July 30, 2020

Entrapment: Through A Looking Glass

MIKE DELLA MAGGIORE

I. INTRODUCTION

In today's political climate, police conduct has never been under such watchful eyes. The Black Lives Matter movement has directed the attention of every observant American to the systemic discrimination our country perpetuates. But what about the processes that lie beneath the surface, out of view of even the most vigilant? Entrapment is the result of undercover police conduct, but in California entrapment is defined as law enforcement conduct likely to induce a normally law-abiding person to commit the offense.[1] This article serves not to argue the legality of affirmative police conduct or its justifications but seeks to explore California's current entrapment defense standard and the discriminatory patterns therein. This article begins with the history of the entrapment defense and how different standards evolved. This article will then explain California's current standard and its shortcomings, specifically, how it produces patterns of discrimination based on race, socio economic status, and gender. This article then posits California should enact a different test to avoid the discrimination currently perpetuated by this practice.

II. HISTORY

Although the entrapment defense had existed for fifty years before, the case of *Sorrells v. United States* sets the stage for the modern-day entrapment defense.[2] The opportunity presented itself in 1928 when a prohibition agent induced a World War I veteran to obtain and sell liquor.[3] The agent used the sympathies of a veteran by claiming he himself was a veteran of the first World War and a member of the same division.[4] The prohibition agent's first two requests for liquor yielded no results.[5] However, after sharing war stories, the agent asked a third time if he could obtain liquor from the defendant.[6] The defendant left and returned with a half-gallon of liquor for which the agent paid five dollars.[7] The Court found an abuse of authority because

rather than detecting crime and allowing it to be punished, the agent created crime.[8] Having found an abuse of authority, the question remained whether this abuse could act as a defense for the defendant.

Chief Justice Hughes wrote for the majority employing the absurdity doctrine, a rule of statutory construction employed by courts to avoid absurd results; the Court reasoned Congress could not have intended criminal statutes be used to punish people where government agents induce otherwise innocent citizens into committing crimes.[9] Because Congress could not have intended to punish otherwise innocent citizens, or those who lacked a criminal predisposition, the basis for the Court's analysis rests in the defendant's state of mind.[10] Chief Justice Hughes' rationale set the groundwork for what would become the subjective approach in the entrapment defense. Because the defendant was an otherwise law-abiding citizen who rejected the first two advances of the prohibition agent, the Court held the defendant lacked the predisposition to commit the criminal offense.[11]

In a separate opinion, Justice Roberts agreed with the holding, but disagreed with the rationale. He argued that the focus of the entrapment defense should be shifted from the defendant and their predisposition to the government official's conduct.[12] He argued Justice Hughes' approach unduly placed a burden on the prior reputation or former act of the defendant, rather than the crime charged.[13] Although Justice Roberts dissented in part, his opinion would lead to basis of the objective test in entrapment defense.

III. TWO TESTS FOR WHETHER THE DEFENSE OF ENTRAPMENT EXISTS: THE OBJECTIVE TEST VS. THE SUBJECTIVE TEST

A. The Subjective Test

The subjective test, applied by federal courts and a majority of states, hinges on two factors: inducement and predisposition.[14] The first, inducement, is the defendant's barrier in

raising an entrapment defense in a subjective test jurisdiction.[15] The defendant has the burden to prove the government induced them to commit the criminal offense.[16] While there is no uniform standard that constitutes the level of inducement required, the burden is typically easy to meet.[17] Generally, an inducement is viewed as something more than affording a mere opportunity to commit the crime.[18] For example, in *Sorrells v. United States*, the prohibition agent requested liquor three times and relied on the sympathies of a World War I veteran to induce the defendant to obtain and sell liquor.[19] The prohibition officer had not merely afforded the defendant the opportunity to commit the crime, but inquired multiple times after appealing to the defendant's service in World War I.[20]

If the defendant establishes inducement, the burden shifts to the government to prove that the defendant was predisposed to commit the crime.[21] The defendant's predisposition, or lack thereof, is the crux of the subjective approach.[22] Relying on Chief Justice Hughes' rationale in *Sorrells v. United States*, because Congress could not have intended to punish innocent persons via government inducement, a defendant's guilt for the current charged crime hinges on their predisposition.[23] Courts have struggled to define the parameters of predisposition; however, courts have used several factors that may aid in determining the defendant's predisposition which include, but are not limited to, the following: the defendant's (1) past conduct, (2) reputation, (3) conduct in negotiations with the undercover agent, and (4) acts post negotiations.[24] If the prosecution can use evidence of the above to persuade a trier of fact that the defendant was predisposed to commit the crime, the entrapment defense will fail and conviction will follow.[25]

B. The Objective Test

Prior to *People v. Barraza*, California courts had employed a subjective hybrid approach.[26] In 1979, the California Supreme Court took the opportunity to depart from the standard previously employed after determining that standard "undermined the deterrent effect of the entrapment defense on impermissible police conduct."[27] Instead, Justice Mosk writes, "The success of an entrapment defense should not turn on differences among defendants. . . [w]hat we do care about is how much and what manner of persuasion, pressure, and cajoling are brought to bear by law enforcement officials to induce persons to commit crimes."[28] The court proceeded to outline the new standard for California.

Accordingly, the California test asks whether the conduct of the law enforcement agent was likely to induce a normally law-abiding person to commit the offense.[29] The test states it is presumed a normally law-abiding person is one who would normally resist the temptation to commit a crime if presented with the simple opportunity to commit the criminal offense.[30] Official conduct that does no more than offer that opportunity to the suspect is permissible, "but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law abiding person to commit the crime."[31]

The court points out the ad hoc basis in the determination of whether police conduct is impermissible but offers two principles by which it may be determined.[32] First, if the government agency conduct would provide a normally law-abiding person a motive to commit the crime other than criminal intent, entrapment will be established.[33] Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will also constitute entrapment.[34] Finally, under *Barraza*, while the primary focus is on the government agency conduct, that conduct is not to be viewed in a vacuum and should be judged

by the effect it would have on a normally law-abiding person under the circumstances.[35] Borrowing from the Alaska Supreme Court, Justice Mosk states transactions preceding the offense, the suspect's response to the inducements, the gravity of the crime, and the difficulty of detecting instances of its commission are considered relevant circumstances.[36]

IV. CRITICISMS OF CALIFORNIA'S OBJECTIVE TEST

It is not the goal of this article to argue affirmative government agency inducement should be considered illegal nor is it to argue against its current justifications. Before discussing the weaknesses of California's current standard, it is important to set the landscape in which entrapment exists. When a person calls 9-1-1 for police assistance, generally there is someone in danger or in need of help. But not all crimes are the same, nor are they equal. Robberies, assaults, and murders involve a victim and often endanger the surrounding community. But robberies, assaults, murders, and the like are not the arena in which entrapment lies.

Entrapment is a widely contested topic and it is important we examine it under the right lens. If dangerous crimes such as robbery, assault, and murder do not require affirmative government inducement for apprehension, where does entrapment exist? Crimes such as drug and sex offenses, while illegal, often contain two consenting parties in which their actions are shielded from the public eye. In these situations, the public's need for affirmative government intervention is low, if the crime was even detected by the community. However, these actions are still considered crimes for which citizens can be charged and convicted. But, without the public's need for affirmative government intervention, police must resort to alternative methods of apprehension.

Admittedly, statistics for entrapment and affirmative government inducement are not easy to find. When a defendant is charged and unsuccessfully raises an entrapment defense, the

result is a conviction of the charged crime. While those numbers are masked by legal procedure, examining the discriminatory patterns involving conviction statistics of drug and sex offenses is an illuminating exercise. This section serves to take aim at California's current entrapment standard, specifically the focus on police conduct and the use of a hypothetical person, using statistical data to examine discriminatory patterns.

A. Police Conduct

As a way to shift the burden off any one individual, the objective test that California currently employs places the burden on the police conduct and takes a magnifying glass to the circumstances involving police conduct.[37] The objective test in theory should limit discrimination patterns of any one individual. Logically, this makes sense. If the onus is shifted off any one defendant and the magnifying glass instead focuses on police conduct, the individuals themselves are wholly irrelevant in the case.[38]

However, shifting the focus to solely concentrate on police conduct inadvertently allows government agencies to set a market on crime, specifically in drug and sex offenses where goods and services are exchanged to buy into the market. Imagine a monopoly in any given arena of a hypothetical economy. That monopoly operates freely to set a price point. However, like any corporation or organization that operates as a monopoly, that entity must still find the price point at which consumers will buy into the market. Similar to the criminal market surrounding drug and sex offenses, a sole focus on police conduct allows police to operate as a monopoly in the criminal market. By limiting the relevance of the individual defendant's disposition, the California objective test incentivizes government agencies to perfect their tactics to set the minimum and maximum price points to which a hypothetical normally law-abiding person would enter into the criminal market.

Alone, this criticism carries little weight. Government agencies are enacted to protect and serve its populace. The justifications for undercover operations are well documented and are entrenched in our criminal justice system. However, the goal of this article is not to argue the legality of affirmative government agency inducement, but to examine the discriminatory patterns within the scope of California's objective test. Just like California's entrapment test states, this criticism is not to be viewed in a vacuum but how it operates in concurrence with the hypothetical normally law-abiding person.

B. The Normally Law-Abiding Person

The normally law-abiding person as it pertains to California's entrapment test acts as a hypothetical person. The use of hypothetical person is not unique to California's entrapment test or even criminal law itself. The normally law-abiding person is simply defined as someone who would not act when given the opportunity to commit the crime.[39] What attracts one individual to commit a crime may not be attractive to another. While the hypothetical person is meant to act as a shield for a defendant against entrapment practices, the hypothetical person serves as a "Benedict Arnold" in legal dressings. The hypothetical person hinders the principles of fairness and justice our criminal justice system is built to protect.

Imagine a scenario in which A earns $75,000 a year in household income in California. B earns $31,000 per year. As such, A has more access to choose where to live and where to work. B has limited options in where they can live and where they can work. C, an undercover agent, approaches A and offers slightly above the market price to have A obtain and deliver a gram of methamphetamine. A says no thanks and proceeds about their day. That is not an attractive deal for someone whose income affords them a more comfortable living wage and area to live. D, also an undercover agent, approaches B with the same deal. Person B, with more than 50% less

household income, has a tougher decision than A. A has more opportunities to legally obtain currency, whether that be money, status, or relationships, while B possesses comparatively fewer legal means to obtain currency than Person A.

For the less imaginative, Person A represents the average non-Hispanic white household income in California, which sits at $74,276 per year.[40] B represents the income of a full-time employee receiving a $15.00 per hour wage.[41] Although the disparity in income is clear, this hypothetical still does not take into account the unemployed, the under-employed, or those with multiple dependents who would have even fewer legal means than Person B. While this exercise serves to show externalities renders harmful the use of a hypothetical person in the California entrapment standard, a closer look at conviction numbers serves to show an alarming pattern in the arenas in which affirmative government inducement operates.

In 2019, California logged 758,056 misdemeanor arrests.[42] Drug offenses comprise 189,326 total misdemeanor arrests.[43] Latinx and Black individuals collectively account for a majority of these arrests at 58.6% while only comprising of 45% of the population.[44] The numbers here show that while Latinx and Black individuals compromise of a minority of the population, they are overrepresented in the arrests for these crimes. While alarming, misdemeanor sex offenses, specifically prostitution, offer some eye-opening statistics. Of the 5,518 prostitution arrests in 2019, Black individuals accounted for 2,491 of those arrests.[45] A community that accounts for 6.5% of the state's population accounts for 45% of prostitution arrests.[46] Furthermore, of those 2,491 arrests, 2,196 were black women.[47] Black women account for less than 3% of the California population but are overrepresented at nearly 40% of California's misdemeanor prostitution arrests and 62.5% of prostitution arrests among women.[48]

Earlier, this article noted the average white household income and highest minimum wage income to highlight that externalities play a role in the entrapment arena, alluding to the hypothetical person. After an in-depth look at California's arrest numbers, it is clear that California's objective test creates a disparate effect for racial minorities, those with low socio-economic status, and on the basis of sex. The focus on police conduct seems to protect the individual from discrimination. However, when examined in tandem with the hypothetical person, California's objective test allows for class-wide discrimination by allowing police to set a market on crime relative to the hypothetical normally law-abiding citizen. In the current system where the focus is on police conduct and how it relates to a hypothetical normally law-abiding person, crimes that are naturally saturated with affirmative government inducement produce disproportionately high arrest rates among racial minorities, those of low socio-economic status, and on the basis of gender.

C. A Call to Action: Move Towards a Hybrid Test

After *People v. Barraza*, California courts displayed their willingness to change a standard that did not serve the interest of fairness and justice. This article calls for California courts to adopt the hybrid test enacted by a number of other states, specifically New Mexico, which allows a defendant to use the subjective or objective test. The New Mexico Supreme Court states, "[w]e hold that a criminal defendant may successfully assert the defense of entrapment, either by showing lack of predisposition to commit the crime for which he is charged, or, that the police exceeded the standards of proper investigation."[49] Under New Mexico's entrapment test, a defendant may use the subjective test *or* the objective test to successfully raise an entrapment defense.[50]

This form of hybrid test does not place the burden on any one entity the individual defendant or the police conduct—nor does it compare the defendant to a hypothetical normally law-abiding citizen. This test allows for targets of discriminatory practices more protection against affirmative government inducement by expanding the scope of the entrapment defense beyond police conduct. In doing so, a defendant is able to successfully raise an entrapment defense on the basis of their character, regardless of police conduct. In a scenario where a defendant is predisposed to commit the crime, whether they be in recovery or reformed, the defendant may still succeed on the basis that police conduct went beyond merely presenting an opportunity to commit the crime. However, a defendant will not succeed where the defendant is predisposed to commit the crime and police conduct falls within the acceptable standards of investigation. This allows for government agencies to protect the populace against criminal activity, while placing the appropriate restrictions to prevent discriminatory results.

V. CONCLUSION

The current political climate calls for a careful examination of the procedures that perpetuate the systemic discrimination highlighted by the Black Lives Matter movement. The objective test California employs for the entrapment defense produces a disparate effect on racial minorities, those of low socio-economic status, and on the basis of gender. California courts have adopted new legislation when the current standard does not serve the court's interest in fairness and justice. It is time for California to re-examine its entrapment defense standards and adopt a pre-existing legal solution to a current legal issue.

ENDNOTES

1. *People v. Barraza* (1979) 23 Cal.3d 675, 689-690 [153 Cal.Rptr. 459, 591 P.2d 947].
2. (1932) 287 U.S. 435 [53 S.Ct. 210, 77 L.Ed. 413].
3. *Id.* at p. 439.
4. *Ibid.*
5. *Ibid.*
6. *Ibid.*
7. *Ibid.*
8. *Id*. at p. 441.
9. *Sorrells*, *supra*, at p. 446.
10. *Id.* at p. 448.
11. *Ibid.*
12. *Sorrells*, *supra*, at p. 459.
13. *Id.* at p. 459.
14. Scott C. Paton, *Government Made Me Do It: A Proposed Approach to Entrapment Under* Jacobson v. United States (1997) 79 Cornell L.Rev. 995 (hereafter Paton).
15. Paton.
16. Paton.
17. Paton.
18. Paton.
19. *Sorrells*, *supra*, 287 U.S. at p. 439.
20. *Ibid.*
21. Paton.
22. Paton.
23. *Sorrells*, *supra*, 287 U.S. at p. 451.
24. Paton.
25. Paton.
26. *Barraza*, *supra*, 23 Cal.3d at p. 688.
27. *Ibid.*
28. *Ibid.*
29. *Barraza*, *supra*, 23 Cal.3d at pp. 689-690.
30. *Ibid.*
31. *Ibid.*
32. *Barraza*, *supra*, 23 Cal.3d at p. 690.
33. *Ibid.*
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*
37. *Barraza*, *supra*, 23 Cal.3d 675.
38. *Ibid.*
39. *Ibid.*
40. *California Median Household Income 2014-2018*, American Community Survey 5-Year Estimates <http://www.census.gov> [as of July 20, 2020].
41. *The National Law Review*, Minimum Wage Increases Are Still Coming in July 2020 <https://www.natlawreview.com/article/minimum-wage-increases-are-still-coming-july-2020> [as of July 20, 2020].
42. *Crime in California* (2019) <data-openjustice.doj.ca.gov> [as of July 20, 2020].
43. *Ibid.*
44. *Ibid.*
45. *Ibid.*
46. *Ibid.*
47. *Ibid.*
48. *Ibid.*
49. *Baca v. State* (N.M. 1987) 742 P.2d 1043, 1046.
50. *Ibid.*