University of Baltimore Law Forum

Volume 23
Number 2 *Fall, 1992*

Article 7

1992

Recent Developments: Jacobson v. United States: Entrapment Defense Prevailed Where Government Failed to Prove Criminal Predisposition Existed before Investigation Induced Defendant to Break the Law

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1863. The dissent, therefore, concluded that it was no longer necessary to enforce sweeping suppression of political speech subject to the protection of the First Amendment.

In addition to overbreadth, the dissent noted that the statute discriminated in its regulation of speech. The dissent asserted that the plurality failed to inquire whether this discrimination was related to the purported state interest. *Id.* at 1864. The dissent opined that the State did not isolate any legitimate state interest justifying the selective prohibition because the same evil can result from unrestricted conduct. *Id.* at 1865.

Finally, the dissent argued that the plurality's opinion represents a departure from the "strict scrutiny" standard. *Id.* First, the Court replaced the requirement of a showing of "necessity" with the need to show longstanding tradition. *Id.* Second, the Court modified the requirement of "narrowly drawn" by granting the State broad power to legislate in a prospective manner in an effort to respond to possible future difficulties. *Id.* Third, the dissent noted that if the State no longer needs to show that other expressive conduct does not pose the same danger, it no longer has the burden of showing justification for the law. *Id.* at 1866. The dissent thus concluded that the presence of campaign workers outside a polling place was not more than a minor nuisance and that there was no justification for suppressing their freedom of speech. *Id.* at 1866-67.

By its ruling in *Burson*, the Supreme Court perpetuates the longstanding tradition of allowing a state to regulate the areas surrounding a polling facility on election day. However, because this is only a plurality decision, with a strong dissent, this ruling may represent a departure from this tradition. In addition, *Burson v. Freeman* is significant because it holds that the right to freely cast a ballot in an election is a fundamental right which justifies limiting an individual's right to freedom of speech.

- Julie Buchwald

***Jacobson v. United States:* ENTRAPMENT DEFENSE PREVAILED WHERE GOVERNMENT FAILED TO PROVE CRIMINAL PREDISPOSITION EXISTED BEFORE INVESTIGATION INDUCED DEFENDANT TO BREAK THE LAW.**

In *Jacobson v. United States*, 112 S. Ct. 1535 (1992), the United States Supreme Court held that once the defense of entrapment is asserted, the government must establish that a criminal defendant's independent predisposition to commit the crime for which he was arrested existed before the initiation of a government investigation into the matter. The Court concluded that as a matter of law the prosecution failed to generate sufficient evidence to support a jury verdict that the defendant possessed the requisite prior criminal disposition beyond a reasonable doubt.

In 1984, Nebraska farmer Keith Jacobson ordered magazines containing photos of nude teen and preteen boys from an adult bookstore in California. Jacobson legally received these publications and he maintained that he expected them to include pictures of young men, eighteen years of age or older. Congress subsequently passed the Child Protection Act of 1984, 18 U.S.C. § 2252 (1984), which made the receipt of sexually explicit pictures of children through the mail illegal. In an effort to enforce the new law and to target potential offenders, government officials obtained Jacobson's name from the mailing list of the California bookstore.

Under the guise of promoting sexual freedom and freedom of choice, federal law enforcement agents posed as representatives of various lobbying organizations, seeking responses to several questionnaires and surveys in an attempt to determine Jacobson's sexual preferences and propensity to violate the law. From these correspondences, the Government succeeded in eliciting an indication of his interest in preteen homosexual materials, but uncovered no other evidence that Jacobson had intentionally possessed child pornography in contravention of the law.

After continuing its mailings over a period of twenty-six months, the Government sent letters to Jacobson from fictitious companies which decried censorship and the hysteria concerning pornography. The letters also invited him to request more information about ordering materials depicting young boys engaged in various sexual activities. Jacobson responded to these correspondences and received brochures from the bogus companies. Although he never received the materials he had ordered from the first mailing, Jacobson was arrested after a controlled delivery of his second catalogue order of a publication containing sexually explicit photographs of young males.

Jacobson was indicted in the United States District Court for the District of Nebraska for violating the Child Protection Act. In a search of his home, the Government found no materials related to child pornography except the two original legally ordered magazines and the correspondences sent by law enforcement agents during their investigation. At trial, Jacobson testified that he ordered the magazines because the Government had succeeded in arousing his curiosity. Although the jury was instructed on the defense of entrapment, Jacobson was convicted. On appeal, the United States Court of Appeals for the Eighth Circuit, sitting *en banc*, affirmed the lower court's decision and concluded that Jacobson was not entrapped as a matter of law. The Supreme Court thereafter granted certiorari to review the issue of entrapment.

The Court began its analysis by recognizing that the Government in its law enforcement capacity may afford an opportunity for the commission of an offense. *Jacobson*, 112 S. Ct. at 1540. It may not, however, employ its agents to instill in an innocent person's mind the inclination to commit a crime, and then induce a criminal act in order to prosecute. *Id.* The Court concluded that where Government agents have

"induced an individual to break the law and the defense of entrapment is at issue . . . the prosection must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson,* 112 S. Ct. at 1540 (citing *United States v. Whoie,* 925 F.2d 1481 (D.C. Cir. 1991)).

The Court next explained that in a situation where an individual is merely presented with the opportunity to commit a crime, the immediate willingness to engage in criminal conduct gives a clear indication of a defendant's criminal predisposition. *Id.* at 1541. Jacobson's conviction, however, involved an extended effort on the part of the Government, culminating in an arrest only after twenty-six months of ongoing correspondence with fictitious organizations. *Id.* Thus, the Court ruled that although Jacobson may have been predisposed to receive mail-order child pornography by the time of his arrest in 1987, the Government did not prove that this inclination developed independently of the investigation directed toward Jacobson since 1985. *Id.*

The evidence produced by the Government concerning Jacobson's sexual propensity prior to the law enforcement mail campaign was insufficient to support a finding of his predisposition to commit a criminal act. *Id.* The Court opined that the receipt of two magazines from a California bookstore, as the sole piece of such pre-investigative evidence, could indeed indicate Jacobson's desire to view sexually oriented photographs. *Id.* This inference, however, merely demonstrated a certain preference to act within a broad range of sexual conduct, only some of which was criminal, and thus was not probative of a predisposition to engage in illegal activity. *Id.* The Court further acknowledged that because most people tend to obey the law even if they disagree with it, evidence of one's inclination to perform what was once a lawful act does not justify an inference of a tendency to perform that which is now illegal. *Id.* at 1542.

Similarly, the Court emphasized that evidence produced during the investigation failed to prove Jacobson's predisposition to receive child pornography through the mail. *Id.* The Court viewed his responses to the many communications prior to the commission of the actual crime as indicative only of Jacobson's personal inclinations and interests rather than sufficing as proof of any criminal design on his part. *Id.* Furthermore, the Government's tactic in its solicitation was to suggest to Jacobson that viewing the prohibited sexually oriented materials should be within his constitutional privilege of freedom of choice. *Id.* The Court concluded that the Government exerted considerable pressure on him to obtain the outlawed materials as a protest against an encroachment on his constitutionally guaranteed individual liberties. *Id.* Consequently, rational jurors could not determine beyond a reasonable doubt that, absent the protracted investigation by the Government, Jacobson was autonomously predisposed to commit the crime. *Id.* at 1543.

In a lengthy dissent, Justice O'Connor, joined by Chief Justice Rhenquist, Justice Kennedy, and in part by Justice Scalia, maintained that the majority's position unnecessarily usurped a reasonable jury inference of predisposition. *Id.* at 1544. In the dissent's view, the holding redefined the term "predisposition" and placed a new requirement on law enforcement officials by demanding a determination of a "reasonable suspicion of illegal activity before contacting a suspect." *Id.* at 1544. The minority argued that the Government cannot induce a suspect to commit a criminal act through its communications until it actually provides the opportunity to engage in such illegal conduct, because until then, there can be no finding of an implantation of criminal design in the mind of an innocent person. *Id.* In addition, the dissent lamented that the Government must now show not only that a suspect was predisposed to commit a crime before an opportunity was presented, but also that such person was criminally predisposed before the Government came on the scene. *Id.* at 1545. Furthermore, Justice O'Connor reasoned that the readiness with which Jacobson responded to the opportunity to commit the crime indicated that he likely would have broken the law if left to his own devices. *Id* at 1543-44.

Jacobson v. United States represents an important clarification of the law of entrapment because it places a limitation on the Government's use of undercover agents to enforce the law. The Supreme Court thus has reaffirmed the individual's right of freedom from unwarranted government intrusion by recognizing a level of intervention by law enforcement officers at which a finding of criminal predisposition by a jury is unreasonable. *Jacobson* will effectively prompt the courts to scrutinize more carefully law enforcement sting operations, and will ultimately provide criminal defendants with a heightened opportunity to argue for exoneration if induced to engage in illegal activity by government officials.

- Scott N. Alperin

Williams v. United States: SUPREME COURT ESTABLISHES NATIONAL CONSENSUS REGARDING THE SCOPE OF APPELLATE REVIEW UNDER THE SENTENCING REFORM ACT OF 1984.

In *Williams v. United States,* 112 S. Ct. 1112 (1992), the Supreme Court reviewed the Sentencing Reform Act of 1984 ("Sentencing Act") in an attempt to establish a national consensus on the scope of appellate review when a district court's sentence varies from the United States Sentencing Commission Guidelines ("Guidelines"). The Court held that when a lower court relies on both valid and invalid factors during sentencing, a reviewing court cannot affirm a sentence solely on its independent assessment that the dis-