. Those found to be criminally predisposed cannot prevail on an entrapment defense, regardless of the government inducement to which they were subjected.

Nevertheless, the Court's adoption of the subjective theory of entrapment has not foreclosed judicial inquiry into the government's methods of investigating crime. To the contrary, the Court has made clear, in *United States v. Russell*[42] and again in *Hampton v. United States*,[43] that due process considerations may preclude securing convictions through outrageous governmental involvement in criminal activity.[44]

Still, it is important to note that the due process defense is not a strand of entrapment theory. Although its focus on the government's conduct rather than on the defendant's disposition has caused the due process defense to be identified with objective entrapment,[45] the association is unwarranted. Indeed, the entrapment and due process defenses proceed from entirely separate and distinct theoretical bases.

As both the majority and concurring opinions in *Sorrells* and *Sherman* make patently clear, entrapment exists to negate a defendant's criminal liability when his crime is caused by the government. Proponents of the objective theory ask whether the government inducements would have caused the average law abiding citizen to commit crime. Proponents of the subjective theory ask whether the

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41 *See, e.g.*, Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1114 (1951); Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1581 (1982); Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 687-90 (1975); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 899-903 (1963); Whelan, *supra* note 21, at 1197. The American Law Institute has adopted the objective approach in its Model Penal Code. *See* MODEL PENAL CODE § 2.13(1)(b) (1962). Several state legislatures have also adopted the objective approach, *see, e.g.*, ARK. STAT. ANN. § 41-209 (1977); COLO. REV. STAT. § 18-1-709 (1978); HAW. REV. STAT. § 702-237(1)(b) (1976); N.H. REV. STAT. ANN. § 626:5 (1974); N.D. CENT. CODE § 12.1-05-11 (1985); 18 Pa. Cons. Stat. Ann. § 313(A)(2) (PURDON 1983); Tex. Penal Code Ann. § 8.06(A) (VERNON 1974); Utah Code Ann. § 76-2-303(1) (1978), as have several state supreme courts. *See* Grossman v. State, 457 P.2d 226, 229 (Alaska 1969); State v. Mullen, 216 N.W. 2d 375, 382 (Iowa 1974); People v. Turner, 390 Mich. 7, 19-20, 210 N.W. 2d 336, 342 (1973).

42 411 U.S. 423 (1973).

43 425 U.S. 484 (1976).

44 *See Russell*, 411 U.S. at 431-32; *Hampton*, 425 U.S. at 488-89.

45 Indeed, Judge Adams's dissent in *Twigg* is premised almost entirely on that association. *See infra* notes 103-130 and accompanying text.

government inducements caused the particular defendant to commit crime. In either case, if the answer is yes, entrapment is established.

The due process defense, however, is not a causation-based defense. Under that defense, a defendant's conviction will be disallowed where the government's overall involvement in his crime was so outrageous as to violate due process. Whether that outrageous government conduct caused the crime is immaterial. Indeed, a defendant's predisposition—irrebuttably presumed to be the proximate cause of his criminal behavior—does not preclude his reliance on the due process defense. Unlike the wholly "inducement-based" defense of entrapment, the due process defense is entirely "involvement-based." This basic but vital distinction has been clear since the Supreme Court recognized the due process defense as one distinct from entrapment in *United States v. Russell*.[46]

III. The Birth of The Due Process Defense

In *Russell*, a federal undercover agent was assigned to locate the defendants' methamphetamine (speed) laboratory. Posing as a regional speed distributor,[47] the agent offered to augment the defendants' supply of phenyl-2-propanone (P-2-P), a scarce and essential ingredient in the manufacture of that illegal drug. In return, he was to receive one-half the speed produced. As a further condition of the deal, the defendants agreed to take the agent to their laboratory.

During their initial meeting, the defendants advised the agent that they had been manufacturing speed for several years. In fact, when they brought him to their laboratory, they showed him some speed that they had produced. Additionally, the agent noticed an empty P-2-P bottle on the premises.[48] Approximately one month later, the agent returned to the defendants' laboratory and asked one defendant whether he was still interested in their "business arrangement." The defendant indicated that he was, and would be producing some speed within the next two days. Three days later, the agent returned to the defendants' premises with a search warrant authorizing him to seize the contraband.[49] The defendants were subsequently convicted of un-

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[46] 411 U.S. 423 (1973).

[47] *Id.* at 425. The agent explained to the defendants that he was affiliated with an organization in the Pacific Northwest that was interested in controlling the distribution and manufacture of speed. *Id.*

[48] *Id.*

[49] *Id.* at 426.

lawfully manufacturing and selling speed.[50]

On appeal, the Ninth Circuit reversed Russell's conviction[51] on two separate theories. First, the court held that, irrespective of predisposition, entrapment exists whenever the government provides contraband to a defendant.[52] Therefore, the court found that Russell had been "entrapped" despite his clear predisposition to commit the crime of which he was convicted.[53]

Given its sharp deviation from the subjective entrapment theory embraced by the Supreme Court in *Sorrells* and *Sherman*, the Ninth Circuit offered an alternative basis for its holding. Specifically, the court held that even if Russell's predisposition precluded his reliance on entrapment per se,[54] " 'when the Government permits itself to become enmeshed in criminal activity, from beginning to end, . . . the same underlying objections which render entrapment repugnant to American criminal justice are operative.' "[55]

In a five-to-four decision, the Supreme Court reversed the lower court's ruling and reinstated Russell's conviction.[56] Although the Court expressly rejected the Ninth Circuit's entrapment ruling, it disapproved the lower court's due process rationale solely on factual, not legal, grounds.

First, as the lower court seemed to anticipate, the Supreme Court rejected its cavalier treatment of settled precedent—i.e., *Sorrells* and *Sherman*—which had denied the entrapment defense to predisposed defendants. The Court held that to permit the admittedly predisposed Russell to prevail on entrapment

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50 *Id.* at 427.

51 United States v. Russell, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973).

52 *Russell*, 459 F.2d at 673.

53 *Id.*

54 In acknowledging the problem posed by Russell's predisposition, the court pointed to a prior holding in which it concluded that " '[e]ntrapment is shown where Government agents . . . exert persuasion of one kind or another which induces the commission of a crime *by one who has no predisposition to do so*.' " *Id.* (quoting United States v. Walton, 411 F.2d 283, 288 (9th Cir. 1969)) (emphasis added).

55 *Id.* at 674 (quoting Greene v. United States, 454 F.2d 783, 787 (7th Cir. 1971)). Indeed, the Ninth Circuit refused to acknowledge a substantive difference between what it termed "strict entrapment" and the due process defense, noting:

> [T]he only difference . . . is the label affixed to the result. Both theories are premised on fundamental concepts of due process and evince the reluctance of the judiciary to countenance "overzealous law enforcement." We do not choose to affix a label to our result; hence we need not select between the alternative theories.

Id. (footnotes omitted).

56 United States v. Russell, 411 U.S. 423 (1973).

grounds would be to overrule *Sorrells*'s and *Sherman*'s common holding: that predisposition vitiates entrapment.[57] Thus the Supreme Court strongly disagreed with the Ninth Circuit's reading of the law of entrapment.

By contrast, the *Russell* Court did not reject the lower court's principal contention that "regardless of the significance of 'predisposition' as an element in 'entrapment,' . . . a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise."[58] Despite disapproving the Ninth Circuit's application of that defense to this case, in which the government had merely attached itself to an ongoing criminal enterprise,[59] the Court expressly stated: "[W]e 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."[60] With that passage, the Supreme Court acknowledged the existence of the due process defense.

The Court revisited that defense three years later in *Hampton v. United States*.[61] In *Hampton*, the defendant claimed that a government informant had supplied him with heroin and then arranged for him to sell that heroin to government agents.[62] Despite ample evidence of his predisposition, Hampton requested a jury instruction mandating his acquittal, on entrapment grounds, if the jury found that he had sold narcotics supplied to him by a government informant.[63] The court refused

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57 As the Court explained:

> This Court's opinions in *Sorrells* . . . and *Sherman* . . . held that the principal element in the defense of entrapment was the defendant's predisposition to commit the crime. Respondent . . . argues that the views of Justices Roberts and Frankfurter, in *Sorrells* and *Sherman*, respectively, which make the essential element of the defense turn on the type and degree of governmental conduct, be adopted as law.
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> We decline to overrule these cases.

Id. at 433.

58 *Russell*, 459 F.2d at 673.

59 The Court noted that: "the propanone used in the illicit manufacture of methamphetamine not only *could* have been obtained without the intervention of [the government agent] but was in fact obtained by these defendants." *Id.* at 431 (emphasis in original). It further stated that "[the agent's] contribution of propanone to the criminal enterprise already in process was scarcely objectionable." *Id.* at 432.

60 *Id.* at 431-32.

61 425 U.S. 484 (1976).

62 *Id.* at 486-87.

63 *Id.* at 487-88. Although there was considerable factual dispute as to the in-

to so instruct the jury and Hampton was convicted.[64] On appeal, the Eighth Circuit affirmed Hampton's conviction,[65] holding that his proposed jury charge had been properly rejected because "the Supreme Court's opinion in *Russell* forecloses us from considering any theory other than predisposition with respect to Hampton's entrapment defense."[66]

Perhaps aware that Hampton had miscast his due process defense as the objective entrapment defense expressly rejected in *Russell*, the Eighth Circuit went on to address the due process defense he might have raised. In holding that Hampton had failed to establish governmental overinvolvement, the court noted that by his own admission he had carried out the heroin sales "substantially on his own."[67] Hence, much like the Supreme Court in *Russell*, the Eighth Circuit in *Hampton* acknowledged both entrapment and the due process defense—which it awkwardly described as "an entrapment defense based on Government conduct, apart from defendant's predisposition."[68] It simply found that neither defense had been established on the facts before it.[69]

In the Supreme Court, *Hampton* provoked three separate opinions by the eight participating Justices.[70] Echoing the Eighth Circuit, the plurality opinion, authored by Justice Rehnquist and

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formant's role in Hampton's sale of the narcotics, Hampton rendered those factual differences irrelevant by requesting the blanket instruction that entrapment exists whenever the government provides contraband in a contraband case. *Id.* at 486-87. Specifically, Hampton requested the following instruction:

> The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.
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> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
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> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offense charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

Id. (citation omitted).

64 *Id.* at 488.

65 United States v. Hampton, 507 F.2d 832 (8th Cir. 1974), *aff'd*, 425 U.S. 484 (1976).

66 *Hampton*, 507 F.2d at 835.

67 *Id.* at 836.

68 *Id.*

69 *See id.*

70 425 U.S. 484 (1976). Justice Stevens took part in neither the consideration nor the decision of *Hampton*. *Id.* at 491.

joined by Chief Justice Burger and Justice White, noted that *Russell* had "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."[71] As a result, the plurality went on to note: "[P]etitioner correctly recognizes that his case does not qualify as one involving 'entrapment' at all. He instead relies on the [due process] language in *Russell*."[72]

Although distinguishing Hampton's due process defense from the entrapment claim negated by his predisposition, the plurality refused to recognize that defense. Ignoring *Russell*'s explicit acknowledgment of a due process defense in cases involving outrageous governmental conduct, the plurality stated: "The remedy of the criminal defendant with respect to the acts of Government agents . . . lies solely in the defense of entrapment. But, as noted, petitioner's conceded predisposition rendered this defense unavailable to him."[73] The Court continued, "[i]f 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."[74] Thus the plurality foreclosed the possibility that a predisposed defendant could ever escape conviction on due process grounds, no matter how outrageous the government's conduct in securing that conviction.[75]

Significantly, the remaining five Justices who decided *Hampton* expressly reaffirmed the existence of the due process defense. In a concurrence joined by Justice Blackmun, Justice Powell noted that *Russell* did not warrant the plurality's blanket rejection of the due process defense.[76] While the concurring Justices

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71 *Id.* at 488-89.

72 *Id.* at 489.

73 *Id.* at 490.

74 *Id.* (citing Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976); O'Shea v. Littleton, 414 U.S. 488, 503 (1974)).

75 The plurality charged Hampton with having "misapprehend[ed] the meaning of the quoted language in *Russell*," which states that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 489 (quoting United States v. Russell, 411 U.S. 423, 431-32 (1973)). The Court did not, however, offer any alternative interpretation of that passage.

76 *Id.* at 492-93 (Powell, J., concurring). As Justice Powell succinctly stated:

> I agree with the plurality that Russell definitely construed the defense of "entrapment" to be focused on the question of predisposition. "En-

agreed that Hampton's predisposition legally barred his entrapment claim, they rejected his due process defense on the facts, not the law.[77] In expressly recognizing that defense, they refused to retreat from the majority's ruling in *Russell*. Although noting "the doctrinal and practical difficulties of delineating limits to police involvement in crime that do not focus on predisposition"[78] and acknowledging the need for governmental participation in crime,[79] Justice Powell declared that *Hampton* was completely controlled by *Russell*.[80] Therefore, the concurring Justices declined to endorse the plurality's revision of *Russell*.

In dissenting from the Court's decision to affirm Hampton's conviction, Justices Brennan, Stewart and Marshall explicitly agreed with Justice Powell's conclusion that the due process defense is available to predisposed individuals.[81] Moreover, the dissent argued that the informant's involvement in Hampton's

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> trapment" should now be employed as a term of art limited to that concept. This does not mean, however, that the defense of entrapment necessarily is the only doctrine relevant to cases in which the Government has encouraged or otherwise acted in concert with the defendant.

Id. at 492 n.2 (Powell, J., concurring) (citation omitted).

77 *Id.* at 494-95 (Powell, J., concurring).

78 *Id.*

79 *Id.*

80 *Id.* at 494-95 (Powell, J., concurring) (footnotes omitted). Of course *Hampton* was controlled by *Russell*; Hampton, like Russell, sought a per se ruling that entrapment exists, regardless of predisposition, when the Government provides contraband in a contraband case. In squarely rejecting that argument, the *Russell* Court nonetheless acknowledged the limitations due process places upon governmental involvement in criminal activity. When the identical argument was presented in *Hampton*, however, the plurality did not merely reject it based on *Russell*. Instead, in *Hampton*, Justice Rehnquist—who wrote the majority opinion in *Russell*—attempted to rewrite *Russell* to hold that due process places no limitation on governmental involvement in crime. Given the clear teaching of *Russell*, it is not surprising that a majority of the Justices who decided *Hampton* refused to sanction the radical departure urged by Justice Rehnquist.

81 *Id.* at 495-96 (Brennan, J., dissenting). Although the dissenting Justices would have overruled *Sorrells*'s and *Sherman*'s predisposition-focused analysis in favor of the objective theory of entrapment, they also relied on the alternative ground of the due process defense. As Justice Brennan noted:

> I agree with Mr. Justice Powell 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." . . . I agree with my Brother Powell that "entrapment" under the "subjective" approach is only one possible defense—he suggests due process or appeal to our supervisory power as alternatives—in cases where the Government's conduct is as egregious as in this case.

Id. at 497-98 (Brennan, J., dissenting) (citations omitted).

offense was sufficiently outrageous to violate due process.[82] Hence, as in *Russell*, a majority of the Justices who decided *Hampton* expressly held that outrageous law enforcement conduct could violate due process irrespective of a defendant's predisposition.[83] That was the state of the law in 1978, when the Third Circuit decided *United States v. Twigg*.[84]

IV. THE MAJORITY OPINION IN *TWIGG*

Twigg was the unfortunate outgrowth of a cooperation agreement between federal prosecutors and a career speed manufacturer named Robert Kubica. In May 1976, following his most recent arrest for plying his trade, Kubica entered into a plea agreement with the government in which he agreed to assist the Drug Enforcement Administration (DEA) in "apprehending illegal drug traffickers."[85]

That October, at the DEA's request, Kubica contacted his ex-partner Henry Neville, with whom he had operated a speed lab in 1973, to discuss setting up another lab. Neville expressed interest and agreed to raise capital and arrange distribution while Kubica undertook to provide equipment, materials and a laboratory site.[86]

Over the next several months, the DEA supplied Kubica with everything necessary to honor his arrangement with Neville. In particular, they provided him with the rare and essential speed ingredient P-2-P, twenty percent of the necessary glassware, and the production site, a rented New Jersey farmhouse. Moreover, the DEA arranged for Kubica to purchase the remaining materials from chemical supply houses under the fictitious business name "Chem Kleen." He did so using money—approximately $1,500.00—supplied by Neville.[87]

Sometime during the set-up phase of the operation, Neville enlisted the aid of William Twigg, who became involved to satisfy a debt he owed Neville. Twigg's role was limited to accompany-

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82 *Id.* at 498-99 (Brennan, J., dissenting).

83 As set forth above, five Justices in *Hampton* expressly endorsed that view: Justices Powell and Blackmun in concurrence and Justices Brennan, Stewart and Marshall in dissent. Three years previous, the *Russell* majority, which comprised Chief Justice Burger and Justices Rehnquist, White, Blackmun and Powell, had approved the possibility of the defense, as had Justices Brennan, Stewart and Marshall in dissent. *See* United States v. Russell, 411 U.S. 423 (1973).

84 588 F.2d 373 (3d Cir. 1978).

85 *Id.* at 375.

86 *Id.*

87 *Id.* at 376.

ing Kubica to the chemical supply houses, providing minor production assistance at the lab, and running for groceries or coffee. Indeed, what little production assistance either Twigg or Neville provided was done at Kubica's specific direction.[88]

The laboratory operated from March 1st to March 7th, 1977, and produced six pounds of speed. On March 7th, Neville left the farmhouse with the speed in a suitcase. Kubica alerted waiting DEA agents, who stopped and arrested Neville near the farmhouse. The agents then apprehended Twigg at the lab.[89]

Following their convictions for speed manufacture and related offenses, Twigg and Neville appealed to the Third Circuit. In an opinion authored by Judge Rosenn, a divided panel of that court reversed the defendants' convictions on the due process grounds announced in *Russell* and reaffirmed in *Hampton*.[90]

As a prelude to his exceedingly thorough analysis in *Twigg*, Judge Rosenn carefully noted, "[i]t should be made clear from the outset that our reversal is not based on the entrapment defense. The entrapment defense requires an absence of predisposition on the part of the defendant to commit the crime."[91] The court explained that Neville's predisposition had been established by Kubica's testimony that the two had previously engaged in the manufacture of speed. Additionally, the defense of entrapment was unavailable to Twigg because he was brought into the criminal activity by Neville, who was not a government agent.[92] Thus, the court expressly approved the jury's finding that predisposition had been established and that, accordingly, the entrapment defense was unavailable.

That having been said, the court went on to identify the defense on which its reversal was based, the due process defense. As the court termed it, "the nature and extent of police involvement in this crime was so overreaching as to bar prosecution of the defendants as a matter of due process of law."[93] The court observed that while the Supreme Court had yet to reverse a conviction on that basis, the police behavior at hand went well beyond that which the Court previously had found acceptable. The

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88 *Id.*

89 *Id.*

90 *Id.* at 373.

91 *Id.* at 376.

92 *Id.* An entrapment defense cannot be predicated on the actions of a party who has not agreed to assist the government in bringing its claim against the person who alleges entrapment. *See id.* at 381.

93 *Id.* at 377.

obvious inference was that, under existing law, the Supreme Court would reverse a conviction on the facts at hand.

To support that assessment, Judge Rosenn meticulously examined the law and facts in *Russell* and *Hampton*. The court explained that legally, both *Russell* and *Hampton* had acknowledged the due process defense though factually, neither had found it to be established.[94] Then, the court carefully distinguished the facts in *Russell* and *Hampton* from those in the case at bar.

To explain the law in *Russell*, the court noted the Supreme Court's now familiar suggestion that due process would absolutely preclude a conviction secured through sufficiently outrageous police work. The court went on to describe the decisive factual distinction between *Russell* and the case at bar, noting that in *Russell*, "the defendant 'was an active participant in an illegal drug manufacturing enterprise which began before the government agent appeared on the scene.' "[95]

Similarly, as to the law in *Hampton*, the court stated: "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.' "[96] As to the facts, Judge Rosenn observed that while *Hampton* merely involved governmental supply of contraband to the defendant, "we . . . have before us a crime, unlike *Hampton*, conceived and contrived by government agents."[97]

By contrasting the facts in *Hampton* and *Russell* to those in the case at hand, Judge Rosenn identified the salient characteristic of outrageous government conduct: extensive government involvement in crime from beginning to end. As the court recounted, when Kubica reestablished contact with Neville at the DEA's behest, Neville was not involved in illegal drug activity. Actively participating with Kubica, the agents "deceptively implanted the criminal design in Neville's mind."[98] As the Court explained, "[t]hey set him up, encouraged him, provided the essential supplies and technical expertise, and when he and Kubica encountered difficulties in consummating the crime, they assisted in

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94 *See id.* at 377-79.

95 *Id.* at 377 (quoting United States v. Russell, 411 U.S. 423, 436 (1973)).

96 *Id.* at 378-79 (citing United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978); United States v. Johnson, 565 F.2d 179, 181 (1st Cir.), *cert. denied*, 434 U.S. 1075 (1977)).

97 *Id.* at 378.

98 *Id.* at 381.

finding solutions."[99] The court continued, "[t]his egregious conduct on the part of government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs."[100] Accordingly, Judge Rosenn had "no trouble" concluding that the law enforcement conduct in *Twigg* had reached " 'a demonstrable level of outrageousness.' "[101]

Despite Judge Rosenn's painstaking adherence to *Russell* and *Hampton*, his opinion in *Twigg* was not unanimous. In a carefully worded dissent, Judge Adams rejected the majority's holding that the government's conduct violated due process.[102] Although Judge Adams's dissent purports to be a good faith application of existing law, it is a clear departure from Supreme Court precedent. Nevertheless, that dissent has become law in the Third Circuit.

V. JUDGE ADAMS'S DISSENT

Judge Adams's design to create rather than apply the law was clear from the opening lines of his opinion:

> For almost fifty years the legal community has been divided over what a court's attitude should be when law enforcement agents are accused of encouraging criminal activity so as to gather evidence for a prosecution. Such police activity is generally referred to as entrapment and historically there have been two basic views on how it should be treated.[103]

That having been said, Judge Adams went on to contrast the objective and subjective theories of entrapment.

On its face, Judge Adams's opening was merely an historical overview of the issue before the court: government encouragement of crime. On closer inspection, that opening performed a far more significant function. While ostensibly informational, it was in fact definitional. While purporting merely to introduce the issue before the court, Judge Adams instead redefined that issue. Despite Judge Rosenn's explicit statement, "our reversal is not based on the entrapment defense,"[104] Judge Adams's dissent from that reversal clearly focused on entrapment from the very outset.

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99 *Id.*
100 *Id.*
101 *Id.* (citations omitted).
102 *Id.* at 382 (Adams, J., dissenting).
103 *Id.*
104 *Id.* at 376. *See* text accompanying *supra* notes 91-93.

After his introductory discussion of the two theories of entrapment, Judge Adams went on to note the Supreme Court's well-settled adoption of the subjective theory, explaining that "[i]t can no longer be doubted that the Supreme Court has resolved this debate in favor of those who wish to emphasize the accused's predisposition to commit the crime."[105] The dissent continued: "When, as in the case before us now, the defendants are found to have been willing participants in the crime, they may not avoid conviction by claiming that they were entrapped."[106]

That conclusion, of course, was also drawn by Judge Rosenn, who expressly found both that "the entrapment defense requires an absence of predisposition" and that predisposition had been proven in this case.[107] By restating those conclusions in his dissent, however, Judge Adams was able to segue neatly into his subtle mischaracterization of the due process defense as a slight variation on classical entrapment theory. As Judge Adams wrote:

> But the defendants also contend that even if they are foreclosed from resorting to the traditional entrapment defense, the official involvement in this particular case was so extensive that they were denied due process of law. The possibility of scrutiny of law enforcement techniques under the due process clause has been left open by the Supreme Court. *The only issue in this appeal, therefore, is what margin, if any, is left by the case law for vindication under the due process clause of the policies voiced by those favoring the objective approach to analyzing a claim of entrapment.*[108]

So framed, the issue determines the answer. As Judge Adams carefully established in the introduction to his dissent, the Supreme Court has rejected objective entrapment theory. Accordingly, the case law leaves no margin for vindicating that theory.

But that was not the issue actually before the court in *Twigg*. As the Supreme Court made patently clear in *Russell* and *Hampton*, the due process defense is not a branch of entrapment theory. Rather, it proceeds from the wholly separate notion that due process places certain limitations on governmental investigation of crime. Hence, "due process defense" is not merely a new name for "objective entrapment," nor is it an underhanded attempt to vindicate the policies underlying the objective theory of entrapment.[109] Perhaps

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105 *Id.* at 382-83 (Adams, J., dissenting) (footnote omitted).

106 *Id.* at 383 (Adams, J., dissenting).

107 *Id.* at 376.

108 *Id.* at 383 (Adams, J., dissenting) (emphasis added) (footnote omitted).

109 Although Judge Adams alluded to those policies, he never expressly identified them. To the extent that the policies to which he referred require an assessment of the causative power of the government's law enforcement techniques, those poli-

most significantly, the due process defense does not turn on the question of who—the government or the defendant—actually caused the commission of the crime. Unlike both subjective and objective entrapment, the due process defense does not focus on causation. Instead, it invalidates a conviction when that conviction is accomplished by governmental overinvolvement in the crime charged. Therefore, the only issue really before the court in *Twigg* was whether the government's role in the speed manufacturing scheme was so extensive as to violate due process.

Judge Adams's detailed dissent, however, made no effort to address that issue. Having recast the due process defense as "the remnant of the 'objective' analysis left open by Mr. Justice Powell in *Hampton*,"[110] Judge Adams easily concluded that that "remnant . . . may be applied only to *truly* 'outrageous' cases"[111]—which, in his view, *Twigg* was not. As the dissent explained its conclusion:

> Had a majority of the Court intended that due process review of government involvement in crime should constitute anything more than a seldom used judicial weapon reserved for the most unusual cases, it would have been more forthright for it to have adopted the position eloquently urged by the minority voices in *Sorrells*, *Russell* and *Hampton*, instead of seeking to reach the same result under a different rubric.[112]

Under Judge Adams's construct, if the Supreme Court really wanted to permit due process review of the government's investigative techniques, it should have embraced the objective theory of entrapment. Because the Court did not embrace that theory, reasoned Judge Adams, it must have meant to limit such due process review to the rarest cases.

Like the remainder of the dissent, however, that argument—which Judge Adams described as "a matter of logic"[113]—proceeds from a faulty premise. Specifically, it presupposes that due process

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cies are contrary to Supreme Court precedent and should not be vindicated. To the extent, however, that those policies simply call for an assessment of the degree of governmental involvement in a particular crime, they are perfectly in keeping with the Supreme Court's teachings.

110 *Twigg*, 588 F.2d at 384 (Adams, J., dissenting).

111 *Id.* at 385 (Adams, J., dissenting).

112 *Id.* Judge Adams further observed: "Due process analysis was not intended simply to re-establish the objective approach to entrapment under a new name." *Id.* at 383 (Adams, J., dissenting).

113 *Id.* at 385 (Adams, J., dissenting). Judge Adams stated:

> As a matter of logic this must be true if the decisions of the Supreme Court in *Sorrells*, *Sherman*, *Russell* and *Hampton* are to have any force. For once the Supreme Court has decided to eschew close scrutiny of law enforcement techniques under the objective approach to entrapment, it

review of governmental conduct is the functional equivalent of objective entrapment. As explained above, that is simply not the case. While objective entrapment focuses on whether the government's conduct would have caused the average law abiding citizen to commit the defendant's crime, the due process defense proscribes outrageous government involvement in crime irrespective of whether that involvement was sufficiently substantial to have caused the crime. Hence, the defense transcends the objective entrapment theorists' preoccupation with the abstract causative power of the government's conduct. Although proof of predisposition obviates any inquiry into the proximate cause of a defendant's crime, the due process defense involves a qualitative assessment of the government's overall role in a particular criminal enterprise. While not necessarily the *cause* of a defendant's crime, outrageous government involvement in that crime will bar its prosecution as a matter of due process.

Nevertheless, having decided that a workable due process defense would constitute a "back-door reincarnation of the objective approach,"[114] Judge Adams set about keeping the due process defense unworkable. To that end, he seized first upon the amorphous nature of outrageousness, noting, "it is difficult to know what standards to apply in order to conclude that a given course of action is 'outrageous.' "[115]

Turning to *Hampton*, Judge Adams found the government's sale of contraband in that case more outrageous than its contribution of non-contraband P-2-P, glassware, skill and a farmhouse in *Twigg*. Nevertheless, noted the judge, Hampton's conviction was not reversed on due process grounds.[116]

Having drawn that spurious factual distinction, Judge Adams went on to criticize the majority's "reliance" on the Third Circuit's

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would seem somewhat inconsistent for it to announce a new doctrine allowing just such a review.

Id. Despite Judge Adams's citation to *Russell* and *Hampton*, the presupposition underlying his analysis—that the Court's rejection of objective entrapment theory implied a blanket refusal to closely scrutinize law enforcement techniques—is directly contrary to those precedents.

114 *Id.*

115 *Id.* Judge Adams's dissatisfaction with the Supreme Court's notion that outrageous government conduct could foil a conviction is evident from his reluctant tone in undertaking to define such outrageous conduct. Following his acknowledgement of the difficult nature of that task, he wrote: "Nonetheless it is necessary to begin somewhere, and perhaps the best place to start is with *Hampton* itself." *Id.* Actually, the best place to start would have been where the Supreme Court started—with *Russell*.

116 *Id.* at 386 (Adams, J., dissenting).

pre-*Hampton* decision in *United States v. West*,[117] stating:

> The facts of *West*, as the majority notes, are virtually indistinguishable from *Hampton*. I do not see how we can rely on *West* to tell us what is outrageous if the Supreme Court has determined in a subsequent opinion, and after specifically considering *West*, that government involvement in a similar perhaps even more questionable situation, is not outrageous enough to justify a reversal.[118]

The majority, however, did not rely on *West* to define outrageous government conduct. *West* was a contraband case decided after *Russell* but prior to *Hampton*. In that case, the Third Circuit upheld the defendant's due process defense where a government informant had procured his involvement in a drug distribution scheme and had provided him with the contraband which he ultimately sold.[119] Although the government conduct disapproved in *West* was similar to that later approved in *Hampton*, the *Twigg* majority carefully noted that "*Hampton* may have attenuated *West*'s applicability in cases involving similar facts."[120] As the majority correctly noted, however, the principles announced in *West* "remain sound today."[121] Those principles are simple: " '[L]aw enforcement authorities [should not be] in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing.' "[122]

Perhaps himself dissatisfied with his reasons for rejecting the majority's vastly persuasive analysis, Judge Adams moved on to the heart of his difference of opinion with the majority. First, as elsewhere in his dissent, Judge Adams recast the majority's reasoning before attacking it. As Judge Adams explained, "[i]n finding a demonstrable level of outrageousness on the facts here, the majority is particularly conscious of the government's role in instigating the crime."[123]

Having reduced the majority's opinion to a mere reaction against governmental instigation of crime, Judge Adams stated: "I do not believe that government incitement, however much I question its advisability, can be seen as the crucial element establishing the level of outrageousness necessary to find a violation of the due

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117 511 F.2d 1083 (3d Cir. 1975).

118 *Twigg*, 588 F.2d at 386 (Adams, J., dissenting) (footnote omitted).

119 *West*, 511 F.2d at 1084-85.

120 *Twigg*, 588 F.2d at 379.

121 *Id.*

122 *Id.* (quoting United States v. West, 511 F.2d 1083, 1085 (3d Cir. 1975)).

123 *Id.* at 386 (Adams, J., dissenting).

process clause."[124] The dissent then gave three reasons for its belief that governmental incitement cannot be the hallmark of outrageous government conduct.

First, Judge Adams correctly noted that "there was government instigation in *Hampton* and it did not lead to a reversal."[125] Second, Judge Adams noted, also correctly, that "a claim of instigation or incitement appears to be logically connected to the question of predisposition."[126] Finally, Judge Adams noted—again, quite accurately—that "instigation of a crime may be 'outrageous' in the context of some forms of criminal activity but acceptable in the context of others."[127]

If, as Judge Adams suggested, the majority had been "particularly conscious of the government's role in instigating the crime,"[128] the dissent's three-pronged attack on the majority's analysis would have been extremely persuasive. For if Judge Rosenn had relied principally on the government's instigation in finding a due process violation, *Twigg* would have been the objective entrapment case Judge Adams read it to be.

A careful reading of the majority's opinion, however, reveals that *Twigg* is indeed the governmental overinvolvement case envisioned by *Russell* and *Hampton*. The government's instigation or incitement of the speed manufacturing plan in *Twigg* was not the majority's focal point. Far more significant to the majority was the fact that, as Judge Rosenn observed, the criminal activity in *Twigg* was "conceived and contrived by government agents."[129] As the majority stated, " '[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.' "[130]

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124 *Id.* at 387 (Adams, J., dissenting).

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 386 (Adams, J., dissenting).

129 *Id.* at 378.

130 *Id.* at 379 (quoting Greene v. United States, 454 F.2d 783, 787 (8th Cir. 1971)). Judge Rosenn is partially responsible for the dissent's mischaracterization of *Twigg* as a "governmental instigation" rather than a "governmental overinvolvement" case. Despite his careful distinction between the due process defense, to which predisposition is irrelevant, and entrapment, to which predisposition is fatal, Judge Rosenn included the following statement in his majority opinion in *Twigg*: "The only evidence that Neville was predisposed to commit the crime was his receptivity to Kubica's proposal to engage in the venture and the testimony of Kubica that he had worked with Neville in a similar laboratory four years earlier." *Id.* at

Hence in *Twigg*, over Judge Adams strong if baseless dissent, the Third Circuit faithfully applied the due process defense the Supreme Court had acknowledged in *Russell* and *Hampton*. Predictably, defense objections to outrageous government conduct proliferated in the wake of *Twigg*. Unfortunately, the Third Circuit's response to that proliferation led to the subsequent emergence of Judge Adams's dissent as the court's majority view.

VI. *TWIGG'S* THIRD CIRCUIT PROGENY

The Third Circuit had occasion to reconsider the due process defense in *United States v. Jannotti*,[131] a case involving the infamous government ABSCAM operation.[132] In *Jannotti*, defendants Harry P. Jannotti and George X. Schwartz were convicted of conspiracy to obstruct interstate commerce. Schwartz was also convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO). Finding that the defendants were predisposed to commit those crimes, the jury convicted them despite the extreme inducements provided by the government.[133]

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381. As Judge Rosenn had expressly approved the jury's finding that Neville was predisposed, his opinion clearly did not rely on a contrary finding. More likely, he included that observation to bolster his general theme that the government's conduct was offensive. In so doing, however, Judge Rosenn unwittingly facilitated Judge Adams's intimation that the majority had effected a "back-door reincarnation" of the objective approach to entrapment. *See id.* at 385 (Adams, J., dissenting).

131 673 F.2d 578 (3d Cir.) (*in banc*), *cert. denied*, 457 U.S. 1106 (1982). After *Twigg* but prior to *Jannotti*, the Third Circuit was confronted with the due process defense in United States v. Bocra, 623 F.2d 281 (3d Cir. 1980). *Bocra* arose out of a tax audit in which the auditor befriended and subsequently accepted a bribe from the defendant. In rejecting the defendant's due process argument, Judge Rosenn did not discuss the defense other than to note that the auditor's actions were "significantly less egregious than the Government's activity in *Twigg*." *Id.* at 290. Accordingly, *Bocra* had no substantive impact on the Third Circuit's due process defense jurisprudence.

132 *Jannotti*, 673 F.2d at 580. As explained by the Third Circuit:

> The basic nature of the plan was that F.B.I agents posed as employees of Abdul Enterprises, a fictional multinational corporation whose principal, a fictional Arab Sheik, . . . was represented as interested in investing large amounts of money in this country and in emigrating here. According to the government, the plan was "conceived to create opportunities for illicit conduct by public officials predisposed to political corruption." From the very beginning, the government utilized the services of Melvin Weinberg, accurately characterized by the district court as a "career swindler," who, with F.B.I. agents, "spread the word" that the Sheik was interested in meeting public officials who could facilitate his planned investments.

Id. at 581 (citations omitted).

133 *Id.* at 605. The Third Circuit noted that the jury's verdict represented a finding that "based on the evidence, including the observations by the jury of the ac-

In vacating those convictions, the district court relied on both entrapment and the due process defense upheld in *Twigg*.[134]

The Third Circuit, sitting in banc, reversed the district court's ruling and reinstated the defendants' convictions.[135] First, the court noted that the jury's finding of predisposition properly precluded the defendants' entrapment defense.[136] As to due process, the court noted that a "delineation of the conduct circumscribed by the due process defense is, at best, elusive."[137] More specifically, the court remarked on the "tendency for the due process defense to overlap with the entrapment defense, notwithstanding the Supreme Court's clear admonition that they are separate and distinct."[138] Despite those limitations, both inherent and otherwise, the court undertook to outline the contours of the due process defense.

Tracing the development of the defense, the court restated its holding in *Twigg* that, under *Russell* and *Hampton*, "fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was outrageous."[139] Noting the district court's improper reliance on government initiation and inducements to support its due process determination, however, the court expressly held that "a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense."[140]

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tions, words, voice inflections and mannerisms of the FBI agents, the defendants were pre-disposed to engage in political corruption." *Id.*

134 United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir. 1982).

135 *Jannotti*, 673 F.2d at 611.

136 *Id.* at 605-06. In a lengthy dissent, most of which was joined by Judge Weis, Judge Aldisert expressed the view that the defendants were not predisposed to criminal activity, and excoriated the government for the extreme inducements to which it had subjected them. *Id.* at 612 (Aldisert, J., dissenting). In Judge Aldisert's view, the entrapment question should only be presented to the jury where a fact finder could "reasonably infer beyond a reasonable doubt" that the defendant was not predisposed. *Id.* at 621 (Aldisert, J., dissenting).

137 *Id.* at 606.

138 *Id.*

139 *Id.* at 607 (quoting United States v. Twigg, 588 F.2d 373, 379 (3d Cir. 1978)). As the court noted, the government did not contest the district court's holding that a due process defense based on governmental overreaching "would be available in appropriate circumstances even to predisposed defendants." *Id.* at 606.

140 *Id.* As the Third Circuit explained:

> In *Twigg*, the first case since *Hampton* in which a defendant prevailed on a due process defense, a divided panel of this court held that "the government involvement in the criminal activities of this case has reached a demonstrable level of outrageousness." In the case before us, the dis-

In holding that the government's conduct must "go[ ] beyond" entrapment to violate due process, the *Jannotti* court fostered the misimpression that the difference between entrapment and outrageous government conduct is one of degree. Actually, the difference is one of kind. No matter how outrageous the government's conduct, that conduct cannot constitute entrapment if its target is criminally predisposed. Insofar as the district court's ruling was based on the government's inducements, however, the Third Circuit properly reversed that ruling. As explained above, outrageous government conduct, unlike entrapment, is not so identified by virtue of its effect on the defendant. In sharp contrast to the objective theory of entrapment, the due process defense does not turn upon a showing that the government's conduct unfairly induced or instigated the defendant's crime. Rather, it is based on the overall degree of the government's involvement in that crime. Hence, unless the government's inducements are accompanied by extensive governmental involvement in the criminal enterprise, the due process defense cannot be established.

In *Jannotti*, despite reversing the district court's ruling, the in banc Third Circuit expressly approved the court's prior ruling in *Twigg*. Moreover, the court did so while echoing Judge Adams's concern that the objective theory of entrapment not be permitted "to reemerge cloaked as a due process defense."[141] Although Judge Adams expressed that concern in his dissent in *Twigg*,[142] the in banc Third Circuit clearly understood that *Twigg* fostered no such reemergence of objective entrapment.

Judge Adams, along with Judges Hunter and Garth, expressed their dissatisfaction with the *Jannotti* majority's approval of *Twigg*. Although relegated to a footnote in the majority opinion, the separate view of those judges bears elevation here given

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> trict court held that *Twigg* compelled a comparable result. *The district court based this conclusion in large measure on the inducements to which the defendants had been subjected*, holding that "it is neither necessary nor appropriate to the task of ferreting out crime for the undercover agents to initiate bribe offers, provide extremely generous financial inducements, and add further incentives virtually amounting to an appeal to civic duty."

Id. (citations omitted) (emphasis added).

[141] *Id.* at 608. The court explained that "[w]hile the lines between the objective test of entrapment favored by a minority of 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 conduct." *Id.*

[142] *See supra* notes 103-30 and accompanying text.

the Third Circuit's post-*Jannotti* treatment of *Twigg*. As the court noted:

> Judges Adams, Hunter and Garth agree that *United States v. Twigg* is distinguishable from the present case on its facts. They would go one step further, however, and directly overrule the *Twigg* decision. They believe that *United States v. West*, relied on by the majority in *Twigg*, the district court below, and the appellees here, was implicitly reversed by *Hampton v. United States*, and that unless further guidance is given in this area, district courts, in a faithful attempt to apply *Twigg* and *West*, will continue to reach results that cannot be reconciled with the teaching of the Supreme Court in *Hampton*.[143]

Despite the sentiments expressed in footnote seventeen, the due process defense of *Russell*, *Hampton*, and perhaps most notably, *Twigg*, was alive and well after the Third Circuit had spoken, in banc, in *Jannotti*. Given that fact, the Third Circuit's subsequent treatment of that defense is nothing short of remarkable.

In 1983, in *United States v. Beverly*,[144] a three-judge panel of the Third Circuit expressly rejected the court's prior ruling in *Twigg*. In so doing, the panel—which included Judge Adams, along with Judges Becker and Van Dusen—miscast the court's in banc ruling in *Jannotti*, which had expressly approved *Twigg*.

In *Beverly*, a paid government informant introduced defendant Dorrie Adams and his friend Robert Brown to Special Agent Darrell O'Connor of the federal Bureau of Alcohol, Tobacco and Firearms. The informant previously had advised Adams that O'Connor could help him earn a substantial sum of money.[145]

O'Connor explained to Adams and Brown that he wished to hire someone to burn down a building owned by one of his friends. He offered to pay Adams $3,000 to burn the building, provided Adams could prove himself to be an experienced arsonist. At their initial meeting and at subsequent meetings, Adams assured O'Connor that he had burned several buildings, although he later claimed to have been lying to secure the job.

Along with Philadelphia policeman Wayne McGlotten, who claimed to own the building to be burned, O'Connor asked Adams for an example of his handiwork. Adams showed McGlotten and O'Connor an abandoned building he claimed to have burned. Both later testified that it did not appear that the building had been burned, and that the Fire Marshal did not have a record of any fire

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143 *Jannotti*, 673 F.2d at 610 n.17 (citations omitted).
144 723 F.2d 11 (3d Cir. 1983).
145 *Id.* at 12.

on the premises.[146]

Before the fire was to be set, Brown withdrew from the scheme, and O'Connor asked Adams if he had located another partner. Adams told O'Connor that he had recruited Lawrence Beverly, who, like Adams, appeared to be in financial straits. Beverly advised O'Connor that he had not previously committed arson, but that he was willing to participate. On appeal, the Third Circuit would describe the denouement of this grand scheme as follows:

> Following the purchase of a gasoline can, paint supplies and hats (so that the defendants could disguise themselves as painters), O'Connor brought Adams and Beverly in a government car to a service station, bought gasoline, ascertained that Adams had matches, drove the defendants to a building owned by the government, and looked on while they were arrested.[147]

Dorrie and Adams were subsequently convicted by a jury of conspiring and attempting to destroy a government building by fire,[148] and appealed their convictions on entrapment and due process grounds. The extreme facts leading to those convictions were eclipsed only by the stealth with which the court disposed of their due process defense. Noting the defendants' reliance on *Twigg* "for the proposition that fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was 'outrageous,' "[149] the *Beverly* court stated that the majority in *Twigg* had relied on *West*, which, in the court's view, had been limited by *Hampton* and *Jannotti*.[150]

The *Twigg* majority, however, did not rely on *West*.[151] Moreover, the notion that it had, first raised in Judge Adams's dissent[152]

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146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.* (quoting United States v. Twigg, 588 F.2d 373, 379 (3d Cir. 1978)).

150 *Id.*

151 As previously explained, in *West*, as in *Hampton*, government inducements were the basis for the defendant's assertion of the due process defense. Noting that "*Hampton* may have attenuated *West's* applicability in cases involving similar facts," the *Twigg* majority simply declared that "the principles in *West* remain sound today." *Twigg*, 588 F.2d at 379 (quoting United States v. West, 511 F.2d 1083 (3d Cir. 1975)). Those principles are as timeless as they are unassailable: the government should not create new crimes simply to bring charges against a person who they have persuaded to participate in the wrongdoing. In reversing the defendants' convictions, the *Twigg* majority based its holding on the outrageous government involvement from beginning to end—not simply on government inducements. *Id.* at 380-82. Thus, contrary to Judge Adams assertion, *Twigg* is wholly consistent with *Hampton*.

152 *Twigg*, 588 F.2d at 386 (Adams, J., dissenting).

in *Twigg*, was implicitly rejected by the Third Circuit, in banc, in *Jannotti*.[153] For a subsequent three-judge panel of that court to hold that *Twigg* had relied on *West*, therefore, was not only erroneous; it was a clear deviation from binding authority. Nevertheless, that is exactly what the *Beverly* court held.

If *Beverly*'s dismantling of the due process defense was not immediately apparent, it has since become so. In 1986, the Third Circuit again addressed the defense in *United States v. Ward*,[154] a drug smuggling case authored by Judge Adams.[155] In *Ward*, the defendants claimed that a government informant had proposed the marijuana smuggling scheme that led to their convictions. While they admitted prior participation in drug distribution, they denied having been so engaged when approached by the informant. The informant, on the other hand, testified that one of the defendants had "initiated the discussion of illegal activities."[156] In addition, the government alleged—apparently based on defendants' past activities—that it "aimed to infiltrate an existing distribution network."[157]

It was undisputed that the defendants had "made active efforts to promote the distribution scheme,"[158] including the payment of seed money, the securing of a safehouse, and the formulation of distribution plans. It was also undisputed that to facilitate the operation, the DEA supplied a Florida location that "included landing strips, docking facilities, and other accoutrements of an organized smuggling operation."[159]

In rejecting the defendants' due process defense, Judge Adams

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153 The *Jannotti* court distinguished *Twigg* on its facts, noting, "[t]he facts shown in *Twigg*, on which the district court relied, are not comparable to the government activity in this case. There, the government initiated and was actively involved in the operation itself." *Jannotti* 673 F.2d at 608. The court noted in footnote 17, "Judge Adams, Hunter and Garth . . . would go one step further, however, and directly overrule the *Twigg* decision." *Id.* at 610 n.17. Had it been able to foresee *Beverly*, the in banc *Jannotti* court might have added, "and a future three-judge panel including Judge Adams will do so despite our ruling here."

154 793 F.2d 551 (3d Cir. 1986). In the interim, the due process defense was raised and rejected on its facts in United States v. Gambino, 788 F.2d 938 (3d Cir. 1986), where the court noted, "despite the holding in *Twigg*, this Court and other appellate courts have since exercised extreme caution in finding due process violations in undercover settings." *Id.* at 945 n.6. Not surprisingly, the court cited *Beverly* as an example of such caution. *Id.* As *Gambino* did not address the defense beyond noting the caution with which it is applied, it does not warrant further discussion here.

155 *Ward*, 793 F.2d at 552. The *Ward* panel also included Judges Weis and Higginbotham.

156 *Id.*

157 *Id.* at 554.

158 *Id.*

159 *Id.* at 553.

explained that since "the DEA's scheme entailed considerable participation on the part of defendants, it is not comparable to the completely government-initiated and government-operated plan found in *Twigg*."[160] The court concluded that "[t]he prosecution's efforts to secure the arrest of two men experienced in drug distribution and arguably involved in ongoing distribution activities accordingly did not rise to the level of outrageous conduct violative of due process."[161]

Judge Adams's factual analysis, however, was not the most significant aspect of *Ward*. For before Judge Adams undertook that analysis, he carefully laid its framework. Specifically, Judge Adams approved *Beverly*'s rejection of *Twigg*, thus perpetuating the confusion *Beverly* engendered regarding the due process defense. Reiterating the extreme facts in *Beverly*, Judge Adams concluded:

> The facts in *Beverly* are quite similar to those in *Twigg* in a number of respects—both criminal activities relied at every stage on the initiation, participation and expertise of the government representative. Nevertheless, the *Beverly* Court declared: "We are not prepared to conclude that the police conduct in this case shocked the conscience of the Court or reached that demonstrable level of outrageousness necessary to compel acquittal so as to protect the Constitution."[162]

That having been said, the *Ward* court cited *Jannotti* for the proposition that "[t]hus far the precise nature of the *Twigg* defense remains unclear."[163] The court continued, "[t]he present case, however, does not offer an appropriate opportunity to assay a clear definition, inasmuch as it presents facts hardly comparable to the egregious circumstances found in *Twigg* and to a lesser extent in *Beverly*."[164] Analyzing those facts as previously discussed, the court rejected the due process defense raised by defendants.

Judge Adams was involved in every significant due process defense case in the Third Circuit from *Twigg* through *Ward*.[165] As a result, *Ward's* apparently earnest effort to square *Beverly* with *Twigg* is

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160 *Id.* at 555.

161 *Id.*

162 *Id.* at 554 (citations omitted). In this regard, Judge Adams contrasted *Twigg* and *Beverly* as though their disparity was something he had recently discovered.

163 *Id.* at 554 (citing United States v. Jannotti, 673 F.2d 578 (3d Cir.) (*in banc*), *cert. denied*, 457 U.S. 1106 (1982)).

164 *Id.*

165 Specifically, Judge Adams: (1) wrote the dissent in *Twigg*; (2) voiced his opinion, along with Judges Garth and Hunter, that *Twigg* should be overruled in a footnote to the majority opinion in *Jannotti*; (3) sat on the panel, with Judges Becker and Van Dusen, that issued the *per curiam* opinion in *Beverly*; and (4) authored the majority opinion in *Ward* for himself and Judges Weis and Higginbotham.

indeed curious. As Judge Adams was acutely aware, *Beverly* did not reject the "*Twigg* defense" on patently outrageous facts due to any lack of clarity in *Twigg*. Rather, *Beverly* rejected *Twigg* itself because the *Beverly* panel believed that *Twigg* had been wrongly decided. Indeed, Judge Adams argued that *Twigg* had been wrongly decided in his dissent in *Twigg*,[166] and again in *Jannotti*'s footnote seventeen.[167] In *Beverly*, his long-held view simply gained majority support.

Given that background, it was insufficient for the *Ward* court merely to query as to the definition of the due process defense. Although the in banc court in *Jannotti* began by noting the elusive nature of that definition, *Jannotti* ultimately distinguished *Twigg* on its facts. In declining to overrule *Twigg*, *Jannotti* made clear that whatever the precise definition of the due process defense, government involvement in crime to the degree found in *Twigg* is unacceptable.[168]

Rather than perpetuating *Beverly*'s departure from settled precedent, the *Ward* court should have acknowledged that departure and decided the case before it on the basis of *Twigg* and *Jannotti*. Instead, having cited *Beverly* with approval, the court was content to postpone "assay[ing] a clear definition of the due process defense."[169]

The Third Circuit has yet to assay that clear definition of the

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166 *See supra* notes 103-30 and accompanying text.

167 Judges Garth and Hunter also expressed that view. *See* United States v. Jannotti, 673 F.2d 578, 610 n.17 (3d Cir.) (*in banc*), *cert. denied*, 457 U.S. 1106 (1982).

168 *See id.* at 606. Significantly, *Jannotti* noted the elusive nature of the due process defense *before* offering its detailed explanation of that defense. Specifically, the court stated:

> If the contours of the entrapment defense are imprecise, we have at least been able to make an effort to delineate them. A similar delineation of the conduct circumscribed by the due process defense is, at best, elusive. Part of the difficulty stems from the differing views by those who must interpret the constitutional standard as to what are "immutable and fundamental principles of justice."
>
> The other difficulty lies in a tendency for the due process defense to overlap with the entrapment defense, notwithstanding the Supreme Court's clear admonition that they are separate and distinct.

Id. at 606 (citations omitted).

That having been said, the court went on to trace the development of the due process defense. When it had done so, the court distinguished *Twigg*, where "the government initiated and was actively involved in the operation of the criminal enterprise itself." *Id.* at 608. Clearly, the *Jannotti* court did not believe it left the due process defense as hazy as it found it. As is equally clear, the *Jannotti* court believed *Twigg* had properly disapproved the government's conduct in that case.

169 *Ward*, 793 F.2d at 554. The court's statement that *Ward* was not an appropriate vehicle for defining the due process defense was indeed instructive. Had the court not chosen to leave the defense in the amorphous, "we'll know it when we see it" realm, it could simply have reiterated the overinvolvement factors set forth in

due process defense. Instead, the court has been content to reiterate that the contours of the defense remain "at best, elusive,"[170] and to note that it requires "intolerable government conduct which goes beyond that necessary to sustain an entrapment defense."[171] That, along with the disruptive teaching of *Beverly* and *Ward*, describes the present status of the due process defense in the Third Circuit.

VII. THE IMPACT OF *TWIGG*

Given the Third Circuit's treatment of the due process defense in *Beverly* and *Ward*, the court's recent refusal to revisit that defense is particularly unfortunate. In addition to leaving the district courts of this circuit without appropriate guidance as to the status of the defense,[172] *Twigg*'s Third Circuit progeny has

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Twigg. That those factors may not have been satisfied in *Ward* was not a satisfactory reason to eschew their articulation.

170 *See* United States v. Martino, 825 F.2d 754, 763 (3d Cir. 1987). In *Martino*, the government issued a subpoena to defendants Martino and Caputo and to an FBI undercover agent named Wayne Hess, in his undercover name. After both defendants testified before the grand jury, they met with Hess, informed him of their testimony and told him what to say. *Id.* at 756. The grand jury subsequently returned a 16 count indictment against Martino and Caputo. *Id.* The district court dismissed two counts of the indictment on the basis that issuance of the subpoena to Hess constituted prosecutorial misconduct. *Id.* at 757. In reversing that determination, the Third Circuit rejected the due process defense. *Id.* at 763.

171 *Id.* *See also* United States v. Driscoll, 852 F.2d 84 (3d Cir. 1988). In *Driscoll*, the Postal Service solicited the defendant's interest in child pornography, mailed the magazines he ordered, and prosecuted him for receiving child pornography. *Id.* at 85. The court rejected the defendant's due process defense, reiterating that such defense "must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense." *Id.* at 86 (citation omitted). The court also rejected out of hand the defendant's due process argument in United States v. Engler, 806 F.2d 425 (3d Cir. 1986), a Migratory Bird Treaty Act and explosives case. There, the Government's involvement was apparently limited to its agents' request to purchase, and their actual purchases of, birds and explosives from the defendant. *Id.* at 429-30. Like *Martino* and *Gambino*, *Driscoll* and *Engler* did not significantly affect the Third Circuit's definition of the due process defense.

172 Despite that lack of guidance, one Third Circuit district court has invalidated a conviction on due process grounds. *See* United States v. Gardner, 658 F. Supp. 1573 (W.D. Pa. 1987). In *Gardner*, a government agent posing as a postal worker in a Pittsburgh post office befriended defendant Sam Gardner and, on many occasions, requested that Gardner obtain cocaine for him. *Id.* at 1574. Over a period of time, the government agent persuaded and induced Gardner to obtain drugs for him. *Id.* at 1575. While reluctant at first, the defendant did obtain the narcotics as a result of the agent's persistence, although he made no money on the transaction and merely acted as a go-between. *Id.* The defendant was subsequently convicted of distributing cocaine. Acknowledging the continued vitality of the due process defense upheld in *Twigg*, Judge Simmons reversed the conviction, ruling that Gardner was "badgered, implored, inveigled and purposely set up" by a government agent in order to prosecute the crime. *Id.* at 1576. Despite its citation to *Twigg*, the

had a considerable impact on the other courts of appeals.

That impact has taken two general forms. First, because *Twigg* invalidated a conviction on outrageous government conduct grounds, it is widely invoked by criminal defendants in every circuit.[173] Due at least in part to the Third Circuit's subsequent failure to develop that defense, however, most courts—with notable exceptions[174]—routinely reject it out of hand whenever it is invoked.[175] Indeed, in so doing, several courts have expressly

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Gardner court relied principally upon the Ninth Circuit's analysis in United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986) and United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983). Specifically, the court determined that the government had created rather than uncovered defendant's crime, thus engineering his "criminal enterprise from start to finish." *Gardner*, 658 F. Supp. at 1576 (citing United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983)).

173 *See, e.g.*, United States v. Milam, 817 F.2d 1113 (4th Cir. 1987); United States v. Porter, 764 F.2d 1 (1st Cir. 1985); United States v. So, 755 F.2d 1350 (9th Cir. 1985); United States v. Belzer, 743 F.2d 1213 (7th Cir. 1984); United States v. Gamble, 737 F.2d 853 (10th Cir. 1984); United States v. Lard, 734 F.2d 1290 (8th Cir. 1984); United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983); United States v. Romano, 706 F.2d 370 (2d Cir. 1983); United States v. Butera, 677 F.2d 1376 (11th Cir. 1982); United States v. Tobias, 662 F.2d 381 (5th Cir. 1981); United States v. Brown, 635 F.2d 1207 (6th Cir. 1980).

174 *See, e.g.*, United States v. Bogart, 783 F.2d 1428, 1436-37 (9th Cir. 1986) (citing *Twigg* in support of the court's view "that a crime manufactured by the government 'from whole cloth' would constitute outrageous conduct"); United States v. Lard, 734 F.2d 1290, 1296-97 (8th Cir. 1984) (reversing defendant's conviction on entrapment grounds but citing *Twigg* for the proposition that the government's overinvolvement in the crime also approached a due process violation); United States v. Tobias, 662 F.2d 381, 386 (5th Cir. 1981) (citing *Twigg* for the proposition 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").

175 *See, e.g.*, United States v. Williams, 858 F.2d 1218, 1225 (7th Cir. 1988) (defense rejected although government informant orchestrated scheme to obstruct justice and jeopardized safety of many people); United States v. Milam, 817 F.2d 1113, 1114 (4th Cir. 1987) (defense rejected although government agent helped transport printing press, provided counterfeit plates, bought necessary paper and provided technical counterfeiting assistance); United States v. Porter, 764 F.2d 1, 4-5 (1st Cir. 1985) (defense rejected despite government informant's substantial involvement in drug distribution scheme); United States v. Warren, 747 F.2d 1339, 1340 (10th Cir. 1984) (defense rejected although postal inspectors engineered elaborate scheme to procure insurance fraud by doctors and lawyers); United States v. Gamble, 737 F.2d 853, 856-60 (10th Cir. 1984) (defense rejected despite government officials' falsification of documents and tickets, and entering of guilty pleas to false charges using assumed names); United States v. Burrell, 720 F.2d 1488, 1494 (10th Cir. 1983) (defense rejected although government officials offered to sell food stamps to innocent defendant); United States v. Monaco, 700 F.2d 577, 580-81 (10th Cir. 1980) (defense rejected where government officials allowed defendant to engage in prostitution and to use drugs); United States v. Spivey, 508 F.2d 146, 147-50 (10th Cir.) (defense rejected where government informer "held pot parties" for defendant), *cert. denied*, 421 U.S. 949 (1975).

noted the Third Circuit's retreat from *Twigg*.[176] As a result, although the Third Circuit was the first court of appeals to uphold the due process defense, its overriding effect has been to hamper the development of that defense.

While most circuits share the Third Circuit's post-*Twigg*, hands off approach to outrageous government conduct, however, the Ninth Circuit has evolved a workable due process defense. In addressing the defense, the Ninth Circuit has exhibited a marked refusal to adopt the Third Circuit's view that a definition of outrageous police work must remain "at best, elusive." By refusing to settle for imprecision in that important area, the Ninth Circuit has articulated a due process defense which the Third Circuit would do well to emulate.

The Ninth Circuit's approach is most clearly stated in *United States v. Bogart*.[177] *Bogart* arose out of parallel investigations into defendant Bogart's role in alleged real estate fraud schemes in California and in Utah. Following an exchange of information between government investigators in the two locations, Utah authorities arrested Bogart four times in six months on various "charges whose merits are open to question."[178] Unable to raise bails ranging from $50,000 to $400,000 on those charges, Bogart remained in custody in Utah awaiting trial for all but two days between October 25th, 1983 and March 16th, 1984.

While Bogart was in custody, Utah authorities convinced one of his business partners to become a paid police informant. At the direction of the San Diego police, the informant then convinced Bogart to become involved, through intermediaries, in a conspiracy to sell cocaine. Bogart and the intermediaries were subsequently prosecuted on narcotics conspiracy and related charges.[179]

In moving to dismiss the indictment for outrageous government conduct, the defendants asserted that Utah and California authorities had "collusively engineered a series of meritless ar-

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176 *See, e.g.*, United States v. Milam, 817 F.2d 1113, 1115 n.2 (4th Cir. 1987) ("Because it relies on pre-*Hampton* cases, *Twigg* has been questioned by [United States v. Beverly]."); United States v. Porter, 764 F.2d 1, 9 n.4 (1st Cir. 1985) ("[T]he Third Circuit, in *United States v. Beverly*, has stated that the majority in *Twigg* relied on *United States v. West*, which according to their view has been limited by *Hampton* and *United States v. Jannotti*."); United States v. Belzer, 743 F.2d 1213, 1218 n.5 (7th Cir. 1984) ("[W]e note that there is a significant question as to whether *Twigg* is still good law in the Third Circuit.").

177 783 F.2d 1428 (9th Cir. 1986).

178 *Id.* at 1430.

179 *Id.*

rests and excessive bail requests"[180] to keep Bogart in custody. According to defendants, the authorities then manufactured the cocaine transaction when they were unable to find evidence of the real estate fraud they were investigating.

The government, however, denied any collusion between Utah and California authorities. Instead, the government claimed that the charges against Bogart were brought by Utah authorities acting on their own and that the bails set were either proper or were caused by "clerical mistake."[181] The government further claimed that its cocaine scheme was designed to trap a Utah prison guard who had befriended Bogart, and that Bogart himself had conceived the cocaine scheme for which he was indicted.[182]

Although the district court denied defendants' motion, the Ninth Circuit reversed and remanded the case for further factual development.[183] Correctly distinguishing the due process defense from the entrapment defense barred by Bogart's criminal predisposition, the court noted, "[w]e have repeatedly held that the due process outrageous conduct defense 'survived the Court's review in *Hampton*.' "[184]

Then, like the courts in nearly every case involving that defense, the Ninth Circuit cited *Twigg* as the only post-*Hampton* court of appeals decision in which the defense was successfully employed.[185] Unlike many courts, however, the Ninth Circuit neither suggested that *Twigg* was no longer valid nor ruled that it should be limited to its facts. Instead, despite noting that in *Beverly* the Third Circuit questioned the legal reasoning on which *Twigg* was based, the court accurately observed that in *Jannotti*, "a plurality of the court sitting *in banc* reaffirmed the continued vitality of *Twigg*."[186]

The Ninth Circuit went on to draw a vital distinction between *Twigg* and the many cases to reject the due process defense. As the court succinctly noted, "the numerous cases *refusing* to apply the outrageous conduct defense invariably con-

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180 *Id.*

181 *Id.* at 1431.

182 *Id.*

183 *Id.* at 1433.

184 *Id.* at 1432 (citations omitted).

185 *Id.* at 1434. The court noted, however, that the Ninth Circuit dismissed an indictment on due process grounds in Greene v. United States, 454 F.2d 783 (9th Cir. 1971), a case decided prior to *Hampton* and *Russell*. *See Bogart*, 783 F.2d at 1434.

186 *Id.* at 1434 n.5.

clude 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."[187] The court continued:

> The outrageous governmental conduct defense involves a difficult area of the law. Drawing a bright line with any degree of assurance is fraught with problems. The 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. Ultimately, every case must be resolved on its own particular facts. However, some general observations are possible.[188]

Thus, despite acknowledging the difficulties inherent in defining the due process defense, the Ninth Circuit—in sharp contrast to the Third Circuit—was not content to let a definition of the defense "remain[], at best, elusive." Rather, the court proceeded to identify the fundamental distinction between acceptable and unacceptable conduct. First, the court stated the general rule that the government may permissibly "use 'artifice and stratagem to ferret our criminal activity.' "[189] More specifically, the court noted that the government may use paid informants, supply contraband to gain defendants' confidence, provide items necessary and valuable to an existing conspiracy, infiltrate an existing criminal organization, and approach those presently engaged in or contemplating criminal conduct.[190]

By contrast, the court decried police conduct involving "unwarranted physical, or perhaps mental, coercion."[191] More significantly, the court described as unconstitutional "those hopefully few cases where the crime is fabricated *entirely* by the police to secure the defendants' conviction rather than to protect the public from the defendants' continuing criminal behavior."[192]

Having articulated those legal guidelines, the Ninth Circuit reversed the district court's denial of defendants' motion to dismiss and remanded the case to the lower court for findings of fact. On remand, the district court was instructed to apply the guidelines to the facts in order to determine whether the government's conduct

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187 *Id.* at 1437 (emphasis in original).
188 *Id.* at 1438.
189 *Id.* (quoting Sorrells v. United States, 287 U.S. 435, 441 (1932)).
190 *Id.* (citations omitted).
191 *Id.*
192 *Id.* (emphasis in original).

violated due process.[193]

In the past three years, the Ninth Circuit has on numerous occasions reaffirmed the due process defense guidelines announced in *Bogart*.[194] Those decisions, unlike recent Third Circuit rulings in the area, found the defense neither hazy nor elusive. Rather, they clearly and carefully applied *Bogart* to approve the government's conduct.

That is not to suggest that the Ninth Circuit has conceived a rigid formula for determining whether particular government conduct is outrageous. By its very terms, *Bogart* prescribes a flexible, case by case assessment of the challenged conduct.

The Ninth Circuit has, however, devised a workable framework for conducting that assessment. Rather than permitting the outrageous conduct standard to remain amorphous and hence unattainable, the Ninth Circuit has defined such conduct in terms of the nature and extent of the government's role in a particular criminal enterprise. By deeming it outrageous for the government either to physically or mentally coerce crime or to engineer and direct a criminal enterprise from start to finish, the Ninth Circuit has properly focused the due process inquiry on the degree of government involvement in a crime. As interpreted by the Ninth Circuit, outrageous government conduct is neither mere inducement nor something completely beyond the court's conception. Perhaps rare, it is nonetheless identifiable. Hence, despite its amorphousness in the Third Circuit, the due process defense has taken shape in the Ninth Circuit.[195]

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193 *Id.*

194 *See, e.g.*, United States v. Montilla, 870 F.2d 549 (9th Cir. 1989); United States v. Pemberton, 853 F.2d 730 (9th Cir. 1988); United States v. Bonanno, 852 F.2d 434 (9th Cir. 1988); United States v. Emmert, 829 F.2d 805 (9th Cir. 1987); United States v. Simpson, 813 F.2d 146 (9th Cir. 1987); United States v. Wolf, 813 F.2d 970 (9th Cir. 1987); United States v. Stenberg, 803 F.2d 422 (9th Cir. 1986); United States v. Smith, 802 F.2d 1119 (9th Cir. 1986); United States v. McQuisten, 795 F.2d 858 (9th Cir. 1986); United States v. Wiley, 794 F.2d 514 (9th Cir. 1986); United States v. Wingender, 790 F.2d 802 (9th Cir. 1986).

195 The Sixth Circuit has also developed a test for assessing claims of outrageous government conduct. Specifically, that court has identified the following factors to be considered: "(1) the need for the type of government conduct in relationship to the criminal activity; (2) the preexistence of a criminal enterprise; (3) the level of the direction or control of the criminal enterprise by the government; and (4) the impact of the government activity to create the commission of the criminal activity." United States v. Johnson, 855 F.2d 199, 305 (6th Cir. 1988) (citations omitted). While those factors—particularly the fourth—do not reflect the Ninth Circuit's clear understanding of the due process defense, neither do they bespeak the Third Circuit's refusal to address that defense.

VIII. CONCLUSION

That the Third Circuit must clarify its position on the due process defense cannot seriously be questioned. In light of the Supreme Court's rulings in *Russell* and *Hampton*, overruling *Twigg* is not an option. As explained above, *Twigg* was merely a faithful application of those precedents. Moreover, the Third Circuit's in banc decision in *Jannotti* expressly acknowledged *Twigg*'s vitality. Accordingly, it is now incumbent on the court to reembrace *Twigg* and the due process defense articulated therein. To do so, the court must necessarily disavow *Beverly*'s unauthorized retreat from that defense. Stated simply, the court must acknowledge that it erred in *Beverly*.

It will not suffice, however, to reinstate the *Twigg* defense as an amorphous and hence useless doctrine to be raised and rejected with equal frequency. If the Third Circuit is to honor both the Supreme Court's and its own binding decisions in the area, it must adopt a meaningful due process test—one that will encourage valid, fruitful undercover work even as it proscribes the senseless fabrication of crime and convictions.

From Judge Adams's dissent in *Twigg* through the court's majority opinion in *Beverly*, the Third Circuit expressed its justified concern that the due process defense not become a "back-door reincarnation" of the objective theory of entrapment. In keeping with that concern, the court has understandably struggled to resist an inducement-focused approach to the due process defense.

In *Bogart* and its progeny, the Ninth Circuit has properly focused the due process inquiry on the nature and extent of the government's involvement in criminal activity rather than on the fact of its inducement to commit crime. In so doing, the court has not embraced the objective theory of entrapment. Rather, in the spirit of *Russell* and *Hampton*, it simply has placed an outer constitutional limit on what the government may do, even to predisposed individuals.

By clearly defining outrageous government conduct, the Ninth Circuit has adhered to both the letter and the spirit of the law, and has admirably performed its role as an intermediate appellate court. By adopting the Ninth Circuit's approach to the due process defense, the Third Circuit would do the same.