Hastings Constitutional Law Quarterly

Volume 46
Number 1 *Fall 2018*

Article 4

Fall 2018

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Introduction

Helen Miller and her friend posed as stranded travelers in the Los Angeles airport in 1983.[1] Seemingly helpless, Miller and her friend cajoled a suspected heroin user, Darnell Simpson, to give them a ride into town.[2] Soon after, Miller and Simpson became sexually intimate and Miller introduced Simpson to a "friend" who was interested in buying heroin and who subsequently made several purchases.[3] Little did Simpson know, the women were FBI-employed informants.[4] At the time, the FBI knew Miller was a prostitute, heroin user, and a Canadian fugitive facing drug charges.[5] Simpson was subsequently arrested and indicted on various drug charges. The FBI agreed to allow Miller to keep a $10,000 profit from one of the sales she arranged which resulted in Simpson's arrest.[6] In his trial, Simpson raised the defense that the government's conduct was so outrageous that it violated his Due Process rights under the Fifth Amendment, thus requiring dismissal.[7] The Ninth Circuit Court of Appeals rejected his defense, concluding that the law enforcement conduct was not so "outrageous" as to justify dismissal.[8] If law enforcement officers are allowed to utilize prostitution, heroin use, and

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1. United States v. Simpson, 927 F.2d 1088, 1089 (9th Cir. 1991).
2. United States v. Simpson, 813 F.2d 1462, 1463 (9th Cir. 1987).
3. *Simpson*, 927 F.2d at 1088–89.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

international fugitives to profit from the sale of drugs, what does it take to meet the standard of Outrageous Government Conduct ("OGC")?

The U.S. Supreme Court has held that the Due Process Clause protects defendants from OGC via the OGC defense,[9] but the Court has not yet been presented with a set of facts it believes warrants its application. As a result, the Court has not set forth such criteria for application of the OGC defense, leaving the lower courts to apply their own standards. The Supreme Court would fulfill its key role to establish, standardize, and enhance respect for the rule of law by creating a uniform federal standard. By establishing the limits of acceptable law enforcement actions, the Court would assert its historic leadership role, affirming cultural norms consistent with the fundamental precepts of the U.S. Constitution.[10]

This Note will (i) advocate for the application of the OGC defense to appropriate facts and circumstances, (ii) outline the facts and circumstances where the lower federal, as well as state, courts have applied the OGC defense, and (iii) argue for the Supreme Court's clarification of standards to guide lower courts' application of the facts and circumstances that constitute OGC, i.e., where law enforcement action rises to the level of a violation of Fifth Amendment Due Process protection.

Section I of this Note discusses the history of the OGC defense, defines what it is, and explains why it is needed, especially in jurisdictions that have adopted the subjective entrapment test. Section II provides context and interprets judicial decisions, including where federal district, appellate, and state courts have granted defendants relief by reversal of a conviction or dismissal of charges based on the OGC defense. Section III highlights prominent cases where the U.S. Supreme Court was directly presented with the OGC defense and rejected its application, and explores the Court's rationale. Section IV discusses the bases upon which the U.S. Supreme Court might apply the OGC defense, and argues that the Court should apply the defense notwithstanding its failure to do so in any prior decision.

I. What is Outrageous Government Conduct and Why are We Talking About it?

A. Brief History of the OGC Defense

The Due Process Clause of the Fourteenth Amendment proscribes State Government conduct and "empowers the Court to nullify any state law if its

9. Hampton v. United States, 425 U.S. 484 (1976).

10. *See infra* notes 196-199.

application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'"[11] The OGC defense is based on these very principles, as incorporated into the Due Process Clause of the Fifth Amendment, which mandates every citizen's right to due process of law. In its definition of OGC, the Court applied the "shock the conscience" Fourteenth Amendment due process principles from *Rochin*[12] in the context of the Fifth Amendment. In doing so, the Court poses the question: in what instances has law enforcement acted so outrageously that the Court, imposing a sentence so severe (or one at all), would fail "to provide the defendant with [his] claimed [Constitutional] protection"[13] and would "den[y] fundamental fairness, shocking to the universal sense of justice."[14] To date, the Supreme Court has not yet found sufficiently outrageous conduct by law enforcement to warrant a due process violation.[15]

The theory behind the OGC defense is that actions taken by law enforcement, including prosecutors, may be so offensive that they amount to a violation of an individual's right to Fifth Amendment Due Process. Procedurally, the defense is usually raised in a pretrial motion to dismiss,[16] where, if successful, the OGC claim may result in dismissal of an indictment. The OGC defense is often conflated with an affirmative entrapment defense. This is in large part because the defense has principles of entrapment embedded in its veins, and the two are in many ways inextricably linked. However, there are important distinctions between the two defenses.

11. *See* Rochin v. People of California, 342 U.S. 165, 211 (1952) (Black, J., concurring) (holding the State's forcing of emetics upon a defendant a violation of the Due Process Clause of the Fourteenth Amendment).

12. The Court in *Rochin* established a standard, later known as substantive due process. 342 U.S. 165 (1952). Substantive due process can be encapsulated by the question, "when did police actions so invade the individual liberty of a suspect that the government should not be allowed to utilize the evidentiary fruits of those actions?" Jerold H. Israel, *Free-standing Due Process and Criminal Procedure: Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J 303, 353 n.2 (2001). Coerced confessions would also fall under this category.

13. Israel, *supra* note 12, at 353–354 n.2.

14. Betts v. Brady, 316 U.S. 455, 462 (1942), *vacated on other grounds.*

15. Furthermore, there have been a limited number of cases where the OGC defense has been squarely presented to the Court. *See, e.g.,* Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973).

16. The way in which the defense can be raised and decided procedurally may detrimentally affect its success. *See,* FED. R. CRIM. PROC. 12(b) (the defense may be waived if not raised prior to trial); *see also infra* note 167.

1. What is Entrapment?

Entrapment is a complete defense to a criminal charge.[17] The entrapment defense, like the OGC defense, often stems from operations involving undercover agents and informants. For many years, defense attorneys were limited to the entrapment defense[18] when representing clients who were victims to these scenarios. The underlying logic behind an entrapment defense is that, absent government action, the defendant likely would not have engaged in the charged conduct.[19] Theoretically, in the U.S. justice system, every individual is held accountable for his actions, which includes refraining from acting upon a desire to commit a crime, even when an opportunity arises.[20] While each individual is held to this standard, there are protections in place for individuals who are subjected to the "conception and planning of an offense by an officer"[21] where the individual who committed the crime charged would not have done so, but "for the trickery, persuasion, or fraud of the officer."[22]

The Supreme Court recognized the Entrapment defense in *Sorrells v. United States*[23] in 1932, and the defense was developed in *Sherman v. United States*[24] in 1958. In both cases, the Justices agreed that the successful outcome of the defense should be to bar prosecution, but they could not agree

17. Criminal Resource Manual, *645. Entrapment—Elements*, OFF. OF THE U.S. ATT'YS, https://www.justice.gov/usam/criminal-resource-manual-645-entrapment-elements (last visited Apr. 18, 2018).

18. The entrapment defense was born in *Sorrells* in 1932. Sorrells v. United States, 287 U.S. 435, 454 (1932).

19. *Id.*

20. An OGC defense can be distinguished from the most commonly adopted version of the entrapment defense, in that a defendant's predisposition to commit a crime is usually irrelevant for an OGC analysis. Rather, it is the government's conduct, standing alone, that is examined; *cf.* United States v. Batres-Santolino, 521 F.Supp. 744, 751 (N.D. Cal. 1981) ("Just as a defendant's lack of prior criminal involvement is relevant to an entrapment defense, so too is it relevant to a claim of outrageous government conduct. In neither case is it dispositive, but it is highly relevant to the issue of whether the defendant or the government should ultimately be held accountable for the instigation of the crime.").

21. *Sorrells*, 287 U.S. at 454 (*Sorrells* was the first case where justices accepted the entrapment defense and therein, outlined its guiding principles. The case centered on an undercover officer's relationship with the defendant during the Prohibition era. When the two men were at Sorrells' home, the agent asked twice whether Sorrells had any liquor. After Sorrells informed the agent that he did not, the informant asked Sorrells if he would be willing to purchase liquor for him. After Sorrells agreed and complied with the request, he was convicted under the Prohibition Act.).

22. *Id.*

23. *Id.*

24. Sherman v. United States, 356 U.S. 371 (1958).

on the method to accomplish it.[25] Consequently, the entrapment defense has two tests, one objective and the other subjective, both of which often lead to the same result.

2. Divergent Entrapment Tests: Subjective vs. Objective

The objective test, referred to as Justice Frankfurter's approach and outlined in his *Sherman* concurrence, is a question for judges as a matter of law and focuses on the egregiousness of actions taken by law enforcement, based on the time and effort invested, irrespective of a defendant's predisposition to commit a crime.[26]

The Supreme Court majority in *Sherman* employed the subjective test, analyzing entrapment from the perspective of the suspect and requiring (1) creative government inducement for criminal activity and (2) a lack of predisposition by the defendant to commit the crime for a successful defense.[27] In *Sherman*, a government informant and a defendant accidentally met at a doctor's office, where both were being treated for a narcotics addiction.[28] The informant asked the defendant to supply him with narcotics for his own use.[29] The defendant at first ignored the informant but, after repeated requests, complied and unknowingly accepted government money in exchange for the narcotics.[30] The prosecution charged the defendant with the illegal sale of narcotics and, at his trial, the defendant invoked the affirmative entrapment defense.[31] The Court unanimously overturned the conviction,[32] deciding that the government could not make such use of an informant and then claim disassociation through ignorance.[33]

The focus of the subjective test is generally not on the conduct itself as both parties acknowledge that the conduct occurred and is indeed otherwise criminal. The focus, instead, is on whether law enforcement, through the actions of its agents, induced an individual to commit the crime.[34] "Mere

25. *See Sherman*, 356 U.S. at 371; *Sorrells*, 287 U.S. 435 (1932).

26. Alaska, California, Hawaii, Iowa, Michigan, New Mexico, Pennsylvania, Texas, and West Virginia all employ the objective entrapment standard. Ray Rigat, *The Trap of Entrapment*, THE RIGAT L. FIRM BLOG (Nov. 2, 2016), https://www.rigatlaw.com/blog/2016/11/02/the-trap-of-entrapment/.

27. *Sherman*, 356 U.S. at 373.

28. *Id.*

29. *Id. at* 369.

30. *Id.*

31. *Id.* at 372.

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

33. *Id.* at 376.

34. OFF. OF THE U.S. ATT'YS, *supra* note 17.

solicitation to commit a crime is not inducement."[35] Rather, inducement centers on one's predisposition. The key question regarding predisposition is whether the defendant "was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime."[36] In other words, if the defendant likely would have committed the crime, without law enforcement's inducement, he is "predisposed."[37] If, though, by law enforcement's stimulus or encouragement, i.e., "when the criminal conduct was the product of the creative activity[38] of law-enforcement officials,"[39] one commits a crime that he otherwise would not have committed, the defendant is not predisposed.[40] If the Court, or in some instances a jury, finds predisposition, the subjective entrapment defense fails.[41] The Supreme Court has affirmed the subjective test of entrapment and the majority of lower courts have followed suit.

3. Weaknesses of the Subjective Test

What at first may appear to be a relief for a defendant who is at the mercy of government officials who induced him to commit a crime, the subjective entrapment test may be as deceptive as the practices used to employ it. This test has two main issues: (1) the burden and prejudice against defendants by its use and (2) its futility in conditioning the future behavior of authorities. By its very nature, the subjective entrapment test fails upon a finding of predisposition. Therefore, an otherwise irrelevant criminal history and rap sheet[42] becomes central to the question of whether the entrapment defense applies to a defendant. Although in other contexts, evidentiary issues bar a criminal record from entering the courtroom to stave off improper use of character evidence, for entrapment, the court often makes a finding of predisposition through criminal records.[43] Consequently, a

35. Sorrells v. United States, 287 U.S. 435, 451 (1932).

36. OFF. OF THE U.S. ATT'YS, *supra* note 17 (quoting Mathews v. United States, 485 U.S. 58, 63 (1988)).

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

38. *See Sorrells*, 287 U.S. 435 (1932) (the first case where justices accepted entrapment as a defense and provided guiding principles on its use).

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

40. *Id.* at 371.

41. This is one place in the system where protections afforded by the OGC defense are necessary.

42. Also known as a criminal record.

43. "It allows the prosecution, in offering such proof, to rely on the defendant's bad reputation or past criminal activities, including even rumored activities of which the prosecution may have

defendant's prior history may, in some instances, be exposed improperly to a jury as it decides his fate. The procedural necessity to disclose a defendant's past in hopes of an acquittal, on the theory of entrapment, is not only a burden for the defense but may also prejudice the defendant.[44] "The jury may well consider such evidence as probative not simply of the defendant's predisposition, but of his guilt of the offense to which he stands charged."[45] Furthermore, because a finding of predisposition is central to the success of the subjective entrapment test, there is little incentive for police to change their tactics because a finding of entrapment does not hinge on their behavior. In other words, when considering the entrapment defense, the government need not worry that its acts will impact the outcome of its case[46] and, consequently, has little incentive to alter its behavior going forward.[47]

4. The Use of the Entrapment Test in Courts: Subjective vs. Objective

Critics contend there is no use for the OGC defense due to the availability of the entrapment defense. When comparing the OGC defense to the objective entrapment test, their point is well taken. Under the objective test, it is irrelevant whether a defendant was predisposed to commit a crime. Rather, it is the law enforcement's conduct, alone, that is examined. This isolated test is the same substantive test that should be employed under an OGC analysis. However, the objective test of entrapment, which requires a case-by-case determination of facts, is used in a select minority of lower federal and state courts.[48] The subjective test is used by most courts when entertaining the entrapment defense.[49] Consequently, it is vital that the OGC

insufficient evidence to obtain an indictment, and to present the agent's suspicions as to why they chose to tempt this defendant." United States v. Russell, 411 U.S. 423, 443 (1973).

44. While a judge may give the jury instructions not to use the criminal history as improper character evidence in these scenarios, who is to say that juries do not calculate that evidence into their determination of a defendant's guilt.

45. *Russell*, 411 U.S. at 443.

46. Though it may not affect their case, it is true that government officials are not immune from lawsuits, such as 1983 suits, which make it unlawful for the authorities to deprive an individual of his rights under federal law or the Constitution. 42 U.S.C. § 1983.

47. *See* United States v. Chapman, 524 F.3d 1073, 1084 (9th Cir. 2008) (citation omitted). The Court may act "to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." *Id.* at 1085 (quoting United States v. Simpson, 927 F.2d 1088, 1090 (1991)).

48. Rigat, *supra* note 26.

49. Paul Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53 (1986).

defense remain an available option for all defendants, especially in those states that employ the subjective entrapment test.

B. What is the OGC Defense and How is it Different From Entrapment?

The OGC defense generally reflects the *Frankfurter* objective test,[50] focusing on the egregiousness of law enforcement conduct, yet is distinct from the subjective entrapment approach. While there are many similarities between the entrapment defense and the OGC defense, there are also a few key distinctions.

First, there are procedural differences: entrapment is an affirmative defense, whereas an OGC defense is a bar to prosecution. For entrapment, the availability of relief (i.e., reversal of a defendant's conviction) is determined throughout the trial process, whereas, an OGC defense is raised by motion to the court before trial begins. Second, the OGC defense "is distinct from the entrapment defense in that it raises a question of law for the court,"[51] meaning that the issue of whether the defense should apply is left exclusively to the judge's interpretation and application of relevant legal principles, consideration of the facts of a given case, and cannot be resolved by jury consideration. Conversely, entrapment solely raises a question of fact such that the relevance of the defense must be answered by reference to and inferences from facts, the evidence presented, and may be resolved by a trier of fact, often a jury.[52] The most crucial distinction is that the existence of a predisposition to commit a crime is completely destructive to a defense of subjective entrapment. However, it does not eliminate, nor should it diminish, the potential to prevail with an OGC defense.

While the entrapment defense has proved successful in many cases,[53] it is not always enough to protect defendants, specifically in the states using a

50. *See* Sherman v. United States, 356 U.S. 371, 383 (1958).

51. United States v. McQuin, 613 F.2d 1193, 1196 (9th Cir. 1980) (finding OGC is a question of law for the court to consider).

52. People v. Peppars, 140 Cal.App.3d 677, 685 (1983) (". . . while entrapment presents a question of fact, this defense presents a question of law.")

53. *See*, *e.g.*, Jacobson v. United States, 503 U.S. 540 (1992) (defendant ordered reading material from an adult bookstore). Soon after, Congress passed a law prohibiting child pornography sent through the mail. *Id.* Over the next two and a half years, the government investigated the defendant's willingness to break the law by sending him pamphlets and questionnaires, that criticized the new law. *Id.* The defendant finally gave in. *Id.* The entrapment defense succeeded because among other factors, while the defendant may have expressed an interest in the activity before, he stopped when it became illegal and had no predisposition to break the law. *Id.*; *see also* Sorrells v. United States, 287 U.S. 435 (1932); United States v. Lard, 734 F.2d 1290 (8th Cir. 1984) (where the court found that the defendant was entrapped).

subjective entrapment test.[54] Justice Frankfurter's concurrence in *Sherman*,[55] illustrates this very point:

> No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.[56]

Ultimately, law enforcement conduct cannot go unchecked even where criminally-minded defendants are involved. The OGC defense born in *Russell* offered that check on law enforcement conduct. In 1973, the Court raised the intriguing possibility that the government's use of undercover agents or informants, and their use of deception, could constitute a due process violation.[57] The Court acknowledged that the affirmative criminal defense of entrapment is distinct from a constitutional claim and left open the possibility that the Court may someday accept the OGC defense based on constitutional grounds. Justice Rehnquist optimistically framed this idea, stating that the Court "may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[58] Although the *Russell* opinion was written forty-five years ago, the Supreme Court has yet to find specific facts that rise to the Court's threshold to find OGC. This may also mean that motions have not been appropriately raised to the Court on behalf of defendants, notwithstanding evidence of OGC.

The availability of an OGC defense is critical, especially in jurisdictions that employ the subjective entrapment test, because it allows a defendant to raise OGC (1) when the court will not consider entrapment because there is

54. *See* United States v. Russell, 411 U.S. 423 (1973) (government agents supplying a key ingredient for the manufacture of a controlled substance did not constitute entrapment).

55. *See generally, Sherman*, 356 U.S. 371.

56. *Sherman*, 356 U.S. at 383.

57. *See generally, Russell*, 411 U.S. 423.

58. *Id.* at 431. Though, in this case (5-4 split) both the entrapment defense and the due process claim failed. *Id.* The Court held that the governments contribution of propane to a drug ring already in motion was not objectionable as propane was not illegal, despite government efforts to restrict its availability to drug rings, in particular. *Id.* at 432. While Rehnquist acknowledged the possibility of a successful OGC defense, he himself was not a vehicle for change. *Id.* at 423. In fact, some might even say, "the Burger and Rehnquist Courts have failed to live up to their articulated principles" with respect to a possible OGC defense. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 148 (1997) [hereinafter AMAR 1997].

predisposition,[59] (2) when a defendant fears disclosing to the jury what would otherwise be irrelevant and prejudicial prior criminal history,[60] and (3) because it could condition future behavior by the authorities to refrain from acting egregiously.[61] Consequently, the courts' acceptance and granting of an OGC defense, even where entrapment might otherwise have applied, benefits both defendants and society at large.[62] Furthermore, the entrapment defense is statutorily construed and can therefore be legislatively withdrawn at anytime.[63] California courts have recognized that the OGC defense exists independent of the entrapment defense and, in doing so, serves the interests of justice.[64] The Supreme Court's adoption and implementation of the OGC defense would both clarify the entrapment defense and create a narrow use for the OGC defense based on law enforcement conduct standing alone.

II. Lower Courts' Interpretation and Split Regarding the OGC Defense

Although the Supreme Court has yet to grant a motion raising an OGC defense, many federal district and circuit courts, as well as some state courts, have done so. "Given the amorphous state of the outrageous government conduct defense, and with little guidance from the U.S. Supreme Court as to

59. *See* United States v. Wylie, 625 F.2d 1371, 1377 (9th Cir. 1980). An OGC defense is also available to defendants who may stand no chance with an entrapment claim because they were predisposed to the crime; *see also* People v. Smith, 31 Cal.4th 1207, 1229 (2003) (Werdegar, J., concurring) ("but that an area of overlap exists [with a defense of OGC and entrapment] does not make either doctrine redundant and provides no reason to doubt that in a proper case of outrageous conduct, whether including government inducement to crime, the defendant may be able to obtain dismissal of the action on due process grounds."); *see also* United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986) (majority recognized the potential availability of an OGC defense irrespective of a defendant's predisposition).

60. Which is required for a finding of predisposition and consequently, a determination of the subjective entrapment test. OFF. OF THE U.S. ATT'YS, *supr*a note 17.

61. Because predisposition is not usually a factor considered in the determination of the viability of an OGC defense. For example, in the case of bodily invasions, government officials know that this type of behavior will not pass a due process violation evaluation and, as a result, may refrain from engaging in such practices henceforth. *See generally* Rochin v. People of California, 342 U.S. 165 (1952).

62. There is a need for the OGC defense, based on constitutional principles, because "the Court has failed to build up alternative remedial schemes [to the exclusionary rule, which lacks constitutional footing] that would protect innocent people from outrageous searches and seizures and would also deter future government abuse." AMAR 1997, *supra* note 58, at 148.

63. *See* United States v. Russell, 411 U.S. 423, 432–33 (1973).

64. People v. Holloway, 47 Cal.App.4th 1757, 1761 (1996) ("While generally under California entrapment law the focus is on whether police instigated or created the crime, other overreaching by the police at the investigatory stage could be so outrageous as to taint the subsequent arrest.").

its existence or applicability, the lower courts will continue to apply it as they see fit in particular cases."[65] The need for Supreme Court guidance as to the facts and circumstances where the OGC defense is applicable is evident from the lower courts' patch work application of the defense.

Karen Snell, a California civil rights attorney with thirty-seven years of practice and experience, suggests that for a defendant to succeed on an OGC claim, a defendant "must prove that a government player, either an agent or prosecutor,[66] violated the law."[67] In an effort to distinguish between acts these courts deem "not commendable,"[68] and acts that constitute OGC such that they "violate the universal sense of justice,"[69] this Note catalogues a variety of cases to decipher patterns, focusing on several cases where the entrapment defense was denied due to predisposition, but where an OGC defense was considered and accepted.

Some courts have asserted that the government's involvement must be "malum in se,"[70] or, amount to the engineering and direction of the criminal enterprise from start to finish.[71] Other courts, such as the Tenth Circuit,[72] have outlined common threads in case law to decipher its applicability.[73] Some others, have narrowed their attention, focusing on the degree of police participation in the enterprise,[74] the level of coercion, violence or brutality,[75] the length of government involvement,[76] or whether innocent members of

65. Matthew V. Honeywell, *What is Outrageous Government Conduct? The Washington Supreme Court Knows It When It Sees It: State v. Lively*, 21 SEATTLE U. L. REV., 690, 691 (1998).

66. This Note focuses on egregious acts committed by government agents.

67. Telephone Interview with Karen Snell, Cal. Civ. Rights Att'y (Feb. 14, 2018).

68. United States v. McQuin, 613 F.2d 1193, 1196 (9th Cir. 1980).

69. United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991).

70. Meaning, conduct that is inherently wrong by nature. MYRON MOSKOVITZ, CASES AND PROBLEMS IN CRIMINAL LAW 534 (6th ed. 2012).

71. United States v. Citro, 842 F.2d 1149, 1153 (9th Cir. 1988).

72. The Tenth Circuit has defined two factors addressing when an OGC defense should succeed: government creation of the crime and substantial coercion. Stephen A. Miller, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 Nw. U. L. Rev. 305, 321 (1996).

73. *See* People v. Isaacson, 378 N.E.2d 78, 83 (N.Y. 1978) (laying out a four-factor test, based on the totality of the circumstances, in which to consider whether an individual's due process rights have been violated). California appellate courts cite the test, though the test has not been fully sanctioned.

74. *See* Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring).

75. *See* United States v. Kelly, 707 F.2d 1460, 1477 (1983) (finding OGC hinges on the infliction of pain or physical or psychological coercion).

76. *See* Greene v. United States, 454 F.2d 783, 786 (1998) (finding OGC where the government's participation "was of extremely long duration, lasting approximately two and one-half years.").

society were threatened.[77] While selectively drawing from much of the scholarship regarding the OGC defense, this Note differs from that scholarship. This note focuses on the applicability of the defense, the array and categories of facts and circumstances deemed by lower federal and state courts to support applications of the defense, and uniquely, draws on originalist grounds for the conception and application of the OGC defense.

After reviewing a sampling of cases, it is evident that misconduct can be ascribed to a variety or combination of factors.[78] "There is simply no way to reduce the myriad combination of potentially relevant circumstances to a neat list of weighted factors without losing too much in the translation."[79] Although there is no litmus test, three factors seem to be most instrumental in decisions where a lower court has granted the OGC defense: when (1) government contributions are indispensable to the operation,[80] (2) government acts are aimed at reinvigorating or creating criminal activity for the sole purpose of convicting a defendant[81] or, (3) government agents unnecessarily engage in criminal activity in seeking prosecution.[82] For situations that are clearly government created fictions, many courts have granted the defense.[83] In these scenarios, like an entrapment defense, "the defense has been permitted upon grounds of public policy, which the courts formulate by saying they will not permit their process to be used in aid of a scheme for the actual creation of a crime by those whose duty is to deter its commission."[84] The chart below illustrates where courts have done just that, and outlines various criteria relied on by these courts to grant OGC motions.

77. Miller, *supra* note 72.

78. Kenneth M. Miller, *Outrageous Government Conduct that Shocks the Conscience*, 25 CAL. ATT'YS FOR CRIM. JUST., 81, 83 n. 4 (1998).

79. United States v. Santana, 6 F.3d 1, 5 (1st Cir. 1993).

80. *See generally* United States v. Batres-Santolino, 521 F.Supp. 744 (N.D. Cal. 1981) (where the government provided defendant with an otherwise unavailable ingredient); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (where the government facilitated the crime and had the requisite chemical knowledge); Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (where the government facilitated the crime and offered a key ingredient); People v. Isaacson, 378 N.E.2d 78 (N.Y. 1978) (where the officers were insistent and overly persistent); State v. Williams, 623 So. 2d 462, 463 (Fla. 1993) (where government manufactured a highly addictive substance).

81. *See* United States v. Lard, 734 F.2d 1290 (8th Cir. 1984); Metcalf v. State of Florida, 635 So. 2d 11 (1994); State v. Hohensee, 650 S.W.2d 268 (1982).

82. *See Lard*, 734 F.2d 1290; State of Minnesota v. Burkland, 775 N.W.2d 372 (2009).

83. *See* United States v. Gardner, 658 F. Supp. 1573 (1987); *Burkland*, 775 N.W.2d 372.

84. Sorrells v. United States, 287 U.S. at 435, 454 (1932).

Case Where OGC was Granted	Court Issuing Decision	Facts	Predisposition Relevant?	Did Court Consider Predisposition for OGC Determination?
United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978).	3rd Circuit	Defendants were convicted on multiple drug-related offenses for operating a meth lab. The defendant raised money to support the lab and oversaw distribution, however, the **informant** had **complete control** over the drug lab, supplied money, facilities, chemicals, and he alone had the chemical expertise to manufacture meth. The defendants brought an OGC defense based on the informant's extreme involvement in the enterprise. The court granted the OGC defense after considering these key factors:[85] 1) **the government instigated the criminal activity**;[86] 2) **the government's contribution was vital to the criminal enterprise – money, resources, knowledge;**[87] agents sowed the seeds of the conspiracy to entice the defendant to commit the crime.	Yes. The entrapment defense was not available due to the defendants predisposition	Yes. The court factored in that there was no activity until the government engaged, in considering the applicability of the OGC defense.
United States v. Batres-Santolino, 521 F.Supp. 744, 751 (N.D. Cal. 1981).	9th Circuit	A DEA **informant** partly-owned a bar in Quito, Ecuador. The informant told DEA agents about individuals who frequented his bar asking for cocaine. The informant visited his business associate's house and misrepresented who he was while speaking to the defendants about the cocaine trade. When the defendants claimed they did not have money to go through with the deal, the informant was persistent until the defendant	Yes	Yes.

85. *Twigg*, 588 F.2d at 373 (holding the government's involvement reached a "demonstrable level of outrageousness.").

86. *Id*. at 381 ("The illicit plan did not originate with the criminal defendants").

87. *Id.* at 380 (informant's knowledge was an "indispensable requisite to this criminal enterprise").

		made it happen. The defendants were subsequently arrested, while arranging the cocaine shipment.[88] The court considered several factors in granting the OGC defense[89]: 1) informant persuaded the defendants to create an organization, manufacture a crime, and "**provided defendants** with an otherwise unavailable **source of supply** of the illegal drug they were to import;"[90] 2) The **government facilitated the criminal activity;**[91] 3) Defendants had never before imported cocaine and had no foreign source of their own and were not involved in the drug-related enterprise until the government involved them.		
Greene v. United States, 454 F.2d 783 (9th Cir. 1971).	9th Circuit	Defendants were charged with the illegal manufacturing of alcohol. Defendants possessed an unregistered distilling apparatus and engaged in a boot leg whiskey making conspiracy. The court considered these factors in making their determination:[92] 1) The government approached the defendants and continued to persuade them to produce bootleg alcohol; 2) The government was in contact with the defendants for an extended period (2.5 years); 3) The nature of the contact was substantial: the government offered to provide	Yes. The entrapment defense was not available as defendants were predisposed	No.

88. United States v. Batres-Santolino, 521 F.Supp. 744, 746–50 (N.D. Cal. 1981).

89. *Id.* at 752. The court also held that the government conduct "was as objectionable as coerced confessions and unlawful searches." *Id.* at 750.

90. *Id.* at 751.

91. Without the government's agent, "set[ting] in motion the operation" the defendants would not have engaged in the criminal activity. *Id.* at 752.

92. The court made note that the government did not contribute to an ongoing operation, but instead reinvigorated the process to make a few arrests. Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971).

		equipment, a site, and **facilitated the criminal activity**. They provided a **necessary ingredient** (2000 pounds of sugar at wholesale price). And the agent was the only customer of the illegal operation that they helped to create.		
People v. Issacson, 44 N.Y.2d 511 (1978).	NY Court of Appeals	Police engaged in misconduct, including instigating violence and misrepresenting facts to a third-party to persuade him to cooperate as an informant (made him believe he was facing a stiff prison sentence). The informant then desperately sought out individuals who could satisfy the government's thirst for a conviction. The defendant was among these individuals. The informant lured the defendant, a Pennsylvania resident, to NY solely to make a cocaine sale. The court dismissed the indictment due to the egregiousness of the police conduct and considered these factors in doing so: 1) The crime would not have occurred without active and insistent encouragement by the police/agent; 2) The police behavior that led to the conviction of the defendant was deceptive (including making him go to the border of NY when it was not necessary)	Yes. The entrapment defense was not available.	No. The proper focus is whether, regardless of the defendants' inclinations or criminal intent, the Due Process clause mandates dismissal of his indictment.
State v. Williams, 623 So. 2d 462, 463 (Fla. 1993).	Supreme Court of Florida	The defendant was arrested for allegedly purchasing crack cocaine within 1000 feet of a school. The crack cocaine purchased was illegally manufactured by the government for sting operation use.	No.	No.

		The court granted the OGC defense[93] considering: The government **manufactured** (seized powder cocaine and made it into crack cocaine) a **highly addictive substance.**[94]		
United States v. Gardner, 658 F. Supp. 1573 (1987).	Western District of Pennsylvania	Defendant was convicted of distribution and possession with intent to distribute cocaine. The court granted the OGC defense considering the following: 1) The government agent used psychological **coercion** to get the defendant to acquire drugs for him; 2) The government's **sole motive** and intention was to overcome obvious reluctance by the defendant to commit the crime. **The agent was not in pursuit of stopping crime but instead, sought to create it;** 3) The defendant had no prior criminal record.	Yes	Yes. The defendant's lack of predisposition to commit any crime was among many of the factors the court used to grant the OGC motion.
State v. Hohensee, 650 S.W.2d 268 (1982).	Southern District Court of Appeals of Missouri	The defendant was convicted of burglary. The police had employed two felons to work with the defendant **to set up** a burglary, where the defendant acted as a lookout. Government agents accomplished the "break in." The court granted the OGC motion because "due process barred the state from invoking judicial processes to obtain the defendant's conviction for burglary."	Yes. Entrapment was denied because of the defendant's predisposition.	No. The court recognized that irrespective of predisposition, a defendant should not be convicted if the methods employed by the government are unacceptable.
Metcalf v. State of Florida, 635 So.	Supreme Court of Florida	The defendant was convicted of solicitation for purchasing cocaine that the **police manufactured into crack for**	No	No

93. State v. Williams, 623 So. 2d 462, 465 (Fla. 1993) (finding the "only appropriate remedy to deter outrageous conduct by law enforcement was to bar respondent's prosecution.").

94. Some of which was lost in the reverse sting, which left the community even more vulnerable. *Williams*, 623 So. 2d at 466. The highly addictive substance can be distinguished from cannabis, a controlled substance. *See generally* State v. Brider, 386 So.2d 818 (Fla. 2d DCA 1980).

2d 11 (1994).		**use in a reverse-sting operation,** within 1000 feet of a school. The court reversed the defendant's conviction considering: 1) The government **manufactured** the drugs; and 2) The purpose of their manufacturing was for a reverse sting operation.		
United States v. Lard, 734 F.2d 1290 (8th Cir. 1984).	8th Circuit	The defendants (maker and abettor) were convicted of conspiring to transfer an unregistered firearm, a pipe bomb. The court considered the following in granting the OGC motion: 1) The maker was **not predisposed** to commit the crimes and had no prior criminal record. The pipe bomb idea only emerged after the **agent repeatedly pleaded** for a more powerful; weapon; 2)The government agents were overzealous, including using **extreme and illegal measures to investigate crime**, including smoking marijuana; 3) The governments' conduct was aimed at **creating new crimes for the sake of bringing criminal charges against the defendant**.	Yes. Entrapment found.	Yes. The defendant's lack of predisposition was used in the courts' determination in granting the OGC defense.
State of Minnesota v. Burkland, 775 N.W.2d 372 (2009).	Court of Appeals of Minneso ta	Minneapolis Police conducted an undercover operation after receiving a tip regarding the presence of prostitution at a tanning and massage salon. In granting the OGC defense, the court considered: That the government **initiated sexual contact** and permitted the escalation of sexual contact that was **not required for their investigation and collection of evidence** to establish elements of the offense.	No.	No.

While many different factors were considered by courts across the country in their determination of successful and applicable OGC claims, the recognized commonality is that when the government "promote[s] rather than detect[s] crime," courts acknowledge that the "power of government is abused and directed to an end for which it was not constituted."[95]

Even where states have come up with specific criteria constituting offensive government acts, and that activity was present, there is still no guarantee of a successful OGC claim. There are many instances in which a government agent appears to have broken the law or engaged in illegal activity and the courts still denied an OGC defense. While it is not directly evident why, three plausible explanations exist: (1) the harder the crime is to detect, the more relaxed courts are in approving or overlooking government action; (2) informants and agents may be weighed differently in the eyes of the court, i.e., informant misconduct may be reviewed more leniently; and, (3) some courts refuse to consider an OGC defense altogether.

The typical OGC defense argument focuses on actions taken by law enforcement agents.[96] Courts have generally found some types of actions do not rise to the level of OGC. *United States v. Smith* lists factual scenarios where OGC was denied,[97] such as: undercover agents using false identities,[98] supplying the contraband at issue in the offense charged,[99] committing serious offenses during an investigation,[100] introducing drugs into a prison to identify a distribution network,[101] assisting and encouraging escape attempts,[102] and using a heroin-using prostitute whose own activities were

95. *Sherman*, 356 U.S. at 384.

96. However, even if actions by a law enforcement agency do not constitute "engineering a criminal enterprise," this ground for dismissal does not foreclose the possibility that *malum in se* acts by a prosecutor may be "so grossly shocking and so outrageous as to violate the universal sense of justice." United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991). Because "[d]ismissing an indictment with prejudice encroaches on the prosecutor's charging authority," these sanctions are only permitted "in cases of flagrant prosecutorial misconduct." United States v. Simpson, 927 F.2d 1088, 1090 (1991). This Note focuses, however, on actions by law enforcement, rather than prosecutorial misconduct.

97. *Smith*, 924 F.2d at 897; *see also* United States v. Diaz, 189 F.3d 1239, 1246 (10th Cir. 1999) ("numerous courts stand for the proposition that supplying drugs or money or equipment or even all of these does not give rise to outrageous conduct violative of due process.").

98. *See* Shaw v. Winters, 796 F.2d 1124, 1125 (9th Cir. 1986); United States v. Marcello, 731 F.2d 1354, 1357 (9th Cir. 1984).

99. Hampton v. United States, 425 U.S. 484, 489 (1976).

100. United States v. Stenberg, 803 F.2d 422, 430 (9th Cir. 1986).

101. United States v. Wiley, 794 F.2d 514, 515 (9th Cir. 1986).

102. United States v. Williams, 791 F.2d 1383, 1386 (9th Cir. 1992).

under investigation, and regularly having intercourse with the defendant.[103] These courts readily excused government error or merely frowned upon blunders exceeding permissible bounds, yet held average citizens to higher standards for their faults.

There is a connection between the type of scheme, the government's involvement therein, and the level of trust required to carry it out in terms of a court's willingness to forgive government conduct. This is ironic, as courts are more accepting of egregious government behavior when the government is involved in a scheme where convictions are more difficult to secure. For example, heavy government involvement in drug manufacturing schemes seems to be more permissible than heavy government involvement in drug sales. This is because "members of a drug manufacturing ring, who already have access to the necessary materials and expertise, will likely be wary of allowing a stranger to join the conspiracy."[104] It is only after an agent has built up trust by providing necessary materials or financing that he may "gain the conspirators' confidence to obtain sufficient evidence to support a conviction on a manufacturing charge."[105] Drug dealers, however, may be more prepared to make sales to anyone willing to make a purchase, including inadvertently selling to government informants by virtue of interest in profit.

Similarly, in many sexual inducement cases, courts have not granted an OGC defense when it would otherwise appear to have been justified. Perhaps, this can be attributed to the high level of government involvement required to ensure that government participation remains undetected, even if the end result includes engaging in sexual activity on multiple occasions.[106] However, there are many scenarios where it appears that the court erred in

103. United States v. Simpson, 813 F.2d 1462, 1465–71 (9th Cir. 1987).

104. *§ 5.4(c) Government "overinvolvement" in a criminal enterprise*, 2 Crim. Proc. § 5.4(c) (4th ed.).

105. *Id.* This creates an incentive for informants to engage in deception and fabrication to gain a suspects confidence.

106. The court should consider the changing times, and the societal implications of the #MeToo Movement. Particularly, in the last two years, there has been an influx of individuals, mostly women, taking a stand against inappropriate sexual conduct and, society is backing them. Justice Ginsburg detailed her own experiences with sexual harassment and expressed, "[i]t's about time. For so long women were silent thinking there was nothing you could do about it, but now the law is on the side of women, or men, who encounter harassment and that's a good thing." *Justice Ginsburg Details Her Own Harassment: 'For So Long, Women Were Silent,'* DAILY BEAST (Jan. 2018), *https://www.thedailybeast.com/justice-ginsburg-details-her-own-harassment-for-so-long-women-were-silent*.

While sting operations are a bit different, the same theory applies and courts should do their part by following suit to protect individuals from harassment, especially in extreme cases.

making a determination that overlooks the use of sexual leverage.[107] Recall *United v. Simpson* in which the FBI chose to "manipulate" Miller, a prostitute, who was also a heroin user and a Canadian fugitive facing drug charges, into becoming an informant.[108] The government continued to use Miller even after learning that she became sexually involved with the defendant.[109] Furthermore, the FBI kept her on as an informant after learning that Miller continued to use heroin and engage in prostitution unrelated to and during their investigation.[110] The court held that despite these factors, the conduct was not so outrageous to warrant a reversal of the indictment.[111] Similarly, in *United States v. Ornelas-Rodriguez*, the court refused to dismiss the defendant's conviction on the ground that a DEA officer had sexual intercourse with the defendant's girlfriend, despite evidence that indicated the girlfriend would have cooperated with the government, irrespective of sexual activity with the officer.[112] Consequently, the officer's intercourse with the defendant's girlfriend was not necessary for the sake of prosecution. In both cases, the court condoned the deception and sexual exploitation by a government officer and informant in the pursuit of prosecution. While courts may excuse certain acts by informants due to the deceptive nature of their use, unnecessary benefits, such as having sex with a target beyond the scope of the investigation or skimming $10,000 from a drug sale is self-serving misconduct that should not be endorsed by courts in the United States. Likewise, the government should not be in the business of rewarding its agents or informants with sexual gratification.[113] However, in various scenarios, the courts continue to overlook shocking fact patterns as they have done here.

107. *See* United States v. Cuervelo, 949 F.2d 559 (2d Cir. 1991) (deciding that a hearing was not necessary, despite the defendant's raised OGC motion based on the government's informant's sexual engagement with her, on at least fifteen occasions, to assist with his inquiries regarding her suspected narcotics trafficking. The sexual relations included gift giving, love letters from the informant, and inducement for her to enter the U.S. by getting her a visa and paying her way; *see also* United States v. Dyess, 478 F.3d 224 (4th Cir. 2007) (where the government's lead investigator had a sexual relationship with the original defendant, and where the OGC defense raised by the defendant was denied).

108. *Simpson*, 813 F.2d at 1464.

109. *Id.*

110. *Id.*

111. *Id.*

112. United States v. Ornelas-Rodriguez, 12 F.3d 1339, 1349 (5th Cir. 1994).

113. After all, no one likes getting "screwed" by the government.

A. Agents vs. Informants.

Courts weighing the egregiousness of government conduct may hinge, to some degree, on whether the government actor was an agent or an informant.[114] While there are a few cases[115] where an informant was used and an OGC defense was granted, there are many cases where the reverse is true. Courts may be more willing to justify the informant's conduct because "informant misconduct is the most common type and it is hard for the court to pay much attention [to it]. Because if you didn't deal with scummy people as informants, then you wouldn't be able to prosecute cases."[116] The inherently deceptive nature of informants is problematic when the government heavily relies on them for undercover investigations. If the government is more accepting of acts performed by informants than by agents, law enforcement becomes incentivized to use and misuse informants excessively, knowing that such misuse may face less judicial scrutiny. Thus, government misconduct would appear to be directly related to the degree of judicial scrutiny applied.

B. Refusal by Some Courts to Consider the Defense

No matter the facts, an OGC defense may fail simply because a court will not consider it. Both the Sixth and Seventh Circuits have held that an OGC claim "is not one this circuit recognizes."[117] No matter how outrageous the government conduct, these federal appellate courts will not consider barring prosecution.[118] The Sixth and Seventh Circuits are comprised of the following states, respectively: Kentucky, Michigan, Ohio, Tennessee, Illinois, Indiana, and Wisconsin.[119] Of these states, Michigan is the only state that employs the objective entrapment defense test.[120] In other words,

114. Defendant has a much better chance if a government agent was involved in the act rather than an informant working for the government.

115. *See supra* notes 83–92.

116. Telephone Interview with Karen Snell, *supra* note 67.

117. United States v. Gustin*,* 642 F.3d 573, 575 (7th Cir. 2011).

118. *See* United States v. Wright, No. 93-4228, 1995 WL 101300, at *3 (6th Cir. 1995) (holding the Sixth Circuit will not consider an OGC defense, "[T]his court has held that even if the government's conduct is 'outrageous' it does not violate a defendant's constitutional right to due process.").

119. *Geographic Boundaries of the United States Courts of Appeals and United States District Courts*, U.S. CTS., http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf.

120. There are eleven total states that use the entrapment test nationwide: Alaska, Arkansas, California, Hawaii, Michigan, New Hampshire, North Dakota, Pennsylvania, Texas, Utah, and Vermont. PAUL MARCUS, THE ENTRAPMENT DEFENSE n.4 (4th ed. 2012).

six out of the seven states within these circuits where the OGC defense is "stillborn"[121] use the subjective entrapment defense. Because the OGC defense and the objective entrapment test both focus on the egregiousness of government conduct, Michigan's defendants facing criminal prosecution are likely protected, despite the Circuits' refusal to recognize the OGC defense. For the rest of these six states, there is little protection for defendants predisposed to the crimes for which they are charged, even if egregious government activity is involved. This notion runs counter to Justice Frankfurter's concurrence in *Sherman*, and fundamental concepts of due process of law, which motivate the importance of confronting this very issue.[122] Furthermore, even among the states that recognize the OGC defense, there are no clear guidelines to determine its applicability.

What do lower court decisions tell us about the viability of the OGC defense in the Supreme Court? Perhaps, the Court does not want to touch the defense because it perceives lower courts as successfully applying the defense where they see fit. Alternatively, perhaps the prosecution recognizes that the courts' granting of the OGC defense would have detrimental effects on public perception of law enforcement and, therefore, will do what it can to prevent exposure of egregious conduct by law enforcement. Under these circumstances, courts would rarely be presented with the opportunity to adjudicate the OGC defense.

Long-time San Francisco defense counsel Karen Snell agrees: "the government doesn't really want the case [where their agents have committed egregious acts] to go forward. I have asked prosecutors, 'do you really want this to be in the public eye?' That is a useful tool to get a good deal for the client. But really, it's a lot about who your judge is."[123] Given the direct relationship between law enforcement misconduct and judicial scrutiny thereof, it is likely that prosecutors' exercise of discretion will be equally affected by judicial scrutiny. Prosecutorial recognition that law enforcement conduct has gone beyond the pale may lead to a plea deal,[124] such that no substantive opinion addressing OGC is ever written.[125] Those are the defense success stories.

121. United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995).

122. Sherman v. United States, 356 U.S. 371, 378–85 (1958) (Frankfurter, J., concurring).

123. Telephone Interview with Karen Snell, *supra* note 67.

124. The increase in plea deals is presumed to be largely a result of extremely high penalties, that is sentences, associated with infractions. Emily Yoffe, *Innocence is Irrelevant*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171.

125. *See infra* note 175.

But as we have seen, there are cases where courts have inexplicably denied an OGC defense.[126] Furthermore, apart from cases where courts may have denied the OGC defense even though the facts clearly warranted a reversal of conviction, we are reminded of those courts that will not even consider the defense.[127] These cases especially present a need for Supreme Court oversight, leadership, and guidance. Of course, there are cases where juries may "improperly" decide cases. Yet, in cases such as these, where there is no substantial evidence such that a jury could make a finding, judicial oversight can serve to correct mistakes. When the problem lies with those in power at the judicial level, where there is largely a consensus with regard to OGC, there are few protections for defendants at the hands of law enforcement acting in ways that courts deem not be to sufficiently outrageous, but that are indeed egregious.

III. Supreme Court Cases Where the OGC Defense has Been Raised and Failed

Two prominent Supreme Court cases, *United States v. Russell* and *Hampton v. United States*, address and support the viability of an OGC defense. Though squarely presented with case facts addressing this very principle, the Court did not grant the defense in either case and has not done so since.

In *Russell*, the defendant was arrested as part of an undercover operation in the investigation of the manufacturing of methamphetamine.[128] An undercover officer supplied the defendant with phenyl-2-propanone, a chemical and necessary ingredient, for the manufacture in exchange for half of the drugs produced.[129] While the chemical was difficult to obtain, there were other means to access it, which the defendant made clear to the officer, given he had previously produced three pounds.[130] In his defense, the defendant requested that the Court consider the entrapment theory, resting on constitutional grounds.[131] He argued that the high level of government

126. *See generally* United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987); United States v. Cordae Black, 750 F.3d 1053 (9th Cir. 2014) (Noonan, J., dissenting).

127. *E.g.*, the Sixth and Seventh Circuits.

128. United States v. Russell, 411 U.S. 423, 424 (1973).

129. *Id.*

130. *Id.* at 425.

131. Russell was likely inspired by Justice Frankfurter's comment in his *Sherman* concurrence that "the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice." Sherman v. United States, 356 U.S 371, 380 (1958).

participation violated his due process rights. The Court held that they "may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, [], the instant case is distinctly not of that breed."[132] The Court did not overrule and decided, by a small margin,[133] to proceed with the subjective theory adopted in *Sorrells*. Their argument was that because the substance alone was harmless, legal, and obtainable without government participation, the conduct did not reach the level necessary to violate the "fundamental fairness shocking to the universal sense of justice" that the Fifth Amendment of the Due Process Clause mandates.[134]

Several years later in *Hampton*,[135] a defendant was convicted for selling heroin to a government agent, supplied to him by a government informant.[136] As in *Russell*, the Court in *Hampton* determined the entrapment defense failed because of the defendant's predisposition. The defendant alleged in his defense that the supplying of contraband by the government violated his due process rights, amounting to OGC.[137] The majority held that when a defendant is predisposed to commit a crime both the entrapment and due process defenses will fail.[138] The majority opinion suggests that when a defendant is predisposed to commit a crime, such that the entrapment defense is not available to him, he is left no remedy to combat egregious acts by the government. Justice Rehnquist, joined in the majority opinion by Chief Justice Burger and Justice White, wrote, "the remedy of the criminal defendant with respect to the acts of Government agents . . . lies solely in the defense of entrapment."[139] However, "the issue goes beyond the conviction of the individual defendant. At stake is the integrity of the process."[140] It is ironic that Justice Rehnquist made this assertion, considering his famous declaration in *Russell*.[141]

While the majority did not find for the defendant, the case is unique in that six justices recognized the existence and the availability of a defense

132. *Russell*, 411 U.S. at 431.

133. The Court split 5-4 in favor of the government.

134. *Russell*, 411 U.S. at 432.

135. The Court split 5-3. Hampton v. United States, 425 U.S. 484 (1976).

136. *Id.*

137. *Id.*

138. *Id.* at 488–89.

139. *Id.* at 490.

140. David L. Lewis, 4 CRIMINAL DEFENSE TECHNIQUES § 86.04 (2018).

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

based solely on government conduct.[142] Justice Powell in his concurrence, joined by Justice Blackmun, expressed disagreement with the majority opinion and concluded that a rule should not be imposed precluding the possibility of a bar to prosecution based on due process principles, where there is egregious law enforcement activity.[143] In his dissent, Justice Brennan expressed his agreement, concluding "that *Russell* does not foreclose imposition of a bar to conviction based upon our supervisory power or even due process principles where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be 'predisposed.'"[144] Despite the outcome, *Hampton* recognized that the OGC defense should be made available when the conduct of government agents is so outrageous that it offends due process, even though the majority found that the facts presented here did not meet this standard.[145] The Supreme Court explicitly recognized the value of the OGC defense and left open the door to apply the defense when the facts presented fit.

A. Reasons Why the Supreme Court has Not Yet Granted the OGC Defense

The Supreme Court has not yet granted the OGC defense because the Court believes it has not been presented with facts that warrant granting of the motion. Furthermore, there is little case law presenting an OGC motion that has made its way to the Supreme Court. In the rare instances it has, the justices of the Court have collectively rejected the OGC defense. This may be in part due to the phenomenom of the law as a distinct cultural system[146] paired with the absence of structure of the OGC defense. The combination thereof induces paralysis, making it harder for judges and justices to decide what government behavior or actions are over the top.[147]

142. *See generally* MARCUS, *supra* note 120. The three dissenting justices agreed with Justice Powell: a due process defense was available where the government's conduct was particularly egregious. *Hampton*, 425 U.S. at 497. These justices agreed that a defendant's predisposition "cannot possibly justify the action of government officials in purposefully creating the crime." *Id.* at 498–99.

143. *Hampton*, 425 U.S. at 484.

144. *Id.* at 497.

145. *See generally id.* at 484.

146. *See infra* note 148.

147. There is no consensus regarding what constitutes "outrageous," what is reasonable, and which actions are not tolerated by the government.

The anthropological theory of the law of the courts as a distinct cultural system[148] suggests that "if the law that the courts make and apply is a distinct cultural system . . . then sensitivity to trends in the law and the ability to correctly assess the relative weight of law's many elements are indispensable [to] making persuasive legal arguments."[149] In other words, the choice for justices to accept the defense is not really a choice at all. While justices take the bench as unique individuals with their own interpretations and perspectives, there is still some degree of "objectivity in the law (i.e., that a justice cannot resolve a case any way he or she wishes but is severely constrained by the legal culture within which he or she is operating)."[150] That is to say, while of course it "is impossible to eliminate a [justice's] unique personality, character, life experience, and cultural background from the [justice's] legal decision making,"[151] a justice's decision to consider granting an OGC defense may be stifled, despite a belief that it should be conceivable.

The idea of the law as a distinct cultural system stems from prominent scholar Karl Llewellyn, who "played an important role in refuting legal formalism."[152] He posited that the law has repetitive arguments and methods of thinking.[153] And, "lawyers internalize the contents of the law and the modes of thinking and arguments prevalent in the law and therefore these contents and modes not only pervasively structure the way lawyers function in the law but also severely constrain the options available to them."[154] Justice Rehnquist in *Russell* notes the possibility that someday the OGC defense might be accepted. However, the current trend suggests that this possibility is unlikely to come to fruition. While the opportunity remains for justices to make the decision to acquit or overturn a conviction based on the defense, Llewellyn's theory is that "lawyers that operate within the same legal system will act in a similar fashion, and there will be no far-reaching variety in their conduct when they handle similar legal problems."[155]

Perhaps the Court has not applied the OGC defense because change is difficult. It may be even more difficult when the choice is not left open to

148. The theory generally expresses the notion that there is an objective way to rule on the law and that precedent governs. Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 855 (2011).

149. *Id.* at 856–57.

150. *Id*. at 860.

151. *Id*.

152. *Id*. at 859.

153. Mautner, *supra* note 148, at 859.

154. *Id.*

155. *Id.*

juries, but is instead delegated to judges[156] who may fall victim to this cultural phenomenon. The insulated cultural system that this theory posits makes it easier for justices to follow suit in denying a raised OGC motion, asserting that the facts presented do not meet the standard. After all, following precedent often protects the legitimacy of the law, but "precedent alone cannot guide the way—even for those justices who steer by precedent as their polestar because precedent in this field is so regularly contradictory or perverse."[157]

Apart from precedent, justices may fear public scrutiny and ridicule, which serve as deterrents to accepting a defense that has yet to be resolutely accepted and applied. The integrity of the Court is something to which Chief Justice Roberts has devoted a substantial amount of time because it matters to him, and others, what people think.[158] Llewellyn's theory supplements this proposition and recognizes that "other people active in the [justices'] professional culture constantly review judges' opinions: other [justices], lawyers, law professors and law students. Readers of court opinions react positively to opinions that abide by the norms prevalent among lawyers, and react negatively to opinions that deviate from what is customary."[159] So while courts may have greater flexibility to grant an OGC defense and believe it should remain a possibility, perhaps, the fear of public criticism has surmounted the bravery required to make change for the last forty-five years.[160]

B. Critics Assert the Defense has Not Been Accepted

Alternatively, some assert that the Supreme Court's acceptance of the defense is merely theoretical. These critics contend that because the Court has not found facts that meet the OGC standard, justices do not accept the defense nor believe in its longevity.[161] These critics are in the "never say never" camp.[162] This may be in part due to the belief that there is no need for the OGC defense because other doctrines, such as entrapment or

156. Due to the procedural nature of the defense.

157. AMAR 1997, *supra* note 58, at 149.

158. Joan Biskupic, *In Partisan Times, Chief Justice Worries About the Court's Image*, CNN POL. (Oct. 3, 2017), https://www.cnn.com/2017/10/03/politics/john-roberts-image-gerrymandering-redistricting/index.html.

159. Mautner, *supra* note 148, at 859.

160. Since the defense was raised as a possibility in *Russell*. *See supra* note 118.

161. United States v. Tucker, 28 F.3d 1420, 1424–25 (6th Cir. 1994) (discussions of the defense are no more than "dicta," given that relief is never granted).

162. Marc D. Esterow, *Lead Us Not Into Temptation: Stash House Stings And The Outrageous Government Conduct Defense*, 8 DREXEL L. REV. ONLINE 1, 17 (2015).

duress,[163] address the problem of defending the personal interests of defendants.[164] Or, perhaps, because of their belief that it is the job of the legislature and not the Court to establish the scope of legitimate government action.[165]

However, as highlighted throughout this Note, the entrapment defense used by the majority of courts does not entirely address the problem of defending the personal interests of defendants.[166] It is important that the Supreme Court, rather than Congress, accept and recognize the OGC defense because of the extensive ways in which law enforcement could engage in conduct that no rational actor might have considered possible. Otherwise, Congress would need to posit every idiotic, harebrained, cruel or unusual, idea or concept that agents of the government (police and authorities) could engage in.[167] It is the same reason why the courts, and not Congress, determine what is "cruel and unusual"[168] under the Eighth Amendment. This

163. However, there is specific need for the OGC defense in the majority of courts using the subjective entrapment test, in cases where a defendant is predisposed to commit a crime, yet the government has acted egregiously.

164. *See e.g.,* United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993) (declining to bury the defense but calling it "moribund" and refusing to apply it in the present scenario); *see also* Bank of Nova Scotia v. United States, 487 U.S. 250, 254–56 (1988); United States v. Mechanik, 475 U.S. 66, 72–73 (1986) (where the Supreme Court reminds us that reversing convictions should be saved for situations when the irresponsible acts by government agents have caused prejudice to a recognized legal right of a defendant and not for situations when the government has just acted irresponsibly).

165. *Cf.* Rochin v. People of California, 342 U.S. 165, 169–70 (1952) (Frankfurter, J.) ("Courts have an interest in preventing their processes from being used to legitimize and perpetuate offensive executive conduct, in assuring public confidence in the administration of law."). Hence, those who push for the OGC defense are "not so much usurpers of legislative authority as guardians of the judicial process." United States v. Dyke, 718 F.3d 1282, 1286 (10th Cir. 2013).

166. *See* United States v. Russell, 411 U.S. 423, 443 (1973) ("a test that makes the entrapment defense depend on whether the defendant had the requisite predisposition permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor–all of which would be inadmissible in any other context–in order to prove the defendant's predisposition.").

167. *See also Sherman*, 356 U.S. at 381 ("But to look to a statute for guidance in the application of a policy not remotely within the contemplation of Congress at the time of its enactment is to distort analysis. It is to run the risk, furthermore, that the court will shirk the responsibility that is necessarily in its keeping, if Congress is truly silent, to accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals. The reasons that actually underlie the defense of entrapment can too easily be lost sight of in the pursuit of a wholly fictitious congressional intent.").

168. *See* Furman v. Georgia, 408 U.S. 238, 281 (1972) (outlining the four principles the Court used to determine whether a particular punishment is cruel and unusual).

holds true, at least in the first instance, because Congress has the power to pass laws to override the Court's ruling if it wishes.[169]

The Due Process Clause already outlines a general framework within which to understand permissible conduct by condemning governmental deprivations of "life, liberty, or property, without due process of law."[170] The OGC defense delves deeper to target the specific framework that the Due Process Clause generally attempts to address. Although there are no clear guidelines as to what constitutes OGC, the Court is fully empowered to interpret the Constitution. And it is the Court's job to determine when the government has exceeded its power and entered this realm.

C. Reforming Procedural Barriers to the OGC Defense

Reforming the procedural barriers often applicable to the OGC defense might allow for it to remain available as a meaningful option for defendants and their attorneys. Currently, the OGC defense is usually decided in a pre-trial motion and is a bar to prosecution, resulting in the reversal or dismissal of an indictment.[171] Judges can decide the raised motion before hearing all the facts and evidence, but it is rare that they are unable to do so, such that the consideration of the defense is left to trial. But what if the OGC defense could first be presented at trial? Modifying the way in which the OGC defense can be raised, procedurally, may allow for the availability of reduced sanctions, including diminished risks posed to defendants rasising the OGC defense, especially pretrial.[172] Making this procedural change, and therefore, lowering the stakes, might allow for increased acceptance of the defense.

D. Remedies: What Remedies are Available to the Court Upon a Finding of OGC and the Granting of the OGC Defense Motion?

A successful OGC claim, would not have to be an all or nothing decision—a judge could consider a diminution in charges or the sentence,

169. *See* Lilly M. Ledbetter v. The Good-Year Tire & Rubber Company, Inc., 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting) ("The Legislature may act to correct this."); *But see Can Congress over-ride a Supreme Court decision*, THE ECONOMIST (July 28, 2015), https://www.economist.com/blogs/democracyinamerica/2015/07/rights-and-legislation (if we view OGC as protected by the Constitution, then Congress will not be permitted to make corrections because "Congress is not entitled to scale back on rights the Supreme Court says are protected by the constitution.").

170. U.S. CONST. amend. V.

171. Kenneth M. Miller, *Outrageous Government Conduct that Shocks the Conscience*, CAL. ATT'YS FOR CRIM. JUST. 81, 83 no. 4 (1998).

172. *See supra* note 41.

rather than the narrow alternative of barring prosecution altogether.[173] In addition to expanding the possibilities for outcomes on a successful OGC claim, this procedural change would allow jurors, along with judges, to weigh into the decision-making process for a more objective and potentially fair outcome. Consider the words of a Pennsylvania Anti-Federalist in a 1787 essay:

> If a federal constable [searching] for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by jury would be our safest resource, heavy damage would at once punish the offender and deter others from committing the same; but what satisfaction can we expect from a lordly [judge] always ready to protect the officer. [174]

The same idea applies to some degree today. Anticipating the notion of the law as a distinct cultural system, we are aware of the factors that some judges consider in making decisions. These factors extend beyond just the facts of the case at hand to matters like precedent and the court's own image. Allowing jurors the opportunity to make this finding[175] and judges to choose the consequence—a reversal of conviction or diminution of charges—would balance the process and protect defendants from cultural or other unpredictable phenomena. After all, it is crucial that these considerations are made as "we continue to believe that the law will prove itself adequate to the task of preventing the government from going too far. In the war on

173. This concept is like sentencing entrapment, where a defendant's sentence may be reduced, if he was predisposed to commit a lesser offense, but with the government's inducement, he engaged in a crime requiring harsher punishment. *See generally* United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994).

174. AMAR 1997, *supra* note 58, at 14.

175. John De Lorean was an internationally renowned millionaire automaker, who was arrested for drug trafficking cocaine, because of a successful FBI sting operation. Kevin Hackett, *Entrapment, De Lorean and the Undercover Operation: A Constitutional Connection*, 18 J. MARSHALL L. REV. 365, 366 (1985). At his trial, both the entrapment and due process defenses were raised, and De Lorean was acquitted by a jury on all charges. *Id.* There is no opinion on this case, which suggests two things: (1) in the rare circumstance where a motion to dismiss based on OGC is not decided by the judge pretrial, the defense can be raised at trial and may be left to the discretion of the jury. Perhaps, a finding of "overzealous law enforcement practice which portend an erosion of individual liberty and the emergence of an Orwellian police state," as was found here, is due to the jury's rather than the judges' consideration of the due process violation allegation. *Id.* at 367. And, (2) in cases where the defense is granted, there may be no opinion on which courts can rely, such that the paper trail of successful claims is lost.

crime, as in conventional warfare, some tactics simply cannot be tolerated by a civilized society."[176]

IV. The Supreme Court's Acceptance of the OGC Defense is Consistent with the Original Intent of the Framers of the Constitution

It may well have been the Framers' intent in writing the Constitution and in looking to the underpinnings of the Due Process Clause that an OGC defense stand muster. The Framers were fifty-five men appointed as delegates of the original thirteen colonies and sent by their respective state legislatures to the Constitutional Convention in Philadelphia in 1787 to amend the Articles of Confederation.[177] Instead, they drafted the Constitution, which replaced the Articles.[178] A few years later, the "Most Significant Framer of the New Nation,"[179] James Madison, wrote The Bill of Rights comprised of amendments to the Constitution. States had insisted on the addition of the Amendments and had ratified the Constitution[180] on the promise that these Amendments would be subsequently added.[181]

A. A Historical Constitutional Analysis: We Should Accept an OGC Defense

Why is the consideration of the Amendments important? It shows that outrageous government conduct was a matter of such concern to the states during the constitutional period that the Framers agreed to address it in the body of the Constitution. After all, in drafting the Constitution it was the intent of the Framers to prevent the establishment of the same kind of tyranny from which they were escaping, namely, the British Crown.[182] In drafting

176. United States v. Santana, 6 F.3d 1, 12 (1st Cir. 1993).

177. *Introduction to the Framers of the Constitution*, CENTER FOR CIVIC EDUCATION, http://www.civiced.org/introduction-to-the-framers-of-the-constitution?mid=1160.

178. *Id.*

179. *James Madison-Framer of a New Nation*, AWESOME STORIES (Oct. 7, 2013), https://www.awesomestories.com/asset/view/James-Madison-Framer-of-a-New-Nation//1.

180. The Amendments were approved by Congress in 1791 and remain intact today. *Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights In Conjunction with the Universal Periodic Review*, U.S DEPARTMENT OF STATE, https://www.state.gov/documents/organization/146379.pdf.

181. KATHLEEN SULLIVAN AND NOAH FELDMAN, CONSTITUTIONAL LAW (19th ed. 2016).

182. "The concept of 'liberty' was recognized as encompassing not only freedom from physical restraint, but also freedom from undue government intrusion into such fundamental personal decisions as whether to bear or beget a child or how to raise and educate one's children."

the Constitution, and the later Amendments, the Framers' aim was to ensure there were limited restraints on individual freedom[183] and limited federal government powers.[184] While they may not have used the words "OGC," the very actions that concerned them are analogous to the actions that comprise OGC today.

1. The Framer's Intent in Writing the Amendments

The Amendments were a direct reaffirmation of each citizen's inalienable rights. The Amendments were made to protect against what the Framers deemed to be outrageous acts by the federal government. For example, the Third Amendment, "no soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war but in a manner prescribed by law,"[185] was likely adopted because the Framers believed that the forcible quartering of troops in the homes of British individuals was outrageous. Similarly, the Fourth Amendment, "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,"[186] was likely adopted to protect against governmental actors' abuse of private space. "The Framers feared that governmental actors would abuse their offices . . . that searches (other than routine customs inspections) required individualized cause or suspicion . . . [and] searches of structures required a warrant."[187] The Fourth Amendment was motivated by British commanders searching entire neighborhoods and entering homes at will.[188]

> In a 1760s English *cause celebre*, Crown henchmen lacking proper legal authorization invaded the home of John Wilkes, rummaged through his papers, and grabbed his person. Wilkes was a leading opposition politician, and the Crown was trying to find evidence to charge him with the crime of having anonymously authored an antigovernment essay . . . No

Geoffrey Stone, *The Framers' Constitution*, DEMOCRACY, https://democracyjournal.org/magazine/21/the-framers-constitution/ (last visited Oct. 2, 2018).

183. Their proposed structure is diametrically opposed to the system they sought freedom from.

184. Stone, *supra* note 182.

185. U.S. CONST. amend. III.

186. U.S. CONST. amend. IV.

187. Thomas K. Clancy, *The Framer's Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 980, 984 & n.24 (2011).

188. *The History Behind the 4th Amendment,* SWINDLE L. GROUP, P.C. (Mar. 21, 2013), http://www.swindlelaw.com/2013/03/the-history-behind-the-4th-amendment/.

> incriminating items were found in the search, and Wilkes successfully sued the henchmen in tort, winning large civil damages designed to deter future government misconduct.[189]

The court sensed here that the actions of government agents were outrageous and they sought remedy for the victims. "The Founders obviously ratified and drafted the Fourth Amendment with the Wilkes litigation in mind."[190] The focus was on conduct by government officials that was deemed outrageous. They recognized that it was not proper for the government to intrude on the private space of another. When the government violated this principle and obtained information that would have otherwise been unavailable had they not, the Court recognized, like in *Kyllo v. United States*[191] that a reversal of conviction was appropriate. Likewise, the Framers likely recognized the importance of drafting the Sixth Amendment and giving protections to the accused when considering the breadth of potential OGC that individuals might face.

"Consider next the nice-sounding idea that government should not profit from its own wrongdoing."[192] That is perhaps one factor that the Framers considered and were motivated by in writing the Amendments, specifically, regarding their general outrage against actions taken by the British in various contexts. Conceivably, in writing the Amendments, the Framers were most concerned with OGC. As such, the Framers wrote the Due Process Clause of the Fifth Amendment to be all encompassing,[193] thereby embracing all unfathomable contexts to which OGC might apply.

2. The OGC Defense Is a Constituent Part of the Fifth Amendment

The Due Process Clause of the Fifth Amendment allows us the opportunity to "self-consciously consult principles embodied in other parts of the Constitution to flesh out the concrete meaning of *constitutional*

189. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY THE CONSTITUTION 177 (1st ed. 2015).

190. *Id.*

191. Kyllo v. United States, 533 U.S. 27 (2001) (government used thermal imaging to find the defendant growing marijuana inside his home. This was information that otherwise would've been unavailable, had the government not overstepped their bounds.).

192. AMAR 1997, *supra* note 58, at 26.

193. The Due Process Clauses promises "an assurance that all levels of American government must operate within the law ("legality") and provide fair procedures." Peter Strauss, *Due Process*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process (last visited Apr. 1, 2018).

reasonableness."[194] It centers on the proposition that no person "shall be deprived of life, liberty or property, without due process of law."[195] Like the Third, Fourth, and Sixth Amendments, the Due Process Clause of the Fifth Amendment was motivated by the Framers' concerns about outrageous acts of the Crown against British subjects, which resulted in indictments or convictions. "The use of such open-ended provisions would indicate that the framers did not want the Constitution to become a straitjacket on all events for all times."[196] The Framers meant to address this broad proposition of not accepting outrageous conduct, with the idea that while change would come, this fundamental theory should not. After all, there was no need to write a general clause, similar to the Due Process Clause, if they believed it covered all of the specifics. There was no way for the Framers to predict the future and prevent against all harm. However, the Framers knew that the foundations of the Due Process Clause would serve as an overarching principle that could address nonspecific outrageousness long beyond their lifetimes.[197]

Thus, there is an original intent basis for SCOTUS to adopt the OGC defense. The fundamental principles inherent in the Due Process Clause of the Constitution and the basis for its articulation are the same very principles underpinning an OGC defense. As noted, the Framers focused on and fundamentally rejected pernicious acts of the Sovereign when implementing the various Constitutional provisions and Amendments, and in deriving the Due Process Clause. The OGC defense is the heir to the Framers' rejection of the actions taken by the Crown against British and American citizens and, as such, an intrinsic part of the Fifth Amendment.

Adopting the OGC defense would not be a drastic change but rather would be a minor one for the Court to accomplish. There is no need for a reversal of stare decisis. Instead, the Court need only further develop what it has already been set forth. This is exactly what the Framers would have wanted and is something that those justices who focus on originalism (the "originalists") might find compelling, as "[j]udges who value long-run

194. Strauss*, supra* note 193, at 3.

195. U.S. CONST. amend. V.

196. Irving R. Kaufman, *What Did the Founding Fathers Intend*? N.Y. TIMES (Feb. 23, 1986), http://www.nytimes.com/1986/02/23/magazine/what-did-the-founding-fathers-intend.html?page wanted=all.

197. Traditional notions of substantive due process rely on this historical framework and have been embraced.

stability and sustainability should prefer institutions that connect the People to our Constitution, rather than ones that alienate Us from it."[198]

It is not far reaching to assert that the originalists on the Supreme Court, Justices Thomas, Alito, Gorsuch, and perhaps Chief Justice Roberts, would demand some historical evidence that the Framers would have nullified a conviction based on a finding that particular government conduct was egregious. Such judicial recourse is rooted in what Madison referred to in *Federalist Paper* No. 51, as the "necessity of auxiliary precautions" or "internal or external controls" on government, that "oblige [the government] to control itself."[199]

> It may be a reflection on human nature, that such devices [checks and balances] should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[200]

Hamilton, too, in *Federalist Paper* No. 23, considered the need for government institutions to ensure and protect constitutional safeguards and check abuse, in case we have "[a] government, the constitution of which renders it unfit to be trusted with all the powers which a free people *ought to delegate to any government*, [which thus] would be an unsafe and improper depository of the NATIONAL INTERESTS."[201] Indeed, as John Philip Reid, the esteemed legal historian and professor, has noted, "[r]ights we tend to think of today as criminal procedure safeguards—such as those against self-incrimination and unreasonable searches and seizures—mostly derived from particular episodes in eighteenth century England in which the

198. AMAR 1997, *supra* note 58, at 30–31.

199. THE FEDERALIST NO. 51 (James Madison).

200. *Id.*

201. *Id.*

government had targeted political or religious dissidents."[202] Professor Reid continues:

> Constitutional protection of the right to a jury trial was partly responsive to the British practice of using vice-admiralty courts, which operated without juries, to prosecute colonial smugglers, whom local jurors were often reluctant to convict. The right to freedom of the press was partly responsive to the 1735 episode in which the royal governor of New York had brought a seditious libel prosecution to suppress criticism of his administration by colonial publisher John Peter Zenger.[203]

Thus, the OGC defense is a natural and intrinsic derivation of the Due Process clause of the Fifth Amendment, a constitutional precaution or control that engenders public trust in the Constitution. It is also a check on governmental abuse and a defense against the outrageous targeting of citizens, even those predisposed to criminality by agents of the government.

Conclusion

For years, courts have swept apparent due process violations under the rug. "These cases demonstrate the government's willingness to infringe upon values of equality, fairness, and liberty . . . and to employ law enforcement tactics that cross the line established by the Due Process Clause."[204] This is in large part due to the lack of clarity and definitiveness of the criteria that courts use to consider a raised OGC defense. As discussed, the criteria to establish grounds for the acceptance of an OGC defense is not outlined in most jurisdictions and its applicability is determined on a case-by-case basis such that, theoretically, it could be all encompassing. However, while the lack of structure may appear to expand a court's breadth as to what could constitute a due process violation, it has had the reverse effect. The absence of uniform guidelines has induced paralysis and has led to the subsequent dismissal of many cases that have come before courts nationwide. Just as the law as a distinct cultural system theory posits, judges and the courts err on the side of institutional conservatism, shying away from the bravery required to overcome paralysis

202. MICHAEL KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 580 (2016).

203. *Id.*

204. United States v. Black, 733 F.3d 294, 313 (9th Cir. 2013) (Noonan, J., dissenting).

and grant OGC relief.[205]—a catch-22. The Supreme Court, and several lower courts, including the Court of Appeals of the First Circuit, have expressly acknowledged the viability of an OGC defense and have asserted that the defense shall be maintained. However, few courts have granted relief for those defendants who assert the defense "squarely upon the doctrine of outrageous government conduct."[206] The "banner of outrageous misconduct is often raised but seldom saluted."[207] The Supreme Court is no beacon, and the Justices presented with an OGC defense have rejected the defense in each case that has come before them, despite their collective assertion that the defense remains a constitutional option. Eliminating the defense would give the government a sense of entitlement and authority to act with impunity in ways that run counter to the fundamental principles of fairness ingrained in the Constitution. This would especially be true in the areas where defendants are not protected by other statutes or defenses, such as in states within the Sixth and Seventh Circuits that do not recognize OGC and employ the subjective entrapment test. The effectiveness of the OGC defense depends on standardization of the criteria for its application, uniformity of procedures for raising it, and the expansion of remedies upon granting the defense. These will ensure fairness to the accused, reduce institutional risks to courts, and establish appropriate limits for law enforcement behavior, consistent with the intent of the Framers as articulated in the Due Process clause of the Fifth Amendment.

Epilogue

Thinking to the Future: An Increasing Need for Judicial Protection

If the originalist interpretation is not in and of itself convincing, think to the future. As the array of freedoms that individuals might experience or exercise have expanded with technological progress, so too have the government's powers to regulate those freedoms. This is true of the telegraph, telephone, air travel, and the Internet where widespread adoption by civilians has led to increased authority by federal government agencies. And, this will almost certainly be true of tomorrow's technological developments. With government agencies' increasingly expansive

205. *See supra* note 147.

206. United States v. Bouchard, 886 F. Supp. 111, 115 (D. Me. 1995).

207. United States v. Santana, 6 F.3d 1, 4 (1st. Cir. 1993).

mechanisms of enforcement, comes the increased ability to abuse that enforcement.

Consider the following example of using large scale data analysis to predict and preempt crime or predictive policing. No individual action involved in predictive policing necessarily promotes scrutiny under non-OGC claims. In fact, the Supreme Court has already decided that the use of predictive data is permissible as evidence, so long as it is not the sole justification for prosecution.[208] Taken to its extreme, however, seemingly permissible actions can, in the aggregate, reach an impermissible standard without once raising non-OGC due process alarms. For example, consider a scenario in which the government were to preemptively legally collect evidence and DNA from all citizens to help facilitate investigations.[209] Perhaps, law enforcement agencies collected garbage[210] outside of apartments and houses and combined that information with other data points to establish a database containing expansive personal information about each individual. If this information aided the government in validating convictions, what then? Just as the Fourth Amendment would not apply due to the public nature of the garbage, the entrapment defense would also be futile if the individual were predisposed to the crime for which he was charged. The danger is not in the creation of the database, per se, but rather, how it is used. As this admittedly extreme case demonstrates, there is not only a basis for, but there a need for additional protections as "a sort of hedge against a bleak totalitarian future."[211] As such, the OGC defense fulfills the role of protecting against future government abuse where other claims, such as entrapment, may fail.

208. John Villasenor, *Big Data and its threat to the Fourth Amendment*, BIG DATA INNOVATION MAG. (June 24, 2014), http://bigdata-madesimple.com/big-data-and-its-threat-to-the-fourth-amendment/.

209. E.g., MINORITY REPORT (Amblin Entertainment 2002) (where criminals are apprehended before committing crimes based on foreknowledge acquired by psychics).

210. *See generally* California v. Greenwood, 486 U.S 35 (1988) (holding there is no reasonable expectation of privacy in disposed goods on public streets).

211. United States v. Dyke, 718 F.3d 1282, 1287 (10th Cir. 2013).