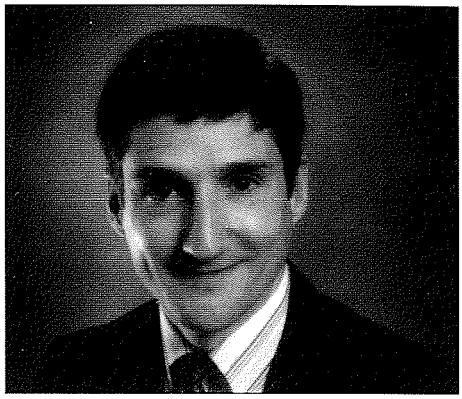
Outrageous Government Conduct that Shocks the Conscience

by Kenneth M. Miller



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A claim of outrageous government conduct asserts that the government obtained incriminating evidence in violation of a defendant's right to substantive due process.[1] Unlike other claimed constitutional violations, a successful claim of outrageous government conduct results in dismissal of the indictment, not just suppression of evidence.[2] The claim may be based upon any combination of factors demonstrating that the means by which the government built its case against a defendant "shocks the conscience."

An outrageous government conduct claim is usually presented as a motion to dismiss.[3] In fact, failure to raise the defense prior to trial may waive it.[4] However, when the motion is based upon evidence that will also be introduced at trial, the court may defer ruling on the motion until trial.[5]

The claim is a question of law.[6] Evaluation of the claim turns on the conduct of the government and its agents; not the defendant.[7]

Legal Origin of Outrageous Government Conduct Claim

In dissent from *Olmstead v. United States*, 277 U.S. 438, 485 (1928), Justice Brandeis stated:

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

Later, in *United States v. Russell*, 411 U.S. 423, 431–32 (1973), the Court recognized the possibility that police conduct could be so "outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." As an example, the Court cited *Rochin v. California*, 342 U.S. 165 (1972).[8] The *Rochin* Court noted that the Due Process Clause:

> inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of jus-

[1] In addition to dismissing an indictment for government misconduct that shocks the conscience and violates due process, district courts may also dismiss indictments under their inherent supervisory authority where "the government's conduct . . . caused substantial prejudice to the defendant and [was] flagrant in its disregard for the limits of appropriate professional conduct." *United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993) (citing *United States v. Barrera–Moreno*, 951 F.2d 1089, 1093 (9th Cir. 1991)).

[2] *United States v. Citro*, 842 F.2d 1149, 1152–53 (9th Cir. 1988). Accordingly, the claim of outrageous government conduct is sometimes referred to as the "Due Process Defense." *See, e.g., United States v. Bogart*, 783 F.2d 1428, 1435 (9th Cir. 1986). However, the claim is not actually an affirmative defense. *United States v. Montilla*, 870 F.2d 549, 551 n.1 (9th Cir. 1989), **modified** 907 F.2d 115 (9th Cir. 1990).

[3] *United States v. Sotelo–Murillo*, 887 F.2d 176, 182 (9th Cir. 1989).

[4] Fed. R. Crim. P. 12(b).

[5] *Montilla*, 870 F.2d at 551.

[6] *Sotelo–Murillo*, 887 F.2d at 182.

[7] *United States v. Luttrell*, 889 F.2d 806, 811 (9th Cir. 1989), **vacated in part**, 923 F.2d 764 (9th Cir. 1991); *United States v. Gardner*, 658 F.Supp. 1573, 1577 (W.D.Pa. 1987). *See also United States v. Green*, 454 F.2d 783 (9th Cir. 1971) (defendants' convictions reversed for outrageous government conduct even though they had previously been convicted of same crime). The government may be held responsible for the actions of its informants. *Sherman v. United States*, 356 U.S. 369, 373–75 (1958); *Gardner*, 658 F. Supp. at 1574.

[8] *Russell*, 411 U.S. at 432.

> tice of English–speaking peoples even toward those charged with the most heinous offenses.[9]

The Court observed "[i]t has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."[10] For example, a coerced confession is inadmissible, not just because it may be unreliable, but because "coerced confessions offend the community's sense of fair play and decency."[11]

Outrageous Government Conduct Is Misconduct That "Shocks the Conscience"

In *Rochin*, the Court held that substantive due process is violated when government conduct "offend[s] those canons of decency and fairness which express the notions of justice of English–speaking peoples even toward those charged with the most heinous offenses."[12] "Due Process of Law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'"[13] In other words, conduct that "shocks the conscience."[14]

Then, in *United States v. Russell*, 411 U.S. 423, 431–32 (1973), the Court stated that due process would only be violated by government conduct "shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment."[15] Finally, in *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976), Justice Powell stated that due process would only be violated by government conduct that reached a "demonstrable level of outrageousness."[16]

The precise limits that the Due Process Clause places on the government are indefinable.[17] Courts give meaning to these general principles with terms like "outrageous" and "shocking,"[18] and by focusing on the "totality of the circumstances" of each case.[19]

There Is No Limit to the Types of Egregious Misconduct That Shock the Conscience

The Ninth Circuit stated in *United States v. Bogart*, 783 F.2d 1428 (9th Cir. 1986), that cases finding outrageous government conduct can be divided into two groups. First, cases in which "the police have been brutal, employing physical or psychological coercion against the defendant." Second, cases where "government agents engineer and direct the criminal enterprise from start to finish."[20]

Indeed, there are numerous examples in which police coercion has violated due process. In *Rochin*, police officers broke into the defendant's bedroom, attempted to pull drug capsules from his throat, and finally forcibly pumped his stomach.[21] Similarly, the Ninth Circuit found a due process violation where border patrol agents forcibly removed heroin tubes from the rectum of suspected smuggler.[22] Finally, allegations of unprovoked beatings by police,[23] and a prison guard's knowing failure to protect an inmate from beatings by another inmate,[24] have been held to state a claim for violation of substantive due process.

There are even more examples of cases in which excessive government involvement in a criminal enterprise has been held to violate due process.[25] For example, in *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the government's extensive involvement in the production and operation of a drug laboratory was sufficiently outrageous to warrant dismissal of an indictment.

However, there are also cases finding outrageous government conduct in situations involving neither physical coercion, nor excessive government involvement in the criminal enterprise. In *United States v. Marshank*, 777 F.Supp. 1507, 1523–24 (N.D. Cal. 1991), the District Court found that the government's collaboration with the defendant's attorney to build a case against him was "so outrageous that it shocked the universal sense of justice" and warranted dismissing the indictment.[26] In *Cooper v. Dupnik*, 963 F.2d 1220, 1237 (9th Cir. 1992),[27] the Ninth Cir-

[9] *Rochin*, 342 U.S. at 169 (quoting *Malinski v. New York*, 324 US. 401 (1945)).
[10] *Id.* at 172.
[11] *Id.* at 173.
[12] *Rochin*, 342 U.S. at 169.
[13] *Id.* at 173.
[14] *Id.* at 172.
[15] 411 U.S. at 432.
[16] 425 U.S. at 495 n.7.
[17] *Rochin*, 342 U.S. at 173.
[18] *See, e.g., Bogart*, 783 F.2d at 1435; *Marshank*, 777 F.Supp. at 1523
[19] *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981); *Marshank*, 777 F.Supp. at 1523.
[20] *Bogart*, 783 F.2d at 1434–38.
[21] *Rochin*, 342 U.S. at 166. The *Russell* Court cited *Rochin* as an example of government conduct that would so "shock the conscience" that it would violate due process. *Russell*, 411 U.S. at 432.
[22] *Huguez v. United States*, 406 F.2d 366, 381 (9th Cir. 1968).
[23] *Rutherford v. Berkeley*, 780 F.2d 1444, 1446 (9th Cir. 1986).
[24] *Curtis v. Everette*, 489 F.2d 516, 517–18 (3rd Cir. 1973).
[25] *See United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984) (agent's conceiving and contriving crime was outrageous); *United States v. West*, 511 F.2d 1083 (3rd Cir. 1975) (The government's extensive involvement in narcotics operation, including supplying and purchasing, constituted a due process violation warranting dismissal); *United States v. Gardner*, 658 F. Supp. 1573, 1575–76 (W.D. Penn. 1987) (Due process was violated where an informant "badgered, cajoled, induced, inveigled" and used his friendship with defendant to induce defendant into obtaining drugs for informant's personal use); *United States v. Batres–Santolino*, 521 F.Supp. 744 (N.D. Cal. 1981) (Informant's prompting of defendants to create a criminal organization was outrageous).
[26] In *Marshank*, Judge Panel also found that dismissal was warranted pursuant to its supervisory powers and because the government's conduct violated the defendant's Sixth Amendment right to counsel.
[27] Courts determining whether a due process violation supports a civil action for damages under 42 U.S.C. § 1983 apply the "shocks the conscience" test outlined in *Rochin*. *See, e.g., Cooper v. Dupnik*, 963 F.2d 1220, 1249–50 (9th Cir. 1992). Accordingly, cases finding liability under section 1983, and cases finding allegations sufficient . . .

cuit, sitting *en banc*, found that the intentional and systematic violation of *Miranda* "shocked the conscience" and violated the defendant's right to substantive due process.[28] In *United States v. Bernal–Obeso*, 989 F.2d 331, 337 (9th Cir. 1993), the Ninth Circuit suggested that dismissal of the indictment for outrageous government conduct might be appropriate where the government engaged in "egregious wrongdoing" in concealing impeachment information about its informant. Indeed, Justice Frankfurter declared in the first outrageous government conduct case that the limits imposed on police conduct by the Due Process Clause cannot be "defin[ed], and thereby confin[ed]."[29]

Misconduct May Be Based Upon Any Combination of Factors

Because the precise contours of the "shocks the conscience" standard are indefinable,[30] it is not surprising that a combination of circumstances may demonstrate a due process violation.[31] For example, in *Green v. United States*, 454 F.2d 783 (9th Cir. 1971), an undercover treasury agent acting as a gangster and a member of the "syndicate" purchased bootleg whiskey from two defendants. The defendants were arrested and convicted, but never figured out that the agent worked for law enforcement.[32] So, when they were released from jail, they again contacted the agent and expressed their desire to get back in the bootlegging business.[33] Over the next two and a half years, the "gangster" set the hapless defendants up in business by offering them financial assistance, initiating numerous telephone calls with the defendants, providing 2000 pounds of sugar for the defendants' still, and being their only customer.[34] Finally, the agent:

> applied pressure to prod [defendants] into production of bootleg alcohol. The government concedes that [the agent] made the statement, "the boss is on my back." And we believe that in the context of criminal "syndicate" operations, of which [the agent] was ostensibly a part, this statement could only be construed as a veiled threat.[35]

The Ninth Circuit reversed the convictions and dismissed the indictments.[36] The Court reasoned that although "none of the factors which we have pointed to as significant would necessarily require reversal of a conviction. In our view, **it is the combination which is important**."[37]

Similarly, in *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978), the police coerced and deceived an individual with a long history of drug convictions into acting as an informant. The informant then indiscriminately called a number of people to set up a drug sale. The defendant was a graduate student at Penn State and a very small–time cocaine dealer. The informant repeatedly called the defendant and played upon his sympathy for the informant's plight (he allegedly needed money for a lawyer or he was going to prison) and thereby talked the defendant into obtaining two ounces of cocaine from other people and delivering it to the informant, who had cleverly arranged for the deal to take place in New York so his handlers would have jurisdiction.[38]

The New York Court of Appeal reversed the defendant's conviction and dismissed the indictment.[39] Initially, the Court noted:

> Upon an inquiry to determine whether due process principles[40] have been transgressed in a particular factual frame there is no precise line of demarcation or calibrated measuring rod with a mathematical solution. Each instance in which a deprivation is asserted requires its own testing in light of fundamental and necessarily general but pliant postulates. All components of the complained conduct must be scrutinized but certain aspects of the action are likely to be indicative.[41]

The Court then identified four factors that should generally be considered in evaluating a claim of outrageous government conduct, including:

> (1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the

to state a claim under section 1983, will also support a claim for outrageous government conduct.

[28] *See also California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327, 334 (C.D. Cal. 1996).

[29] *Rochin*, 342 U.S. at 173.

[30] *Id.*; *Bogart*, 783 F.2d at 1435.

[31] *See, e.g., United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981) (whether outrageous government conduct exists turns on the totality of the circumstances, and the facts presented in each case).

[32] *Id.* at 784.

[33] *Id.* at 785.

[34] *Id.* at 785–86.

[35] *Id.* at 787.

[36] *Id.*

[37] *Id.* (emphasis added).

[38] 44 N.Y.2d at 514–18, 378 N.E.2d at 79–81.

[39] 44 N.Y.2d at 525, 378 N.E.2d at 85.

[40] Although the Court of Appeals specifically stated that it was deciding the case under the New York Constitution, 44 N.Y.2d at 520, 378 N.E.2d at 82, the case is still persuasive authority for outrageous government conduct claims asserted under the United States Constitution. The Court of Appeals relied extensively on federal authority in reaching its conclusions and nothing in the Court's reasoning suggests that its analysis does not apply under the United States Constitution. Accordingly, the case has been cited as an example of a viable approach to outrageous government conduct claims by federal courts. *See, e.g. United States v. Bogart*, 783 F.2d 1428, 1435 (9th Cir. 1986); *United States v. Gardner*, 658 F.Supp. 1573, 1579 (W.D. Pa. 1987)(cited for proposition that police misconduct violated standard of due process).

[41] 44 N.Y.2d at 521; 378 N.E.2d at 83 (citations omitted).

> defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation or exorbitant gain, or by persistent solicitation in the face of unwillingness; and, (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.[42]

The Court noted that none of these factors was determinative, but they should be considered in combination and in light of proper police objectives.[43]

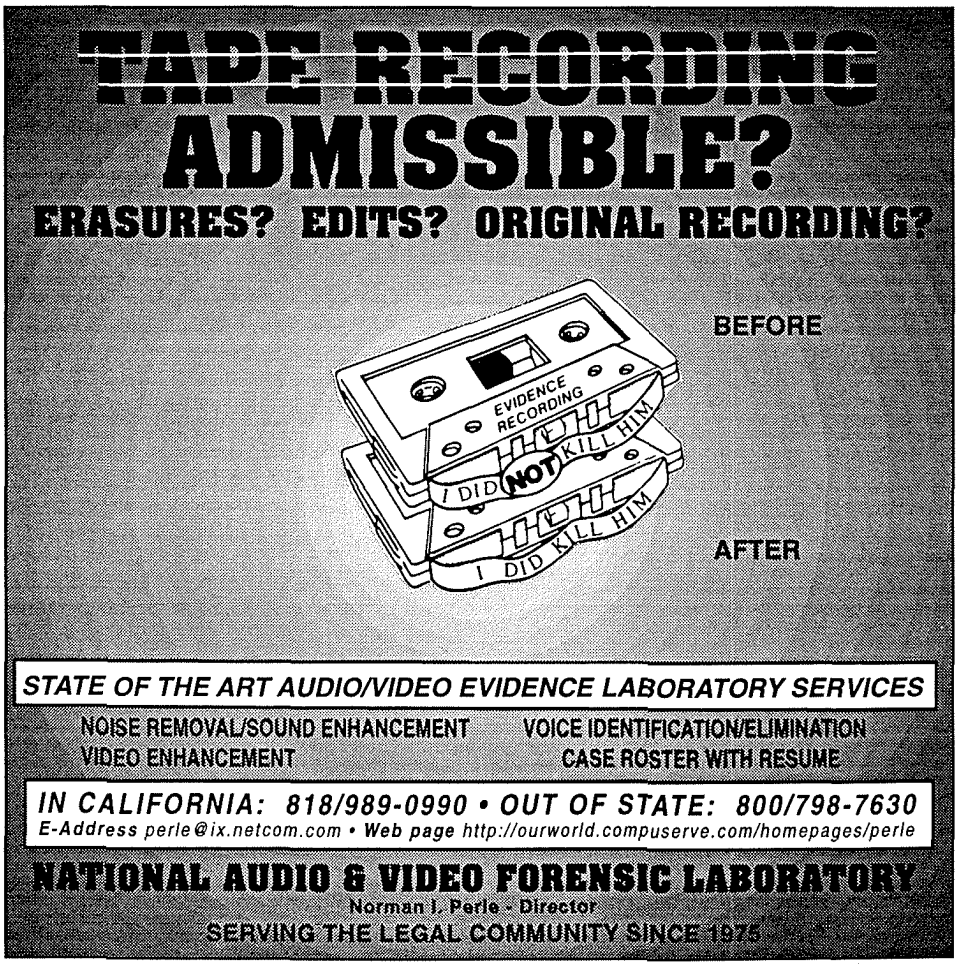
The Court then concluded dismissal was warranted in light of these factors. First, the defendant did not have access to the drug amounts requested by the informant. Second, the police abuse of the informant was unlawful.[44] Third, the informant, through persistence, overcame the defendants reluctance to commit the crime. Finally, law enforcement's stratagems to bring the defendant into New York demonstrated that their real goal was a conviction.[45]

Summary

There is no basis for limiting the types of misconduct that may violate due process. As Justice Frankfurter said in the original outrageous government conduct case:

> Due Process of Law, as a historic and generative principle, **precludes defining, and thereby confining,** these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."

The cases finding due process violations are not limited to a certain type of conduct, e.g. coercion, excess government involvement in a crime or the targeting of innocent people. In fact, even if no single act of misconduct constitutes a denial a due process, the Court may consider any number of lesser acts of misconduct to determine whether together they violate a defendant's right to due process. Accordingly, criminal defendants have a right to have all of the government's conduct in investigating their case measured against the "canons of decency and fairness" embodied in the Due Process Clause. ▲



[42]44 N.Y.2d at 521, 378 N.E.2d at 83 (citations omitted).

[43]44 N.Y.2d at 521, 378 N.E.2d at 83.

[44]Interestingly, the Court found the fact that the informant was tricked and abused supported dismissing the indictment against the defendant. Obviously, this will support an argument that improper government conduct violates due process even when the defendant is not the most direct victim of that conduct. Further, the Court's holding underscores the fact that the Due Process Clause imposes a duty upon the courts to "exercise . . . judgment upon the whole course of proceedings [resulting in conviction]." *Rochin*, 342 U.S. at 169. However, if the improper government misconduct is directed solely at a third party, the defendant will probably not have standing to assert the constitutional violation. *Bogart*, 783 F.2d at 1433.

[45]44 N.Y.2d at 522–23, 378 N.E.2d at 83–84.