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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—but difficult to obtain—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-
[Jacobson] 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.

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, 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 what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without restrictions being placed on us by outdated puritan morality." Jacobson also received a solicitation from a "prohibited mail specialist" in the postal service posing as a representative of the Midlands Data Research Company. He wrote to the defendant seeking responses from those who "believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophyte [sic] age." Still another government-created group called the "Heartland Institute for a New Tomorrow" contacted Jacobson indicating that it was "an organization founded to protect and promote sexual freedom and freedom of choice." Jacobson also received personal letters from the above-mentioned "prohibited mail specialist" writing under the pseudonym of "Carl Long," After writing two return letters, Jacobson discontinued the correspondence. Other letters to him followed, other fictitious organizations contacted him. It was not until the "Far Eastern Trading Company Limited" wrote him, soliciting his order for sexually explicit materials, that he ordered magazines depicting young boys engaged in various sexual activities.

The defendant was convicted and his conviction was affirmed on appeal by the Eighth Circuit sitting en banc. For the Supreme Court the issue was a simple one. Had the prosecution demonstrated, beyond a reasonable doubt, that the defendant was predisposed to purchase through the mails illegal pornographic materials? The answer was a resounding, "No."

If the opinion simply involves evidentiary considerations relating to the predisposition element, why has there been such a controversy surrounding the opinion? One reason for the furor in connection with the opinion is that there are a few misconceptions about the Court's holding. The Court did not decide that before targeting an individual agents must have some individualized suspicion that the person is engaging in criminal behavior 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-
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 probative value in establishing predisposition.99

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 legalization 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."7 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."98 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."79

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."96 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 thatpetitioner 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."4 The majority cited the Court's opinion in Sorrells v. United States.60 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."41

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 condemn-
fundamental fairness inherent in the guarantee of
due process would never prevent the conviction
of a predisposed defendant, regardless of the out-
rageousness of police behavior in light of the sur-
rounding circumstances.” Id. at 492 (Powell, J.,
concurring).

11. See Note 4, supra.

12. See, e.g., United States v. Jannotti, 673 F.2d
578 (3d Cir. 1982) [the ABSCAM prosecutions];
United States v. Dyman, 739 F.2d 762 (2d Cir.
1984), cert. denied 469 U.S. 1193 (1985) [gov-
ernment heavily involved in breaking into a bank];
1990) [mail order child pornography solicitation].

13. Indeed, some judges have expressed doubt
as to whether the outrageous government con-
duct 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.

14. It can be argued, however, that the entrap-
ment 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.

15. See, e.g., State v. Jullett, 475 N.W. 2d 786
(Mich. 1991); State v. Hunter, 596 So. 2d 319 (Fla.
1991); Wasco County v. Hawkins, 752 P.2d 769
(Nev. 1988).

1989) [sheriff's deputies solicited acts of prostitu-
tion at sauna massage business]; Gilley v. State,
535 N.E. 2d 130 (Ind. 1989) [government active-
ly involved in the drug offense]; Harrison v. State,
442 A. 2d 1377 (Del. 1982) [government agent
encouraged defendant to bring drugs into the state
prison].

17. See, e.g., People v. Isaacson, 406 N.Y. 2d
714 (N.Y. 1978); Commonwealth v. Matthews,
500 A. 2d 853 (Pa. 1985); State v. Glosson, 462 So.
2d 1082 (Fla. 1985).


19. Soon thereafter, the receipt of such sexu-
ely 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 enforce-
ment officer or agent of the U.S. Government act-
ing in an undercover capacity for the purpose of
entrapping 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 crim-
inal investigators as requiring that the Gov-
ernment must have sufficient evidence of a
defendant’s predisposition before it ever seeks
to contact him. Surely the Court cannot intent
impose such a requirement, for it would mean
that the Government must have a rea-
sonable 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.2d 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. Uni-
eted 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 defen-
dant’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 bur-
den 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 lat-
ter point was the holding of the Supreme Court
in Russell and Hampton but it did not go any fur-
ther than the narrow fact patterns presented there.

32. See generally, Marcus, The Entrapment
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 character-
ization 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.