Investigatory Practices and the Changing Entrapment Defense

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Introduction

For decades, serious disagreements were heard concerning the basis for the entrapment defense, the two principal tests, and the manner in which the tests should be applied. The broad debate regarding entrapment as a way to extend judicial control over law enforcement behavior has essentially disappeared,\(^1\) even at the United States Supreme Court.\(^2\) Most jurisdictions in our country have adopted a view of the defense which looks mainly to the culpability of the individual defendant rather than the conduct of government officers.\(^3\) With this prevailing subjective approach,\(^4\) judges and juries\(^5\) ask whether the defendant committed the criminal action in response to sufficient inducement by the government, and whether—prior to government

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\(^1\) The debate had been vigorous among Justices of the Supreme Court as well as academics and practicing lawyers. See, for instance, the comments of Chief Justice Warren and Justice Frankfurter in Sherman v. United States, 356 U.S. 369 (1958), and Justices Rehnquist and Stewart in United States v. Russell, 411 U.S. 423 (1973).

\(^2\) Justice Brennan was the last holdout arguing for a change in the standard for entrapment. He gave up in Mathews v. United States, 485 U.S. 58, 67 (1988) where he remarked:

I join the Court’s opinion. I write separately only because I have previously joined or written four opinions dissenting from this Court’s holdings that the defendant’s predisposition is relevant to the entrapment defense. Although some governmental misconduct might be sufficiently egregious to violate due process, my differences with the Court have been based on statutory interpretation and federal common law, not on the Constitution. Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the Government’s conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to stare decisis, and today join the judgment and reasoning of the Court.

\(^3\) Most, but not all, jurisdictions use this “subjective approach.” Some large states such as California, Texas and Michigan principally review the actions of the government agents, under the so-called “objective approach” to entrapment. Minnesota, Pennsylvania and New Mexico have adopted tests which combine the two approaches. For analysis of the various state views, see, Marcus, The Entrapment Defense (The Michie Co., 2nd Ed. 1995).

\(^4\) The federal courts and about two-thirds of the state courts use this test.

\(^5\) Normally the question is one for juries unless a finding can be made as a matter of law. See infra note 18.
contact\textsuperscript{6}—that person was "predisposed" toward this sort of criminal action.\textsuperscript{7}

The United States Supreme Court has spoken in depth about the entrapment defense on several occasions settling many of the earlier disputes.\textsuperscript{8} Some of the key issues surrounding the defense have not, however, gone away. Substantial practical problems remain in applying the defense in the context of an enormous number of law enforcement undercover operations and "stings,"\textsuperscript{9} seen in an incredible array of factual settings.\textsuperscript{10}

\textsuperscript{6} The timing of the inquiry had been open to disagreement until the \textit{Jacobson} decision, infra. It is now beyond dispute that the inquiry is to concentrate on the period before the initial approach by the law enforcement agent, as opposed to the time of the later solicitation. The difference can be substantial, as in \textit{Jacobson}. There the defendant was engaged by the government for a period of more than two years before any solicitation was made.

\textsuperscript{7} Deciding whether the defendant was predisposed can be difficult. Most courts follow a "totality of circumstances" approach. See, e.g., United States v. McClelland, 72 F.3d 717, 722 (9th Cir. 1995), cert. denied, 116 S. Ct. 1448 (1996):

Predisposition is established only after analyzing five factors: 1) the character and reputation of the defendant; 2) whether the government made the initial suggestion of criminal activity; 3) whether the defendant engaged in the activity for profit; 4) whether the defendant showed any reluctance; and 5) the nature of the government's inducement.

\textsuperscript{8} Disputes, for instance, as to whether the government's sale/purchase back of an illegal substance is necessarily entrapment—Hampton v. United States, 425 U.S. 484 (1976)—and whether inconsistent defenses must be barred in the entrapment setting—Mathews v. United States, 485 U.S. 58 (1988). The answer to both questions is "no."

\textsuperscript{9} In just the last several years, long term undercover investigations have been created with these catchy names:

- Operation Casablanca
- Operation Lost Trust
- Wonderland Club Sting
- Operation Clean
- Operation Seek and Keep
- Project Exile
- Operation Tree Surgeon
- Crown Casting Company Operation
- Operation Ramp Rat
- Operation Bright and Shiny
- False Flag Operation
- Operation Double Barrel
- Operation Norlock
- The Dirty Three Operation

Media coverage of these investigations is on file with the author.

\textsuperscript{10} Over these past same years, undercover operations have been designed to combat, among many others, these crimes:

- alien smuggling
- blackmail
- theft of computer chips, golf clubs, sports rings, wiring
Much has been written regarding the rationale for the entrapment defense and the policies behind the various approaches. This essay is not the venue for a reconsideration of such matters. Nor am I interested now in encouraging a very different view of the defense, particularly in light of the Chief Justice's frequent reminder that entrapment is "a relatively limited

- dog fighting
- indecent exposure
- extortion
- fraud in a host of areas such as tax, food stamp, insurance, securities, telemarketing, police crime labs, voter registration, and government contracts
- illegal militia activities
- sale of illegal meat
- garbage hauling cartels
- unlawful dispensing of drugs
- robbery
- assault
- battery
- political corruption
- unlawful wildlife purchases
- bombing
- assassination
- sale of illegal weapons
- money laundering
- child pornography, child molestation
- drug trafficking
- murder
- outstanding felony warrants
- prostitution
- price fixing (for bread, chemicals, corn syrup)
- graffiti
- bribery
- rape
- medical insurance kickbacks.

The subjects of these stings have been a rich assortment of citizenry including judges, doctors, lawyers, F.B.I. agents, business leaders, pharmacists, police officers, teachers, school principals, chemists, athletes, clergy, movie stars, elected officials, and bakers. Here, too, media coverage of these investigations is on file with the author.

THE CHANGING ENTRAPMENT DEFENSE

defense." But, in viewing the manner in which the defense is raised throughout our country, I am struck by the presence of genuine change in one important area. This change is certainly worthy of note.

The Evolving Process

The most recent entrapment opinion from the Supreme Court provides a strong impetus for the development taking place. In Jacobson v. United States, the Court was faced with an egregious sting operation in which undercover postal investigators targeted an individual with no prior record. They conducted a lengthy campaign of personal contacts with him, and the agents emphasized to him—in this child pornography case—the importance of supporting strong freedom of speech considerations under the First Amendment. The defendant raised an entrapment defense, but was convicted of receiving obscene materials through the mail, materials sent to him by the postal inspectors soon after they asked him to order the items. The Court, in reversing the conviction, went well beyond expressing dis­pleasure with the somewhat unusual law enforcement initiative. Instead, the Court found entrapment as a matter of law and spoke strongly of the government’s behavior.

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. But that is not what happened here. By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. . . .

Law enforcement officials go too far when they “implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.”

Sorting out the meaning of the decision has not been easy for judges and lawyers. But change, important change, based on that decision is surely occurring. Perhaps the leading judicial assertion of a broad reading of Jacob-
son is Judge Posner’s opinion for the en banc Seventh Circuit in United States v. Hollingsworth. There, in a case involving two amateurs caught up in a government sponsored money laundering scheme, the majority held that the proper question regarding predisposition is not simply whether the defendants were eager and quick in response to the government inducement. Rather, the courts should determine if the defendants would have committed the crime without the government involvement. This determination emphasizes much more substantially a causal link between the defendant’s state of mind, the government inducement, and the ultimate crime.

[T]he Court [in Jacobson] clarified the meaning of predisposition. Predisposition is not a purely mental state, the state of being willing to swallow the government’s bait. It has positional as well as dispositional force. The dictionary definitions of the word include “tendency” as well as “inclination.” The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation.

I have written before, in praise of Hollingsworth, arguing that it correctly applied Jacobson, and urging other courts to follow the lead of the Seventh Circuit. Not taking into account the likelihood of the crime without government involvement is both a distortion of the entrapment defense and a disservice to the proper functioning of the criminal justice system. After all, if the defendant never would have committed the crime without government

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20 27 F.3d 1196 (7th Cir. 1994) [en banc].
21 One a dentist, the other a farmer. “Tyros,” in the court’s parlance. Id. at 1203.
22 Often courts equate predisposition with enthusiasm, or even a lack of hesitation. See, e.g., United States v. Dozal-Bencomo, 952 F.2d 1246, 1251 (10th Cir. 1991), (indicating that predisposition may be inferred from defendant’s “eagerness to participate in the transaction, his ready response to the government’s inducement offer . . .”). Of course, in Jacobson, the defendant did not hesitate in response to the ultimate solicitation. Still, the Court found entrapment as a matter of law, as the solicitation occurred more than two years after the first contact with him.
23 27 F.3d at 1200.
24 See Marcus, supra, note 11.
25

With long-term investigations, intensive operations, or tremendous incentives to commit crime being offered, government investigators ought to be able to point to more than a willingness, or even an eagerness, on the part of the defendant to participate in the crime. Instead, the prosecution must show that even without the government involvement the person would have been likely to commit a crime in the foreseeable future. This result strikes the proper balance between careful investigation by the government, and the creation of unlawful behavior.

Id., 47 Fla. L. Rev. at 245.
inducement, why is this person being prosecuted, why are valuable public resources being utilized?²⁶

Few judges have chosen to rely on the “positional” approach of Hollingsworth.²⁷ Still, even in those courts which have not embraced this rationale, movement toward a much stronger use of the entrapment defense can be seen. The Ninth Circuit experience is illustrative. In its first major decision after Jacobson, the court could not find that the view of the Seventh Circuit was consistent with the Supreme Court’s entrapment jurisprudence.

Relying on Hollingsworth, Thickstun interprets Jacobson to hold that a defendant not only must intend to break the law but must be “ready” to do so prior to government contact. If she desires to commit a crime but lacks the means to accomplish it, and a government agent subsequently supplies those means, under Thickstun’s reading of Jacobson, she was entrapped.

We read Jacobson not as creating a requirement of positional readiness but as applying settled entrapment law. The inference that the government’s methods had persuaded an otherwise law-abiding citizen to break the law, coupled with the absence of evidence of predisposition, established entrapment as a matter of law under the existing two-part test. It was not necessary for the court to expand the entrapment defense, nor is there language in the opinion indicating that it did so.²⁸

Fair enough, the court could not find that Jacobson had expressly changed the subjective test. Hence, the court was unwilling to direct trial judges to look to the “positional” approach.

The entrapment jurisprudence in the Ninth Circuit though, does not end there. Less than one year later, the judges were again faced with a difficult undercover investigation, in United States v. Martinez.²⁹ While the court would not explicitly follow the Seventh Circuit lead, it reversed the narcotics conviction and found entrapment as a matter of law. It reached this conclusion by scrutinizing very closely the activities of the government in soliciting the crime, and also the evidence relating to the defendant’s prior intent to commit the offense. As to the former, the record showed that a mutual friend had introduced the defendant to a paid police informant and the informant had a series of contacts with the defendant for more than two months, effectively “wooing” the defendant.³⁰ According to the court, the informant made a fine living from his activities: $500 per week to uncover

²⁶ United States v. Thickstun, 110 F.3d 1394, 1398 (9th Cir. 1997).
²⁷ 122 F.3d 1161 (9th Cir. 1997).
³⁰ Id. at 1164.
drug dealers, plus $3000-$4000 per arrest.31 Regarding the latter concern, the prosecution offered little to support the view that the defendant was predisposed to commit the drug offense.32

The dissenter in Martinez complained that the majority was placing too much emphasis on the actions of the informant: "[I]t is not the degree of government participation that is critical but, rather, the predisposition of the defendant."33 For him, the agent’s "inappropriate conduct [was] beside the point."34 He had a point. To be sure, the federal courts utilize the subjective view of the entrapment defense, not the objective view; as such—at least traditionally—they are supposed to review mainly the defendant’s state of mind, not the government’s conduct. The majority, though eschewing the Seventh Circuit approach, emphasized heavily the nature of the inducement and, quoting an earlier Supreme Court opinion,35 decided that the solicitation was inappropriate and that the defendant had been entrapped. ‘[The informant] played on the weaknesses of an innocent party and beguiled him into committing crimes which he otherwise would not have attempted.’36

Moreover, while the decision did not even cite Judge Posner’s broad reading of the Court’s opinion, it quoted Jacobson and reiterated that the causal link was essential to the government’s case in resisting the entrapment defense. ‘[The informant’s inducement] led 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.’37

I believe the Seventh and Ninth Circuits have applied the Supreme Court entrapment precedent just right. Whether one labels it a causal link determination (Ninth Circuit), or a positional approach (Seventh Circuit), the results in both of these cases are correct, and wholly consistent with Jacobson.38 By weighing heavily the activities of the government agent, as well as looking

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31 Tax free . . . . Id. at 1163.
32 The government offered no evidence to rebut the defendant’s testimony of his reluctance. Id. at 1164.
33 Id. at 1167.
34 Id.
36 122 F.3d at 1166.
37 Id.
38 These two circuits have not been the only courts to shift direction in light of Jacobson. The court in United States v. Gamache, 156 F.3d 1 (1st Cir. 1998)—albeit in a case involving the trial judge’s refusal to instruct on entrapment—weighed heavily the nature of the government action.

Gamache initially expressed only his desire for a sexual relationship with Frances and his intent to form a non-sexual relationship with her children. In addition, the agent here manufactured the aura of a personal relationship between Gamache and the fictional “Frances,” and “Frances” disclosed her fictional illicit intentions only well into the correspondence. These solicitations are quite similar to the type of “psychologically graduated” responses that the Jacobson Court found objectionable. Second, the government agent provided justifications for the illicit activity (intergenerational sex) by describing “herself” as glad that Gamache was “liberal” like her, expressing that she, as the
to the evidence of prior criminal behavior by the accused, a court can properly determine if this person likely would have committed this crime without the government involvement.\textsuperscript{39} If we are left with some doubt as to such probable behavior, entrapment as a matter of law should be found.\textsuperscript{40}

With this approach to undercover investigations and the defendant’s affirmative defense in the criminal trial, judges are able to balance the needs of the government to investigate crimes with the individual’s right not to be persuaded to take actions which she otherwise would not have taken.\textsuperscript{41} After all, agents could still engage in serious undercover operations. Of course, the suggested approach of looking closely to the probability of the defendant acting on her own without government inducement would encourage trial judges more often to find the defense as a matter of law. The result, however, is to restore the entrapment defense to an appropriate position in such prosecutions. The government will undoubtedly continue to conduct wide

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\item mother of the children, strongly approved of the illegal activity, and explaining that she had engaged in this conduct as a child and found it beneficial to her. These solicitations suggested that Gamache ought to be allowed to engage in the illicit activity, just as the Government in \textit{Jacobson} used a fake lobbying organization to appeal to anti-censorship motives. Finally, the Government’s sting commenced in May 1995 and did not result in any illegal conduct until January 1996. Thus, the Government persevered for almost seven months to elicit the offense conduct.
\end{itemize}

\textit{Id.} at 11. In addition, the prosecution had argued that an “enthusiastic response” was sufficient to defeat the entrapment claim. Citing \textit{Hollingsworth}, the court wrote that such a response “although clearly relevant to the jury’s inquiry, is not sufficient by itself to mandate a finding that he was predisposed.” \textit{Id.} at 12.

\textsuperscript{39} The Ninth Circuit’s opinion in \textit{Martinez} well makes the point. By reviewing with care the government’s actions, the evidence as to pre-disposition becomes clearer.

Plancarte spent more than two months wooing Martinez. According to Martinez’s uncontradicted testimony, Plancarte cajoled, scolded, and pressured Martinez throughout this time. Among other tactics, Plancarte reassured Martinez not to worry about the police, attempted to teach Martinez about the drug trade, scolded Martinez because he didn’t know how to sell drugs, and was “always instructing” him about the drug trade. Eventually, Plancarte attempted to sway Martinez with promises of wealth and friendship. Martinez finally gave in shortly after Plancarte promised to become his “padrino.” Thus, the undisputed evidence shows that Plancarte went to great lengths to lure Martinez with pressure tactics, suggestions and promises of companionship, wealth, friendship, and an important symbolic relationship.

In addition, there was strong circumstantial support for the inference that Plancarte was inappropriately aggressive in inducing Martinez.

122 F.3d at 1164–65.

\textsuperscript{40} If there is a reasonable doubt as to predisposition, the defendant must prevail. See \textit{Gamache}, supra, 156 F.3d at 9; United States v. Cannon, 88 F.3d 1495, 1504 (8th Cir. 1996).

\textsuperscript{41} As stated by Justice Frankfurter, concurring in \textit{Sherman}, supra, 356 U.S. at 383: “No matter what the defendant’s past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.”
ranging investigations, a judicially approved practice.42 What the proposed approach will not permit routinely are dubious practices such as engaging in tremendously long term investigations,43 giving great sums of money to engage in relatively minor criminal acts,44 or creating specially tailored incentives based upon particular interests of the defendant such as appearing in the movies or even receiving free vacations.45

An Alternative?

Reliance on the entrapment defense46 is not the only way the criminal justice system could respond to concerns as to questionable investigations.47 One could find that undue government actions are invalid under the Due Process Clause. Such an approach, alas, is highly problematic.

In theory, the due process analysis seems ideal, for it is considered apart from the entrapment defense.48 Moreover, the courts as a matter of constitutional construction could limit over-involvement of law enforcement in criminal activity. Also, the doctrine has a powerful heritage looking to the search-and-seizure opinion of Justice Frankfurter in the famous stomach pumping case, *Rochin v. California*.49 In the entrapment setting, however, the doctrine has not fared nearly as well.

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42 This oft-repeated statement was made by then-Justice Rehnquist in United States v. Russell, 411 U.S. 423, 432 (1973):

The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation . . . .

43 Almost two and one-half years in *Jacobson*, 503 U.S. at 550.

44 As in *Hollingsworth*, 27 F.3d at 1200–1201.

45 Actual enticements in some of the prosecuted, but unreported cases. See supra notes 9 and 10.

46 A limited reliance, as the Chief Justice has stated succinctly: "But the defense of entrapment . . . was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." *Russell*, supra, 411 U.S. at 435.

47 In a case in which a young now-Vice President Al Gore was involved as a reporter, the defense counsel in closing argument referred to the sting operation there as "the meanest, vilest, sneakiest method of law enforcement." The jury found the defendant not guilty. Maraniss, "As a Reporter, Gore Found A Reason to be in Politics," Washington Post A-1, January 4, 1998.

48 One can be predisposed and continue to raise the constitutional claim. See Commonwealth v. Monteagudo, 693 N.E.2d 1381 (Mass. 1998).

49 342 U.S. 165 (1952). The Court there reversed a conviction after the police had directed a medical pumping of the defendant's stomach in order to obtain incriminating evidence (the defendant had swallowed pills).
The due process approach in the area was first mentioned, in dictum, by then-Justice Rehnquist in 1973 when he commented that the Court "may some day 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." From that promising beginning, however, the doctrine has seen much resistance and limited application. Few federal courts have actually struck down convictions on this basis. Indeed, Chief Justice Rehnquist himself retreated from the notion that due process could even form the basis—apart from the entrapment doctrine—for voiding a conviction, and some judges today question whether the due process claims still exist.

Most courts do recognize the doctrine, but at the same time find it to be very limited in application. Judges have not been sufficiently outraged, for the purpose of utilizing either the entrapment or the due process analysis, even when faced with quite extreme behavior. Courts have refused to act in egregious cases ranging from sexual contact by government agents, to the purchase/sale of illegal drug or drug components, or even to the involvement of police in the production of bombs. Looking in this area to the Due Process Clause for protection against overzealous law enforcement behavior is likely to leave one disappointed.

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51 State judges have been more inclined to apply the doctrine in favor of the defense. See Marcus, supra note 3, at § 7.05.
55 The standard is whether the law enforcement action is "shocking, outrageous, and clearly intolerable." United States v. Nolan-Cooper, 155 F.3d 221, 231 (3rd Cir. 1998). The defense "is available only where the government 'is so involved in the criminal endeavor that it shocks our sense of justice.'" Franco, supra, 136 F.3d at 629, or when the government engages in "the use of extreme, conscience-shocking physical or psychological coercion . . . [A]nd time has shown that the judicial conscience is sturdy." Labensky v. County of Nassau, 6 F. Supp. 2d 161, 171, 173 (E.D.N.Y. 1998).
56 Nolan-Cooper, supra; Gamache, supra.
57 Hampton, supra; United States v. Sanchez, 138 F.3d 1410 (11th Cir. 1998).
58 United States v. Nunez, 146 F.3d 36 (1st Cir. 1998).
59 See generally, Lord, supra note 11, 25 Fla. St. U. Rev. at 504–13. This due process approach, of course, is not the only alternative. Some have suggested various
Conclusion

Balancing the need to engage in undercover operations against interests of individual liberty will always be difficult. After Jacobson courts are justifiably promoting a more careful review of both government inducement and lack of evidence of predisposition so as to determine if the defendant would have committed the criminal act without law enforcement encouragement. Surely, this must be the lesson from Jacobson itself. There, the Eighth Circuit en banc discussed at length the contention that Due Process had been violated by the postal inspectors' operation, but spent little time looking to the danger actually posed by this offender. The Supreme Court, however, did not mention Due Process and instead found entrapment as a matter of law after chastising the postal service investigators for their intense involvement with the defendant.

We are, then, left with the advice of the United States Supreme Court to avoid the constitutional ground and to advance more intense judicial scrutiny of the government in the entrapment context. Such an evidentiary approach will have a positive impact by concentrating attention on both the role of the government in investigating crime, and the relationship of law enforcement activity to the ultimate commission of crime. In increasing numbers, judges are following this advice by asking whether, without government involvement, the defendant likely would have committed the charged crime. Certainly, for all concerned, that is the appropriate question to ask and answer.

forms of judicial consideration of individualized suspicion before government undercover operations could commence. The courts have been singularly unenthusiastic about such a course. But see, Slobogin, "Deceit, Pretext, and Trickery: Investigative Lies By the Police," 76 Oregon L. Rev. 775, 805–808 (1997); Mosteller, "Moderating Investigative Lies By Disclosure and Documentation," 76 Oregon L. Rev. 833, 839 (1997).

60 916 F.2d 467 (8th Cir. 1990), overruled, 503 U.S. 540 (1992).

61 See discussion in text accompanying notes 13–19, supra.