CONSTITUTIONAL LAW—CRIMINAL INVESTIGATIONS—THE DUE PROCESS CLAUSE'S PROTECTION AGAINST OUTRAGEOUS GOVERNMENT CONDUCT DOES NOT INCLUDE A REASONED GROUNDS REQUIREMENT FOR CRIMINAL INVESTIGATIONS—*United States v. Luttrell*, 923 F.2d 764 (9th Cir. 1991)(*en banc*).

With few Supreme Court cases to guide them,[1] the United States circuit courts have crafted a nebulous protection[2] from the due process clause,[3] available to targets of government under-

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[1] *See* United States v. Russell, 411 U.S. 423, 430-31 (1973) (recognizing the potentiality of a due process defense); Hampton v. United States, 425 U.S. 484, 489-91 (1976) (relegating outrageous government conduct defense to cases of government brutality); *id.* at 491 (Blackmun and Powell, JJ. concurring) (maintaining the viability of the outrageous government conduct defense); *id.* at 495 (Brennan, Marshall, and Stewart, JJ., dissenting) (preserving the existence of the outrageous government conduct defense); *see also* W. LAFAVE AND A. SCOTT, CRIMINAL LAW § 5.2 at 430-31 (2d ed. 1986) (maintaining that the Supreme Court cases on outrageous government conduct "do not provide clear guidelines" for assessing government behavior); Note, *Due Process Defense When Government Agents Instigate and Abet Crime*, 67 GEO. L.J. 1455, 1459 (1979) (observing that the dicta in the Supreme Court cases provide little guidance in appraising police investigatory conduct under the due process clause).

[2] *See infra* notes 175-216 and accompanying text. *See, e.g.*, United States v. Jenrette, 744 F.2d 817, 823-26 (D.C. Cir. 1984) (recounting D.C. Circuit's previous treatment of the outrageous government conduct defense); United States v. Russo, 540 F.2d 1152 (1st Cir. 1976) (examining the government's conduct to determine if outrageous police conduct existed); United States v. Myers, 635 F.2d 932 (2d Cir.), *cert. denied*, 101 S. Ct. 364 (1980) (including a due process clause protection with other constitutional safeguards against improper government investigations); United States v. Jannotti, 673 F.2d 578, 607 (3d Cir. 1982) (*en banc*), *cert. denied*, 469 U.S. 880 (1984) (reiterating concept which Third Circuit established in earlier opinion that due process concept of fundamental fairness guards against outrageous government conduct); United States v. Hunt, 749 F.2d 1078, 1087 (4th Cir. 1984) (recognizing and rejecting defendant's outrageous government conduct defense); United States v. Graves, 556 F.2d 1319, 1324 (5th Cir. 1977) (noting the availability of governmental misconduct defense "grounded on" due process principles); United States v. Leja, 563 F.2d 244, 246 (6th Cir.), *cert. denied*, 434 U.S. 1074 (1977) (expressly adopting a view that a limit exists under the due process clause for government involvement in a crime); United States v. Kaminiski, 703 F.2d 1004, 1009 (7th Cir. 1983) (attesting that although the Supreme Court has not given content to the due process principle, an examination of cases decided by courts of appeals provides general observations about the outrageous government conduct rule); United States v. Irving, 827 F.2d 390, 393 (8th Cir. 1987) (*per curiam*) (accepting a court's review under the due process clause of government investigatory conduct as commonplace); United States v. Bogart, 783 F.2d 1428, 1432 (9th Cir. 1986) (observing that the Ninth Circuit has repeatedly held that the due process outrageous conduct defense survived *Hampton*); United States v. Biswell, 700 F.2d 1310, 1314 (10th Cir. 1983) (commenting that the Tenth Circuit has recognized the existence of the outrageous government conduct defense on several occasions).

[3] U.S. CONST. amends. V and XIV. The Constitution provides in the due pro-

cover operations.[4] Usually entitled the "outrageous government conduct" defense,[5] its conceptual parameters lack clear defini-

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cess clause of the fifth amendment: "[n]or [shall any person] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The due process clause of the fourteenth amendment states: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. Amend. XIV.

[4] L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, DETECTION OF THE CRIME 210 (1967). The authors refer to government undercover operations as "encouragement activity." *Id.* Under this approach, law enforcement officials assume false identities with the express purpose of encouraging a suspect to commit a crime. *Id.*

Courts, commentators, and student authors have produced an entire body of nomenclature to designate this type of government behavior. These various labels do not connote terms of art, and are basically synonymous. *See, e.g.*, Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011 (1987) (interchangeably using terms police solicitation and inducement; provocation of crime; and police encouragement); Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565 (1982) ("undercover investigations" sometimes employ massive government resources and substantial temptation to entice a potential criminal into breaking the law); Note, *Lead Us Not Into Unwarranted Temptation: A Proposal to Replace the Entrapment Defense with A Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193 (1985) (using various terms such as "sting," "scam," and undercover operations, to describe government inducement of criminal behavior); Note, *Executive Targeting of Congressmen as a Violation of the Arrest Clause*, 94 YALE L.J. 647 (1985) ("targeting" identifies "victims" and then attributes offenses).

Many law enforcement officials consider police solicitation and inducement—by any name—an effective and necessary method of law enforcement. *See, e.g.*, SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY TOGETHER WITH DISSENTING VIEWS, FBI UNDERCOVER OPERATIONS, H.R. Doc. No. 267, 98th Cong., 2d Sess. 1 (1984). The committee quoted Attorney General William French Smith as stating that law enforcement "must interject its agents into the midst of corrupt transactions. It must feign the role of corrupt participants. It must go undercover." *Id.* at 1.

One professor found that the following dangers accompany these "necessary" undercover operations:

> Some solicitations are innocuous. An agent who merely asks for a drink in a speakeasy creates no danger of corrupting the innocent. However, because persons engaged in criminal enterprises are wary of strangers, police usually must do more than simply approach a target and request the commission of a crime. They must work through an informer trusted by the target, or have an undercover officer cultivate the target's trust. Moreover, it may be necessary to make multiple requests before the target agrees to commit the crime solicited.
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> When agents do more than make a single arms-length request, they create a danger of inducing crimes by persons not already engaged in criminal enterprise. For example, an agent who has formed a close relationship with a drug user may, by appealing to friendship, be able to persuade him to sell drugs even though he has never previously done so. The danger increases if the agent also offers windfall profits, plays on the target's sympathy (by pretending withdrawal symptoms), or provides assistance that facilitates the crime (by providing the target drugs to sell to another agent).

Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 164 (1976).

[5] *See infra* notes 54-89 and accompanying text.

tion.[6] Nevertheless, a few circuits have confronted a proposed species of the defense entitled the "reasoned grounds" requirement.[7] Nearly all have rejected the defense.[8] Given its emasculated case law legacy and due process origins, the reasoned grounds defense draws its impetus primarily from philosophical concepts rooted in the Bill of Rights.[9] Unfortunately for propo-

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[6] *See* Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 601 (1982) (criticizing outrageous government conduct decisions for unpredictable ability and rulings failure to guide courts analyzing governmental misconduct). *See also* W. LAFAVE AND A. SCOTT, *supra* note 1, § 5.2 at 531-32. LaFave and Scott suggested possible scenarios where government conduct is outrageous enough to yield a due process violation. *Id.* The authors believed that Supreme Court jurisprudence insinuates that due process challenges should rarely succeed, but may include the following government behavior: threats of violence; use of provocateurs in political climates to urge criminal acts; and provision of contraband necessary to the commission of the offense. *Id.*

Moreover, defendants have brought successful challenges based on this defense on only three occasions. *See* United States v. Twigg, 588 F.2d 373, 380 (3d Cir. 1978) (reversing defendants' convictions on drug trafficking charges because government's conduct had reached "a demonstrable level of outrageousness"); Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (reversing bootlegging-related convictions of a criminally predisposed defendant due to an impermissible degree of government involvement); United States v. Archer, 486 F.2d 670 (2d Cir. 1973) (suggesting conviction would have been reversed on due process grounds if defendant's conviction had not been reversed on other grounds).

In general, the outrageous government conduct defense shares with its due process progenitor a resistance to codification.

[7] *See infra* notes 185-205 and accompanying text.

[8] *See* United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991) (*en banc*) (explicitly rejecting a reasoned grounds requirement); United States v. Jenrette, 744 F.2d 817, 824 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1984) (rejecting reasoned grounds requirement for due process); United States v. Gamble, 737 F.2d 853, 860 (10th Cir. 1984) (obviating reasonable suspicion as precedent to government investigation); United States v. Myers, 635 F.2d 932, 941 (2d Cir. 1980) (stating due process does not require "reasonable suspicion").

The Court of Appeals for the Seventh Circuit observed in dictum that a reasoned basis "is not a constitutional prerequisite to an undercover investigation." United States v. Thomas, 726 F.2d 1191, 1198 (7th Cir. 1984), *cert. denied*, 467 U.S. 1228 (1984) (citations omitted).

The Eighth Circuit's position on the reasoned grounds requirement is presently unclear. *See* United States v. Jacobson, 893 F.2d 999 (8th Cir.) (holding due process requires government possess "reasonable suspicion based on articulable facts" before launching an investigation), *vacated and reh'g granted en banc*, United States v. Jacobsen, No. 88-2097NE (8th Cir. April 20, 1990) (order granting rehearing).

See also United States v. Jannotti, 673 F.2d 578, 608-09 (3d Cir. 1982) (*en banc*) (dismissing "probable cause" prerequisite as a bar to conviction), *cert. denied*, 469 U.S. 880 (1984).

[9] *See* R. MOLT, DUE PROCESS OF LAW (1926) (treating due process as an amplification of society's values); Ratner, *The Function of the Due Process Clause*, 116 U. PA. L.

nents of the reasoned grounds protection,[10] courts have not sufficiently amalgamated these reasoned grounds-supportive concepts with case law.[11]

The United States Court of Appeals for the Ninth Circuit fashioned its current position on the reasoned grounds requirement in *United States v. Luttrell*.[12] More specifically, the *Luttrell* court examined whether the due process clause protection against outrageous government conduct prevents law enforcement officials who lack reasoned grounds from investigating an individual.[13] While the three-judge panel affirmed the existence of a reasoned grounds requirement,[14] the Ninth Circuit reheard the case *en banc* and held that no such requirement exists under the due process clause.[15]

In *Luttrell*, William Kegley legitimately acquired credit card drafts[16] valued in excess of one million dollars by selling vacation

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REV. 1048 (1968) (arguing that due process has traditionally reflected moral values).

Professor Gershman noted that the Supreme Court has "[e]ncountered greater doctrinal difficulty when invoking due process to protect some relative and indefinite concepts such as personal dignity and privacy." Gershman, *supra* note 6, at 598. Professor Gershman believed this difficulty exists because these concepts interfere with effective law enforcement activity. *Id.*

10 *See, e.g.*, Gershman, *supra* note 6, at 633-37 (arguing for a legislatively-created staged arrest warrant requirement that would require the government to articulate the reasoned for its operation before initiation of the staged arrest); Note, *supra* note 4, at 1216-30 (recommending that the government should produce "reasonable suspicion," and obtain a warrant prior to the initiation of an investigation); Note, *supra* note 1 at 1471 (advocating the necessity of a reasoned grounds requirement).

11 *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In *Olmstead*, a fourth amendment case, Justice Brandeis articulated a very compelling due process philosophy:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a [constitutional violation].

Id. Nevertheless, positions such as Brandeis's, while compelling, are often expressed in dissent. *See* On Lee v. United States, 343 U.S. 747, 762-65 (1965) (Douglas, J., dissenting) (relying upon Brandeis's views in asserting that the government wiretapping at issue violated the fourth and fifth amendment).

12 889 F.2d 806 (9th Cir. 1989), *modified*, 923 F.2d 764 (9th Cir. 1991).

13 *Luttrell*, 889 F.2d at 812-13.

14 *Id.* at 806.

15 *Luttrell*, 923 F.2d at 764.

16 *Luttrell*, 889 F.2d at 808. *See* J. FONSECA & P. TEACHOUT, HANDLING CONSUMER

packages through his telemarketing business in 1980.[17] Kegley's bank subsequently revoked his draft deposit account and returned his drafts.[18] As a result, Kegley forfeited a large part of his investment because his clients previously had used their vacation packages.[19] Kegley lawfully retained the drafts for seven years before he was approached by Richard Barker, a convict working for law enforcement officials.[20] The court also recognized that Barker was acquainted with Kegley.[21] Despite Kegley's untainted record,[22] Barker solicited him to factor his credit card drafts[23] through Andrew Yee, an undercover Secret Service agent operating a fictitious enterprise.[24]

Yee contacted Kegley and arranged a meeting on March 13, 1987, with Kegley and Kegley's business associate Laurie Lut-

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CREDIT CASES, § 10:2 at 308 (2d ed. 1980). A credit card draft, also known as a sales slip or draft slip, provides evidence to the credit card-issuing bank that a credit card sale transpired between the credit card holder—the consumer—and the merchant. *Id.*

17 *Luttrell*, 889 F.2d at 808.

18 *Id.* Kegley held his account with the Bank of America in Taiwan. Brief for Petitioner at 4, United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991).

A merchant who wishes to receive payment for credit card sales must enter into a bank-merchant agreement with a merchant bank associated with other credit card participating banks. J. FONSECA & P. TEACHOUT, *supra* note 16, at 307. A merchant's obligations are usually defined in the merchant's contract with a bank. *Id.*

The record does not reveal the reason Kegley forfeited his account with Bank of America. *Luttrell*, 889 F.2d at 808. Appellant stated that Bank of America canceled its arrangement with Kegley because of one "charge back." Brief for Petitioner at 4, United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991).

19 *Luttrell*, 889 F.2d at 808. The court estimated that the loss was "hundreds of thousands of dollars." *Id.*

20 *Id.* The court observed that Barker's current employment by the government resulted from a plea bargaining agreement with the government made pursuant to his conviction for credit card fraud. *Id.*

The court also stated that Kegley's business endeavors did not produce criminal or civil charges. *Id.*

21 *Id.* at 808.

22 *Id.* at 812. The panel found no evidence that the Secret Service suspected Kegley and Luttrell of wrongdoing. *Id.* Moreover, the record according to the panel did not even suggest any illegal activity by a discrete group which defendants may have belonged. *Id.*

23 *Id.* at 808. The court explained that credit card factoring is a common, legal activity where an authorized merchant, usually for a fee, deposits drafts on behalf of an unauthorized merchant, such as Kegley. *Id.* at 808 n.3. The court also established that Kegley did not factor unauthorized credit card drafts in violation of 18 U.S.C. section 1029. *Id.* *See infra* note 32 and accompanying text for a reproduction of section 1029.

24 *Id.* Yee operated a fictitious enterprise called Aloha Imports under the alias Andrew Young. *Id.*

trell[25] where Yee presented his factoring scheme under the surveillance of Secret Service agents.[26] At the meeting, Kegley agreed to Yee's suggestion that the merchant imprint be removed from Kegley's drafts, but failed to respond to Yee's interest in altering the draft's dollar figures.[27] Concluding his offer, Yee established that the transaction could be executed on March 16, 1987, and Kegley could receive his money three days later.[28] Overcoming his express reservations concerning the scheme's illegality, Kegley tendered nearly one million dollars in drafts to Yee.[29]

Although Kegley attempted to cancel the transaction on March 19, 1987, and renounced all claims to his share of the proceeds, the government successfully prosecuted[30] Kegley and Luttrell for conspiracy to possess unauthorized credit card drafts under 18 U.S.C. section 1029(a)(1)-(3)[31] and for attempting to traffic in counterfeit drafts under 18 U.S.C. section 1029(a)(1)

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25 *Id.* The court suggested that Luttrell was unknown to the Secret Service prior to her presence at the meeting. *Id.*

26 *Id.* During the March 12th phone conversation, which was secretly recorded by the government, Young discussed the possibility of processing Kegley's drafts. *Id.* Accordingly, the court noted that Young suggested a 60/40 split in Young's favor. *Id.*

27 *Id.* The panel observed that Young initiated the discussion of the factoring scheme, the merchant imprint removal, and the alteration of the dollar figures. *Id.*

28 *Id.* Because Kegley would be unavailable, Luttrell was supposed to collect the money on the March 19, 1987, pay-off date. *Id.*

29 *Id.* at 808-09.

30 *Id.* at 809. The panel stated that Kegley made a number of attempts to cancel the transaction before its appointed consummation. *Id.* Kegley expressed his desire to cancel by a telephone call to Aloha Imports, by mail-gram to Aloha Imports, and in person to Young when he returned Kegley's call. *Id.* In addition, the court recorded that, even after Young claimed to have completed the transaction, Kegley waived all interest in collecting his portion. *Id.* The court also noticed that Young claimed to have consummated the transaction earlier than the original scheme envisioned. *Id.*

Nevertheless, the government charged the defendants. *Id.* The court acknowledged that Kegley and Luttrell were sentenced to terms of probation without incarceration. *Id.*

31 The statute addresses "fraud and related activity in connection with access devises" and states the following:

> (a) Whoever—
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> (1) knowingly and with intent to defraud produced, uses, or traffics in one or more counterfeit access devices;
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> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period;
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> (3) knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices.

and (b)(1).[32] The district court refused to dismiss the indictment based upon the defendant's due process defense of outrageous government conduct,[33] but provided instructions to the jury on entrapment.[34]

On appeal, the three-judge panel opined that due process requires the government to possess "reasoned grounds" before

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18 U.S.C. § 1028 (1986).

The statute provides the following definitions for access devices, counterfeit access devices, and unauthorized access devices:

> (e) As used in this section—
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> (1) the term "access device" means any card, plate, code, account number or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument);
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> (2) the term "counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device;
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> (3) the term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.

18 U.S.C. § 1029 (1986).

[32] *Lutrell*, 889 F.2d at 809. The court previously defined 18 U.S.C. § 1029(b)(1): " 'Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.' " *Id.* at 807 n.1 (quoting 18 U.S.C. § 1029 (b)(1) (1982)).

The statute provides the following punishments:

> (c) The punishment for an offense under subsection (a) or (b)(1) of this section is—
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> (1) a fine of not more than the greater of $10,000 or twice the value obtained by the offense or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2) or (a)(3) of this section which does not occur after a conviction for another offense under either such subsection, or an attempt to commit an offense punishable under this paragraph;
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> (2) a fine of not more than the greater of $50,000 or twice the value obtained by the offense or imprisonment for not more than fifteen years, or both, in the case of an offense under subsection (a)(1) or (a)(4) of this section which does not occur after a conviction for another offense under wither such subsection, or an attempt to commit an offense punishable under this paragraph; and
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> (3) a fine of not more than the greater of $100,000 or twice the value obtained by the offense or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this paragraph.

18 U.S.C. § 1028 (1986).

[33] *Luttrell*, 889 F.2d at 809.

[34] *Id.* The court duly noted that the jury rejected the defendant's entrapment defense. *Id.*

initiating an investigation.[35] The court of appeals granted a rehearing *en banc*, vacating and reversing the panel's opinion in part.[36] More specifically, the court *en banc* held that reasoned grounds are not a necessary prerequisite to government investigations.[37]

To illustrate the reasoned grounds argument fully and appreciate its swift dismissal in *Luttrell*, it is important to undertake an historical examination of the relevant case law involving due process, outrageous government conduct, and reasoned grounds. In *Rochin v. California*,[38] the Supreme Court promulgated what became the benchmark instructions for judicial review of government investigatory tactics.[39] In *Rochin*, the police unlawfully entered petitioner Rochin's residence, forced him to the ground, attempted to dislodge drug capsules from his throat, and then had his stomach pumped at a hospital.[40] In holding the government's conduct violative of the due process clause of the fourteenth amendment, the Court promulgated the general parameters of due process scrutiny of governmental conduct.[41] Although reminding prospective reviewing courts that states control the criminal justice system,[42] the Supreme Court posited that the judiciary must ensure the protection of essential rights.[43]

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35 United States v. Luttrell, 889 F.2d 806, 813 (9th Cir. 1989), *modified*, 923 F.2d 764 (9th Cir. 1991)(*en banc*).

36 United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991)(*en banc*).

37 *Id.* at 764.

38 342 U.S. 165 (1952).

39 *See* United States v. Russell, 411 U.S. 423, 431-32 (1973) (employing *Rochin* as a paradigm for government conduct which violates due process norms). *See, e.g.*, Gershman, *supra* note 6, at 598 (referring to *Rochin* as the "classic case" demarcating due process limits on government investigations); Note, *United States v. Simpson: "Outrageousness!" What Does it Really Mean?—An Examination of the Outrageous Conduct Defense*, 18 SW. U.L. REV. 105, 108 (1988) (also referring to *Rochin* as the classic example of government conduct surpassing the due process clause's outrageousness threshold).

40 *Id.* at 166-67. The government's actions in *Rochin* involved more than a simple investigation; the defendant was actually searched. *Id.*

41 *Id.* at 168-69.

42 *Id.* at 168. Building upon this notion that the criminal justice system should be primarily administered by states, the court elaborated, "[d]ue process of law, 'itself a historical product,' is not to be turned into a destructive dogma against the [s]tates in the administration of their systems of criminal justice." *Id.* (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1938)).

43 *Id.* at 169-70. The court evinced that government behavior should be measured against "[t]hose canons of decency and fairness which express the notions of justice of English-speaking peoples. . ." *Id.* at 169 (citations omitted). It summarized the protection of the due process clause as a guarantee for "personal immunities" that are "so rooted in the traditions and conscience of our people as to be

The Court emphasized that the due process clause, while composed of vague contours, does not permit judges to act whimsically;[44] rather, due process protects against a government act which "shocks the [court's] conscience."[45] In so finding, the Court explicitly warned against elevating government behavior which offends a court's "fastidious squeamishness" or "private sentimentalism" about combatting crime too energetically to constitutionally repugnant status.[46]

The Court of Appeals for the Ninth Circuit applied the principles enumerated in *Rochin* to a searchless government investigation in *Greene v. United States*.[47] In 1971, the *Greene* court reviewed a government operation where an agent posed as a syn-

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ranked as fundamental," or are "implicit in the concept of ordered liberty." *Id.* (citations omitted).

[44] *Id.* at 170-71 (footnote omitted). The Court warned that due process does not signal a "revival of natural law." *Id.* at 171 (footnote omitted).

[45] *Id.* at 172. Despite its warning, the Supreme Court reiterated its belief that due process cannot be cast easily into static tabulars: "[d]ue process of law, as a historic and generative principle, precludes defining, and thereby confirming, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." *Id.* at 173 (citation omitted) (quoting Brown v. Board of Mississippi, 297 U.S. 278, 285-86 (1936)).

[46] *Id.* at 172. The court also urged that reviewing judges should exercise a "requisite detachment" and "sufficient objectivity" when scrutinizing governmental conduct. *Id.* at 171.

The Supreme Court abandoned the *Rochin* rationale in search and seizure cases because of its lack of clarity. In forsaking the *Rochin* approach to searches and seizures and instead developing the exclusionary rule of the fourth amendment, Justice Black stated in Mapp v. Ohio: "[a]s I understand the Court's opinion in this case, we again reject the confusing 'shock-the-conscience' standard of the *Wolf* and *Rochin* cases, and instead set aside this conviction in reliance upon precise, intelligible and more predictable constitutional doctrine." Mapp v. Ohio, 367 U.S. 643, 654-55 (1961). *See also* Irvine v. California, 347 U.S. 128, 142-49 (1954) (Frankfurter, J., dissenting) (arguing to employ the *Rochin* test to a search and seizure case factually similar to *Rochin*).

Commentators have criticized *Rochin* in the area of outrageous government conduct or its shocked-conscious standard. Professor Tribe, for example, explains, "[r]eferences to history, tradition, evolving community standards, and civilized consensus, can provide suggestive parallels and occasional insights, but it is illusion to suppose that they can yield answers, much less absolve judges of responsibility for developing and defending a theory of what rights are 'preferred' or 'fundamental' and why." L. TRIBE, CONSTITUTIONAL LAW § 11-4, at 572-73 (1978). *See also* Abramson & Lindeman, *Entrapment and Due Process in Federal Courts*, 8 AM. J. CRIM. 139, 174 n. 145 (1980) (criticizing the lack of standards in *Rochin*). Others have criticized *Rochin* for providing placebo-like protections because of *Rochin*'s factual extremity: "[i]f *Rochin* indicates how outrageous police conduct must be before due process is denied, then the due process defense will offer negligible protection beyond that already afforded by the exclusionary rule." Survey, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 251-52 (1973).

[47] 454 F.2d 783 (9th Cir. 1971).

dicate member;[48] established contact with suspects "*without reason*" upon their release from prison;[49] facilitated the production of illegal liquor by purchasing necessary equipment and providing sugar at wholesale prices;[50] and served as the *suspects'* only customer.[51] Although the court ruled that the entrapment defense was unavailable because of the defendants's predisposition,[52] it reversed defendants' conviction, employing a new, untitled defense, based on the same objections which make entrapment repugnant to American notions of criminal justice.[53] The *Greene* court offered only an enumeration of the agent's of-

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48 *Id.* at 784. The court characterized the defendants' reaction: "[t]he events which thereafter unfolded reveal almost unbelievable naivete on the part of defendants in accepting [the government agent] as a representative of the 'syndicate.' " *Id.*

49 *Id.* A government informant introduced the agent to the defendants in September 1962. *Id.* The agent's infiltration subsequently lead to an arrest, guilty plea, and six month sentencing in October 1963. *Id.* The agent then re-established contact with defendants in late 1963. *Id.* at 784-85. It was the latest behavior that drew the court's scrutiny. *Id.*

50 *Id.* at 785-86. In addition, the court perceived that the government agent made threats in an effort to spur production. *Id.* at 785.

51 *Id.* at 786.

52 *Id.* The court stated that defendants exhibited a predisposition to bootlegging from the time of the government agent's initial contact. *Id.* Therefore, the court concluded that the entrapment defense was unavailable. *Id.* (footnote omitted).

53 *Id.* at 787. The court supported its reversal only with the following:

> But, although this is not an entrapment case, when 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. Under these circumstances, the Government's conduct rises to a level of 'creative activity', and substantially more intense and aggressive than the level of such activity charged against the Government in numerous entrapment cases we have examined.

Id. (citing Sherman v. United States, 356 U.S. 369, 372 (1958)).

In *Sherman v. United States*, an early entrapment decision, the Supreme Court found entrapment as a matter of law because in that case, the criminal conduct was a product of the law-enforcement official's "creative activity." 356 U.S. at 372-73. In *Sherman*, a government informant befriended and solicited petitioner to procure narcotics for the government informant. *Id.* at 371. The Court observed that the solicitation occurred at a drug rehabilitation center where both were receiving treatment, and that only the informant's repeated supplications overcame petitioner's reluctance. *Id.* The Supreme Court received the case on appeal after jury conviction and court sentence of ten years imprisonment which was affirmed by the court of appeals. *Id.* at 371-72.

Justice Frankfurter, joined by Justice Douglas, Harlan, and Brennan, argued that the majority's traditional basis for entrapment, the predisposition and record of a particular defendant, should be replaced by an objective entrapment test based on the government's conduct and the chance that it would entrap only those indi-

fensive tactics to guide future decisions.[54] The court emphasized that the following combination of obnoxious government behavior required dismissal of the indictment: 1) the agent re-established contact with defendants; 2) the government agent's involvement was for an extremely lengthy period; 3) the agent's involvement was also substantial; 4) the agent applied pressure to compel defendant's criminal behavior; 5) the agent's methods established and sustained the operation; and 6) the agent was the only customer.[55]

Two years later in *United States v. Russell*,[56] the Supreme Court clarified its position on the non-constitutional doctrine of entrapment,[57] and, building on *Rochin* in dictum, unveiled the

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viduals prepared and inclined to commit a crime. *Id.* at 382-84 (Frankfurter, J., concurring).

Although the *Greene* court did not specify these objections repugnant to American notions of criminal justice, the Supreme Court previously has confronted the most obvious notion—legitimate law enforcement does not include the manufacturing of crime:

> The function of law enforcement is the prevention and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, a different question is presented when the criminal design originated with the officials of the [g]overnment, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

Sorrells v. United States, 287 U.S. 435, 442 (1932).

54 *Greene*, 454 F.2d at 786-87.

55 *Id.* The court emphasized that the dismissal of the indictment in *Greene* depended upon the totality of the government's behavior: "[w]e also acknowledge that, taken individually, none of the factors which we have pointed to as significant would necessarily require reversal of a conviction. In our view, it is the combination which is important." *Id.* at 787.

56 411 U.S. 423 (1973).

57 *Id.* at 428. The Supreme Court previously defined entrapment as when "officials of the Government [] implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Sorrells v. United States, 287 U.S. 435, 442 (1932).

In earlier decisions, the Supreme Court was divided over two possible approaches to entrapment law—a "subjective" test of entrapment which emphasizes a defendant's predisposition to commit a crime, and an "objective" approach which focuses on the government's behavior. *See Sorrells*, 287 U.S. 435; *Sherman*, 356 U.S. 369; United States v. Russell, 411 U.S. 423 (1976); United States v. Hampton, 425 U.S. 484 (1976).

A majority of the Supreme Court recognized the pre-eminence of the subjective approach in a 1932 landmark entrapment decision, *Sorrells*, 287 U.S. at 441-52, and re-proclaimed its adherence in *Sherman*, 356 U.S. at 372-73 and *Russell*, 411 U.S. at 433.

The subjective approach labors to distinguish between "otherwise innocent" citizens and "unwary" criminals by establishing whether the subject was "predis-

due process defense of outrageous government conduct.[58] *Russell* involved an undercover government agent who, in the course of infiltrating a known drug manufacturing operation, supplied his subjects with a legally attainable, but rare and essential ingredient for their drug production.[59] Following arrest for the resulting sale to the infiltrating agent, respondent Richard Russell was found guilty by the trial court but his conviction was reversed on appeal.[60]

Writing for the majority,[61] Justice Rehnquist examined the amorphous theory used by the court of appeals to reverse Russell's conviction.[62] Accordingly, Justice Rehnquist observed that the appellate court had relied upon fundamental due process no-

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posed" to commit the crime. *See, e.g., Sorrells*, 287 U.S. at 448; *Russell*, 411 U.S. at 435. After a defendant produces evidence to create an inference that the crime was induced by a government agent, the government must prove that the defendant was predisposed at the time of solicitation. Sagansky v. United States, 358 F.2d 195, 202-03 (1st Cir.), *cert. denied*, 385 U.S. 816 (1966). If the government demonstrates a defendant's predisposition to a jury's satisfaction, the subjective entrapment defense cannot be sustained. *Russell*, 411 U.S. at 436. Courts generally use subjective entrapment to police situations where government representatives "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells*, 287 U.S. at 442.

The Supreme Court members supporting the objective view include Justices Brandeis, Roberts, and Stone, concurring in *Sorrells*, 287 U.S. at 453-59; Justices Brennan, Douglas, Frankfurter and Harlan, concurring in *Sherman*, 356 U.S. at 378-85; and Justices Brennan and Douglas, dissenting in *Russell*, 411 U.S. at 496-450, and *Hampton*, 425 U.S. 484 (1976). Their approach focuses upon the acceptability of government investigative conduct. *Id.* More specifically, this view seeks to ensure the propriety of police conduct, *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring), by evaluating the government's actions without scrutinizing the defendant's state of mind. *Russell*, 411 U.S. at 441 (Stewart, J., dissenting).

The American Law Institute has adopted Justice Frankfurter's "hypothetical person" approach from *Sherman*. MODEL PENAL CODE 2.13(a)(b) (1962). Analogous to the reasonable person standard from tort law, the hypothetical person approach focuses on the likelihood, "objectively considered," that the solicitation would entrap only those readily willing to commit the crime. *Sherman*, 356 U.S. at 384 (Frankfurter, J., concurring).

58 *Russell*, 411 U.S. at 427-32.

59 *Id.* at 424-27.

60 *Id.* at 427. The Court of Appeals for the Ninth Circuit posited that the government intolerably participated in the criminal enterprise by supplying the essential, scarce substance; accordingly, the court of appeals reversed the conviction. *Id.* The Supreme Court noted that the court of appeals, in reaching this result, had expanded traditional entrapment doctrine beyond a predisposition inquiry. *Id.*

61 *Id.* at 423. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger, and Justices Blackmun, Powell, and White jointed. *Id.*

62 *Id.* at 427-28. According to Justice Rehnquist, the lower court decoded the first theory from United States v. Beuno, 447 F.2d 903 (5th Cir. 1971), and United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970). *Id.* The Court then ob-

tions and judicial aversion to overzealous law enforcement in reversing the conviction.[63] After acknowledging this nascent constitutional principle without ruling on its legitimacy, the Court addressed Russell's entrapment and due process arguments. The majority first rejected Russell's interest in barring prosecution based upon police over-involvement in the criminal activity.[64] Distinguishing prior cases involving the confession[65] and exclusionary rule[66] decisions, the majority further noted that, in this case, the government did not violate any independent constitutional right that Russell might possess.[67] The Court then questioned whether a flexible due process principle could be cast in static rules.[68] The Court also challenged Russell's ability to fit within the proposed rule.[69]

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served that these two cases found entrapment, despite the defendant's predisposition, when the government supplied the ordinance at issue to defendants. *Id.*

The Court recognized that the second theory involved a non-entrapment rationale drawn from Greene v. United States, 454 F.2d 783 (9th Cir. 1971). *Id.* The *Greene* case, according to the Supreme Court, involved an unnamed, non-entrapment rationale to reverse conviction because a government agent became so overly intertwined with the criminal enterprise as to make the government's behavior repugnant to the U.S. criminal system. *Id.* (citing *Greene*, 454 F.2d 783).

Justice Rehnquist then acknowledged the lower court's belief that these two theories constitute the same defense, and that only the label distinguishes them. *Id.*

63 *Id.* (quoting Sherman v. United States, 356 U.S. 369, 381 (1958) (Frankfurter, J., concurring)).

64 *Id.* at 430-32.

65 *Id.* at 430 (citing Miranda v. Arizona, 384 U.S. 436, 439-41 (1966) (holding that the fifth amendment's privilege against self-incrimination prevents the prosecution's use of a defendant's custodial statement unless the police employed adequate procedural safeguards)).

66 *Id.* (citing Weeks v. United States, 232 U.S. 383, 398 (1914) (holding the fourth amendment protects defendants from unauthorized government seizures of personal property by excluding that evidence at trial); Mapp v. Ohio, 367 U.S. 643, 657 (1961) (holding that "the exclusionary rule (from *Weeks*) is an essential part of both the Fourth and Fourteenth Amendments")).

67 *Id.* Expounding upon this notion, the Court acknowledged that the principal reason for the creation of the exclusionary rule involved the "government's 'failure to observe its own laws.' " *Id.* (quoting *Mapp*, 367 U.S. at 659). The Court continued this line of reasoning: "[u]nlike the situations giving rise to the holdings in *Mapp* and *Miranda*, the Government's conduct here violated no independent constitutional right of the respondent. Nor did (the government informant) violate any federal statute or rule . . . in infiltrating the respondent's enterprise." *Id.*

68 *Id.* at 431. The Court suggested its difficulty in reducing due process to static principles involved an inability to "surmount the difficulties attending the notion that due process can be embodied in fixed rules." *Id.* The Supreme Court expressed additional concern with crafting defendant's particular version of due process. *Id.*

69 *Id.* In suggesting that the outrageous government conduct defense would not be of "significant" benefit to defendant, the court concluded that defendant may not "fit" within his proposed rule. *Id.*

Despite its aforementioned reservations, the *Russell* Court promulgated the existence of a due process protection from outrageous government conduct.[70] To create a fifth amendment violation, however, the Court articulated that the challenged government conduct must violate fundamental fairness and abhor the universal sense of justice.[71] Emphasizing the legitimate need for police infiltration of a continuing,[72] illegal business enterprise, the Court rejected Russell's challenge.[73]

The Supreme Court faced the opportunity in *United States v. Hampton*[74] to re-examine its position on the outrageous government conduct issue.[75] In *Hampton*, a criminally predisposed petitioner[76] was convicted of distributing heroin[77] purchased from a

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70 *Id.* at 431-32 (citing Rochin v. California, 342 U.S. 165 (1953)). More specifically, the court stated "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 conviction." *Id.* (citing *Rochin*, 342 U.S. at 165).

71 *Id.* at 432 (citing Kinsella v. Singleton, 361 U.S. 234, 246 (1960)).

72 The Court presented its perception of the conditions which must precede a government investigation:

> [T]he illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus . . . law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices.

Id.

73 *Id.* at 436.

74 425 U.S. 484 (1976).

75 *Id.* at 489. One must conclude, however, that it was a squandered opportunity. Quite simply, commentators condemn *Russell* and *Hampton* for not providing clear guidelines. *See, e.g.*, Stetson, *Outrageous Conduct: A Fifth Amendment Due Process Defense*, 5 CRIM. JUST. J. 55, 67 (opinion that "confusion will continue to grow" until the Supreme Court rules on "this modern and vital area of criminal law"); Note, *Entrapment as a Due Process Defense: Development After Hampton v. United States*, 57 IND. L. J. 89, 109 (1982) (attributing the nebulous tests used by lower courts to the unclear *Russell* decision and its reliance on the amorphous *Rochin* precedent); Note, *supra* note 10, at 1457 (observing that *Russell* and *Hampton* do not provide clear guidelines for outrageous government conduct); *but see*, Marino, *Outrageous Conduct: The Third Circuit's Treatment of the Due Process Defense*, 19 SETON HALL L. REV. 606, 613-19, 642 (1989) (praising the Ninth Circuit for developing, in accordance with *Russell* and *Hampton*, more exact standards for outrageous government conduct defense).

76 *Id.* at 487 and n.3. Defendant testified that he solicited the sale which lead to arrest. *Id.* at 487.

77 *Id.* at 485. Petitioner violated 21 U.S.C. section 841(a)(1). *Id.* Section 841 provides in relevant part:

government agent.[78] A plurality of the Court[79] found that neither entrapment nor due process is available where a predisposed defendant acts in concert with government agents.[80] While cuing courts that entrapment[81] and statutory[82] defenses protect against government abuses in some cases, the plurality emphasized that the due process clause becomes involved only when the government violates a defendant's constitutional right.[83]

Justice Powell's concurrence in *Hampton*[84] pointedly disagreed with the plurality's conclusion that a defendant's criminal predisposition forecloses the outrageous government conduct defense.[85] In refusing to distinguish petitioner's case from *Russell*, however, Justice Powell equated the government-supplied

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(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. § 841(a)(1) (1986).

78 *Id.* at 485-87. The Court's stipulation of facts contained two interpretations of events: the government informant's version and petitioner's version. *Id.* at 485-88. According to the informant, petitioner "needed money" and solicited the assistance of the informant to find a buyer for petitioner's drugs. *Id.* at 485-86. Petitioner asserted, however, that he had arranged to purchase a counterfeit, non-narcotic drug from the informant. *Id.* at 486-87. As a result, petitioner claimed that his subsequent sale of government supplied narcotics to government agents was not made knowingly. *Id.* at 487. The Court noted that the jury, although rejecting some of petitioner's account, accepted that the drugs at issue were supplied by the government informant. *Id.* at 487-88.

79 The plurality opinion was written by Justice Rehnquist and joined by Chief Justice Burger and Justice White. *Id.* at 485.

80 *Id.* at 489-90.

81 *Id.* at 490. Justice Rehnquist stated that entrapment protects against government implantation "in the mind of an innocent person and disposition to commit the alleged offense and induce its commission." *Id.* (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)).

82 *Id.* The plurality suggested that protecting against illegal government activity should not lie in freeing an "equally culpable" defendant, but by prosecuting the police under the relevant statute. *Id.* (citations omitted).

83 *Id.* at 490-91. Justice Rehnquist elaborated on the application of this principle to the instant case: "[h]ere . . . the police, the [g]overnment informant, and the defendant acted in concert with one another. . . . [T]he police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights." *Id.* (citations omitted).

84 *Id.* at 491-95. Justice Blackmun joined Justice Powell's concurrence. *Id.*

85 *Id.* at 492-93. Rather, the concurrence emphasized that the legacy of the *Russell* decision involves the abandonment of predisposition for due process purposes. *Id.* at 494-95. In abandoning the security of the bright-line predisposition test, the court must face the accompanying difficulties that attend identification of practical and doctrinal delimitations for judging police conduct. *Id.* Justice Powell refused

contraband in *Hampton* with the rare non-contraband supplied by the government in *Russell*.[86]

In dissent, Justice Brennan[87] relied upon the objective view of entrapment,[88] but also noted the availability of due process protection.[89] The dissent vehemently condemned the government's enticements[90] and accordingly denounced the relevance of defendant's predisposition in judging the government's "abhorrent" conduct.[91]

During the 1970s and early 1980s, the Court of Appeals for

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to fortify this open-ended legacy because he concluded *Hampton* was controlled by *Russell*. *Id.* at 495.

86 *Id.* at 491-92.

87 *Id.* at 495. Justice Brennan, joined by Justices Marshall and Stewart, dissented. *Id.* In so doing, Justice Brennan rejected petitioner's argument that the government-supplied contraband in *Hampton* created a constitutional violation, whereas the government supplied non-contraband in *Russell* did not. *Id.*

88 *Id.* at 496-97 (citations omitted).

89 *Id.* at 499. Justice Brennan failed to provide, however, when the outrageous government conduct defense may be germane: "for present purposes it would be sufficient to adopt this rule under our supervisory power and leave to another day whether it ought to be made applicable to the [s]tates under the [d]ue [p]rocess [c]lause." *Id.* at 500 n.4.

90 *Id.* at 498. Justice Brennan articulated his specific objections: "[w]here the Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a potential purchase, the Government's role has passed the point of toleration. The Government is . . . buying contraband from itself though an intermediary and jailing the intermediary." *Id.* (citations omitted).

91 *Id.* at 498-99. The dissent relied greatly upon policy considerations in advancing the merits of an approach which places diminished reliance upon predisposition:

> There is little, if any, law enforcement interest promoted by such conduct; plainly it is not designed to discover ongoing drug traffic. Rather, such conduct deliberately entices an individual to commit a crime. That the accused is 'predisposed' cannot possibly justify the action of government officials in purposefully creating the crime. No one would suggest that the police could round up and jail all 'predisposed' individuals, yet that is precisely what set-ups like the instant one are intended to accomplish. Thus, this case is nothing less than an instance of 'the Government . . . seeking to punish for an alleged offense which is the product of the creative activity of its own officials.'

Id. (citation omitted).

As a result of the concurrence's and dissent's views on due process protection, many courts, as well as commentators, have contended that the outrageous government conduct defense survived *Hampton*. *See, e.g.*, Note, *supra* note 10, at 1459 (also concluding that the outrageous government conduct defense survives *Hampton*); Note, *supra* note 75, at 105 (finding that the *Hampton* case did not foreclose the use of the outrageous government conduct defense by a criminally predisposed defendant). *See also* United States v. Bogart, 783 F.2d 1428, 1432 (9th Cir. 1986) (listing nine other Ninth Circuit cases which found that the outrageous government conduct defense survived *Hampton*) (citations omitted).

the Ninth Circuit continued to add pieces[92] to what would become an increasingly complex mosaic spawned by Justice Rehnquist's enigmatic dictum in *Russell*.[93] For example, in the 1980

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92 The Ninth Circuit has recognized the outrageous government conduct defense for over two decades. *See, e.g.*, Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (holding that a due process protection against outrageous police conduct exists under the due process clause).

In addition, the Ninth Circuit articulated a reasoned grounds requirement in non-due process cases. *See, e.g.*, United States v. Trice, 211 F.2d 513 (9th Cir. 1954). In *Trice*, the Ninth Circuit scrutinized an FBI investigation of a liquor store owner allegedly trafficking in heroin. *Id.* at 514-15. In reviewing petitioner's defense of entrapment, the court ascertained that a determination into the legality of entrapment focuses on "whether [government agents] had reasonable grounds to believe that [the defendant] was predisposed to engage in illicit traffic." *Id.* at 516. Although specifically refusing to adopt a "probable cause" standard similar to the standard used in felony preliminary hearings, the court reiterated its belief that officers must have "reasonable cause" before launching an investigation to avoid illegally entrapping the subject of the operation. *Id.* at 519. The court ultimately held that the police possessed reasonable grounds to believe defendant was predisposed to engage in heroin trafficking and his entrapment was legal. *Id.*

93 *See* United States v. Ryan, 548 F.2d 782 (9th Cir. 1976); United States v. Lue, 498 F.2d 531 (9th Cir. 1974). Two initial Ninth Circuit cases restricted the potentially broad defense to only the most extreme government conduct. *Id.* In *Lue*, the court faced a defendant convicted on drug related charges stemming from a government informant's $2000 sale of heroin to defendant pursuant to an undercover operation. *Id.* at 532. In rejecting defendant's due process defense, the court intimated: "[f]or an accused to benefit from this remedy, the facts of this case would have to demonstrate government conduct 'so outrageous' as to be analogous to the police conduct in *Rochin*." *Id.* at 534. The court of appeals also demonstrated a clear recognition of the nature of this defense: "[t]his is not an exception to entrapment law which focuses on a defendant's predisposition. It is a recognition that some government activity might be so grossly shocking to be violative of due process regardless of whether the requirements of entrapment have been met." *Id.*

In 1976, the court of appeals addressed the propriety of government actions where a real estate agent-deal maker was cajoled by the government into serving as an informant in an undercover operation which produced a number of convictions under certain federal statutes. *Ryan*, 548 F.2d at 784-86. The defendants appealed their convictions. *Id.* Although concluding that defendant's due process rights cannot be violated by an informant's mistreatment, the court added that a successful outrageous conduct defense follows "only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice." *Id.* at 789 (citing *Lue*, 498 F.2d at 534).

In other decisions, the court of appeals tolerated substantial degrees of uncommendable conduct by government officials where they targeted existing criminal enterprises. *See, e.g.*, United States v. Gonzalez, 539 F.2d 1238 (9th Cir. 1976). In *Gonzales*, two government agents penetrated a counterfeiting operation after conception of the plan but prior to production of the illegitimate bills. *Id.* at 1239. Although government agents provided ink, supplies, and a replacement printing machine, the court rebuked defendant's due process arguments. *Id.* at 1239-40. The court of appeals suggested that government conduct must be *malum in se*, or represent engineering and direction of the criminal activity from the beginning to the end of the operation. *Id.* at 1240 (citing *Hampton*, 425 U.S. at 493 n.3). In

decision of *United States v. Wylie*,[94] petitioners, college students, were convicted of crimes involving large-scale LSD production.[95] The petitioners alleged that undercover law enforcement officials, introduced to them by another student who was employed as a government informant, offered to provide an essential LSD ingredient, ET,[96] in exchange for petitioner's completed LSD.[97] The court acknowledged petitioners' contention that they only intended to purchase ET and the government agents suggested payment in LSD.[98] The court summarily rejected their due process claim, however.[99] In support of its position, the court found

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addition, the court reiterated that this type of government conduct must be "extreme" to constitute a due process violation. *Id.*

In 1977, the court countenanced the conviction of defendant on drug-related charges, despite the government informant's use of threats to wheedle defendant into his illegal actions. United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977). Defendant, who admitted previous drug-dealing experience to the informant, challenged his conviction on due process grounds. *Id.* at 1339. In rejecting defendant's due process arguments, the court concluded that the informant's conduct while "not commendable" must be viewed in the context of "vulgarity and puffing" engaged in by transaction participants. *Id.* The court also stipulated that trafficking in drugs is a "sordid business and often involves persons of the lowest caliber." *Id.* As a result, the informant's behavior still did not violate due process. *Id.* (citations omitted).

In *United States v. Prairie*, the Ninth Circuit upheld the conviction of a defendant on drug charges despite the use of a prostitute to entice defendant's culpable behavior. United States v. Prairie, 572 F.2d 1316, 1318-19 (9th Cir. 1978). Acknowledging defendant's admitted "extensive experience" in drug transactions, the court of appeals stressed that use of paid informants to "ferret out" criminals has been tolerated by the law. *Id.* at 1319. The court also attested that the government's use of a prostitute—even if illegal under state criminal laws—would not produce a due process violation "without more." *Id.* at n.4 (citations omitted).

The court of appeals in *United States v. McQuin* reviewed defendants' conviction of conspiracy and attempted bank robbery. United States v. McQuin, 612 F.2d 1193 (9th Cir. 1980). The court observed that an undercover government agent joined the defendants' operation at the invitation of an informant, after a "well-developed plan to rob a specific [bank]" had been formulated by defendants. *Id.* at 1194. Like the court in *Raynosa-Ullua*, the court received contradictory evidence concerning the government informant's use of threats to prompt the criminal operation. *Id.* at 1196. The court posited that not only must the government be permitted to "assume identities that will be convincing to criminal elements," but government's statements must be "viewed in the context of the 'vulgarity' and 'puffing' engaged in by all participants." *Id.* (citing *Raynoso-Ullua*, 548 F.2d at 1339). Accordingly, it ruled against defendants' appeals. *Id.*

94 625 F.2d 1371 (9th Cir. 1980).

95 LSD, or lysergic acid diethylamide, is a powerful hallucinogen. WEBSTER'S THIRD INT'L DICTIONARY 1342 (16th ed. 1971).

96 *Id.* at 1374. The court identified ET as ergotamine tartrate, which is used in the production of LSD. *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 1377-79.

that the police were investigating an on-going, large-scale LSD operation and that student-petitioners were predisposed.[100]

The Ninth Circuit continued its frugal use of the outrageous government conduct defense[101] in *United States v. O'Connor*.[102] In the 1984 decision, the court sanctioned a government undercover scheme that manipulated an informant's pre-existing indebtedness to certain known drug dealers.[103] The government's

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[100] *Id.* at 1378. The court evinced that petitioner's lack of hesitation in accepting the government's offer strongly corroborated a finding of predisposition. *Id.*

[101] United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981). In *Bagnariol*, the court of appeals reviewed the lower court's refusal to dismiss the indictment against certain politicians, who were subsequently convicted under various federal statutes in connection with a scheme to legalize gambling in Washington and thereby harvest sizeable profits. *Id.* at 880. In *Bagnariol*, an FBI agent posing as a corporate representative interested in legalized gambling, employed an unwitting lobbyist to initiate contracts with "powerful political figures" who could make the agent "certain assurances." *Id.* at 880-81. The court intimated that the lobbyist preliminarily negotiated the agreement with the politicians and then introduced the undercover agent. *Id.* In denying the convicted politicians' petition, the court ensconced that outrageous government conduct is rarely available, and the Supreme Court has never reversed a conviction on these grounds. *Id.* at 882.

The court in *United States v. Lomas* reiterated its vision of the due process defense engendered by *Russell*. United States v. Lomas, 706 F.2d 886 (9th Cir. 1983). In *Lomas*, the court endorsed the government's actions in arresting two participants in a syndicate to purchase cocaine prompted by a government's offer to supply cocaine. *Id.* at 888. The court noted that all the government knew about the defendants prior to the arrest was that they were supposed to supply a portion of the syndicate's payment. *Id.* at 889. The *Lomas* court propagated a seemingly narrow role for the outrageous government conduct protection from prior cases:

> In the two cases in which the federal appellate courts have squarely upheld an outrageous government conduct argument, the defendants would not have had the capacity to commit the crimes with which they were charged without the government's assistance. . . . In both cases the government not only provided resources for the production of contraband but bore primary responsibility for its manufacture.

Id. at 891 (citations omitted). Nevertheless, the court expressly disclaimed an adherence to the view that only the activity found intolerable in other cases invokes the outrageous government conduct defense. *Id.*

The court of appeals summarized its restrictive vision of the outrageous government conduct defense in United States v. Ramirez, 710 F.2d 535 (9th Cir. 1983). Defendant alleged that he was working as a police informant in the transaction which produced his indictment. *Id.* at 538. Unknown to the informant, the police had categorized defendant as a "double agent" because of his previous behavior that compromised police operations. *Id.* In rebuking defendant's outrageous government conduct claim that he was improperly convicted on drug-related offenses because of his role as a police informant, the court again indicated that government conduct must become "so outrageous as to violate the universal sense of justice." *Id.* at 539 (citation omitted).

[102] 737 F.2d 814 (9th Cir. 1984).

[103] *Id.* at 817. The court added that the pre-existing debt stemmed from a frustrated drug transaction where the informant had been given jewels to purchase narcotics, but the seller had seized the jewels without delivering his product. *Id.*

scheme sought to lure the drug dealers to the United States, offer payment of their debt in cocaine, and arrest them upon acceptance.[104] The court constructed the issue as whether the government's initial offer of cocaine violated due process.[105] The court obviated the need to rule upon the propriety of government overtures to unsuspected targets, however, because the court found that lack of reasoned grounds was not in issue.[106] Rather, the court attested that the government, through its scheme, simply had relocated the situs of the illegal transaction from Columbia to the United States.[107] Therefore, the government's behavior, according to the court of appeals, was distinguishable from potentially due process violative government action where complete governmental orchestration[108] or government supplied capacity exists.[109]

Despite its historically stern treatment of government targets, the court occasionally exhibited libertarian designs.[110]

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104 *Id.*

105 *Id.* at 817 n.1.

106 *Id.* at 817.

107 *Id.* at 817-18. The court declared that although the plan originally was to be executed outside the United States, the government had nothing to do with the scheme's original inception: "the nature of the original transaction and the manner of its going awry do not suggest innocent behavior [by the defendants], nor is there any doubt that the defendants knew that their ultimate receipt of the cocaine in the United States was unlawful." *Id.* at 818.

108 *Id.* (citing United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983)). The court observed: "[t]his is not a situation where 'government agents engineer and direct the criminal enterprise from start to finish.' " *Id.* at 818 (quoting *Ramirez*, 710 F.2d at 539)).

109 *Id.* (citing United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983)). The majority elaborated: "[t]he capacity of these defendants to engage in the cocaine transactions did not depend wholly on the assistance of the government. *Id.* (citations omitted). The majority ultimately measured the circumstances in the instant case against unidentified hypothetical behavior " 'so grossly shocking and so outrageous as to violate the universal sense of justice.' " *Id.* (quoting *Ramirez*, 710 F.2d at 539).

110 *See* United States v. So, 755 F.2d 1350 (9th Cir. 1985). In *So*, the court of appeals endorsed government behavior involving a money laundering scheme. *Id.* at 1350. The court considered whether the government could offer a money laundering scheme to a bank representative brought to the government's attention by another suspect and then arrest the bank representative. *Id.* at 1352-53. The majority posited its now-familiar position: "[o]ur sense of justice is not shocked . . . when the government merely infiltrates a criminal organization, . . . approaches persons already engaged in or anticipating a criminal activity, . . . or provides valuable and necessary items to the conspiracy." *Id.* at 1353 (citations omitted). The court then determined that the bank representative and suspect provided "the creative inspiration" for the crimes charged; the suspect made the initial inquiries with the government informant and bank representative; and the suspect made the tech-

In *United States v. Bogart*,[111] for example, the court of appeals received a due process appeal from Lynn Dale Bogart, an individual charged with drug-related crimes,[112] and attempted to clarify the Ninth Circuit's construction of the outrageous government conduct doctrine.[113] Bogart alleged that the government acted outrageously by proposing a cocaine transaction to Bogart while he was in prison with an extremely large bail amount stemming from an unrelated charge.[114] Ultimately remanding Bogart's appeal to the district court for factual findings,[115] the court emphasized that outrageous government conduct determinations,[116] fraught with the problems associated with line drawing,[117] depend greatly upon factual settings.[118] More specifically, the court of appeals rejected an analytical approach, adopted by a number of courts, which confines due process scrutiny of government investigations to cases where the police employ brutal conduct.[119]

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nical arrangements. *Id.* As a result, it rejected the bank representative's due process appeal. *Id.* at 1354-55.

111 783 F.2d 1428 (9th Cir. 1986).

112 *Id.* at 1430. The court stated that the petitioner was in custody on unrelated charges when he and a government informant entered into a plan to purchase some business-related items with cocaine. *Id.* at 1430-31. The record received by the court of appeals, however, did not reveal whether the petitioner or the informant had suggested the idea. *Id.* at 1430-31.

113 *Id.* at 1438. The court of appeals summarized the pertinent case law in an effort to assist the district court on remand. *Id.* at 1434. The court noted that no federal court has defined the scope of the outrageous government conduct defense with precision. *Id.* at 1435.

114 *Id.*

115 *Id.* at 1438.

116 *Id.* at 1435.

117 *Id.* at 1438.

118 *Id.* at 1435-38.

119 *Id.* at 1435-36. The court attributed this broader definition of unconstitutional outrageous conduct to Justice Brandeis's dissent in *Olmstead v. United States*. *Id.* at 1436 (citing Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)). In *Olmstead*, Justice Brandeis expressed substantial consternation over the contagious effects of criminal behavior on society when government representatives behave like law-breakers. *Olmstead*, 277 U.S. at 485. Justice Brandeis elaborated his beliefs:

> In a government of laws, existence of the Government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes the law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Id. at 485.

The court then reviewed factual situations exemplifying successful defenses;[120] provided some general construction methods for due process defenses,[121] and promulgated potential factors to gauge the propriety of governmental conduct.[122]

The Ninth Circuit continued to develop its outrageous government defense tradition through the late 1980s. For example, in *United States v. Emmert*,[123] one of two outrageous government conduct cases[124] before the Ninth Circuit in 1987, the court re-

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120 *Bogart*, 783 F.2d at 1437. The court recognized that appeals failing to find relief under the outrageous conduct defense "invariably . . . involved a continuing series of similar crimes, or . . . the charged criminal enterprise was already in progress at the time the government agent became involved." *Id.*

121 *Id.* at 1438. Because of the line drawing problems inherent in the area of due process, the court of appeals granted the lower court great latitude in ruling on the due process defense. *Id.* More specifically, the court found that every case must be resolved on its facts. *Id.*

122 *Id.* Notwithstanding its prior warnings, the court decoded the following "general observations" from prior cases to measure government behavior in a criminal investigation: 1) use of amoral approaches; 2) use of "artifice and stratagem to ferret out" criminals; 3) use and payment of informants; 4) supply of contraband; 5) provision of items to further existing conspiracy; 6) infiltration of a criminal organization; and 7) solicitation of individuals already engaged in or contemplating criminal activity. *Id.* (citations omitted).

123 829 F.2d 805 (9th Cir. 1987).

124 *See also* United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987). *Simpson* was the first case. *Id.* at 1462. *Simpson* involved the employment by the government of a prostitute and heroin user with numerous prior arrests in an investigation of a suspected heroin dealer. *Id.* at 1464. According to the record on appeal, the relationship between the prostitute-government informant and the drug dealer became sexually intimate during the period that the government informant introduced the suspect to undercover narcotics agents who made purchases from the suspect. *Id.* The district court held that the government's behavior violated due process on three grounds: 1) manipulation of a prostitute into working for the government; 2) continued use of informant despite her heroin addict status, prostitute status, and numerous prior arrests; and 3) continued use of the informant despite government awareness of her sexual intimacy with suspect. *Id.* at 1465-67.

The court of appeals reversed and remanded with an order to dismiss the indictment. *Id.* at 1462. First, the court posited that the government's alleged mistreatment of the prostitute would not amount to a due process violation of the defendant. *Id.* at 1469. Second, it found that it would be unrealistic to permit the court to combat crime without the use of "unsavory characters." *Id.* at 1470. Next, the court of appeals refused to draw lines between permissible levels of emotional intimacy and impermissible ones. *Id.* at 1467. While the due process clause does protect against outrageous government conduct, according to the court, it does not protect a suspect from voluntarily reposing his trust in one undeserved of it. *Id.* at 1466. Moreover, the court questioned whether the suspect's behavior was attributable to the government. *Id.* at 1467. Characterizing the government's role as "passive tolerance" of the suspect's behavior, the court relegated to the political branches of government the decisions to regulate conduct which "offend[s] some fastidious squeamishness or private sentimentality about combatting crime too energetically, but which is not antithetical to fundamental notions of due process." *Id.* at 1468 (citations omitted).

buked the appeal of Walter Emmert, a college student convicted on drug-related crimes.[125] Martin Mosteller, retained by the government as an informant, offered $200,000 to Thomas Powell, another student, if Powell could locate a substantial source of cocaine.[126] Seizing upon the bait, Powell introduced Emmert to the informant as a potential locator of a supplier.[127] Although the students later told the informant that they were incapable of executing the transaction, Emmert produced drug samples for an undercover government agent posing as a Detroit-based buyer associated with the informant.[128] The court observed that the sale did not occur until a few month later, however,[129] after a series of negotiations between the parties and numerous overt threats by government agents.[130]

Judge Brunetti, writing for the majority, quickly dispatched Emmert's allegations of mental coercion as a form of outrageous government conduct by categorizing the government's threats as reasonable in their context.[131] The court also dismissed Emmert's contention that it was outrageous government conduct to

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125 *Emmert*, 829 F.2d at 805.

126 *Id.* at 807. The government informant offered the money to Powell because the informant believed Powell was at a party where cocaine was served. *Id.*

127 *Id.*

128 *Id.* The samples were produced during preliminary negotiations in early August 1984. *Id.* The defendants said that the samples were representative of a forty kilogram shipment. *Id.*

129 *Id.* The court of appeals established that the initial meeting with the government agent occurred in July 1984. *Id.* at 807. The court observed that the transaction was executed in October, only after negotiations throughout August and a hiatus until late September. *Id.*

130 *Id.* For example, one agent testified that in August he told one of the suspects: "[m]aybe we'll do the deal in an airplane and if something goes wrong, we'd have one parachute and guess who'd come down without one." *Id.* Another agent stated that on that occasion she informed Emmert that she had three words for Powell, "R.I.P." *Id.* The court also noted that an agent made a threat in August that he was losing credibility with his associates in Detroit for his inability to complete the transaction. *Id.* According to the record, the informant later menaced Emmert by stating he had one week to complete the deal "or else." *Id.*

The court also noted Emmert's post-arrest contention that he thought the informant was involved with organized crime. *Id.*

131 *Id.* at 811-13. The court explicated its position: "[b]ecause threats of the kind here—scarcely more than bluster—are ordinary bargaining tactics in drug deals, government agents may need to engage in such unsavory conduct to maintain their cover. Indeed, in this case [the agent] had to allay [the target's] suspicions that [the agent] was a police officer." *Id.* at 812.

The panel also warned that, while threats may provide a basis for both outrageous government conduct and entrapment claims, the due process defense seeks a higher threshold, and focuses on the government's behavior. *Id.* at 811.

target the defendants.[132] In so doing, Judge Brunetti upheld the solicitation because of the informant's belief that Powell attended a party where cocaine was served.[133] Moreover, the majority sanctioned the government's overtures to Emmert because he had voluntarily accepted Powell's invitation to meet the undercover informant.[134]

The majority thereafter rejected Emmert's other outrageous government conduct claim that the government fabricated the crime merely to obtain convictions.[135] Judge Brunnetti maintained that government agents are permitted to approach active criminals or individuals contemplating criminal activity.[136] Because Emmert was targeted after he approached the government's informant,[137] the court concluded that Emmert was contemplating criminal behavior and further investigation was reasonable.[138] Also noting that the government appeared on only one end of the transaction,[139] the court dismissed Emmert's due process claim that the government fabricated the crime.[140]

It was against this background that a Ninth Circuit Court of Appeals panel decided *United States v. Luttrell*.[141] After establish-

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132 *Id.* Significant to the development of a reasoned grounds requirement, the court distinguished between the various types of government behavior. *Id.* These included the government's threats after solicitation, the amount of the government's inducement, and the government's choice to target defendants. *Id.*

133 *Id.* at 812.

134 *Id.* The court recalled that Emmert had been introduced by Powell as someone capable of locating a source. *Id.*

135 *Id.* at 812-13.

136 *Id.* at 812 (citations omitted).

137 *Id.* The court charged: "Emmert was drawn into the conspiracy by Powell. When the government agents had first targeted Emmert for investigation, he had expressed interest in receiving a portion of the finder's fee in exchange for brokering cocaine supplied by [another]." *Id.* Concluding that Emmert was contemplating criminal behavior, the court, in hindsight, approved of Emmert's selection as a target. *Id.*

138 *Id.*

139 *Id.* at 813. The court of appeals distinguished this case from an earlier Ninth Circuit case where the government was involved in both the purchase and sale aspects of the transaction. *Id.* (citing Greene v. United States, 454 F.2d 783 (9th Cir. 1971)).

140 *Id.* A 1988 Ninth Circuit decision relegated its outrageous government conduct analysis to a comparison with *Greene* and *Twigg*. *See* United States v. Citro, 842 F.2d 1149, 1151-54 (9th Cir.)(countenancing the government's behavior where it proposed and explained the scheme to defendant, supplied him with the necessary instruments, and then arrested him for the criminal act), *cert. denied*, 488 U.S. 866 (1988).

141 United States v. Luttrell, 889 F.2d 806, 808 (9th Cir. 1989), *modified*, 923 F.2d 764 (9th Cir. 1991)(*en banc*).

ing the appropriate standard of review,[142] the *Luttrell* panel, in an opinion written by Judge Nelson, upheld the defendants's conspiracy[143] and attempt convictions.[144] The panel then reviewed *de novo*[145] the district court's refusal to dismiss the indictments on the due process grounds of outrageous government conduct.[146] The majority established that courts justify dismissal of an indictment because of outrageous government conduct on two possible grounds:[147] due process protection[148] and general supervisory power.[149]

Apparently focusing on the due process implications of the government's behavior, the court of appeals acknowledged that

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142 *Luttrell*, 889 F.2d at 809. The court posited that the evidence must be constructed in favor of the government. *Id.* The court then recognized that the conviction must be upheld unless no rational juror could have concluded that the defendant's conduct met the essential elements beyond a reasonable doubt. *Id.*

143 *Id.* at 809-10. In upholding defendants' conspiracy conviction, the court recognized that the transfer of the drafts represented an overt act in furtherance of the conspiracy, and, as a result, the court found that Kegley's attempt to recant his participation constituted a failed withdrawal. *Id.*

144 *Id.* at 810-11. More specifically, the court rejected arguments made by defendants based on legal and factual impossibility. *Id.* at 810. Although the panel agreed that defendants did not possess "unauthorized access devices" within the statute's usage, it recognized that their conviction only depended upon use of a "counterfeit access device." *Id.* The court also produced the following description of "counterfeit access device": "counterfeit, fictitious, altered or forged, or an identifiable component of an access device or counterfeit access device." *Id.* (citing 18 U.S.C. § 1029(e)(2) (1982)).

145 *Id.* at 809. The Ninth Circuit treats the outrageous government conduct defense as a question of law. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983). In turn, the Ninth Circuit reviews questions of law *de novo*. United States v. Bogart, 783 F.2d 1428, 1431 (9th Cir. 1986). In general, *de novo* trials review the matter with disregard for the lower court's decision. BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

146 *Id.* at 811-14.

147 *Id.* at 811 (citations omitted). The court also noted that in measuring outrageous government conduct, the court should focus on the government's investigatory behavior and disregard predisposition completely. *Id.* (citations omitted).

148 *Id.* (citing Hampton v. United States, 425 U.S. 484, 489 (1976) (Powell, J., concurring); United States v. Russell, 411 U.S. 423, 431-32 (1973) (Rehnquist, J., concurring)).

149 *Id.* (citing United States v. Simpson, 813 F.2d 1462, 1465 n.2 (9th Cir. 1987)). Supervisory power serves at least two purposes: 1) deterrence of illegal government conduct; and 2) protection of a court's integrity. *See, e.g.*, McNabb v. United States, 318 U.S. 332, 332-47 (1942) (reasoning that judicial supervision of the criminal justice system requires the establishment and maintenance of civilized standards of procedure and evidence).

The Supreme Court has exercised its supervisory power over the federal judicial system on numerous occasions by suppressing evidence obtained through governmental misconduct. *See, e.g.*, *McNabb*, 318 U.S. at 347; Elkins v. United States, 364 U.S. 206 (1960).

the lack of Supreme Court guidance[150] produced three possible manifestations of outrageous government conduct.[151] According to Judge Nelson, the first approach measures whether police conduct violates universal notions of justice.[152] The court of appeals posited that the second approach policed situations where the government continuously managed the entire criminal operation.[153] The majority rejected both theories.[154] In rebuffing the first approach, the court recognized that the government's behavior in *Luttrell* could not meet the high outrageousness threshold articulated in previous Ninth Circuit cases.[155] The court thereafter rejected the complete orchestration argument in *Luttrell* because the government did not create a complete "criminal apparatus."[156]

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150 *Id.* The court posited that Supreme Court opinions evince "little guidance by which [a court] may determine whether the government's conduct [was] outrageous." *Id.*

151 *Id.* at 811-14.

152 *Id.* at 811 (quoting United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983) (quoting United States v. Ryan, 548 F.2d 782, 789 (9th Cir. 1976), *cert. denied*, 430 U.S. 965 (1977))).

The court explained that it employs a "sphygmomanometer test" to derive its answer. *Id.* The court defined a sphygmomanometer as a medical instrument which measures blood pressure. *Id.* at 811 n.5. The panel cited *Rochin v. California* as a possible example of conduct meeting the metaphor's parameters. *Id.* (citations omitted). The *Luttrell* panel then capsulized the events in *Rochin* as forceful police entry into defendant's bedroom; attempted removal of drugs from the defendant's throat; and a forced stomach pumping. *Id.* (citation omitted).

153 *Id.* (citing Greene v. United States, 454 F.2d 783 (9th Cir. 1971)).

154 *Id.* at 811-12.

155 *Id.* at 811. The Court compared the one million dollars offered to Luttrell and Kegley with the government's use of a prostitute's sexual favors to induce criminal behavior in *Simpson*, and the government's offering of threats and a $200,000 bribe to a student in *Emmert*. *Id.* (citations omitted). The court concluded that the government's behavior in *Luttrell* did not exceed the behavior found in *Simpson* and *Emmert*. *Id.* (citations omitted). Because outrageous government conduct was not found in those cases, the court refused to find it in *Luttrell*. *Id.*

156 *Id.* at 812. The Court distinguished the government's behavior in *Greene* with other cases where outrageous government conduct was not found: "thus the key factor distinguishing *Greene* from *Bagnariol* and *Citro* is that the government in *Bagnariol* and *Citro* had not established an actual, complete, and long-functioning criminal apparatus. In this case, the government did not create and operate any such criminal enterprise." *Id.* (citations omitted). The court characterized the undercover agents as actors. *Id.* Accordingly, the court will permit "dramatic license" until "it goes beyond the stage and endangers the audience." *Id.* The court illustrated the outer limits of its metaphor with *Greene*. *Id.* In *Greene*, the government established an illegal bootlegging operation which lasted for more than two years. *Id.*

In summarizing *Citro*, the court noted: "an undercover agent's conduct in proposing and explaining to the defendant the details of a counterfeit credit card scheme, supplying him with the counterfeit credit cards, and arresting him when he

The court then turned its attention to the third outrageous government conduct variant,[157] which prevented the government from undertaking a covert investigation without reasoned grounds.[158] While the panel's survey of Ninth Circuit law evinced an implicit requirement that the government possess a factual basis before undertaking an investigation,[159] the *Luttrell* panel ultimately relied upon philosophical concepts, rooted in the Bill of Rights[160] and delivered through an expansive conception of substantive due process.[161] Emphasizing the violative nature of government investigations,[162] the *Luttrell* court rejected the notion that random or suspicionless investigations of apparently innocent people are necessary for effective law enforcement.[163] Judge Nelson recognized that courts normally provide the government with deference in law enforcement decisions, but rejected that deferential posture under the circumstances existing in this case.[164] More specifically, the majority expressed especial concern with the ulterior motives which drive police in-

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used them, did not constitute a due process violation." *Id.* (citing United States v. Citro, 842 F.2d 1149 (9th Cir.), *cert. denied*, 488 U.S. 866 (1988)).

157 *Id.* The majority found that Kegley and Luttrell greatly relied upon *Twigg* to produce "a third ground for a due process violation." *Id.* (citations omitted). *See infra* note 184 and accompanying text.

158 *Id.*

159 *Id.* at 813-14 (citing *Citro*, 842 F.2d at 1153) (quoting Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971); United States v. Emmert, 829 F.2d 805, 812 (9th Cir. 1987); United States v. Simpson, 813 F.2d 1462, 1470 (9th Cir. 1987))).

160 *Id.* at 813. The court determined that "the permissible limits on government conduct" are rooted in the Bill of Rights "concept that the processes of criminal investigation move deliberately, purposefully and fairly." *Id.* The court cited the fourth amendment's probable cause requirement as one example of these permissible limits. *Id.*

161 *Id.* The panel relied upon an expansive, "flexible" construction of the phrase "liberty" in the fifth amendment. *Id.* The court emphasized that privacy is an important part of this concept. *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

162 *Id.* Judge Nelson articulated the following objection:

> The principle that people who are scrupulously conforming to the requirements of the law should not be made the objects of highly intrusive, random police investigations is an important ingredient of our liberty. We see substantial mischief in any pattern of law enforcement that arbitrarily targets for intrusion the lives of individuals who, to all reasonable appearances, are minding their own business.

Id.

163 *Id.*

164 *Id.* The panel acknowledged that undercover investigations of known criminal enterprises have an established place in law enforcement. *Id.* The court reiterated its reservations, however, concerning suspicionless investigations: "[o]perations directed at targets whom the police have no reason to suspect may occasionally uncover evidence of crime, but as a general method of conducting

formants.[165] The panel ultimately remanded the decision to the district court to determine whether the government possessed reasoned grounds to conduct its covert operations.[166]

The full Court of Appeals for the Ninth Circuit determined whether the due process clause requires police to possess reasoned grounds before conducting an investigation of an individual.[167] The *en banc* opinion held that such a requirement does not exist,[168] and vacated the portion of the panel court's opinion which addressed this requirement.[169] The court, *en banc*, thereafter explicitly rejected the requirement for reasoned grounds under the due process clause.[170]

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criminal investigations, they constitute an inefficient as well as arbitrary means of law enforcement." *Id.*

165 *Id.* at 813-14. Judge Nelson observed the improbability that police investigators would pursue a baseless endeavor; but, she tempered her confidence in this case because an informant was employed:

> [T]he investigation utilized the services of an informant, a member of a group that in its eagerness to gain rewards does not always obey the niceties of police protocol. Many informants play their roles because of completed or prospective plea bargaining arrangements. They have strong incentive to find targets for police investigation, regardless of the reasonableness or the accuracy of their information.

Id. Judge Nelson also challenged the integrity of all police informants:

> Their tips to the police may be based either on legitimate information about the criminal underworld or wholly fabricated. The origin of the information may be direct observation or it may be innuendo, conjecture or even just plain animus. While in some cases informant activities may be conducted in a fair and decent manner, in others there appears to be little regard for fundamental concepts of honesty and fair play.

Id. at 814.

166 *Id.* The panel obviated the need to overrule the lower court because the record contained suggestions that the government possessed a reasoned grounds for their actions. *Id.*

167 United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991)(*en banc*).

168 *Id.*

169 *Id.* In so doing, the *en banc* decision eliminated all of the panel's discussion of the reasoned grounds requirement. *See id.*

170 *Id.* The Ninth Circuit joined the District of Columbia, Tenth, Third, and Second Circuits in so holding. *Id.* The court stated, "in partially vacating the three-judge court's opinion, we follow four of our sister circuits in explicitly rejecting a 'reasoned grounds' requirement for investigating of an individual under the due process clause." *Id.* (citing United States v. Jenrette, 744 F.2d 817, 824 (D.C. Cir.), *cert. denied*, 471 U.S. 1099 (1984); United States v. Gamble, 737 F.2d 853, 860 (10th Cir. 1984); United States v. Jannotti, 673 F.2d 578, 608-09 (3d Cir. 1982) (*en banc*), *cert. denied*, 469 U.S. 880 (1984); United States v. Myers, 635 F.2d 932, 941 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980)). *See infra* notes 125-205 and accompanying text.

Judge Pregerson, in dissent,[171] posited that the outrageous government conduct defense prevents the government from targeting otherwise innocent individuals without reasoned grounds.[172] The dissent intimated that protection from police "fishing expeditions"[173] stems from concepts, such as personal liberty, lodged in the Bill of Rights.[174]

In *United States v. Luttrell*, the court of appeals discarded a case history replete with sublime references to a due process-based reasoned grounds requirement.[175] While the Ninth Circuit never held upon the existence of a reasoned grounds requirement before *Luttrell*, it was certainly present in the dictum of numerous outrageous government conduct decisions, and a factor in numerous case holdings. For example, the *Greene* court dismissed the government's indictment in part because the government agent had "no reason" to contact the defendants.[176] In the *Trice* entrapment decision, the Ninth Circuit bluntly required the government to possess reasoned grounds before launching an investigation to avoid legally entrapping the subject of the operation.[177]

In addition, the Ninth Circuit often devoted attention in its outrageous government conduct opinions to the establishment

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171 United States v. Luttrell, 923 F.2d 764, 764-65 (9th Cir. 1991) (Pregerson, J., dissenting) (citing United States v. Bogart, 783 F.2d 1428, 1432 (9th Cir. 1986)).

172 *Id.* at 765 (citing *Bogart*, 783 F.2d at 1432 (Pregerson, J., dissenting)). Judge Pregerson insisted: "[t]he government must have a legitimate reason to infringe upon an individual's freedom who is—by all appearances, and according to all information possessed by the police—innocent." *Id.*

173 *Id.* (Pregerson, J., dissenting). The dissent cautioned: "[L]aw enforcement officials should not be allowed to hire informants simply to go out on fishing expeditions to find targets for undercover sting operations." *Id.*

174 *Id.* The dissent observed the "paramount importance" which our society places upon personal liberty. *Id.*

175 More notably, many of the decisions in the Ninth Circuit rejected outrageous government conduct arguments based largely on the government's choice to pursue criminally-suspect targets. In *Wylie* for example, the court found that the government was investigating an on-going operation when it stumbled across defendants. United States v. Wylie, 625 F.2d 1371, 1378 (9th Cir. 1980). In *O'Connor*, the court established that the defendant's criminal machinations antedated the government's overtures by years. United States v. O'Connor, 737 F.2d 814, 817-18 (9th Cir. 1984). Likewise, the *Emmert* court also observed that the defendant was introduced to the government informant as a potential supplier of cocaine. United States v. Emmert, 829 F.2d 805, 806-07 (9th Cir. 1987).

Also instrumental to the emergence of a reasoned grounds requirement, the Ninth Circuit had foreclosed the prospect that only brutal conduct may fulfill the outrageous government conduct defense's requirements. United States v. Bogart, 783 F.2d 1428, 1436-38 (9th Cir. 1986).

176 Greene v. United States, 454 F.2d 783, 786 (9th Cir. 1971).

177 Trice v. United States, 211 F.2d 513, 519 (9th Cir. 1954).

of reasoned grounds. The *Lomas* court, for example, noted that the government had prior knowledge of defendants' role in a cocaine transaction before an arrest was made.[178] In *Wylie*, the court countenanced the government's behavior, but carefully noted that the government was investigating an on-going, large-scale LSD operation.[179] In the *O'Connor* decision, the court of appeals affirmatively recognized that the government possessed reasoned grounds to initiate its solicitation of the defendants.[180] In *Emmert*, the majority also approved the government's solicitation of defendants because of the former's reasoned grounds for suspicion, and the defendants' voluntary acceptance of the government's offer.[181] Each of the foregoing cases demonstrated the Ninth Circuit's tacit recognition of a reasoned grounds requirement.

In addition to giving attention in its decision to reasoned grounds evidence, the Ninth Circuit in *Bogart* emphasized that it would not limit the outrageous government conduct defense only to brutal conduct cases.[182] In that decision, the court, noting its own case law, observed that other courts' refusal to accept outrageous government conduct defense arguments could be attributed to the existence of an illegal enterprise for the government operation to approach.[183] The natural inference from this statement is that, without such a tangible basis to initiate an operation, the government's behavior may more readily constitute outrageous government conduct. As a result, the *Luttrell* panel correctly noted that the Ninth Circuit long had recognized a reasoned grounds variant of the outrageous government defense. Accordingly, an *en banc* affirmation of the panel's holding would have been wholly natural and perfectly fitting to the Ninth Circuit's outrageous government conduct and reasoned grounds tradition.

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178 United States v. Lomas, 706 F.2d 886, 889 (9th Cir. 1983). *See supra* note 101.

179 Wylie v. United States, 625 F.2d 1371, 1378 (9th Cir. 1980). *See supra* notes 94-100 and accompanying text.

180 United States v. O'Connor, 737 F.2d 814, 814-17 (9th Cir. 1984). *See supra* notes 102-109 and accompanying text.

181 United States v. Emmert, 829 F.2d 805, 812 (9th Cir. 1987). *See supra* notes 123-140 and accompanying text.

182 United States v. Bogart, 783 F.2d 1428, 1435-38 (9th Cir. 1986). *See supra* notes 111-122 and accompanying text.

183 *Id.* at 1438. Other decisions are in accord with *Bogart*'s emphasis that the propriety of the government's action is greatly dependent upon the existence of a real, substantial, and tangible target. *See, e.g.*, United States v. So, 755 F.2d 1350, 1353 (finding the defendants provided the creative inspiration for the crime); *Ramirez*, 710 F.2d at 540 (stating the defendants created the crime, not the government).

Rather than following its own skillfully crafted course, however, the Ninth Circuit, in *Luttrell*, blindly chose to embark down a patch-work path woven by "sister jurisdictions" without any regard for its brethren's craftsmanship.[184] In so doing, the court of appeals staked the soundness of its summary rejection of an otherwise compelling due process argument on the rationales proffered by other jurisdictions. As the following case law survey will demonstrate, these rationales are not persuasive.

The Second Circuit in *United States v. Myers*[185] was the first jurisdiction to renounce a reasoned grounds prerequisite to government investigations.[186] In so holding, the court addressed appellant's primary concern, which involved the dangers inhering when the executive branch possesses unfettered discretion to selectively investigate members of Congress.[187] As a result of the *Myers* holding, the executive branch may randomly target legislators, and test their wherewithal to withstand temptation.

Some observers have questioned the wisdom in permitting this result by emphasizing congressional vulnerability to these tactics and the problems associated with this vulnerability.[188] Their concerns include fear of a weakened congressional leadership role, diminished congressional integrity, and weakened congressional representational abilities.[189] Even if one does not share these concerns,[190] one must question the wisdom of extending the *Myers* holding beyond its facts. After all, the defend-

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184 *See* United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991)(*en banc*) (swiftly vacating the panel's reasoned grounds decision and relying on other jurisdictions for guidance).

185 635 F.2d 932, 940-41 (1980). The *Myers* decision involved an appeal from a motion to dismiss an indictment against United States Representative Michael A. Myers (D., 1st Dist. Penn.). *Id.* at 932. Myers received fifty thousand dollars for offering immigration assistance to agents posing as Arab businessmen. *Id.* at 934. He was convicted for conspiracy, under 18 U.S.C. section 371, to defraud the United States in violation of 18 U.S.C. section 201; agreeing to accept money for influence under 18 U.S.C. section 201(c); and travelling in interstate commerce to accomplish these purposes under 18 U.S.C. section 1952. *Id.* at 934-35.

186 *Id.* While the appellant did not specify "reasoned basis," the *Myers* court suggested appellant sought a favorable ruling on an analogous notion: "the executive branch [must] demonstrate some basis . . . short of probable cause before [targeting] any member of Congress [for] a sting." *Id.*

187 *Id.* at 940.

188 *See, e.g.*, Note *supra* note 4, at 650-53 (discussing the dangers presented by a powerful federal law enforcement branch without safeguards to prevent abuse).

189 *Id.* at 650-51.

190 *See, e.g.*, Note, *Entrapment and Due Process of Law—The Efficacy of Abscam Type Operations*, 5 CAMPBELL L. REV. 377, 406-12 (1983) (emphasizing the necessity and propriety of "Abscam-type" operation).

ants in *Myers* were public officials—their lives were arguably more open to public inspection than a private citizen's.

Unfortunately, the *Luttrell* decision drew upon *Myers* to produce its holding. In contrast with the defendant in *Myers*, the defendants in *Luttrell* were not congressmen and their concern focused on privacy rather than unbridled executive investigatory discretion. As a result, one must question the appropriateness of applying the *Myers* ruling to the *Luttrell* case.

The *Luttrell* court credited the Third Circuit, in its 1982 decision *United States v. Jannotti*,[191] with joining the Second Circuit.[192] The court of appeals in *Jannotti* found defendant's due process arguments legally and factually unpersuasive.[193] Accordingly, the court substantially questioned the legal existence of the reasoned grounds requirement by relying on *Myers*[194] and an entrapment precedent.[195] Nevertheless, the court tempered the effects on the reasoned grounds requirement, which its skepticism had promised, by holding that the government need not possess probable cause to investigate.[196] Given past Third Circuit precedent and *Jannotti*'s probable cause holding, *Jannotti* did

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191 673 F.2d 578, 609-10.

192 *See, e.g.*, United States v. Jenrette, 744 F.2d 817, 824 n.13 (D.C. Cir. 1984) (also crediting *Jannotti* with rejecting a reasonable ground requirement rather than a probable cause requirement).

193 *Id.* Defendant Jannotti, Philadelphia City Council majority leader, was convicted under 18 U.S.C. section 1951(a) for conspiring to obstruct interstate commerce. *Id.* at 580. Defendant Schwartz was also convicted under the same statute and 18 U.S.C. section 1962(d) (conspiracy of Racketeer Influenced and Corrupt Organizations Act). *Id.*

A government informant contacted a lawyer with local political connections to arrange a meeting with city council members regarding a hotel to be built by Arab businessmen. *Id.* at 581. Undercover agents, under the watchful aegis of the FBI, met with Schwartz and then with Jannotti. *Id.* at 584-87, 587-89. The agents repeatedly induced defendants to receive the money; provided reassurances to the politicians that the business would be legitimate; and accepted the politicians's promise that they would simply battle for the businessman so long as it provided jobs for Philadelphia. *Id.*

194 *Id.* (citing *Myers*, 635 F.2d at 941).

195 *Id.* (quoting United States v. Silver, 457 F.2d 1217, 1220 (3d Cir. 1972)). The majority in *Jannotti* observed that in the entrapment context: "it is inconsequential whether law enforcement officials did or did not act on well-grounded suspicion . . ." *Id.* (quoting *Silver*, 457 F.2d at 1220).

The court also charged that no evidence of targeting existed and an influential lawyer's representations of his ability to "deliver" defendants provided the government with a reasoned basis to investigate. *Id.*

196 *Id.* More specifically, the court held: "[w]here the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without *probable cause* does not bar conviction of those who rise to the bait." *Id.* (emphasis added).

not represent a complete rejection of the reasoned grounds requirement.[197] Despite the *Jannotti* decision's inapposite holding, more recent Third Circuit cases have built upon *Jannotti* as a patent rejection of reasoned grounds.[198] In relying upon *Jannotti*, the *Luttrell* court emulated the same misconstrued legal deference exhibited by *Jannotti*'s Third Circuit progeny.

The *Luttrell* court also acclaimed *United States v. Gamble* as a Tenth Circuit repudiation of the reasoned grounds requirement under the due process clause.[199] The *Gamble* court had produced its reasoned grounds holding by interpreting previous Tenth Circuit decisions.[200] But, in so doing, the *Gamble* court relied on an entrapment case to create its ruling of law.[201] In light of the

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197 *See* United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). In *Twigg*, for example, the court of appeals reversed the convictions against defendants based on an outrageous government conduct defense. *Id.* In distinguishing the defendant's action in *Twigg* from defendant's actions in cases where due process challenges failed, the Third Circuit placed great significance that the government in *Twigg* concocted the venture and then initiated contact with defendants. *Id.* at 379-80 (citations omitted).

The court was also baffled by the government's decision to use a felon with multiple convictions as an informant—and therefore reduce his sentence—to convict two men without "apparent designs." *Id.* at 381 n.9.

One commentator observed: "*Twigg* suggests that a 'reasonable suspicion' prerequisite may on occasion emerge as an aspect of the due process limits upon encouragement activity. The point seems to be that over involvement by the government to the extent reflected in *Twigg* is permissible only against a person who is 'reasonably suspected of criminal conduct or design.'" W. LaFave and A. Scott, *supra* note 6, § 5.2 at 432.

See also Gershman *supra* note 6, at 612. Professor Gershman suggested that the court in *Twigg* found a due process violation because of the dangers which arise from police action lacking factual foundation.

198 *See, e.g.*, United States v. Driscoll, 852 F.2d 84, 87 (3d Cir. 1988) (rejecting defendant's "reasonable basis" argument by relying upon *Jannotti*'s probable cause holding).

199 737 F.2d 853, 856-60 (1984). In *Gamble*, the defendant was convicted of mail fraud under 18 U.S.C. section 1341 for assisting government undercover agents file fraudulent claims against insurance companies. *Id.* at 853-54. The court observed the compassionate situation which surrounded defendant's conviction: "the government sent agents posing as poor people to a doctor serving a ghetto community . . . to seek financial assistance from the doctor . . . in appealing circumstances . . . in which he might appear callous if he did not cooperate. . . ." *Id.* at 854. Moreover, the agents appealed to sympathy based on economic disadvantage and race. *Id.*

200 *Id.* at 860. More specifically, the court of appeals posited: "[w]e have held that the government need not have a reasonable suspicion of wrongdoing . . . to conduct an undercover investigation of a particular person." *Id.* (citing United States v. Biswell, 700 F.2d 1310, 1314 (10th Cir. 1983); United States v. Salazar, 720 F.2d 1482, 1488 (10th Cir. 1983)). In so doing, the *Gamble* court accepted *fait accompli* the Tenth Circuit's rejection of reasoned grounds.

201 *Id.* In *United States v. Biswell*, the court boldly stated: "[t]he absence of a reasonable basis for initiation of undercover investigation does not bar prosecution;"

Supreme Court's instructions that entrapment and outrageous government conduct are separate defenses,[202] the jurisprudence underpinning the Tenth Circuit's decision is not beyond reproach. Because of its flawed reasoning, *Gamble* was a weak precedent, possibly unworthy of adherence within its own circuit. As a result, the *Gamble* decision certainly presents an inappropriate basis upon which to buttress the Ninth Circuit's patent rejection of the reasoned grounds requirement.

In 1984, the District of Columbia Court of Appeals committed a jurisprudential mistake similar to the Tenth Circuit's. More specifically, *United States v. Jenrette*—the most recent case relied upon by the *Luttrell* court—represents the District of Columbia's contribution to the reasoned grounds legacy.[203] In *Jenrette*, the court rejected appellant's reasoned grounds challenge citing a previous District of Columbia Circuit opinion, *United States v. Kelly*, as controlling precedent.[204] In direct contradiction to the *Jenrette* court's observation, however, the *Kelly* court had expressly avoided ruling on the reasoned grounds issue in its opinion.[205]

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but the court could only tender an entrapment case to support its contention. *Biswell*, 700 F.2d at 1314 (citing United States v. Swets, 563 F.2d 989, 991 (10th Cir.), *cert. denied*, 434 U.S. 1022 (1978)). The *Swets* decision held that government in entrapment cases need not demonstrate that it possessed reasoned grounds to investigate an individual. *Swets*, 563 F.2d at 991.

202 *See* United States v. Hampton, 425 U.S. 484, 489 (1976) (drawing a distinction between entrapment and due process). The Ninth Circuit has on previous occasions expressly warned that the two areas should not be confused—entrapment uses a subjective approach, and outrageous government conduct employs an objective method. *See* United States v. Bogart, 783 F.2d 1428, 1435 (9th Cir. 1986).

203 744 F.2d 817 (D.C. Cir. 1984). Congressman John Jenrette was convicted by a jury for accepting a one-hundred thousand dollar bribe. *Id.* at 819. The record showed that defendant did not accept the bribe to enact legislation granting certain Arabs political asylum until two days after its offer. *Id.*

204 *Id.* (citing United States v. Kelly, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 464 U.S. 908 (1983)). The *Jenrette* court dismissed defendant's assertion that reasoned grounds claims were not "raised":

> The defendants in *Kelly* claimed that the FBI violated due process by proceeding with the investigation despite a lack of reasonable suspicion of wrongdoing and by failing to record all phone conversations. In concluding that the Abscam operators' investigation of Kelly did not violate principles of fundamental fairness, the court necessarily rejected the argument that lack of suspicion . . . violated due process violations.

Id. at 824 and n.13.

205 *Kelly*, 707 F.2d at 1471 n.58. The *Kelly* court found that the government had ample suspicion in this case, *id.* at 1471, but the court stated "we need not decide the question." *Id.* at 1471 n.58.

Rather the court of appeals in *Kelly* found reasoned grounds based upon general evidence of official corruption at the targeted agencies (New Jersey and the Immigration and Naturalization Service); another congressman's acceptance of a

The District of Columbia's ruling in *Jenrette* then appears to originate from historical fortuity, rather than a principled rejection of the reasoned grounds requirement. The Ninth Circuit, in *Luttrell*, became a part of this groundless tradition.

While the case law in the District of Columbia, Second, Third, and Tenth Circuits rejects a reasoned grounds requirement under the due process clause, the reasons for its rejection are neither compelling nor airtight. Rather, these courts balk at discussing the merits of the requirements and blindly follow nonprecedential cases as binding law. Had the Ninth Circuit chosen to probe beyond the dented case law armor shielding the reasoned grounds requirement, the court would have found an unpredictable,[206] but compelling due process argument.[207]

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bribe; and a statement by those claiming to know the defendant. *Id.* at 1471. *See, e.g.*, Marino, *supra* note 75, at 617-18 (observing that five out of the eight participating judges expressly reaffirmed the outrageous government conduct defense's continued existence); Note, *supra* note 1, at 1459 (also concluding that the outrageous government conduct defense survives *Hampton*).

206 *See* Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1938) (stating that due process is a creature of history); Malinski v. New York, 324 U.S. 401, 417 (1944) (Frankfurter, J., concurring) (emphasizing that "these standards" are not "authoritatively" formulated anywhere); Rochin v. California, 342 U.S. 165, 169 (1951) (noting that the standards of due process are not authoritatively formulated in any decision); United States v. Russell, 411 U.S. 423, 431 (1972) (observing the difficulty which attends translating the due process clause into static concepts).

These cases demonstrate that the Supreme Court repeatedly envisioned a growing conception of due process. Accordingly, the Court has determined that judicial review of government action under due process requires the following inquiry: "whether (government actions) offend those canons of decency and fairness which express the notions of justice of English speaking people even toward those charged with the most heinous crimes." *Malinski*, 324 U.S. at 416-17.

While the Court also reiterated its belief that judges are not simply at large under due process to judge government practices, *id.* at 417; *Russell*, 411 U.S. at 431, some commentators contend that this theoretically-espoused self-restraint produces inconsistent practical results. *See* Gershman, *supra* note 6, at 599-600. Professor Gershman writes that, while some—such as Justice Frankfurter in *Rochin*—claim that due process is not a matter of "judicial caprice," a test dependent upon "the shock capacity" of particular judge's consciences creates confusion and unpredictable results. *Id.* at 599 (citing *Rochin*, 342 U.S. at 172). Gershman also argues that the entire outrageous government conduct is vague, unpredictable, and unguided. *Id.* at 604-05.

207 United States v. Jannotti, 673 F.2d 578, 612-13 (3d Cir. 1982) (Aldisert, C.J., dissenting). Chief Judge Aldisert compared the work of the FBI in Abscam to the gestapo in National Socialist Germany because both employed the "honey pot" technique:

> The FBI employed the honey pot through a secret agent who, by ostentatiously flashing and giving away wads of money, would attract both the wary and the unwary, the scrupulous and the unscrupulous. Having attracted, the honey pot would serve also to capture those who were willing, that is, predisposed, to make the flight to the honey

This compelling reasoned grounds concept arguably stems from substantive due process.[208] Most notably, the *Luttrell* panel relied upon substantive due process when it emphasized that the Bill of Rights demands that the processes of criminal investigation should move "deliberately, purposefully, and fairly."[209] The *Luttrell* panel made its reliance upon substantive due process even more clear by emphasizing that "the right to be left alone" protects individuals "scrupulously conforming" to the law from being subjected to "highly intrusive, random investigations."[210]

The *Luttrell* panel's reliance upon substantive due process certainly comports with basic due process teachings. The Supreme Court generally applies a strict form of judicial scrutiny under the due process clause to any governmental action impinging upon the exercise of a fundamental constitutional right.[211] While some scholars continue to demand a textual basis for all constitutional rights,[212] the Supreme Court has recognized a number of fundamental rights not readily visible in the Constitution's text.[213] More notably, the court has implicitly recognized

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> in the first place, as well as those who would have been unwilling, but who made the flight to the pot only because of the strength of the lure. But this trap was particularly selective: the operators of this honey pot personally selected those who could share the sweet stuff. The party was by invitation only; when the guests came to the pot it was not necessary for them to ask for a sample; rather, their mouths were opened for them and the honey poured down their gullets.

Id. at 613.

Other observers have drawn similar conclusions. Professor Gary Marx, for example, warned: "[Some government] undercover work has lost sight of the profound difference between carrying out an investigation to determine whether a suspect, is in fact, breaking the law, and carrying out to determine if an individual can be induced to break the law. Marx, *Who Really Gets Stung? Some Issues Raised by Police Undercover Work*, CRIME AND DELINQUENCY 173, 190-91 (April 1982). Professor Alan Dershowitz added: "[t]he scam as a technique is now out of control. Every prosecutor, undercover investigator, and policeman . . . is free to conduct any scam he sees fit without fear of judicial rebuke." Dershowitz, *Getting Stung*, PENTHOUSE 148 (June 1982).

208 *See* Gershman, *supra* note 6, at 612-13 (arguing that when a government initiates an investigation without a factual basis, it impinges upon its citizens' privacy); Note, *supra* note 4, at 1215-16 (advocating that willpower will not undo the damage to "psychic privacy" or besmirched reputation caused by a staged arrest operation).

209 United States v. Luttrell, 889 F.2d 806, 813 (9th Cir. 1989).

210 *Id.*

211 NOWAK, ROTUNA AND YOUNG, CONSTITUTIONAL LAW § 11.7 at 369 (3d ed. 1986).

212 R. BERGER, GOVERNMENT BY THE JUDICIARY (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

213 *See* NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 460-61 (1958) (fundamental right to freedom of association implied by the first amendment); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) (right to vote and participate

in numerous decisions, the right to fairness in criminal procedure,[214] in governmental deprivations of life, liberty, or property,[215] and in rights to privacy.[216]

While the substantive due process right to privacy has received most of its application in the family and reproductive rights area,[217] its service as a protection from police investigations is even more fitting.[218] Although government investigations have a long history in western civilization,[219] the technological and methodological improvements in government law enforcement techniques since the Constitution's drafting have heightened the need to extend case law protection in the area of criminal investigations to the fundamental right to be let alone.

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in the electoral process is found in several amendments and the liberty concept of the fourteenth amendment); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel interstate).

214 Douglas v. California, 372 U.S. 353 (1963) (right to counsel during original appeal); Bounds v. Smith, 430 U.S. 817 (1977) (right to court access).

215 Youngberg v. Romeo, 457 U.S. 307 (1982) (holding that state sanitoriums must provide care which does not greatly depart from professional standards).

216 Griswold v. Connecticut, 381 U.S. 479 (1965).

217 *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (rearing of children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (rearing of children); Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives by married couples); Loving v. Virginia, 388 U.S. 1, 12 (1967) (involving marital decisions); Carey v. Population Services International, 431 U.S. 678 (1977) (involving distribution of contraceptives).

218 *See* Henkin, *Privacy & Autonomy*, 74 COLUM. L. REV. 1410, 1410-11, 1424 (1974). Professor Henkin writes that the word privacy intuitively connotes freedom from official intrusion. *Id.* at 1410-11. Moreover, he suggests that the Supreme Court has failed to vindicate a right to be free from official intrusion. *Id.* at 1424-25. Professor Henkin elaborated accordingly:

> In [the Supreme Court privacy cases] the Court was not talking about my freedom from official intrusion into my home, my person, my papers, my telephone; about my right to be free from official surveillance or accosting, from questions by census-takers, officials, or congressional committees; from having to file with governmental bodies, forms and returns containing information of varying "privateness"; from being mentioned and publicized, or having data about me collected, by official bodies.

Id. at 1424.

According to Henkin, the fundamental right to privacy will only escape ephemeral status by adding the aforementioned protections. *Id.* at 1425.

219 A. WESTIN, PRIVACY AND FREEDOM 57 (1967). Westin contended: "one of the central elements of the history of liberty in Western societies since the days of the Greek city-state has been the struggle to install limits on the powers of . . . authorities to place individuals and private groups under surveillance against their will." *Id.* He then placed the United States Constitution against this legacy: "[t]he whole network of American constitutional rights . . . was established to curtail the ancient surveillance claims of governmental authorities." *Id.*

Even if this freedom from baseless criminal investigations does not reach the fundamental stature worthy of substantive due process protection, the outrageous government conduct defense also presents ample procedural justifications. One of the due process clause's most basic purposes is to ensure that the government provides a fair decision-making process before impairing a person's life, liberty, or property rights.[220] More specifically, procedural due process requires a petitioner to possess a property or liability interest in the subject matter at issue before granting due process.[221] Very often, this determination is made based upon the importance of the right to the individual.[222] As *Luttrell* demonstrates many criminal investigations culminate in convictons. Given this reality, an individual certainly has a property or liberty interest in freedom from intrusive government investigations. By nature, most successful criminal investigations culminate in a conviction.

Accordingly, the *Luttrell* panel correctly established the bare minimum process that is due—the government should be able to provide a post-investigation justification for launching an investigation. Considering the waste and inefficiency which may be incurred in random fishing expeditions,[223] a reasoned grounds requirement also comports with sound policy notions.

Especially when the inadequacy of alternative protections is viewed,[224] one begins to recognize fully a citizen's vulnerability under current court doctrine.[225] Even more troublesome, one

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220 NOWAK, ROTUNDA, & YOUNG, *supra* note 211, at § 10.6 at 322. *See also* United States v. Luttrell, 889 F.2d 806, 813 (1990) (advocating that "the processes of criminal investigation move deliberately, purposefully, and fairly").

221 *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (finding public assistance termination warrants certain procedural requirements).

222 *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (finding the existence of a property right based upon the importance of the right to the individual).

223 *See, e.g.*, Hampton v. United States, 425 U.S. 484, 498-99 (1976) (Brennan, J., dissenting). Justice Brennan suggested that overzealous encouragement activity lacks policy justification: "[t]he [g]overnment is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary . . . . There is little, if any, law enforcement interest promoted by such conduct." *Id.*

224 *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972) (using justiciability doctrine to dismiss defendant's first amendment challenge of army intelligence practice of collecting, maintaining, and disseminating information about defendant's political activities).

225 *See, e.g.*, Gershman, *supra* note 6, at 1584-85. Professor Gershman notes the absence of any meaningful restriction on government solicitation:

> The government's ability gratuitously to generate crime through random honesty checks clearly involves unjustified intrusion into citizen's privacy and autonomy. Such interferences, however, is ordinarily re-

also begins to realize the consequences. Quite simply, without a reasoned grounds requirement as a preliminary to government investigations, only the government and its legislative component can control police methods used to pursue criminals.[226] Given congressional inaction during ABSCAM when law-makers were targets, other criminal investigation targets, such as Luttrell and Kegley, should take little solace in the prospect of congressional protection. Accordingly, suspects such as Luttrell and Kegley can only turn to the courts, such as the Ninth Circuit, for relief.

While some may applaud the benefits which accompany unrestrained government action,[227] some should remember how

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> stricted by procedural safeguards such as the requirement of a warrant. Ironically, however, the Abscam operation, an intrusion of greater duration and intensity, was not subject to such safeguards. Government agents secretly monitored the Abscam defendants for many months, recorded their intimate conversations and surreptitiously videotaped meetings they attended. No judge authorized such procedures; indeed it is unlikely that any judge would have authorized this type of surveillance absent prior suspicion.

Id.

226 *See* United States v. Russell, 411 U.S. 423, 434-35 (1972). In *Russell*, the Court eliminated a "chancellor's foot" veto derived from entrapment over law enforcement practices which did not meet the chancellor's vision of appropriate conduct. *Id.* at 435. As a result, the court posited that only the Constitution can provide adequate limitations: "the execution of the federal laws under our Constitution is confided primarily to the [e]xecutive [b]ranch, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." *Id.*

The reasoned grounds requirement would provide just the type of "judicially-fashioned" constitutional limitation that *Russell* requested.

Without it, a target usually only has two protections—entrapment and refusal to cooperate. Problems of evidence, logic, and jury dynamics often precede the former. *See* J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2 (Tillers ed. 1983) (demonstrating how harmful evidence of reputation and character can be on the trier of fact); *Jannotti*, 673 F.2d at 612-15 (focussing on the jury's inability to appraise the type of entrapment involved in *Jannotti*). Park *supra* note 4, at 178 (for a discussion of "evidentiary bootstrapping" which focuses upon the circular logic often found in entrapment proceedings).

The second alternative, refusal, cannot undo the privacy infringements nor restore besmirched reputations that often accompany government investigations. *See infra* Subcommittee Reports note 229, at 5-10 (describing the impact that ABSCAM investigations had on targets' lives).

227 *See, e.g.*, Note, *supra* note 190, at 412-13 (approving the results in ABSCAM cases by emphasizing the necessity of sting operations).

Nevertheless, such enthusiasm certainly ignores a sense of propriety and constitutional limitations. In holding that an unwed father must receive a competency hearing before having his child taken away, the Supreme Court advocated that efficiency must always yield to constitutional concerns:

> The Constitution recognizes higher values than speed and efficiency.

easily one can fall to temptation.[228] Even if a suspect has the temperance to reject a government solicitation, the baseless investigation may inherently damage the suspect, especially the suspect's reputation.[229] In addition, random solicitations flirt with thought-policing, which is certainly anathemaic to American criminal concepts[230] and values.[231] Unfortunately, in this era of

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> Indeed, one might fairly say of the Bill of Rights in general, and the [d]ue [p]rocess [c]lause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from an overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

Moreover, this ardor for active law enforcement also ignores the reality that law enforcement agents do not always obey the law themselves. *See* Fried, *Five Officers Facing Trial are Reinstated: Back to Modified Duty Despite Murder Charges*, N.Y. Times, March 26, 1991, at B1, col. 5 (reporting Officer's reinstatement despite murder charges); Harrison, Brutality, Hard Issue for Police, Has the Videotape of the King Beating Exposed a Dirty Little Secret? Or Is the Problem of Excessive Force Being Blown Out of Proportion? Experts Differ Sharply on the Matter, L.A. Times, April 4, 1991, at A1, col. 1 (reflecting upon the prevalence of police violence historically and today).

228 *See, e.g., Jannotti*, 673 F.2d at 613 (Aldisert, J., dissenting). Chief Judge Aldisert, in dissent, noted an anecdote to illustrate the compulsion which defendant's in Abscam felt as the FBI lured them to its honey-pot: " 'it is one thing to take a street where hookers work, dress a policewoman up as a hooker and put her out there . . . It's something else entirely . . . to take Bo Derek and throw her naked into the Notre Dame locker room.' " *Id.* at 613 n.4 (citations omitted).

Since the felling of Adam, *see Genesis* 3:19 (chronicling Adam's fall), even seemingly pure men have known the allures of temptation. Man's inability to resist temptation accordingly has been well-chronicled in proverbs. Sir Robert Walpole once observed: "[a]ll those men have their price." W. COXE, MEMOIRS OF WALPOLE 369 (1978). William Shakespeare underscored this notion that no one is beyond reproach: "O! Thou hast damnable iteration, and art indeed able to corrupt a saint." Shakespeare, *Henry IV*, Pt. I, Act I. Sc. 2.

The weaker-soled readily admit their lack of constitution in the face of temptation: "[t]he only way to get rid of temptation is to yield to it," O. WILD, THE PICTURE OF DORIAN GRAY (1835); "I can resist everything except temptation." Vandiver, *Lady Windermere's Fan*, Act I (1892).

229 *See* SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY TOGETHER WITH DISSENTING VIEWS, FBI UNDERCOVER OPERATIONS, H.R. Doc. No. 267, 98th Cong., 2d Sess. 30 (1984) (presenting Senator Alan Cranston's observations about the personal and reputational effects of the government's unfounded and unsuccessful solicitation of Senator Larry Pressler).

230 *See, e.g.*, W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 195 (2d ed. 1986). The authors stated: "[b]ad thoughts alone cannot constitute a crime; there must be an act." *Id.* While some might argue that a criminal act does result, albeit through the government's assistance, others have rejected this reasoning as circular. *See, e.g.*, Note, *supra* note 75, at 127 (arguing that "the government cannot justify punishment on the basis of an act that would not have occurred had it left the defendant alone"). Even accepting that a government's assisted deed technically fulfills the definition of a criminal act, a government assisted deed certainly undermines the purpose of the act requirement. *See, e.g.*, C. FLETCHER, RETHINKING

increased undercover government activity,[232] individuals have even more reason to fear the fall of the reasoned grounds requirement.

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CRIMINAL LAW 431 (1978) (writing that the act requirement stems from ethical, political, and legal beliefs that the state "is bound to respect the autonomy and capacity for self-actuation of its citizens").

231 Rehnquist, *Is an Expanded Right or Privacy Consistent with Fair and Effective Law Enforcement?*, 23 KAN. L. REV. 1, 2, 9, 11 (1974). In examining the paradoxical conflict between freedom and order, Justice Rehnquist suggested that society must strike a balance between the two values. *Id.* at 7. He stated: "[o]ne of the basic questions that must be answered by any organized society is the extent to which the government shall regulate the lives of its citizens." *Id.* at 14. Justice Rehnquist believes the trend in industrialized countries is toward increased government participation in its citizen's daily lives. *Id.* at 14-17.

232 SELECT COMM. TO STUDY UNDERCOVER ACTIVITIES OF THE DEPARTMENT OF JUSTICE, FINAL REPORT TO THE U.S. SENATE, S. REP. No. 682, 97th Cong., 2d Sess. 1 (1982). The committee reported that Director J. Edgar Hoover disapproved of FBI involvement with the underworld because of the degenerative effects that association would have on the FBI. Moreover, its findings noted that Hoover also worried about sullying public confidence. According to the committee, since Hoover's stint as director, the FBI's use of undercover activities has taken quantum leaps. For example, the FBI budget for undercover work leaped from $1 million in 1977 to $12.5 million in 1984. Furthermore, the committee found that the FBI conducted 53 operations in 1977, but over 300 in 1983. *Id.*

See also, SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY TOGETHER WITH DISSENTING VIEWS, FBI UNDERCOVER OPERATIONS, H.R. DOC. No. 267, 98th Cong., 2d Sess. 1-6 (1984) (discussing the impact of the government's increased undercover activity).

Despite its controversy, government encouragement activity has become an institution in modern law enforcement practices. Mydans, *Civics 101 on Tape in Arizona, "We All Have Our Prices"*, N.Y. Times, February 11, 1991, at A1, col. 1; Blumenthal, *Police Lure: Trolling for Subway Thieves*, N.Y. Times, March 28, 1991, at B1, col. 2.