The Fall and Rise of the Entrapment Defense

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For more than three decades the defense of entrapment has suffered. This suffering has occurred in many jurisdictions and at all levels, it has been especially acute at the United States Supreme Court. The high watermark for the entrapment defense in the Supreme Court was *United States v. Sherman* back in 1958. The Court there reaffirmed its reliance on the subjective, predisposition test but condemned the behavior of the government and found entrapment as a matter of law. This conclusion was significant through the conduct of the government in *Sherman* was egregious. In the words of Justice O'Connor, "the Government agent had repeatedly and unsuccessfully coaxed the defendant to buy drugs, ultimately succeeding only by playing on the defendant's sympathy." Since *Sherman*, the Court has expressed serious doubts about the entrapment defense and has refused to apply it in any sort of vigorous fashion.

In *United States v. Russell* government agents had been heavily involved in the commission of a crime. They supplied the defendants with the necessary—ingredient for the manufacture of methamphetamine. After manufacture of the drug the agents arrested the defendants. The Court rejected the assertion that the government had gone too far. Instead, looking to its predisposition test, it noted that “entrapment is a relatively limited defense.” The conduct of the government really was amazingly intertwined with the criminal behavior of the defendant. The Court, though, was far less concerned with the government’s actions than with the defendant’s state of mind. The one positive feature of the opinion was that it recognized that in certain cases the behavior of the government may be so improper as to raise due process concerns.

The defense fared no better a few years later with the decision in *Hampton v. United States*. Government behavior there went even farther than in *Russell*, for the defendant claimed that the heroin he was accused of selling to undercover agents had in fact been supplied to him by another agent. The Court looked again to the subjective test, found that the defendant was predisposed and rejected the entrapment claim. Indeed, perhaps the most telling aspect of *Hampton* was the view of three members of the Court that the Due Process Clause would have little impact in the entrapment area and would only “come into play when the Government activity in question violates some protected right of the defendant.” From 1976 until 1992, the Supreme Court had issued opinions in no major entrapment decision. Moreover, after World War II the only genuinely supportive entrapment opinion was *Sherman*, decided 34 years ago. Its lead in limiting the appli-
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The application of the entrapment defense has been widely followed throughout the country in both federal and state courts. The federal courts which have allowed a variety of remarkably intense involvements by the government in criminal behavior without seeing entrapment, have been reluctant to find much role for the Due Process Clause and have generally been resistant to defense claims of entrapment.

The record on the entrapment defense in the state courts is more mixed. Some states utilize the objective entrapment test, focusing on police conduct; they have been much more receptive to defense claims of entrapment. In the states which follow the predisposition test, however, the courts have echoed the tone if not the specific holdings of the Supreme Court in restricting the application of the defense. While the due process contention in the state courts has been somewhat more successful than in the federal courts generally the past 34 years have not been kind to defense claims of entrapment across the nation.

I write this very soon after the decision was announced; still, it is fair to say that the Supreme Court's opinion in Jacobson v. United States will be an extremely positive change of pace for defense lawyers and a very chilly disappointment for prosecuting attorneys. It is certainly too early to determine if the case will have dramatic, long-term impact in the entrapment area generally, or be limited to extended sting operations. It is, however, a significant view of the Supreme Court's disgust with at least certain governmental activities in ferreting out crime.

**Jacobson v. United States**

Government agents were relentless in their pursuit of the defendant. They initially came across him when they closed down a bookstore in California. In 1984 he had ordered two magazines, containing photographs of nude preteen and teen-aged boys, from the bookstore. His name thus was on its mailing list. At the time of the 1984 order the purchase of those magazines was lawful. "The court in its introductory section of the opinion gives a flavor for what took place after the agents targeted Jackson. "There followed over the next two and a half years years, repeated efforts by two government agencies, through five fictitious organi...
tions and a bogus pen pal, to explore petitioner’s willingness to break the new law by ordering sexually explicit photographs of children through the mail. The efforts began in early 1985 and ended more than two years later when the defendant purchased materials that the government had sent him through the mails. The efforts included a letter from the “American Hedonist Society” espousing the view that people should have the “right to read or have any proof of petitioner’s predisposition or is likely to do so.” Indeed, Justice White’s majority opinion expressly noted that such individualized suspicion would not be necessary.

Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner—who must be presumed to know the law—had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction.

The case also did not indicate a willingness of the Court to have the judiciary actively involved either in regulating police conduct or in routinely finding entrapment as a matter of law. Justice White pointed out that this was an extraordinary case requiring reversal because at the time Jacobson finally placed his order “he had already been the target of 26 months of repeated mailings and communications from government agents and fictitious organizations.”

Still, the opinion in Jacobson is a strong one, and one that will likely have an important impact throughout the criminal justice system. In three ways, the case is of significance. First, it demonstrated that the concept of entrapment as a matter of law is alive and well. Second, it indicated that the courts should and will carefully scrutinize evidence of predisposition to make sure that the government’s burden has been satisfied. Third, the timing of the predisposition inquiry is clarified so that the question must be focused on the moment before government contact rather than before solicitation of an illegal act. Let us turn to a brief discussion of each of these areas.

Entrapment As A Matter Of Law
The Supreme Court in reversing Jacobson’s conviction did not send it back for a retrial or an evidentiary hearing. The Court did not conclude that the charging document was faulty, that the instruc-

Did the United States Supreme Court change the test for predisposition? Not at all.

The Government’s Predisposition Burden
The prosecution believed that it presented strong evidence of Jacobson’s predisposition. The evidence was grouped into two time periods: the time before government contact with him, and the time during its lengthy investigation. The majority of the Court was, however, not impressed by the prosecution presentation. The early evidence of predisposition—prior to any government contact—was quite limited. It consisted of the defendant’s 1984 magazine order. The Court ruled that these magazines were lawfully protected at the time that he ordered them so that the order “does little” to sustain the predisposition requirement. Moreover, the fact that the defendant enjoyed reading sexually explicit magazines by itself could not be sufficient.

[The order of the magazines is scant if any proof of petitioner’s predisposition to commit an illegal act, the criminal character of which the defendant is pre-
sumed to know. It may indicate a predisposition to view sexually-oriented photographs that are responsive to his sexual taste; but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probable value in establishing predisposition.30

This conclusion by the Court means a great deal. If the Court had decided otherwise, could predisposition then be satisfied with a showing of other sorts of tastes which many might find offensive? Would, for instance, the purchase of lawful, generally available, but sexually explicit magazines be sufficient? What of magazines promoting the legalizing of drugs, the ending of restrictions on weapons, etc.? The possibilities would be endless. It is good to see the Court unwilling to speak of predisposition when dealing with broad, “generic” categories.

With regard to the evidence during the investigation, the Court was also not moved. The agents’ pursuit of the defendant was intense and lengthy; it was specifically designed to exploit what they believed to be his tastes. His responses during this two and half year-period were not indicative of a predisposition, they “were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations.”31 The Court could not find this to be evidence of predisposition to violate the law. Its holding was bolstered when the Justices looked to the agents’ fervent campaign which “exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights.”32 True, the defendant responded quickly to the ultimate solicitation to purchase illegal magazines through the mails. This response, however, was not deemed sufficient to establish predisposition because it “came only after the Government had devoted two and half years to convincing him that he had or should have the right to engage in the very behavior prescribed by law.”33

Redefining The Predisposition Time Period?

Perhaps the most debated feature of Jacobson was the view of the dissenters that the Court changed the time element for the entrapment defense. That is, the question can be phrased as “whether a suspect is predisposed before the government induces the commission of the crime, [or whether he was predisposed] before the government makes initial contact with him.”34 In a case such as Jacobson the difference between the two approaches is of real importance. Clearly the defendant’s ready response to the ultimate solicitation would indicate at least a triable issue on the question of predisposition if the issue is the moment of solicitation. By focusing attention on the time before the initial government contact, two and half years earlier than the solicitation, however, the predisposition evidence is far more questionable. The evidence is, as the Court correctly held, insufficient as a matter of law.

Did the United States Supreme Court change the test for predisposition? Not at all. Justice White properly stated that the issue has always been “whether the Government carried its burden of proving that petitioner was predisposed to violate the law before the Government intervened.” The dissent is mistaken in claiming this is an innovation in entrapment law and in suggesting that the Government’s conduct prior to the moment of solicitation is irrelevant.”35 The majority cited the Court’s opinion in Sorrells v. United States.36 Sixty years earlier the Supreme Court wrote that an individual could not be punished “for an alleged offense which is the product of the creative activity of its own officials ... [the Government] is in no position to object to evidence of the activities of its representatives in relation to the accused.”37

While the Court did not in fact change the definition of predisposition the message it sent out is unmistakable. If government agents are going to engage in long term operations, they must be prepared to prove at trial that the accused’s state of mind results from his own activities rather than from the process of government involvement. In short, the prosecution will have to offer evidence of predisposition relating to the time before any government contact or inducement. This requirement is as it should be. The key question of the subjective test relates to the defendant’s predisposition to commit the crime. We want to focus our attention on the individual’s state of mind, his behavior, his plans. Once we have intense government involvement intertwined with the individual it becomes impossible to decide whether the intent originated with the agents or with the defendant. This becomes clear if we look to the time of solicitation rather than initial contact. Such a result would conflict with the condemnation in Sorrells of law enforcement techniques which “implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order [to] prosecute.”38

Conclusion

Justice White’s opinion in Jacobson is a refreshing reaffirmation of the validity and importance of the entrapment defense. The decision did not create new law, it did not strain prior interpretations. What it does, however, is concentrate our attention on the propriety of long-term government undercover operations. It also requires judges to be certain that when we convict an individual of a serious crime the conviction is based upon that person’s own improper purpose, not those of government agents. Strong language in this area has been missing from United States Supreme Court jurisprudence for more than three decades. Its return is to be applauded.

When the Government’s quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.39

Notes

2. Over the vigorous dissent of Justice Frankfurter who wished to adopt the objective test, evaluating appropriate police conduct.
4. 1 put to the side Matthews v. United States, 485 U.S. 58 (1988). It rejected the view that the entrapment defense could only be raised if the defendant admitted the underlying crime. The case has far more to do with notions of procedure involving inconsistent defenses than it does with the defense of entrapment. To be sure, the opinion of the Court in Jacobson mentions Matthews but once.
6. Id. at 435.
7. “While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed.” Id. at 431-32.
10. 425 U.S. 490-91. On this point, no other members of the Court were in agreement. Indeed, Justices Powell and Blackmun specially concurred leaving the due process question open. Essentially they rejected the idea that “the concept of
fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.” *Id.* at 492 (Powell, J., concurring).

11. See Note 4, supra.
13. Indeed, some judges have expressed doubt as to whether the outrageous government conduct doctrine of the Due Process Clause is any longer viable. See, especially, Judge Easterbrook’s concurring opinion in *United States v. Miller*, 891 F.2d 1265, 1271 (7th Cir. 1989). *But see Marcus, The Due Process Defense in Entrapment Cases, the Journey Back*, 27 American Criminal L. Rev. 457 (1991).
14. It can be argued, however, that the entrapment defense has a much better rate of success with members of the public than members of the judiciary. Certainly, the jury verdicts in the John DeLorean and Marion Barry cases would support such a view.
19. Soon thereafter, the receipt of such sexually explicit materials involving minors became illegal. *Id.* at 1538.
20. *Id.*
21. At the time of his arrest, a search of his home found no other materials related to child pornography. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. In one of the great ironies of the case, the government in that solicitation asked Jacobson to sign an affirmation that he was “not a law enforcement officer or agent of the U.S. Government acting in an undercover capacity for the purpose of entrapment Far Eastern Trading Company, its agents or customers.” *Id.* at 1539.
26. The panel decision in the Eighth Circuit had reversed; it required a reasonable suspicion basis before the targeting of an individual would be allowed. This requirement was rejected by the court en banc.
27. The dissenting Justices, in an opinion by Justice O’Connor, were concerned that the result of the Court’s decision would be construed as fashioning just such a requirement.

The rule that preliminary Government contact had created predisposition has the potential to be misread by lower courts as well as criminal investigators as requiring that the Government must have sufficient evidence of a defendant’s predisposition before it ever seeks to contact him. Surely the Court cannot intend to impose such a requirement, for it would mean that the Government must have a reasonable suspicion of criminal activity before it begins an investigation, a condition that we have never before imposed.

*Id.* at 1545 (O’Connor, J., dissenting). *Emphasis in original.*
28. *Id.* at 1541.
29. *Id.*
30. Hopefully, it is also significant because the majority opinion had in its voting block the two newest members of the Court, Justices Souter and Thomas.
31. A few courts have made the statement that there could not be entrapment as a matter of law. The leading case is *United States v. Andrews*, 765 F.2nd 1491, 1499 (11th Cir. 1985) “The doctrine of entrapment as a matter of law did not survive the Supreme Court’s opinion in *Hampton v. United States*.” A more accurate view was taken by the Fifth Circuit in *United States v. Nations*, 704 F.2d 1073, 1077 (5th Cir. 1985):

In essence, the jury must find that the defendant’s culpable intent originated with the defendant and was not the result of the acts of Government’s agents. Thus, to declare entrapment as a matter of law requires the conclusion that a reasonable juror could not find that the Government discharged its burden of proof.

The Court in *Andrews* seemed to be confusing the doctrine of entrapment as a matter of law with the view that *supplying drugs* as such does not constitute entrapment as a matter of law. The latter point was the holding of the Supreme Court in *Russell and Hampton* but it did not go any further than the narrow fact patterns presented there.
33. 112 S. Ct. at 1543.
34. The dissenters, Justice O’Connor joined by the Chief Justice and Justices Kennedy and Scalia, strongly disagreed with the majority’s characterization of the evidence. They would have found sufficient evidence to uphold the jury’s verdict. *Id.* at 1547 (O’Connor, J., dissenting).
35. *Id.* at 1542.
36. *Id.* at 1541.
37. *Id.* at 1542.
38. *Id.*
39. *Id.* at 1543.
40. *Id.* at 1545. (O’Connor, J., dissenting.)
41. *Id.* at 1541, n. 2.
42. 287 U.S. 435 (1932).
43. *Id.* at 451.
44. *Id.* at 442.
45. 112 S. Ct. at 1543.