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"They Knew What We Were Doing?": The Evolution of the Criminal Estoppel Defense

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"THEY KNEW WHAT WE WERE DOING": THE EVOLUTION OF THE CRIMINAL ESTOPPEL DEFENSE

John W. Lundquist†

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I. INTRODUCTION

In criminal prosecutions, particularly those involving crimes that are regulatory in nature, one available defense is premised upon the government having contemporaneous or prior knowledge of illegal activity. This defense, known as criminal estoppel, asks this question: "How can the government now say we committed a crime when they knew what we were doing all along?" Criminal estoppel has the same fundamental appeal to the criminal defendant as the plea, "Dad let me do it," has to a child when Mom attempts punishment. The same equitable consideration is present; if those responsible for enforcing the law are aware of the behavior and explicitly or implicitly condone it, what justice lies in later punishing that behavior?

This Article explores the theoretical underpinnings of criminal estoppel and considers its application as an affirmative criminal defense in various factual settings. Drawing from a recent federal Food and Drug Administration (FDA) prosecution in Minnesota,1 this Article harmonizes the boundaries and the doctrinal bases of the defense. Part II of this Article provides a brief overview of the criminal estoppel defense. Part III examines various courts' interpretations of criminal estoppel. Part IV explores cases in which defendants cite the government's knowing acquiescence in order to invoke the criminal estoppel defense. Part V considers the limits of criminal estoppel. Part VI examines the standards by which a court or jury must examine the criminal estoppel defense. Finally, Part VII concludes that criminal estoppel will continue to evolve as a defense in the modern climate of regulatory prosecutions.

II. OVERVIEW OF THE CRIMINAL ESTOPPEL DEFENSE

The defense of criminal estoppel ranges from the modest claim that the defendant believed that the government was aware, or should have been aware, of the defendant's criminal conduct,2 to the assertion that the government not only was aware, but was consulted and specifically approved of the defendant's criminal conduct.3 Some defendants offer the criminal estoppel defense to

2. See, e.g., Najarian, 915 F. Supp. at 1473 (rejecting the defendant's contention that the government should be estopped from prosecuting the defendant for alleged conduct that the FDA had known about for years).
create reasonable doubt about one of the elements of a charged offense, such as whether there actually was misrepresentation, concealment, or criminal intent. Procedurally, a defendant's goal is to obtain a jury instruction on “entrapment by estoppel,” the awkward and inaccurate expression often applied to the defense.

The United States Supreme Court has observed it is “indefensible [to convict a citizen] for exercising a privilege which the state clearly had told him was available to him.” Many jurists and scholars agree that government approval of conduct is, and should be, a defense to criminal charges. The criminal estoppel defense draws its philosophical basis from many sources, including an aversion to entrapment, the protection of fundamental fairness or due process with respect to adequate notice, and statutory vagueness.

4. See, e.g., United States v. Levin, 973 F.2d 463, 468-70 (6th Cir. 1992) (finding that a government agency’s declaration of legality must negate the existence of criminal intent). At least one commentator has stated that criminal estoppel is inconsistent with specific intent crimes and that no instruction should be given whenever specific intent is an essential element of the offense. See Sean Connelly, Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law, 48 U. MIAMI L. REV. 627, 638-39 (1994).

5. Rather than “entrapment by estoppel,” this Article refers to the defense as “criminal estoppel” in the broadest sense, so as to cover all of its variations.


7. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.1(e)(2)-(3) (2d ed. 1986) (discussing one’s reliance upon a statute, judicial decision, or official interpretation as a defense); Frank C. Newman, Should Official Advice Be Reliable? – Proposals as to Estoppel and Related Doctrines in Administrative Law, 53 COLUM. L. REV. 374 (1953) (proposing a statute relieving liability for one who acts in conformance with a written agency statement).

8. See Raley, 360 U.S. at 425-26 (refusing to sustain a conviction as it would be an “indefensible sort of entrapment by the State”).

9. See Connelly, supra note 4, at 632; see also United States v. Abcasis, 45 F.3d 39, 42-43 (2d Cir. 1995) (citing Raley, 360 U.S. at 437, in support of the notion that the Due Process Clause did not permit conviction when the defendant has been entrapped); United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991) (holding that whether prosecution of the defendant violates his due process rights depends upon the totality of the circumstances surrounding the prosecution, and not solely upon whether the defendant was incorrectly informed or misled by the government).

10. See United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674 (1973) (holding that traditional notions of fairness should preclude the government from pursuing a criminal prosecution when the defendant was deprived of a “fair warning” as to what conduct the government intended to make criminal); State v. McKown, 475 N.W.2d 63, 68 (Minn. 1991) (holding that the indictment of
The defense also is consistent with historical application of estoppel and mitigates problems that stem from the absence of mens rea in specific intent crimes. Central to these concerns is the issue of whether the requisite knowledge is based either upon the knowledge and conduct of the government agent, or upon the knowledge, conduct, and beliefs of the defendant.

The two independent bases for the criminal estoppel defense are objective due process and subjective reliance. When faced with the defense of criminal estoppel, courts and scholars stress either: (1) objective evidence of communications to or from the government agents or the setting of actual or apparent standards, or (2) the subjective beliefs and actions of the defendant, based on information or circumstances for which the government is responsible. A defense based on the former may emphasize the due process issue and focus on the lack of adequate notice in a statutory or regulatory scheme which has the capacity to mislead. A defense based upon the latter may emphasize the detrimental reli-
ance of the defendant on statements or information provided by
government agents. These objective and subjective bases are simi-
lar to the elements of "pure" entrapment.

III. COURTS' TREATMENT OF THE CRIMINAL ESTOPPEL DEFENSE

A. Supreme Court Interpretations

The United States Supreme Court first recognized criminal es-
toppel in 1959 in *Raley v. Ohio.* In a prosecution for contempt, the Court held that erroneous advice given by the tribunal to the
defendants that they could assert their Fifth Amendment privilege
was a defense to the contempt charge. The Court, in an opinion
by Justice Brennan, declared that the conviction of the defendants
for contempt as a result of their invoking the Fifth Amendment was
"the most indefensible sort of entrapment by the State -- convicting
a citizen for exercising a privilege which the State clearly had told
him was available to him."

The Court based its application of the defense of criminal es-
toppel upon the Due Process Clause of the Fourteenth Amend-
ment. In so holding, the Court stressed that while "there is no
suggestion that the Commission had any intent to deceive the ap-
pellants," there nevertheless was "active misleading" through the
Commission's erroneous advice that the Fifth Amendment privi-
lege was available even though the appellants had been immu-

18. See, e.g., United States v. Tallmadge, 829 F.2d 767, 774-75 (9th Cir. 1987)
(holding that the defendant could not be prosecuted for possession of a firearm
where he relied on the misleading statement of a government agent that he could
possess a nonconcealable weapon).

19. Entrapment applies where a defendant lacks the predisposition to
commit a crime and is induced by a government agent to participate in criminal
United States,* the Supreme Court outlined the contours of the entrapment de-
fense: the defendant had been affirmatively solicited by police to commit an act
known by all to constitute a crime, and the defendant lacked the predisposition to

Criminal estoppel is a distinct defense from entrapment with altogether dif-
f erent elements and rationale. Entrapment involves inducement -- that is, a cer-
tain coercion that causes the defendant to commit a criminal act. See 2 ROBINSON,
*supra* note 16, §§ 183, 209. Criminal estoppel, on the other hand, involves mis-
taken reliance by the defendant that the act was permissible in certain circum-
stances. See id.

21. Id. at 438-39.
22. Id. at 438.
23. Id. at 437.
nized.\textsuperscript{24}  

Six years later in \textit{Cox v. Louisiana},\textsuperscript{25} the Court again invoked the criminal estoppel doctrine. The statute at issue in \textit{Cox} prohibited demonstrations "near" a courthouse.\textsuperscript{26} The defendant, a leader of a demonstration, had been advised by police to conduct the demonstration on the far side of the street away from the courthouse.\textsuperscript{27} However, the defendant subsequently was arrested for demonstrating in that area.\textsuperscript{28} Justice Goldberg, speaking for the majority, found that the defendant, in effect, had been advised that "a demonstration at the place it was held would not be one 'near' the courthouse within the terms of the statute."\textsuperscript{29} This official advice, like that given in \textit{Raley}, was found to constitute "'an indefensible sort of entrapment by the State.'\textsuperscript{30}

Following \textit{Raley}, the \textit{Cox} court based its application of the criminal estoppel defense upon the Due Process Clause.\textsuperscript{31} The "affirmative misleading" in \textit{Cox} was the implied permission given to the protesters "that they could meet where they did, 101 feet from the courthouse steps, but could not meet closer to the courthouse."\textsuperscript{32} While not a clear statement, the court did find that it provided sufficient basis for a criminal estoppel defense.\textsuperscript{33}

The Supreme Court last discussed criminal estoppel in \textit{United States v. Pennsylvania Industrial Chemical Corp.}\textsuperscript{34} This case dealt with pollution charges brought under a statute that had been narrowly construed by the Army Corps of Engineers in a manner that tended to exonerate the defendant.\textsuperscript{35} The defendant relied on the Corps of Engineers' construction that the defendant's discharge was not illegal under the statute\textsuperscript{36} and sought to offer evidence at

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{24} Id. at 438.
  \item \textsuperscript{25} 379 U.S. 559 (1965).
  \item \textsuperscript{26} Id. at 560.
  \item \textsuperscript{27} Id. at 569-71.
  \item \textsuperscript{28} Id. at 560.
  \item \textsuperscript{29} Id. at 571.
  \item \textsuperscript{30} Id. (quoting \textit{Raley v. Ohio}, 360 U.S. 423, 426 (1959)).
  \item \textsuperscript{31} \textit{Cox}, 379 U.S. at 571.
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Id. ("The Due Process Clause does not permit convictions to be obtained under such circumstances.").
  \item \textsuperscript{34} 411 U.S. 655 (1973).
  \item \textsuperscript{35} Id. at 674. Although the statute generally prohibited the dumping of waste into navigable waters, the Army Corps of Engineers' regulations construed an illegal discharge under the statute as one which obstructed navigation. \textit{Id.} at 659.
  \item \textsuperscript{36} Id. at 674.
\end{itemize}
\end{footnotesize}
trial of his reliance on the interpretation of the statute. The trial court rejected the evidence as irrelevant. The Supreme Court held that the evidence should have been allowed. Citing two law review articles on estoppel, the Supreme Court held:

[T]o the extent that the regulations deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.

As in Cox, the "affirmative misleading" in Pennsylvania Industrial Chemical is also less than clear. While a regulation of the Army Corps of Engineers did indicate that the appellant's conduct was permissible, a separate controlling decision of the Court undermined that claim by authoritatively construing the statute as applying to all pollutants and not just to those that impeded navigation. Following the Court's authority in that case, virtually all lower courts subsequently held that the statute imposes a "flat ban" on the discharge of pollutants. The Supreme Court held that this did not go to the question of whether reliance on the Army Corps of Engineers' regulation was available as a defense, but rather, to whether there was reliance and whether such reliance was reasonable under the circumstances.

Thus, from the Supreme Court decisions, the following conclusions may be drawn: (1) the defense of criminal estoppel is based on the theory of due process and, in particular, on the issue of what constitutes a fair warning that conduct is criminal; (2) the

37. Id. at 673.
38. Id. at 660.
39. Id. at 675.
41. See United States v. Standard Oil Co., 384 U.S. 224 (1966). This decision came down four years before the alleged criminal conduct in Pennsylvania Industrial Chemical Corp.
43. Id. at 675.
44. See id. at 670-75; Cox v. Louisiana, 379 U.S. 559, 571-72 (1966); Raley v.
pertinent government pronouncements, or "affirmative mislead-
ings," that are alleged to justify the defense may be "implied" from behavior and from circumstances; 45 (3) the defense may be raised even though the pertinent pronouncement is contradicted by other more authoritative statements; 46 and (4) whether the defense may be successful in any given case should be determined by the finder of fact. 47

B. Circuit Court Interpretations

With the foundation laid by the Supreme Court, the federal circuits have developed more distinct and workable approaches to criminal estoppel. As in the Supreme Court decisions, due process has played a primary role in the lower court applications of criminal estoppel. 48 These courts have emphasized the unfairness of allowing prosecutions to go forward when a defendant has been led by government statements or conduct to believe reasonably that the actions which would later form the basis of the criminal charge were, in fact, authorized. 49

The most expansive use of criminal estoppel has been from the Ninth Circuit, where the defense has been based on statements made by nongovernment agents. In United States v. Tallmadge, the court based criminal estoppel on statements made by a privately licensed firearms dealer that led the defendant into believing that he lawfully could possess a firearm. 50 The Ninth Circuit, in United States v. Clegg, also held that a defendant’s reliance on statements of government officials, who led the defendant to believe he was transporting guns lawfully, was a defense to his prosecution for exporting firearms. 51 Other Ninth Circuit cases have held that crimi-
nal estoppel "applies when an official tells the defendant that certain conduct is legal and the defendant believes the official" and shows reasonable reliance on the misinformation. However, the Ninth Circuit's broad expansion of criminal estoppel occasionally has been overturned.

The Sixth Circuit, in *United States v. Levin*, created a four-part test to delineate the elements of estoppel. The case involved a prosecution for Medicare fraud and false statements, based upon a physician billing a flat rate for a medical product but receiving certain disposable surgical supplies or a credit of equivalent value for every medical product purchased. The government's theory was that fraud occurred when the government was induced to pay for the ostensible full price of the product without any reduction for the value of the rebated surgical supplies or credit. It turned out, however, that the Health Care Financing Administration, a government agency, had issued letter opinions to others in the industry approving of this sales arrangement. Although the defendants

the context of actual versus apparent authority, see discussion infra Part V.D.2.

52. *See* United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 825 (9th Cir. 1985).

53. *See* United States v. Timmins, 464 F.2d 385, 387 (9th Cir. 1972) (finding that the would-be conscientious objector reasonably could rely on the draft board's incorrect position that formal religious training was necessary for conscientious objector status).

54. *See* United States v. Albertini, 830 F.2d 985, 990 (9th Cir. 1987) (holding that a protester's conduct of distributing leaflets on a naval base could legally be resumed in reliance upon the appellate court's reversal of his conviction), rev'd, 472 U.S. 675, 683 (1985) (dismissing as implausible the assertion that the defendant lacked notice that entry on the base was prohibited).

In addition, some of the Ninth Circuit's pronouncements on civil estoppel against the government also have been overturned. *See* United States Immigration & Naturalization Serv. v. Miranda, 459 U.S. 14, 18 (1982) (finding that despite a delay in processing, the government was not estopped from enforcing Immigration and Naturalization Service regulations); United States Immigration & Naturalization Serv. v. Hibi, 414 U.S. 5, 8-9 (1973) (holding that neither the failure to fully publicize the rights that Congress accorded to those deserving naturalization, nor the failure to station an authorized representative in the Philippines to assist those seeking naturalization, estopped the government from relying on the statutory deadline).

55. 973 F.2d 463, 468 (6th Cir. 1992). The Sixth Circuit has broken the defense down into the following elements: (1) a government official must have advised that the act was legal; (2) the defendant must rely on the advice; (3) the reliance must be reasonable; and (4) given this reliance, the continuation of the prosecution must be unfair. *See* id. The First Circuit has adopted the same test. *See* United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991).


57. *Id.* at 464.

58. *Id.* at 465.
themselves initiated no inquiry concerning the legality of the sales campaign, the court noted that the government's approval had been disseminated throughout the medical community.\textsuperscript{59} The Sixth Circuit specifically found that: (1) the government had approved the sales promotion program, (2) the defendants had relied upon this pronouncement, (3) the defendants' reliance was reasonable, and (4) prosecution would be unfair under the circumstances.\textsuperscript{60}

The Second Circuit focuses on government conduct which the defendant reasonably believed authorized her to commit an unauthorized act.\textsuperscript{61} In \textit{United States v. Abcasis}, the defendants maintained that they had been authorized by the government to deal in narcotics in conjunction with their role as confidential informants.\textsuperscript{62} At trial, the court instructed the jury that it would be a defense if they were, in fact, authorized to so act, but it refused to instruct the jury that it would be a defense if their belief was mistaken, inasmuch as the offense was not a specific intent crime.\textsuperscript{63} The Second Circuit reversed, holding that the defense of criminal estoppel applies when a defendant "commits forbidden acts in the mistaken but reasonable good\-[\-]faith belief that he has in fact been authorized to do so."\textsuperscript{64} The court ruled that the defense "focuses on the conduct of the government leading the defendant to believe reasonably that he was authorized to do the act forbidden by law. The doctrine depends on the unfairness of prosecuting one who has been led by the conduct of government agents to believe his acts were authorized."\textsuperscript{65}

The court noted that the defendants should be allowed to produce evidence that the government agents made statements or committed acts that caused the defendants to believe they were authorized.\textsuperscript{66} The admission of such statements and acts demonstrates that estoppel does not depend solely on specific advice but on all of the circumstances, including conduct, that form the basis

\begin{itemize}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.} at 468.
\item \textsuperscript{61} \textit{See United States v. Abcasis, 45 F.3d 39, 44-45 (2d Cir. 1995) (applying criminal estoppel where the defendant reasonably relied on a drug enforcement agent's statements that he was authorized to commit unlawful acts).}
\item \textsuperscript{62} \textit{Id.} at 42.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.} at 43.
\item \textsuperscript{65} \textit{Id.} at 44 (citing United States v. Brebner, 951 F.2d 1017, 1025 (9th Cir. 1991); United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991)).
\item \textsuperscript{66} \textit{Id.} at 45.
\end{itemize}
for the belief of the defendants. 67

The Eleventh Circuit has stressed objective fairness rather than whether the defendant actually believed the government advice. In United States v. Hedges, the court emphasized reliance on an informal communication with a government employee. 68 The court described the defense as resting "upon principles of fairness rather than the defendant's mental state and thus it may be raised even in strict liability offense cases." 69 The application of fairness principles is a broader view of the estoppel defense and is not uniformly followed.

The Fifth Circuit has held that criminal estoppel only applies to federal government officials or their authorized agents. In United States v. Spires, a convicted felon on probation attempted to invoke the defense when charged with possession of a firearm. 70 The defendant grounded his reliance on statements by a state crime task force agent that he could not carry a gun but that he should leave the gun in his truck and put it away when at home. 71 The court refused to instruct the jury on the basis that the defendant's reliance was not based on advice by a government official, 72 holding that the state task force agent on whom the defendant relied had no authority to render the advice, didn't consider herself a government agent, and never held a federal commission. 73 The court held that the state task force and its agents were state actors -- but not authorized federal agents -- notwithstanding the fact they received federal funding. 74 Therefore, without reliance on the federal official, the court held that estoppel did not apply. 75

The Eighth Circuit has agreed with the Ninth Circuit's statement of the defense but has been much more conservative in its application. In United States v. Austin, 76 a convicted felon raised the estoppel defense when prosecuted for crimes stemming from a rifle purchase. The defendant claimed that several police officers and the gun dealer who sold him the rifle told him that it was not

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67. Abcasis, 45 F.3d at 42-43 (citing Cox v. Louisiana, 379 U.S. 559 (1965)).
68. 912 F.2d 1397, 1404 (11th Cir. 1990).
69. Id. at 1405 (citing United States v. Tallmadge, 829 F.2d 767, 773 (9th Cir. 1987)).
70. 79 F.3d 464, 465 (5th Cir. 1996).
71. Id.
72. Id. at 466.
73. Id. at 467.
74. Id. at 466-67.
75. Id. at 467.
76. 915 F.2d 363 (8th Cir. 1990).
illegal for a felon to possess a rifle. However, he also denied he was a felon on a federal firearms questionnaire. The court never speculated as to whether the defendant in fact received the advice he claimed, but rather succinctly declared that the individuals offering advice were merely private individuals without any apparent or actual authority to bind the government. Thus, the court concluded that it is the authority of the government official that is crucial to the criminal estoppel defense.

The circuit courts have not strayed far from the Supreme Court's foundation when addressing the criminal estoppel defense. Yet, each circuit has crafted its own emphasis in analyzing the application of the criminal estoppel defense. In short, it is important for a defense attorney to know the rules of the circuit, especially with respect to its disposition toward actual authority, subjective fairness, government conduct, and the defendant's reasonable belief.

C. Minnesota Tackles Criminal Estoppel

In *State v. McKown*, the Minnesota Supreme Court affirmed the dismissal of second-degree manslaughter charges against parents who relied upon spiritual treatment in lieu of conventional medicine in caring for their son, who ultimately died of diabetes mellitus. In its decision, the court focused on a provision in the Minnesota child neglect statute, which states that parents and guardians must provide their children with food, clothing, shelter, health care, and supervision. The court noted that if the parent relies in good faith on spiritual means or prayer for care of the child, as an alternative to conventional medical treatment, this treatment cannot be the basis for prosecution under the child neglect statute. The court found that this statute was not "*in pari materia*" with the second-degree manslaughter statute, and it con-

77. *Id.* at 365.
78. *Id.* at 364.
79. *Id.* at 366-67. The court rejected the contention that a federal license to sell firearms is sufficient to transform sellers into government officials for purposes of the criminal estoppel defense. *Id.*
80. *Id.* at 366 (citing United States v. Tallmadge, 829 F.2d 767, 777 (9th Cir. 1987)).
81. 475 N.W.2d 63, 64 (Minn. 1991).
82. *Id.* at 67 (citing MINN. STAT. § 609.378(a) (1988)).
83. *Id.* at 68-69.
84. Statutes *in pari materia* are those relating to the same purpose or thing or
cluded that the proviso of the child neglect statute allowing parents to "select and depend upon" spiritual treatment 86 failed to give fair notice that acting in accordance with the statute could expose the parents to criminal prosecution. 87 The court also held that the statute would "violate the long-established rule that a government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct." 88 The court ruled that, having granted parents the right to rely upon methods such as Christian Science treatment, the state may not prosecute parents for exercising that very right and be consistent with due process of law. 89

IV. APPLICATION OF CRIMINAL ESTOPPEL IN CASES OF KNOWING ACQUIESCENCE

A. When Is Government Knowledge Enough?

As noted above, the case law requires a defendant asserting criminal estoppel to rely upon a representation from a government official. Yet, in a number of cases in which criminal estoppel was asserted successfully, no affirmative representations were made. 90 A difficult issue, and one which is fact-dependent, is when government conduct or knowing acquiescence will justify submission of the defense to the finder of fact in the absence of affirmative representations.

The courts have tried to make distinctions as to what level of government knowledge is enough. Prior to its three seminal cases in this area, the Supreme Court was reluctant to apply "immunity" to prosecutions based on the hint of government knowledge. 91

having a common purpose. See id. at 65.
85. Id. at 67.
86. Minn. Stat. § 609.378.
87. McKown, 475 N.W.2d at 67-69.
88. Id. at 68.
89. Id.
90. See, e.g., United States v. Race, 632 F.2d 1114, 1120 (4th Cir. 1980) (finding the government's continued performance of the contract with knowledge of certain facts estopped the government from prosecuting based on those facts).
91. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The Court held that "[t]hough employees of the government may have known of those programs [which allegedly constituted violations of the Sherman Act] and winked at them or tacitly approved them, no immunity would have thereby been obtained." Id. at 226. Instrumental to the Court's decision was the fact that Congress had established a method for obtaining approval of buying programs with respect to which the defendants did not avail themselves. See id. at 226-27.
Likewise, the Supreme Court did not delve deeply into issues of acquiescence when it examined criminal estoppel directly. At the circuit level, knowing acquiescence by the government has figured prominently in defense strategies. In particular, the Ninth Circuit has concluded that solicitation, encouragement, and assistance from government agents constitutes knowing acquiescence and is a defense. However, in a claim of what could be termed "reverse reliance," the Ninth Circuit has held that the required "affirmative misleading" conduct is not present where a defendant misrepresents facts to a government agent who acts upon those misrepresentations. In asserting the defense of criminal estoppel, therefore, affirmative representations are not required, so long as the government has engaged in conduct which has created the same effect of misleading a person into believing the conduct is authorized.

Whether Socony is still good law is questionable, as it was not cited in any of the three Supreme Court cases dealing with the defense of criminal estoppel discussed herein. However, it was referred to in a dissenting opinion in Cox v. Louisiana. See 379 U.S. 559, 582 n.5 (Black, J., dissenting).

Indeed, the case can be made that there was no affirmative approval in Cox of the demonstrators' behavior but only a partially successful effort to keep them as far from the courthouse as possible. See id. at 586-88 (Clark, J., dissenting). Similarly, one of the defendants in Raley was allowed to infer from the circumstances of his colleagues that he could appropriately assert the Fifth Amendment privilege. See Raley v. Ohio, 360 U.S. 423, 430, 437 (1959).

92. See, e.g., United States v. Abcasis, 45 F.3d 39, 43-44 (2d Cir. 1995) (finding that consistency of government agents' actions supported defendants' inference that they were still immune from prosecution as federal informants); United States v. Levin, 973 F.2d 1463, 469 (6th Cir. 1991) (affirming the trial court's finding that the government's issuance of "numerous opinion letters... appear[ed] to sanction the practice challenged by this indictment"); United States v. Hedges, 912 F.2d 1397, 1401 (11th Cir. 1990) (discussing the knowledge of a superior who was aware of the defendants' activities, which would be criminal, and pointing to the statutory requirement that the government official have knowledge of the criminal behavior).

93. See United States v. Glegg, 846 F.2d 1221, 1222-24 (9th Cir. 1988) (citing United States v. Tallmadge, 829 F.2d 767, 774 (9th Cir. 1987)). The dissenting opinion in Glegg argued that since the record failed to disclose reliance on any official interpretation of law, the defense did not apply. See id. at 1225 (Skopil, J., dissenting).

94. See United States v. Brebner, 951 F.2d 1017, 1025-26 (9th Cir. 1991). Moreover, approval by state and local law enforcement officials would not be sufficient to justify the defense because those officials "lacked the authority to bind the federal government to an erroneous interpretation of federal law." See id. at 1026.

95. See, e.g., Race, 632 F.2d at 1119; State v. McKown, 475 N.W.2d 63, 68-69 (Minn. 1991).
There are certain situations which do not create the requisite knowing acquiescence. Mere nonprosecution of a certain type of conduct is insufficient to support a criminal estoppel defense. For example, the claim of an automobile driver that everyone always drives ten miles over the speed limit on a particular roadway would not likely succeed as a defense to a speeding ticket. The road is marked, there is no misleading information about the speed limit, and it is obvious to all that only a small number of speeders are ever ticketed. Any government "acquiescence" here is nothing more than a reflection on law enforcement priorities.

In addition to nonenforcement, obsolescence of a statute is insufficient to form the basis of knowing acquiescence. The obsolescence of a statute, referred to as desuetude, applies when a law simply is not prosecuted at all even though it is "on the books." Although commentators have argued that desuetude should create a sort of estoppel defense, case law is largely to the contrary.


97. While law enforcement agents may choose any case to prosecute, they may not do so on the basis of impermissible factors (such as race, gender, et cetera) without violating equal protection and running afoul of the selective prosecution defense. That defense is beyond the scope of this Article. For an example of a selective prosecution case, see Wayte v. United States, 470 U.S. 598 (1985).


99. See id. The nonenforcement of fornication statutes is an example of desuetude. Such laws are on the books in Minnesota and about half of all states, but prosecutions are so rare as to be front-page news when they occur. See RICHARD A. POSNER, SEX AND REASON 260-61 n.44, 309 (1992) (referring to a handful of news stories describing such prosecutions or attempts to repeal the statutes). The Nonfelony Enforcement Advisory Committee recommended repeal of Minnesota's fornication statute. See Nonfelony Enforcement Advisory Committee, Final Report 103-05 (Jan. 15, 1997) (on file with author).

100. See Egger, supra note 12, at 1071 (citing Arthur E. Bonfield, The Abrogation Of Penal Statutes By Non-Enforcement, 49 IOWA L. REV. 389, 393 (1964)).

101. See, e.g., San Francisco County Democratic Cent. Comm. v. Eu, 826 F.2d 814, 822 n.15 (9th Cir. 1987) (discussing the Supreme Court's treatment of desuetude and stating that "federal courts should not lightly determine that as statute has fallen into desuetude"); Delaware Watermen's Ass'n v. State, No. 789, 1983 WL 103281, at *5-*6 (Del. Ch. Apr. 5, 1983) (discussing the theory and factors of the "desuetude" argument); Doris v. Police Comm'r, 373 N.E.2d 944, 949 (Mass. 1978) (stating that it would be "a most serious consequence if we were to conclude that the inattention or inactivity of governmental officials could render a statute unenforceable and thus deprive the public of the benefits or protections bestowed by the Legislature"); Committee on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d 720, 724-27 (W. Va. 1992) (discussing the doctrine of desuetude).
Mere silence by the government does not give rise to an estoppel defense. Alternatively, being lulled into the reasonable impression that conduct is not criminal may justify dismissal in unique circumstances.

B. United States v. Najarian: An Example of Knowing Acquiescence

United States v. Najarian, a 1996 Food and Drug Administration (FDA) prosecution in Minnesota, illustrates the application of criminal estoppel in a situation involving official acquiescence. An analysis of the facts in Najarian highlights the subjective nature of criminal estoppel, as opposing parties view the case quite differently. On the one hand is a defendant who carried on an activity, purportedly with the belief that his practices were officially approved due to the regulatory agency's silence. On the other hand is a regulatory agency, purportedly believing that its act of silence did not constitute approval and that the defendant willfully ignored any indications that his practices were subject to prosecution.

1. The Facts

John S. Najarian, M.D., a well-known transplant surgeon and chair of the department of surgery at the University of Minnesota, developed a drug that effectively induced immunosuppression and treated graft rejection in organ transplant recipients. On December 9, 1970, Dr. Najarian and others at the University of Minnesota filed an Investigational New Drug (IND) Application with the FDA for the use of this new drug called Antilymphocyte Globulin (ALG). For the next twenty-two years, ALG underwent re-

102. See United States v. Mann, 517 F.2d 259, 270 (5th Cir. 1975) (rejecting an estoppel defense in the case of a willful misapplication of bank funds, because governmental silence and the absence of prior prosecutions does not constitute "active misleading"); United States v. Brookshire, 514 F.2d 786, 789 (10th Cir. 1975) (stating custom and usage involving an act that a state had defined as criminal does not defeat prosecution of a defendant for violation of that statute).

103. See United States v. Inesco, 496 F.2d 204, 208-09 (5th Cir. 1974). In Inesco, the Fifth Circuit reversed the conviction of a defendant who violated a state statute by failing to place an attribution clause on a political bumper sticker. The court based its decision on the fact that this was the first prosecution ever brought under the statute, and on the "universal practice" of non-enforcement. Id.


105. Id. at 1463.

106. See Notice of Claimed Investigational Exemption for a New Drug Ap-
search and was used extensively at many transplant centers. Although ALG remained on investigational status with the FDA during its entire twenty-two-year life, by the late 1980s the University of Minnesota's annual production of ALG exceeded 40,000 grams. ALG was distributed to more than 100 transplant centers in the United States and Europe. ALG received widespread use despite its lack of official approval. A monetary charge sufficient to enable the University to recoup its costs was levied on the drug from the very beginning.

In 1992, however, the Upjohn Company complained to the FDA that Najarian was selling ALG unfairly. By mid-August 1992, FDA representatives visited the University and placed the ALG program on hold.

2. The Court's Procedure

Following a lengthy investigation by the FDA, Najarian was indicted in United States District Court in St. Paul, Minnesota, on a variety of charges alleging violations of the Food, Drug & Cosmetic Act and the Public Health Service Act. The major count of the indictment alleged a conspiracy to violate these laws by illegally distributing and charging for ALG, among other matters.
The defense sought pretrial dismissal of the FDA charges on the ground that the government knew about the manner in which ALG had been distributed and should, accordingly, "be estopped from prosecuting the defendant for alleged conduct that the FDA had countenanced over the course of years." The court denied the motion on the basis that the defense was so fact-dependent that the jury must decide it.

The evidence at trial established that cost recovery had been requested in the original IND application and had been implicitly granted by the FDA's failure to object. FDA regulations provided that IND approval became effective thirty days after filing, absent negative comments from the FDA, including applications seeking cost recovery. The practice of permitting cost recovery was pursuant to informal policy, which was confirmed in a 1973 opinion from FDA's general counsel. No written regulations specifically dealing with the criteria and mechanism for cost recovery were promulgated until 1987. The evidence established that the FDA not only failed to object to the cost recovery request included in the IND application, but that it had been aware for years that the University was charging clinical investigators for ALG and did not object. The FDA formally granted approval for cost recovery in 1989 after regulations had been promulgated on the subject.

118. Najarian also was charged with theft and embezzlement, mail fraud, tax fraud, and obstructing justice. See id. The jury returned a verdict of not guilty on these non-FDA charges. Transcript of Proceedings, Feb. 21, 1996, at 1, United States v. Najarian, 915 F. Supp. 1460 (D. Minn. 1996) (No. 3-95-45) (on file with author).

119. See Najarian, 915 F. Supp. at 1463.

120. Id. at 1473.

121. Id. (citing United States v. French, 46 F.3d 710, 714 n.6 (8th Cir. 1995)).

122. Id.; see also IND Application, supra note 106, at 34-37.


124. See 21 C.F.R. § 312.40(b) (1) (1987); see also 1 JAMES T. O'REILLY, FOOD AND DRUG ADMINISTRATION § 13.12, at 13-76 to -77 (2d ed. 1995) (noting that if the application is not acted upon in 30 days, either by approval or disapproval, then the IND is deemed accepted).


126. See 21 C.F.R. § 312.7(d) (1987). The current rule explicitly calls for prior written approval from the FDA before changes for an IND are authorized. See id. (1996).

127. See Lundquist, supra note 107, at 913-14.

128. See id.

129. See id.
Although the trial court had denied the pretrial motion to dismiss,130 it did grant the defendant's motion for a judgment of acquittal at the close of the government's case-in-chief.131 The court ruled that the government had failed to establish sufficient evidence to justify submission of any of the FDA counts to the jury.132

At the conclusion of the case, the court stated that the FDA monitored the ALG Program "for 15 or 20 years with what I guess I could describe as benign neglect."133 Referring to the issue raised before trial, the court added, "The FDA, as I indicated, was certainly aware of what was going on, and yet they came in here... to testify that somehow they were hoodwinked by this defendant and his colleagues and other people at the University."134

3. Analysis of Najarian

Because the burden of disapproving IND applications is on the FDA,135 knowing acquiescence by the government should justify proceeding with plans set forth in the IND application136 which, in the case of ALG, included a proposal for cost-recovery sales.137 In Najarian, the evidence of official acquiescence was found not in the FDA's acts but in its omissions. While silence generally cannot be construed as approval,138 when an affirmative obligation to respond exists, official acquiescence is tantamount to approval.139 Such a result is, of course, fact-specific but is not without support from well-established legal principles.

132. See id. at 6-7, 9, 11.
134. Id. at 3.
136. See 1 O'REILLY, supra note 124, § 13.12, at 13-77.
137. See IND Application, supra note 106, at 34-37.
139. See id. § 6:52.
a. An Analogy from Contract Law

The distinction is well-illustrated by examples drawn from the realm of contract law where the general rule is that silence may not be construed as acceptance of an offer. An exception to the rule exists for parties that have an ongoing relationship that justifies the offeror in regarding silence as acceptance. Thus, if the parties stand in a vendor-vendee relationship pursuant to which orders are accepted and payment is made on an ongoing basis, silence in response to an offer may well constitute acceptance. The offeree may authorize the offeror to regard silence as acceptance, or other reasons may exist such that a reasonable person would construe silence as indicating assent. In circumstances where it is apparent that silence will be regarded as acceptance, an individual "should not be allowed to deny the natural interpretation of his conduct."

b. Applying the Analogy to Criminal Estoppel in Najarian

Applying the same principle of contract law to criminal estoppel, when an affirmative duty to respond is imposed on the government, knowing acquiescence in conduct should be on the same footing as express approval. Therefore, knowing acquiescence, coupled with a duty to object, is the functional equivalent of official advice for purposes of applying the elements of estoppel.

In the case of FDA receipt of the IND application in Najarian, approval could be inferred from FDA silence as a matter of law and practice. Under both contract and regulatory law, parties dealing with the FDA are justified in relying upon official acquiescence just as though formal, written approval had been expressed. Najarian, through the IND application, established both the due process and reliance components of the defense of criminal estoppel. By virtue of the government's duty to voice any objections it has to the conduct proposed in the application, Najarian received notice.

140. See id. § 6:49.
141. See id. § 6:52.
142. See id. § 6:49, at 569.
143. See id. § 6:52.
144. 2 WILLISTON ON CONTRACTS, supra note 138, § 6:52, at 561.
146. Compare 2 WILLISTON ON CONTRACTS, supra note 138, § 6:52, with 1 O'REILLY, supra note 124, § 13.12 at 13-76 to 13-77.
that he would not be subject to criminal prosecution for engaging in the proposed plan, thereby defeating the government's claim that he received the minimum due process required. Likewise, the subjective reliance aspects of the estoppel defense were met, because Najarian was entitled to rely upon official acquiescence in the application.

A looming question remains: If criminal estoppel may be asserted against the government based on its knowing acquiescence with respect to the relevant conduct, how is the government's knowledge to be proven? In the absence of an admission, the defense may resort to the concept of "willful blindness."

C. Asserting the Doctrine of Willful Blindness

A jury instruction given with increasing frequency concerns the notion of willful blindness. The instruction allows the jury to impute to an individual knowledge that should be obvious to him when accompanied by "a conscious purpose to avoid enlightenment." One leading jury instruction guide contains the following model instruction on willful blindness:

The government may prove that the defendant acted "knowingly" by proving, beyond a reasonable doubt, that this defendant deliberately closed [his] [her] eyes to what would otherwise have been obvious to [him] [her]. No one can avoid responsibility for a crime by deliberately ignoring what is obvious. A finding beyond reasonable doubt of an intent of the defendant to avoid knowledge or enlightenment would permit the jury to infer knowledge. Stated another way, a defendant's knowledge of a

147. See I O'Reilly, supra note 124, § 13.12, at 13-76 to -77.
148. See State v. McKown, 475 N.W.2d 63, 67 (Minn. 1991) (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983), for the proposition that "due process requires criminal statutes to define offenses clearly enough that ordinary people can determine what they prohibit").
149. See United States v. Abbas, 74 F.3d 506, 513 (4th Cir. 1996) (ruling that willful blindness instruction given in drug conspiracy case was proper); United States v. Gabriele, 63 F.3d 61, 66 (1st Cir. 1995) (holding that a willful blindness instruction in Racketeer Influenced and Corrupt Organizations Act prosecution was warranted); United States v. Brandon, 17 F.3d 409, 451-52 (1st Cir. 1994) (permitting a willful blindness instruction in a fraud case).
150. United States v. Zimmerman, 832 F.2d 454, 458 (8th Cir. 1987); see also United States v. Hiland, 909 F.2d 1114, 1130 (8th Cir. 1990) (finding that a jury instruction for willful blindness need not state that one defendant acted with willful intent to do the illegal act, but that negligent conduct may impute knowledge).
particular fact may be inferred from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact.

It is, of course, entirely up to you as to whether you find any deliberate ignorance or deliberate closing of the eyes and the inferences to be drawn from any such evidence.

You may not infer that a defendant had knowledge, however, from proof of a mistake, negligence, carelessness, or a belief in an inaccurate proposition.  

A court may give a willful blindness instruction when an individual claims a lack of knowledge and there are facts which would support an inference of deliberate ignorance on his part. But since the purpose of the instruction is to allow the jury to impute knowledge of what should be obvious when there is a conscious purpose to avoid enlightenment, there is no reason to limit its application to defendants. When criminal estoppel is asserted by the defense, knowledge on the part of the government of the operative facts becomes the critical issue. Fairness and consistency require that the doctrine of willful blindness be as accessible to the defendants as it has been to the government.

In United States v. Hiland, an Eighth Circuit case, the court gave a willful blindness instruction to establish knowledge on the part of the defendants that a drug was dangerous and falsely labeled. The court found that if the defendants did not have actual knowledge of that fact, the jury could infer knowledge from evidence that the defendants had failed to investigate reports of adverse reactions. The court went so far as to conclude that, even though

152. See, e.g., United States v. White, 794 F.2d 367, 371 (8th Cir. 1986); United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984). The instruction has its modern genesis in the Ninth Circuit decision of United States v. Jewell, 532 F.2d 697, 700-04 (9th Cir. 1976). The court in that case allowed a willful blindness jury instruction where a defendant may have "knowingly" possessed marijuana, based on the facts that he was offered $100 to transport a car from Mexico to the United States and the car was laden with 110 pounds of marijuana. Id.
153. See Hiland, 909 F.2d at 1130; Zimmerman, 832 F.2d at 458.
154. See United States v. Race, 632 F.2d 1114, 1121 (4th Cir. 1980) (finding that even though the defendants may not have performed properly under the contract, the Navy had forfeited its right to complain, since it knew of the defendants' interpretation of the contract and did not advise them of its objections).  
155. Hiland, 909 F.2d at 1130.
156. Id. at 1130-31.
the defendants were under no legal duty to inquire of the FDA as to whether it was necessary to test the drug for safety, "their decision not to consult the FDA constituted at least some evidence of deliberate ignorance."157

Although willful blindness instructions usually are applied against defendants, they could be used against the government as well. In cases where the government is on notice that regulated persons are relying upon official acquiescence in directing the conduct, but the government fails to investigate or inquire into the nature of the defendant's conduct, a willful blindness instruction may be appropriate to establish the government's knowledge of the essential facts justifying estoppel. In United States v. Najarian, for example, it appeared that FDA staff for years turned a blind eye toward alleged regulatory failings, including cost recovery, due to the medical importance of the drug.158 At trial, the government denied knowledge of and acquiescence in the cost recovery program, yet it asserted that the inspection reports which were prepared by the early staff personnel who were aware of the program had been destroyed.159 Destroying such critical evidence could well be seen as willfully avoiding knowledge of the salient facts. Under such circumstances, a willful blindness instruction may be appropriate.160

V. THE BOUNDARIES OF CRIMINAL ESTOPPEL

Knowing acquiescence is only one of the potential limits of criminal estoppel.161 While an affirmative misrepresentation would normally be necessary in order to successfully assert the criminal

157. Id. at 1131 (citing United States v. Vesterso, 828 F.2d 1234, 1244-45 (8th Cir. 1987)).
159. Id. at 1474-77.
160. The case of United States v. Race, 632 F.2d 1114 (4th Cir. 1980), illustrates the same principle in a knowing acquiescence context. In this case, a government contractor was prosecuted for submitting false and fraudulent invoices. Id. at 1115. In reversing the convictions, the Fourth Circuit observed that the government was on notice throughout the life of the contract as to how the defendant interpreted the contract, and it concluded that the Navy should have advised the defendant if he was misconstruing the contract. Id. at 1121. While not an example of the willful blindness instruction, Race illustrates the underlying concept that the government may not be free to ignore circumstances of which it has notice without suffering consequences.
161. See discussion supra Part IV.
estoppel defense, knowing acquiescence coupled with a duty to speak out may create an alternative ground. This Part examines some of the other limits that have been or should be placed on the defense. These limits involve the inappropriateness of the defense in connection with heinous crimes, the application of the defense in specific intent crimes, and the determination of whether the defense can be based upon statements made with actual authority and apparent authority.

A. Threshold Limitations

Criminal estoppel does not constitute an excuse to do something unlawful. However, jurists have expressed a fear that the defense will be used to permit such unlawfulness. Justices Black and Clark, dissenting in Cox v. Louisiana, both expressed such a view. Justice Black noted that "a police chief cannot authorize violations of his [s]tate's criminal laws," and Justice Clark said he "never knew until today that a law enforcement official - city, state or national - could forgive a breach of the criminal laws." Moreover, because ignorance of the law is no defense, it would be regarded as inconsequential that a government agent had rendered an erroneous interpretation of a law which the agent presumed a citizen already knew. But the presumption that every citizen knows the

162. See discussion supra Part III.
163. See discussion supra Part IV.
164. See 379 U.S. 559, 582 (1965) (Black, J., dissenting); id. at 588 (Clark, J., dissenting). Another concern, over potential compromise of the separation of powers, has led the Supreme Court to hold that agents of the executive branch may not, on an ad hoc basis, override laws enacted by the legislative branch. See Raoul Berger, Estoppel Against the Government, 21 U. CHI. L. REV. 680, 686 (1954).
165. Cox, 379 U.S. at 582 (Black, J., dissenting).
166. Id. at 588 (Clark, J., dissenting). Justice Clark punctuated his comments by adding that he "missed that in my law school, in my practice and for the two years while I was head of the Criminal Division of the Department of Justice." Id. at 588-89.
167. See Cheek v. United States, 498 U.S. 192, 199 (1991) (noting the general rule that neither ignorance nor mistake of the law is a defense); see also Oliver Wendell Holmes, The Common Law 48 (1881) ("[E]very one must feel that ignorance of the law could never be admitted as an excuse, even if the fact could be proved by sight and hearing in every case.").
168. See United States v. Barker, 546 F.2d 940, 947 (D.C. Cir. 1976) (acknowledging that under a strict construction of the mistake of law rule, a recipient of a warrant is not excused from an unlawful search and seizure prosecution by reliance upon a judicial determination as to probable cause, but that "in certain situations there is an overriding societal interest in having individuals rely on the authoritative pronouncements of officials whose decisions we wish to see re-
law has little basis in fact, especially with respect to laws that are *malum prohibitum*\(^{169}\) or specialized or arcane laws such as administrative regulations.

Despite these criticisms, criminal estoppel decisions do not actually hold that police may “excuse” or “forgive” violations of the law. Rather, they are premised on the belief that it is reasonable to rely on an interpretation of the law by one who appears to be in good position to provide reliable guidance. None of the three seminal Supreme Court criminal estoppel cases deal with police agreeing to forgive or somehow disregard a known violation of the law. Rather, in each case, law enforcement agents provided views on how the law applied to the fact situation presented,\(^{170}\) i.e., how the defendant could conform his or her conduct to the requirements of the law. In most criminal estoppel cases, the acquiescence is not a license to violate the law but rather advice on how conduct may conform to the law.\(^{171}\) Thus, the criticism that police should not be permitted to forgive violations of the law is misplaced, for the cases show that this has not happened.\(^{172}\)

The essence of criminal estoppel is that the government, through its words or actions, has led a defendant to believe that the conduct at issue is *not* illegal and will *not* result in punishment. It seems unlikely that the criminal estoppel defense could be used to assert that conduct that was known to be illegal by both the defendant\(^{169}\).

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169. *Malum prohibitum* is defined as “a thing which is wrong because prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law.” *BLACK'S LAW DICTIONARY* 960 (6th ed. 1990). Compare *malum in se*, which is defined as an act that is inherently and morally wrong. *See id.* at 959.


172. *See, e.g.*, United States v. LaChapelle, 969 F.2d 632, 637 (8th Cir. 1992) (holding that there must be an "explicit assurance of legality" for the defense to succeed); United States v. Brebner, 951 F.2d 1017, 1025-26 (9th Cir. 1991) (requiring evidence that a government official made some affirmative misrepresentation that the conduct in question was legal); United States v. Hurst, 951 F.2d 1490, 1499 (6th Cir. 1991) (stating that "mere nonfeasance in law enforcement" cannot be "tantamount to official approval of [an] illegal act" and will not support the estoppel defense).
dant and police nevertheless was authorized. The exception to this lies in those cases where the defendant claims he was assisting the government in an undercover investigation—for example, setting up drug deals—and therefore was allowed to engage in what otherwise would have constituted criminal conduct.

B. Heinous Crimes

In cases of "heinous" criminal offenses, particularly those involving "substantial personal injury," questions may be raised as to the appropriateness of applying the doctrine of criminal estoppel. The consequences of such crimes are so severe and the acts so reprehensible that it is socially irresponsible to allow estoppel to be tendered as an excuse in these cases. Further, in heinous cases the law is rarely ambiguous, and the community moral standards so clear, that the wrongfulness of the act "should be apparent even in the face of official misleading." Thus, a defendant accused of a heinous crime could not credibly claim that he believed his act was in conformity in the typical case with the law as a result of an official's statements or conduct.

But whether criminal estoppel is available as a defense turns not so much on whether a crime is "heinous" or upon the policy question of whether the lawbreaker should be "excused." Rather, criminal estoppel turns on whether the defendant acted reasonably in relying on the official pronouncement and whether the government should be estopped because of its communication of a message that the conduct was not illegal. As noted above, these


174. See, e.g., United States v. Abcasis, 45 F.3d 39, 43 (2d Cir. 1995) (opining that if the defendant "commits forbidden acts . . . belie[ving] that he has in fact been authorized to do so as an aid to law enforcement, then estoppel bars conviction").

175. See Egger, supra note 12, at 1060-61.

176. See id. at 1061.

177. Id.

178. See id.

179. An exception to the rule against application of estoppel in heinous crimes lies in cases of spiritual healing. In McKown (discussed above), the defendants successfully raised the estoppel defense against charges of second-degree manslaughter. State v. McKown, 475 N.W.2d 63, 68 (Minn. 1991); see also Hermanson v. State, 604 So. 2d 775 (Fla. 1992) (holding that parents convicted of felony child abuse and third-degree murder could rely on statutes that failed to
are the subjective and objective touchstones of the defense, respectively.\footnote{180}

C. Specific Intent Crimes

Heinous crimes aside, criminal estoppel should apply in all criminal cases irrespective of whether specific intent is an element of the crime charged. In United States v. Hedges, the Eleventh Circuit reversed a conviction based on the trial court’s erroneous exclusion of the estoppel defense.\footnote{181} The trial court had concluded that estoppel would not apply since specific intent was not an issue, \footnote{182} thereby conflating estoppel and criminal intent. The Eleventh Circuit disagreed, holding that criminal estoppel was indeed a defense even where specific intent is not an element of the crime.\footnote{183} The court based its holding on the idea that estoppel “rests upon principles of fairness rather than the defendant’s mental state and thus it may be raised even in strict liability offense cases."\footnote{184}

Other circuits agree with this analysis. The Second Circuit has held that criminal estoppel may apply even though the charge does not require specific intent.\footnote{185} Likewise, the Ninth Circuit stressed the due process aspect of the government’s conduct when it concluded that estoppel may be raised as a defense to a non-specific intent charge.\footnote{186}

\footnote{180. See discussion supra Part II.}
\footnote{181. 912 F.2d 1397, 1406 (11th Cir. 1990).}
\footnote{182. Id. at 1400.}
\footnote{183. Id. at 1406.}
\footnote{184. Id. at 1405.}
\footnote{185. See United States v. Abcasis, 45 F.3d 39, 44 (2d Cir. 1995) (stating that criminal estoppel does not rely “solely on absence of criminal intent”).}
\footnote{186. See United States v. Brebner, 951 F.2d 1017, 1025 (9th Cir. 1991); see also United States v. Tallmadge, 829 F.2d 767, 773 (9th Cir. 1987) (noting that the district court, in rejecting the defendant’s “state of mind – due process defense,” failed to consider whether the due process defense of criminal estoppel applied to the case). In the dissent of Tallmadge Judge Kozinski wrote, “I fear the majority’s analysis reads scienter into statutes we have consistently held require none.” Id. at 781 (Kozinski, J., dissenting). Kozinski argued that because mental state is irrelevant, “it matters not whether he came to that belief as a result of erroneous advice or on his own.” Id. at 782.}

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A problem arises as to how estoppel applies if criminal intent is also present. Estoppel is not simply the lack of criminal intent. If it were, estoppel would be irrelevant in general intent or strict liability cases. In other words, a defendant cannot have relied in good faith on advice from law enforcement officials that conduct was lawful and, at the same time, have acted with criminal intent. It has been argued that these concepts cannot coexist and that criminal estoppel is superfluous in specific intent cases because specific intent statutes protect against fundamentally unfair convictions.\textsuperscript{187}

While it seems logical that a defendant could not both act with the intent to defraud and rely in good faith on official advice, it is not clear that the defense of criminal estoppel is unnecessary or inapplicable. If the estoppel defense were excluded, a court might rule evidence about official advice irrelevant on the ground that neither ignorance nor misunderstanding of the law is a defense.\textsuperscript{188} But even the trial court in \textit{Hiland} admitted estoppel evidence and gave an estoppel instruction to the jury.\textsuperscript{189} Similarly, the Sixth Circuit not only found the defense of estoppel applicable in a specific intent prosecution alleging fraud and false statement\textsuperscript{190} but affirmed the pretrial dismissal of portions of the indictment.\textsuperscript{191} The court ultimately found that the existence of the elements of estoppel rendered the government incapable of establishing intent as a matter of law.\textsuperscript{192}

In light of these concerns, a jury instruction on the principle of criminal estoppel may be advantageous to a defendant, even though defendants usually assert a lack of criminal intent. Such an instruction would focus attention on the issue of what the government said or did and how that influenced the defendant.\textsuperscript{193} Far from being "superfluous," the instruction would amplify the defendant's presentation and reflect his theory of the defense.\textsuperscript{194}

Further, criminal estoppel is not irrelevant in specific intent prosecutions because the defense focuses not only on the defen-

\textsuperscript{187.} See Connelly, \textit{supra} note 4, at 637-38.
\textsuperscript{189.} See United States v. Hiland, 909 F.2d 1114, 1125-26 (8th Cir. 1990).
\textsuperscript{190.} See United States v. Levin, 973 F.2d 463, 464 (6th Cir. 1992).
\textsuperscript{191.} See id. at 470.
\textsuperscript{192.} See id. at 469-70.
\textsuperscript{193.} See \textit{supra} Part IV.A (discussing when government knowledge is enough in cases of knowing acquiescence).
\textsuperscript{194.} A defendant is entitled to have a theory of the defense instruction submitted to the jury when supported by the facts and the law. See, e.g., United States v. Casperson, 773 F.2d 216, 223 (8th Cir. 1985).
vant's mental intent, but on the government's words and actions. Because of this objective due process aspect to the defense, it is not identical to the defense of lack of criminal intent. The defendant is entitled to have the finder of fact consider both his lack of criminal intent as well as the government's conduct in its deliberations. Therefore, for this reason and the others discussed, the defense of criminal estoppel should be available in specific intent, general intent, and strict liability offenses where it applies.

D. Actual Versus Apparent Authority

Another limitation on criminal estoppel concerns the authority of the government official upon whom the defendant relies. The government official must have actual, apparent, or some other level of authority to make the representation upon which the estoppel defense is based. The reasonable reliance element of criminal estoppel is particularly dependent upon the official's level of authority. Drawing upon two examples, one relating to firearm possession and the other to drug dealing, this Part examines these questions of authority and the inconsistency of the holdings.

At the most fundamental level, one could argue that an official never will have the actual authority to make a representation that forms the basis of the estoppel defense. In other words, no government official is authorized to excuse a violation of the law. Accordingly, the inquiry shifts to whether a defendant's mistaken but reasonable belief that he was authorized to violate the law is sufficient to invoke the defense of estoppel. However, some courts have stated that there can be no estoppel when the agent lacks authority to bind the government.

195. See, e.g., Levin, 973 F.2d at 469-70 (upholding a dismissal where the government's representations negated any of the defendant's possible criminal intent).

196. See, e.g., United States v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990) (stating that the holding "rests upon principles of fairness rather than the defendant's mental state").

197. See RESTATEMENT (SECOND) OF AGENCY § 7 (1958) ("Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him.").

198. See id. ("Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.").

199. See United States v. Abcasis, 45 F.3d 39, 44 (2d Cir. 1995).

200. See, e.g., United States v. Spires, 79 F.3d 464, 466-67 (5th Cir. 1996);
Rather than judging whether an agent has the actual authority to bind the government, the issue should be framed as whether the official had the apparent authority to make the pronouncement and whether the defendant's reliance was reasonable. Thus, the issue of authority turns on a mixed fact determination of (1) whether the agent had some colorable authority to render the advice, and (2) whether the defendant's reliance was reasonable under the circumstances.

1. Possession of Firearms

Courts have split on the question of whether it is a defense to the charge of possession of a firearm that a knowledgeable official advised the defendant that he could possess a gun. In United States v. Tallmadge, the Ninth Circuit held that a private gun dealer, licensed by the Bureau of Alcohol, Tobacco and Firearms (ATF), had apparent authority to advise a customer – erroneously – that he lawfully could purchase rifles because his felony conviction had been reduced to misdemeanor status under California law.\(^{201}\) The court noted that had such advice been given by an ATF agent, estoppel clearly would apply.\(^{202}\) Under agency law, the licensed dealer was empowered to "gather[] and dispens[e] . . . information on the purchase of firearms."\(^{203}\) In rejecting the defense, the dissent stressed that the dealer was neither a federal employee nor authorized to speak for the government.\(^{204}\) The majority rebutted this argument by relying not only on the firearms dealer's statements, but also on similar statements made by a state court judge, the prosecuting attorney, and the defense attorney.\(^{205}\)

In United States v. Austin,\(^{206}\) the Eighth Circuit refused to find actual authority and rejected criminal estoppel in a similar case in which a pawn shop clerk dispensed both guns and advice to a felon. The court found that the clerk's erroneous advice that the defendant lawfully could consummate the transaction, regardless

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\(^{201}\) United States v. Browning, 630 F.2d 694, 702 (10th Cir. 1980).
\(^{202}\) 829 F.2d 767, 774 (9th Cir. 1987).
\(^{203}\) Id.
\(^{204}\) Id. at 777 (Kozinski, J., dissenting).
\(^{205}\) Id. Judge Kozinski added, "[T]he court today reaches a just result. But it does so at too high a price, for this is a case where 'justice to the individual is rightly outweighed by the larger interests on the other side of the scales.'" Id. at 775 (Kozinski, J., dissenting) (quoting Holmes, supra note 167, at 48).
\(^{206}\) 915 F.2d 363 (8th Cir. 1990).
of the defendant's felony status, was insufficient to invoke estoppel. The court ruled that even though the clerk was a federally licensed gun dealer and dealers are required by their license to enforce the law, these factors do not "transform them into government officials, at least for purposes of the entrapment by estoppel defense."

The Eighth Circuit is not alone in rejecting criminal estoppel in these situations. The Fourth Circuit has held that advice from a state court judge to a felon that he could hunt with a gun would not be a defense to felony possession charges. The court explained that because "the government that advises and the government that prosecutes are not the same," the criminal estoppel defense would not be available. Again, while the licensed merchant of a sporting goods store or hardware store is a state agent empowered to issue a hunting license, that agent lacks the power to restore the felon's civil rights merely by issuing such a license.

Even where criminal estoppel is legally available, the advice must be sufficiently clear and consistent so as to justify reliance as reasonable. A "mixed message" from a government agent that a defendant should cooperate with the government and retain his guns, but that it would be illegal were he to do so, was not enough to invoke estoppel, particularly where a defendant continued to possess guns after the arranged cooperation had terminated. The question, naturally, is whether the defendant received a consistently misleading message from several sources or messages about the legality of a certain behavior.

207. Id. at 366. The court stated that "[i]t is the authority, whether apparent or actual, of the government official that is crucial to the entrapment by estoppel defense." Id. (citing United States v. Tallmadge, 829 F.2d 767, 777 & n.2 (9th Cir. 1987) (Kozinski, J., dissenting)).
208. Id. at 366-67.
209. Id. at 366.
210. Id. at 367 (citing Tallmadge, 829 F.2d at 778 (Kozinski, J., dissenting)).
211. See United States v. Etheridge, 932 F.2d 318 (4th Cir. 1991).
212. Id. at 321 (citing United States v. Bruscantini, 761 F.2d 640, 641-42 (11th Cir. 1985)).
213. See id. at 322.
214. See Tallmadge, 829 F.2d at 775 (noting the defendant's reasonable reliance on the firearms dealer's misleading affirmation, his attorney's legal opinion, and comments by the trial judge and deputy district attorney).
216. See id. (comparing the facts of a successful estoppel claim with the ultimately unsuccessful claim in Smith).
2. Dealing Drugs and Contraband

Drug prosecutions also raise questions concerning officials' authority. Defendants are sometimes encouraged to deal in contraband of one sort or another by government agents as part of an investigation. Even if the agents lacked the authority to enroll the defendants as cooperating witnesses in the investigation, the defense of criminal estoppel should be allowed so long as reliance is reasonable.

In United States v. Abcasis,217 the Second Circuit held that actual authority, while instructive, is not necessary to criminal estoppel. The defendants allegedly were authorized by DEA agents to deal in narcotics.218 At trial, the court instructed the jury to acquit if it found that the defendants were in fact authorized, but it refused to instruct that it would be a defense if the defendants were found to have acted in the mistaken belief that they had authorization.219 The Second Circuit reversed, holding that the defense applies when a defendant “commits forbidden acts in the mistaken but reasonable, good[-]faith belief that he has in fact been authorized to do so.”220 The court stressed that estoppel does not depend solely on the absence of criminal intent or on actual authority.221 Rather, the defense “focuses on the conduct of the government leading the defendant to believe reasonably that he was authorized to do the act forbidden by law.”222

In United States v. Clegg,223 the Ninth Circuit also looked to the conduct of the government, as well as the context of the activity, in analyzing an estoppel defense. While the defendant was teaching school in Pakistan, U.S. officials asked him to help smuggle guns to Afghan rebels.224 When he was later prosecuted for providing the requested assistance,225 the defendant raised the criminal estoppel defense.226 The Ninth Circuit found this appropriate.227 The court reasoned that since the officials were high-ranking and were inter-

217. 45 F.3d 39 (2d Cir. 1995).
218. Id. at 42.
219. Id.
220. Id. at 43.
221. Id. at 44.
222. Id. (emphasis added).
223. 846 F.2d 1221 (9th Cir. 1988).
224. Id. at 1222.
225. Id.
226. Id. at 1222-23.
227. Id. at 1224.
preting the uncertain application of U.S. law abroad, adequate authority was present, availing the defendant of the criminal estoppel defense.228

A government official perhaps never has the actual authority to advise that a law may be broken, but she or he may be clothed with the apparent authority to make such statements.229 Whether the defense is viable may turn on such factors as whether the agent is a government official, what position the agent holds, and whether providing advice on legal matters is part of that position. Reliance on the advice must also be reasonable: Was it credible? Was it consistent with other information? Was it straightforward or “mixed”? Was the advice in the nature of an interpretation, as opposed to an instruction to violate a known legal duty? The answer to these questions, in large measure, will determine the success of the defense.

VI. THE DEFENSE AS A QUESTION OF LAW AND A QUESTION OF FACT

The court must decide, as a matter of law, whether estoppel is available as a defense. If the defense is available, the finder of fact must determine whether the elements of estoppel have been proven. For instance, the Supreme Court held in Pennsylvania Industrial Chemical Co. that an error of law would occur in denying a criminal defendant the right to present factual evidence that the government misled it into believing that its actions did not violate the law.230 In other words, where the defense is legally available, a factual inquiry must follow.

The burden of proving estoppel is on the defendant, but he or she is not required “to pass a credibility test to have [the defense] presented to the jury.”231 Even though the court may have good reason to be doubtful, when the evidence submitted by the defendant establishes a prima facie defense, the matter must be submit-

228. Id. at 1223-24. The court found Tallmadge controlling: “If Tallmadge was entitled to rely upon the representations of a gun dealer... we can hardly deny the same defense to Clegg.” Id. at 1224.
229. Cf. United States v. Abcasis, 45 F.3d 39, 43-44 (2d Cir. 1995) (focusing on the conduct of the government as evidence of apparent authority was absent or questionable).
231. Abcasis, 45 F.3d at 44 (citing United States v. Austin, 915 F.2d 363, 365 (8th Cir. 1990)).
In rare cases where relevant facts are not in dispute, criminal estoppel may be applied as a matter of law. For example, the Sixth Circuit in *Levin* affirmed the pretrial dismissal of an indictment based upon undisputed operative facts establishing that government agents declared a sales promotion to be legal, that the defendants relied upon those pronouncements, that the reliance was reasonable and, accordingly, that prosecution would be unfair. Faced with similarly undisputed operative facts, the Minnesota Supreme Court affirmed a pretrial dismissal of an indictment in *McKown*. In the normal case, however, the issue will be for the jury. In those cases, an appropriate jury instruction should be provided laying out the elements of estoppel.

VII. CONCLUSION

The doctrine of criminal estoppel has evolved into a recognized defense over the last forty years. It draws on principles of fairness that prohibit the government from prosecuting a crime that one of its agents has authorized, and its armor is strengthened by the notice requirements of constitutional due process.

Those constitutional protections are most pronounced in the United States Supreme Court’s application of the doctrine. At lower levels of the judicial system, the scope of criminal estoppel

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232. *See id.*
233. *See United States v. Levin, 973 F.2d 463 (6th Cir. 1992).*
234. *Id. at 467.*
235. *Id. at 468.*
236. *See discussion supra Part III.C.*
237. In *United States v. Hiland, 909 F.2d 1114 (8th Cir. 1990)*, the court quoted the following jury instruction, which the defendants did not challenge:

[The defendants] have introduced evidence that the regulation, policies and practices of the United States Food and Drug Administration led these defendants to believe that E-Ferol Aqueous Solution did not require an approved new drug application, an NDA, before it could be legally introduced into interstate commerce.

There has been evidence that E-Ferol Aqueous Solution was a single entity vitamin drug which was similar or related to other vitamin products that themselves were not the subject of an approved new drug application, and that it [sic] had been marketed prior to 1938.

[The defendants] were led to believe that E-Ferol Aqueous Solution could be used on equal terms with these other unapproved Vitamin E products.

*Id. at 1126 n.15.* This instruction seems to be more in the nature of a theory of the defense instruction rather than one which sets forth the elements of estoppel.
varies by jurisdiction. These variations between jurisdictions and the fact-specific inquiries surrounding the criminal estoppel defense may make its application somewhat unpredictable. However, given today's climate of regulatory prosecution, criminal estoppel undoubtedly will continue to evolve, and its usage will endure.