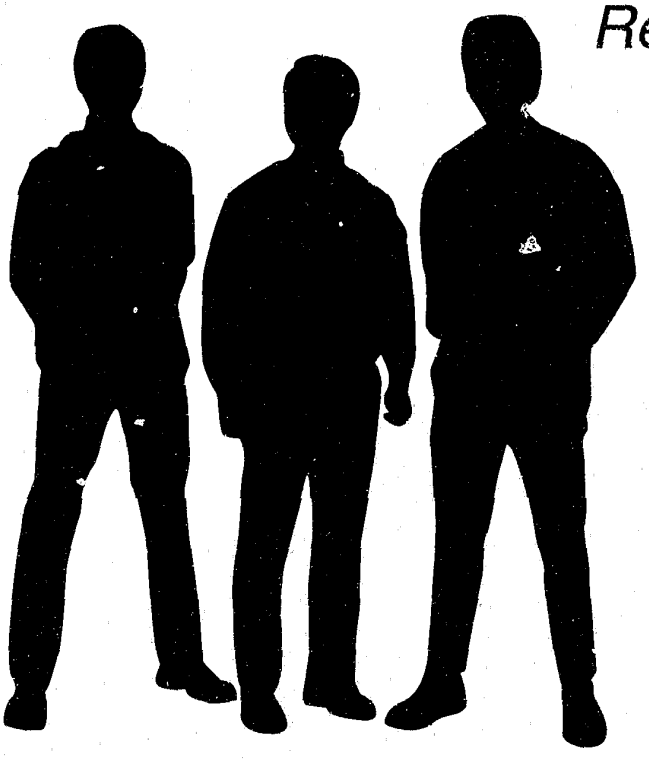
Undercover Investigations and the Entrapment Defense

Recent Court Cases

By
THOMAS V. KUKURA, J.D.



Law enforcement officers often employ trickery and deception to catch those involved in criminal activity. The U.S. Supreme Court has recognized that when investigating certain criminal behavior, law enforcement may lawfully use an array of undercover techniques. However, in 1992, the Supreme Court in *Jacobson* v. *United States*[1] overturned a Federal child pornography conviction based on an entrapment defense.

Entrapment and other related defenses are often asserted by criminal defendants to challenge the legality of various undercover investigative techniques. This article begins with a discussion of the entrapment defense in the context of the *Jacobson* decision. It then examines selected lower Federal court decisions that delineate several important factors law enforcement officers should consider when conducting undercover operations.

While *Jacobson* involves the so-called subjective view of entrapment used in the Federal courts, some State jurisdictions permit an objective entrapment defense that stresses the wrongfulness of Government action without regard to the defendant's criminal predisposition.[2] This article focuses on recent cases concerning the subjective entrapment defense, which concentrates on the predisposition of the defendant. However, the general principles discussed are relevant for any law enforcement officer considering the use of undercover techniques.

Background of the *Jacobson* Decision

In February 1984, a 56-year-old Nebraska farmer (hereinafter the defendant), with no record or reputation for violating any law,

Special Agent Kukura, Drug Enforcement Administration, is a legal instructor at the FBI Academy.

> ***"Entrapment and other related defenses... challenge the legality of various undercover investigative techniques."***

lawfully ordered and received from an adult bookstore two magazines that contained photographs of nude teenage boys. Subsequent to this, Congress passed the Child Protection Act of 1984, which made it illegal to receive such material through the mail. Later that year, the U.S. Postal Service obtained the defendant's name from a mailing list seized at the adult bookstore, and in January 1985, began an undercover operation targeting him.

Over the next 2 1/2 years, Government investigators, through five fictitious organizations and a bogus pen pal, repeatedly contacted the defendant by mail, exploring his attitudes toward child pornography. The communications also contained disparaging remarks about the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit material, and finally, offered the defendant the opportunity to order illegal child pornography.

Twenty-six months after the mailings to the defendant commenced, Government investigators sent him a brochure advertising photographs of young boys engaging in sex. At this time, the defendant placed an order that was never filled.

Meanwhile, the investigators attempted to further pique the defendant's interest through a fictitious letter decrying censorship and suggesting a method of getting material to him without the "prying eyes of U.S. Customs." A catalogue was then sent to him, and he ordered a magazine containing child pornography.

After a controlled delivery of a photocopy of the magazine, the defendant was arrested. A search of his home revealed only the material he received from the Government and the two sexually oriented magazines he lawfully acquired in 1984.

The defendant was charged with receiving child pornography through the mail in violation of 18 U.S.C. § 2252 (a)(2)(A). He defended himself by claiming that the Government's conduct was outrageous, that the Government needed reasonable suspicion before it could legally begin an investigation of him, and that he had been entrapped by the Government's investigative techniques. The lower Federal courts rejected these defenses, but in a 5-4 decision, the Supreme Court reversed his conviction, based solely on the entrapment claim.[3]

Entrapment Based on a Lack of Predisposition

In *Jacobson*, the Supreme Court held that law enforcement officers "...may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute."[4] The Court's rationale followed a traditional entrapment defense analysis that focuses on two basic questions. First, did the Government induce the defendant to commit the crime? Second, assuming the Government improperly induced the defendant to commit the crime, was the defendant nevertheless predisposed to commit the criminal act prior to first being approached by Government agents?

Because the Government did not dispute that it induced the defendant to order the pornography, the sole issue before the Court in *Jacobson* was whether the Government had proved beyond a reasonable doubt that the defendant was predisposed to order the illegal pornography *before* the Government intervened. Based on the unusual facts of this case, the Court held that the Government failed to prove Jacobson's predisposition to commit this criminal act, independent of the attention the Government directed at him for 2 1/2 years.

The Court rejected as insufficient the Government's evidence of the defendant's predisposition de-

veloped 1) *prior* to the Government's mailings and 2) *during* the course of the investigation. The preinvestigative evidence of predisposition consisted solely of the defendant's then lawful 1984 purchase of the two magazines. The Court found this lawful purchase insufficient to show predisposition to do what is now unlawful because "there is a common understanding that most people obey the law even when they disapprove of it."[5]

The Court likewise dismissed the Government's evidence of predisposition gathered during the investigation, finding that the defendant's responses revealed, at most, a predisposition to view photographs of teenage sex and a willingness to promote a given agenda by supporting lobbying organizations. The Court concluded that this evidence was not sufficient to prove, beyond a reasonable doubt, that the defendant was predisposed to commit the crime of receiving child pornography through the mail.

Since *Jacobson*, courts have discussed the following four questions relevant to entrapment and related defenses that law enforcement officers should consider prior to initiating undercover investigations:

1) Does the Government need reasonable suspicion before targeting an individual in an undercover investigation?

2) What constitutes inducement?

3) What constitutes evidence of predisposition? and

4) What is the viability of the so-called outrageous Government conduct defense?

Each of these issues will be addressed in turn.

Does the Government Need Reasonable Suspicion Before Targeting an Individual?

Numerous Federal courts have held there is no Federal constitutional requirement for any level of suspicion to initiate undercover operations.[6] The issue of whether the Government needed reasonable suspicion to approach the defendant in *Jacobson* was resolved in the Government's favor by the lower courts, and the Supreme Court refused to overturn that holding.

> ***"...inducement focuses on the Government's conduct, while predisposition focuses on the defendant's actions and statements."***

These decisions rejected the claim that the Government needs a pre-existing basis for suspecting criminal activity before targeting an individual in an undercover investigation. The decisions are based on the grounds that there is no constitutional right to be free of investigation and that the mere fact an undercover investigation started without reasonable suspicion "does not bar the conviction of those who rise to its bait."[7] However, as a practical matter, investigative agencies have little incentive to expend their limited resources on frivolous undercover investigations, and some agencies proactively implement internal policy guidelines designed to ensure that persons targeted are predisposed to engage in the contemplated illegal conduct.[8]

What Constitutes Inducement?

The Federal defense of entrapment requires that a defendant first establish that he was induced to commit the crime. Then, the burden shifts to the Government to prove the defendant was nonetheless predisposed to commit that crime. If a defendant cannot establish Government inducement, the inquiry ends, and the Federal defense of entrapment fails.[9]

Inducement generally requires more than merely establishing that an officer approached and requested a defendant to engage in criminal conduct. While evidence that the Government engaged in persuasion, threats, coercive tactics, harassment, or pleas based on sympathy or friendship may amount to inducement, most courts also require the defendant to demonstrate that the described Government conduct created a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.[10]

For example, in *United States* v. *Young*,[11] the Internal Revenue Service (IRS) placed an undercover female informant at an IRS site to investigate drug activity. The informant became friendly with the male defendant, who hoped the relationship would develop into a romantic one.

During the next 4 months, they had contact at work and talked frequently over the telephone. The informant initiated at least five of these telephone conversations, in

which they discussed their mutual marijuana habit and the availability of marijuana. Sometime later, the defendant agreed to find a buyer for a quantity of marijuana that the female informant indicated was available.

The court found this alleged evidence of inducement insufficient because the level of contact was not so persistent as to be harassing or coercive. Nor was the friendship such that the defendant would feel compelled to respond affirmatively to the informant's offer.[12]

In *United States* v. *LaChapelle*,[13] the Government initiated a child pornography investigation similar to *Jacobson*. The Government began the operation by developing a flier advertising a fictitious Belgium company that could supply "extremely hard to obtain erotica."

Unlike the defendant in *Jacobson*, LaChapelle independently and unilaterally inquired about the availability of child pornography and proceeded to order such materials at the first available opportunity, without the Government pressing him to do so. The court held the defendant failed to establish inducement and distinguished *Jacobson*, where the Government had mentioned child pornography in at least five mailings and aggressively urged Jacobson to battle censorship in four other mailings before Jacobson broke down and ordered a magazine.[14]

In both *Young* and *LaChapelle*, the defendants needed little encouragement to take part in criminal activity. These cases suggest that inducement is not established if law enforcement officers merely provide the opportunity or facilities to commit a crime by the use of artifice and stratagem.

What Constitutes Evidence of Predisposition?

Most courts consider the inducement and predisposition elements of entrapment to be closely related, and often, the same evidence will establish both elements.

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The primary distinction between these elements is that inducement focuses on the Government's conduct, while predisposition focuses on the defendant's actions and statements.

For example, in *United States* v. *Skarie*,[15] a Government informant, who was a distant relative of the defendant's estranged husband, moved in with her and asked her to put him in touch with people who could sell him and his friend drugs. She declined at first, but the informant continued to pressure and threaten her. He impaled one of her chickens on a stick and left it outside her back door; he later stated that what happened to the chicken could happen to people as well.

The defendant subsequently took the informant to meet a source, who later brought approximately 3 pounds of methamphetamine to the defendant's house. At this point, police arrested the source and the defendant.

The U.S. Court of Appeals for the Ninth Circuit found in *Skarie* that the Government *induced* the defendant to break the law because the informant initiated the idea of a drug sale, pressured the defendant repeatedly to agree to the plan, and threatened the defendant to convince her to do so.[16] Because the court found Government inducement, the burden shifted to the prosecution to prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.

The court identified the following five factors as being relevant in determining predisposition:

1) The character of the defendant

2) Who first suggested the criminal activity

3) Whether the defendant engaged in the activity for profit

4) Whether the defendant demonstrated reluctance, and

5) The nature of the Government's inducement.[17]

Using these factors, the court found that no reasonable jury could find beyond a reasonable doubt that the defendant was predisposed to sell drugs independent of the insistent and threatening actions of the informant.

Proving Predisposition

Several recent cases reveal how Government agents provided a

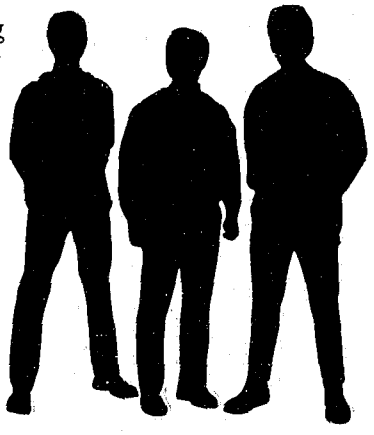
court with articulable factors to prove predisposition, which defeated an entrapment defense, despite evidence of Government inducement. For example, in *United States* v. *Casanova*,[18] the defendant, a federally licensed firearms dealer, sold several guns to a Government agent and an informant posing as convicted felons. The court assessed the five factors applied in *Skarie* and determined that the defendant was predisposed based on the following evidence.

First, the defendant had several prior misdemeanor convictions disclosing a less than law-abiding background. Second, he readily agreed to sell a weapon to the informant, even after he had been informed on two occasions of the informant's felon status. Third, he admitted engaging in the illegal activity to make a "quick buck." And, finally, the defendant demonstrated a lack of reluctance to engage in the criminal conduct.[19]

In *United States* v. *Martinez*,[20] the Government provided evidence of predisposition by showing that during a surreptitiously recorded conversation with an undercover DEA agent, the defendant proved well versed in drug trafficking terminology. The defendant also advised the agent about the prices of various drugs in certain geographical areas, all of which indicated the defendant's "knowledge and experience" in the drug trade.

In *United States* v. *Olson*,[21] the court found "copious evidence" of predisposition where the record reflected the defendant had two prior felony drug convictions, a drug arrest during a probationary period, and frequent association with drug traders. In addition, the defendant made a quick reply to an undercover agent's invitation to "talk business."

However, the lack of any evidence that a defendant previously engaged in a specific crime does not conclusively preclude any predisposition to commit the crime. Evidence of predisposition may also be established by showing the defendant's desire to make a profit, an eagerness to participate in the criminal activity, or a quick response to the Government's inducement offer.[22]



Clearly, an undercover investigator cannot lawfully create predisposition. However, the Court in *Jacobsen* did not foreclose the possibility of developing evidence of predisposition during the investigation. Therefore, officers should carefully document any evidence of a defendant's eagerness to engage in illegal conduct.

For example, the court in *United States* v. *Lew*[23] found that the defendant was predisposed to bribe an IRS employee based on his enthusiastic response to the revenue officers' overtures concerning the bribery. Similarly, the U.S. Court of Appeals for the Fifth Circuit held that even though the Government may initiate an illegal scheme, such as money laundering, a defendant's "willing and active participation in the scheme" can establish a predisposition toward the crime.[24]

The Outrageous Government Conduct Defense

A defense closely related to the objective view of entrapment is the outrageous Government conduct defense, which is predicated on the Due Process Clause of the fifth amendment to the U.S. Constitution.[25] The Supreme Court, in a 1973 decision, foreshadowed the evolution of this defense by suggesting that even where predisposition is established, "[W]e 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...."[26]

The outrageous Government conduct defense presents a very *narrow* opportunity to challenge Government conduct. And while many courts recognized the viability of such a defense, it is clearly considered to be an extraordinary defense reserved for only the most egregious circumstances.[27]

One of the few cases in which a court actually acquitted a defendant based on this outrageous Government conduct defense was *United States* v. *Twigg*,[28] where a Government informant suggested the establishment of a speed laboratory and then supplied the chemicals, glass-

ware, and the isolated farmhouse used for manufacturing. The informant also did the bulk of manufacturing because the defendant did not have knowledge of the manufacturing process.

The court invoked the due process defense and found that although proof of predisposition to commit a crime will bar application of the entrapment defense, fundamental fairness will not permit a defendant to be convicted of a crime in which police conduct was outrageous. The defense of outrageous Government conduct is theoretically viable where the Government is overly involved in the creation of a crime or coerces a defendant to participate, but the defense has only succeeded in cases like *Twigg* with a very high degree of Government involvement or coercion.

Conclusion

To ensure that undercover investigations do not give rise to successful claims of entrapment or related defenses, all law enforcement officers should consider the following three points before conducting undercover investigations. First, while reasonable suspicion is not legally necessary to initiate an undercover investigation, officers should nonetheless be prepared to articulate a legitimate law enforcement purpose for beginning such an investigation. Second, law enforcement officers should, to the extent possible, avoid using persistent or coercive techniques, and instead, merely create an opportunity or provide the facilities for the target to commit a crime. Third, officers should document and be prepared to articulate the factors demonstrating a defendant was disposed to commit the criminal act prior to Government contact.

Such factors include a prior arrest record, evidence of prior criminal activity, a defendant's familarity with the terminology surrounding a particular criminal venture, and a defendant's eagerness to engage in the criminal activity. The most convincing evidence of predisposition will typically occur during the initial Government contacts, which officers should carefully document to successfully defeat the entrapment defense.✦

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Endnotes

[1] 112 S.Ct. 1535 (1992).

[2] For a comprehensive discussion of the various views of entrapment, *see State* v. *Johnson*, 606 A.2d 315 (Sup. Ct. of N.J. 1992).

[3] The Supreme Court declined to address the issues of outrageous Government conduct or the need for reasonable suspicion.

[4] 112 S.Ct. at 1540, citing *Sorrells* v. *United States*, 53 S.Ct. 210 (1932).

[5] *Id.* at 1542.

[6] *See United States* v. *Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990), *en banc*, reversed on other grounds by 112 S.Ct. 1535.

[7] *Id.* at 1545.

[8] The Court in *Jacobson* cited approvingly from the Attorney General Guidelines on FBI Undercover Operations. 112 S.Ct. at 1541, n.2; *See also, United States* v. *Casanova*, 970 F.2d 371 (7th Cir. 1992), where the court mentioned ATF policy regarding initiation of undercover investigations.

[9] *United States* v. *Van Slyke*, 976 F.2d 1159 (8th Cir. 1992).

[10] *United States* v. *Mendoza-Salgado*, 964 F.2d 993 (10th Cir. 1992).

[11] 954 F.2d 614 (10th Cir. 1992).

[12] *Id.* at 617. However, in *United States* v. *Beal*, 961 F.2d 1512 (10th Cir. 1992), the court found Government inducement on the basis of persistent phone calls and contacts by informant.

[13] 969 F.2d 632 (8th Cir. 1992).

[14] *Id.* at 635.

[15] 971 F.2d 317 (9th Cir. 1992).

[16] *Id.* at 320.

[17] *Id.*

[18] 970 F.2d 371 (7th Cir. 1992).

[19] *Id.* at 375-76.

[20] 979 F.2d 1424 (10th Cir. 1992).

[21] 978 F.2d 1472 (7th Cir. 1992).

[22] *United States* v. *Sanders*, 962 F.2d 660 (7th Cir. 1992), where court found ready response by defendant to involvement in bribery established predisposition.

[23] _F.2d _, 1992 WL 348515 (2d Cir. 1992).

[24] *United States* v. *Arditti*, 955 F.2d 331 (5th Cir. 1992).

[25] *See United States* v. *Mosely*, 965 F.2d 906 (10th Cir. 1992). It has also been suggested that the outrageous conduct defense might rest upon the equitable supervisory power of the courts. *See Hampton* v. *United States*, 96 S.Ct. 1646, 1655, n.4 (1976).

[26] *United States* v. *Russell*, 93 S.Ct. 1637, 1642-43 (1973).

[27] *United States* v. *Olson*, 978 F.2d 1472 (7th Cir. 1992). *Olson* raises doubts as to the validity of the outrageous Government conduct defense. *See also United States* v. *Hart*, 963 F.2d 1278 (9th Cir. 1992); *United States* v. *Payne*, 962 F.2d 1228 (6th Cir. 1992); *United States* v. *Jones*, 976 F.2d 176 (4th Cir. 1992).

[28] 588 F.2d 373 (3d Cir. 1978). *See also United States* v. *Sontana*, _F.Supp. _ (D. Mass. 12/10/92), where a Federal district court found Government's conduct outrageous in a reverse sting when it supplied a would-be heroin distributor with a sample (13.3 grams) of high purity heroin, did not recover it, and most importantly, the heroin apparently made its way to unknown users.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.