Journal of Criminal Law and Criminology

Volume 66 | Issue 3 Article 3

1976

Recent Trends

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 66, No. 3

Printed in U.S.A.

RECENT TRENDS

ENTRAPMENT

Ever since the Supreme Court's landmark decision in *United States v. Russell*,[1] the various circuits have attempted to apply its holding regarding entrapment to numerous other factual situations. The Court in *Russell* held that the primary criterion for availability of the entrapment defense was the absence of the defendant's predisposition toward committing the crime, in accord with the holdings of *Sorrells v. United States*[2] and *Sherman v. United States*.[3] The defendant in *Russell* was convicted for the manufacture and sale of narcotics. The government agent's contribution of a legal, but scarce, ingredient in the manufacture of methamphetamine, which was then sold to the agent, was held to make no difference in the application of the predisposition test.[4] Be-

[1] 411 U.S. 423 (1973). For an analysis of the rationale of this case and those leading up to it see Note, *Criminal Law—Entrapment—Predisposition of Defendant Crucial Factor in Entrapment Defense*, 59 CORNELL L. REV. 546 (1974); Note, *Criminal Law—Entrapment in the Federal Courts—Subjective Test Reaffirmed Against Lower Court Departures*, 42 FORDHAM L. REV. 454 (1973); Note, *Entrapment*, 64 J. CRIM. L. & C. 407 (1973); Note, *Entrapment:* Sorrells *to* Russell, 49 NOTRE DAME LAW. 579 (1974); Note, *Elevation of Entrapment to a Constitutional Defense*, 7 U. MICH. J.L. REFORM 361 (1974). For a recent short commentary on the state of the law on entrapment see The Wall Street Journal, Sept. 22, 1975, at 1, col. 1.

[2] 287 U.S. 435 (1932). The defendant was convicted of possessing and selling whiskey in violation of the National Prohibition Act. The defense of entrapment was based on the government agent's testimony of his solicitation of the defendant at his home three times on the same day. The defendant finally left and returned with a half-gallon of liquor which he sold to the agent. In the absence of any evidence that the defendant was predisposed, *i.e.*, the government's evidence did not show, for instance, that he had ever possessed or sold any intoxicating liquor prior to the transaction in question, the Supreme Court reversed his conviction. The Court found that it was error to hold that as a matter of law there was no entrapment. It held that where the defendant was not predisposed, and the crime was induced by the government agent's persuasion and creative activity, the defense of entrapment was appropriate. *Id.* at 442.

[3] 356 U.S. 369 (1958). The conviction was reversed because the Court found entrapment as a matter of law. *Id.* at 373. As in *Sorrells*, the government's agent testified regarding the solicitation, but here his testimony was undisputed. The defendant and the government informer were both being treated for narcotics addiction by the same physician. The informer asked the defendant on numerous occasions if he would supply him with narcotics, and he finally acquiesced, providing the informer several times. Sales were made at cost plus expenses. This lack of profit motive was of assistance to the defendant on review of his arrest and conviction.

The Court found error in the submission of the issue of entrapment to the jury:

> We conclude from the evidence that entrapment was established as a matter of law. In so holding, we are not choosing between conflicting witnesses, nor judging credibility. Aside from recalling [the government informer], who was the Government's witness, the defense called no witnesses. We reach our conclusion from the undisputed testimony of the prosecution's witnesses.

Id. at 373. In addition, there was no evidence of predisposition presented; a nine-year-old sales conviction and five-year-old possession conviction were held insufficient to prove readiness or predisposition at the time of solicitation.

[4] The Court explicitly refused to overrule the primacy of the *Sorrells/Sherman* predisposition test for the availability of the entrapment defense, adding that "... Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." 411 U.S. at 433. The entrapment defense has been held by the Supreme Court to be mandated by judicial interpretation of Congressional (legislative) intent: Congress, the Court reasoned, must have had the purpose in mind when enacting criminal legislation of convicting only those people who have acted of their own volition. Sorrells v. United States, 287 U.S. 435, 448 (1932). *See also* United States v. Russell, 411 U.S. 423, 435 (1973); Note, *Entrapment:* Sorrells *to* Russell, 49 NOTRE DAME LAW. 579, 585–87 (1974).

Legislation which expressly defines entrapment is currently in the Senate judiciary committee, as part of the comprehensive Criminal Justice Reform Act:

> § 551 Unlawful Entrapment.
> It is a defense to prosecution under any federal statute that the defendant was *not predisposed* to commit the offense charged and did so *solely* as a result of active inducement by a federal public servant acting in his own official capacity or by a person acting as an agent of such a public servant or of a federal agency. The employment of strategem or deception, or the provision of a facility or an opportunity for commission of an offense, or the failure to foreclose such an opportunity, or mere solicitation that would not induce an *ordinary law-*

cause the government showed, contrary to defense testimony, that the defendant was ready and willing to commit the crime at the time of the agent's contact with him, the Court held that the defense of entrapment was properly a jury issue and upheld the jury's denial of the defense.[5]

In addition, the defendant's second ground for reversal, that the government's agent was so "intolerably" involved in the illegal manufacture of methamphetamine that the dismissal of the prosecution was mandated, was rejected because the government-contributed ingredient was not impossible to obtain, and its possession was legal.[6] The *Russell* Court labelled this second ground as a new defense which rested on two theories. One theory suggested a finding of entrapment as a matter of law, regardless of predisposition, in two types of cases: (1) whenever the government supplies the contraband, the defendant sells the contraband to a government agent, and the arrest is for possession, handling, and sale, as in *United States v. Bueno*,[7] or (2) whenever the government supplies the contraband, and the arrest is for possession with intent to distribute, as in *United States v. Chisum*.[8] The second theory was a ra-

abiding person to commit an offense, does not in itself constitute unlawful entrapment.

S.1, 94th Cong., 1st Sess. (1975) (emphasis added). The first sentence reaffirms the importance of the predisposition test for availability of the entrapment defense, but the addition of the second sentence causes some confusion. This bill may arguably label as entrapment conduct which *would* induce an ordinary law-abiding person, thus adopting the objective judicial policy test which focuses on the government conduct, rather than the intent of the defendant. *See* note 13 and accompanying text *infra*.

[5] The issue of entrapment is usually one for the jury, because the defendant's evidence of solicitation and the government's evidence of the defendant's predisposition must be evaluated for weight and credibility:

> [T]he Courts of Appeals have since *Sorrells* unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.

Sherman v. United States, 356 U.S. 369, 377 (1958). The judge will rule that there is entrapment as a matter of law if there is no evidence of predisposition and the evidence establishing solicitation comes from government witnesses. *Id.* at 373. Some courts have also held that entrapment at law exists when there is no evidence of predisposition and the defendant's evidence of solicitation is unrebutted. *See* note 32 and accompanying text *infra*.

[6] Mr. Justice Rehnquist noted in the opinion of the Court:

> While we 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, [citation omitted], the instant case is distinctly not of that breed.

411 U.S. at 431–32.

[7] 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973). A government informer supplied the predisposed defendant, a narcotics addict, with heroin which the defendant then sold to undercover agents. Entrapment was established as a matter of law, and the conviction was reversed because the government did not meet the requirement, established by the Fifth Circuit, of contradicting the defendant's testimony in order to submit the issue to the jury. The court did not allow the government to prevail by resting its case on a challenge to the defendant's credibility. After conviction on remand, the Fifth Circuit affirmed because the government had produced witnesses, including the informer-supplier, who contradicted the defendant's testimony as to entrapment, and whom the jury chose to believe. 470 F.2d 154, 155 (5th Cir. 1972).

[8] 312 F. Supp. 1307 (C.D. Cal. 1970). The undisputed facts showed that the defendant had approached a reputed counterfeiter with the intent to buy and pass counterfeit money. The counterfeiter then contacted the Secret Service, and a government agent was introduced to the defendant as the counterfeiter's associate. The agent provided the defendant with the money and arrested him for receiving counterfeit bills with the intent to pass them as genuine. The court found entrapment as a matter of law, with its justification in due process considerations, and granted the motion to dismiss the indictment, notwithstanding the defendant's predisposition:

> Were the courts to sanction the law enforcement activities committed in this case, it would transform the laws designed to promote the general welfare into a technique aimed at manufacturing disobedience in order to punish, a concept thoroughly repugnant to constitutional principles. When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it. To permit the government to do so would be to countenance violations of justice.

Id. at 1312. Although the government was the source of the contraband, the alleged crime was not sale, but possession with specific intent to distribute. The fact pattern differs from the *Bueno* conduit case because there was no second government agent to receive the illegal goods. *See* text accompanying note 19 *infra*.

Because most of the courts have been confronted with cases based on arrests for sale, not just possession, the conduit rule of *Bueno* has been more readily used, and the applicability of *Chisum* seems to have been limited to its facts. Attempts to use the reasoning of the case in federal courts have been overturned on review. *See, e.g.*, United States v. McGrath, 468 F.2d 1027 (7th Cir. 1972), *va-*

tionale based on excessive involvement of the government investigator in the criminal activity. The Court did not initially present separate discussions based on the labels used; rather it accepted the lower court's determination that both theories are based on " . . . fundamental concepts of due process and evince the reluctance of the judiciary to countenance 'overzealous law enforcement.' " [9] It was not until later in the opinion that the Court discussed, and rejected, Russell's reliance on judicial policy as establishing the defense.[10]

The requirements for the defense of entrapment were not changed by *Russell;* the predisposition test of *Sherman* and *Sorrells* continues to be universally accepted, except when there is government involvement in the supplying of contraband. The circuits remain in conflict regarding the evidence required to successfully present the type of due process or judicial policy arguments noted in *Russell,* regardless of the results of the predisposition test.

Before entering into a discussion of the recent case law regarding entrapment, it is essential to enumerate the justifications for the entrapment defense, and note those which were explicitly affirmed in *Russell.* There are three sources of the entrapment defense which have been categorized by the commentators:[11] (1) legislative intent, as outlined in the majority opinions of *Sherman, Sorrells,* and *Russell,*[12] (2) judicial policy, as proposed in the concurring opinions in *Sherman* and *Sorrells,*[13] and (3) constitutional due process notions, as referred to in *Russell* by Mr. Justice Rehnquist's majority opinion.[14] The *Russell* Court both recognized the legislative intent justification, and said that there may come a time when the government conduct would be so outrageous that a defense could be developed based upon due process considerations. Moreover, even though it refused to sanction the non-constitutionally-based objective test of the concurring opinions of *Sorrells* and *Sherman,* which would allow the judiciary a "chancellor's foot" veto over law enforcement practices,[15] the Court was not presented with, nor did it comment upon, the fact pattern in which the government is involved as source and purchaser of the contraband, with the defendant as the seller/middleman.

Although it could foresee the application of due process principles to police conduct, the *Russell* Court would not allow a reconsidera-

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cated, 412 U.S. 936 (1973); United States v. Russell, 459 F.2d 671 (9th Cir. 1972), *rev'd,* 411 U.S. 423 (1973). *Cf.* United States v. Mahoney, 355 F. Supp. 418 ,E.D. La. 1973), where the court denied the defendant's motion to dismiss but did say that it agreed with the holding of *Chisum.* The court said that case might be applicable to establish entrapment unless the government could show that the person to whom a seaman, who decided to work with customs agents after receiving his supply of marijuana, delivered the contraband was the intended recipient of the drug shipment. Because the facts of this case arguably fit the *Bueno* conduit situation, the court's agreement with *Chisum* may be dictum.

[9] 411 U.S. at 428, *quoting* United States v. Russell, 459 F.2d 671, 674 (9th Cir. 1972). *See also* 411 U.S. at 430. The Court was again using the fifth amendment due process clause as a means of balancing the conduct of the government against general standards of "fundamental fairness" and "shocking to the universal sense of justice." Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960). *See* Betts v. Brady, 316 U.S. 455, 462 (1942); Powell v. Alabama, 287 U.S. 45, 71–72 (1932). Needless to say, the standards which have been used in applying this balancing test are subjective and vague, contributing to the confusion in applying the rule.

[10] 411 U.S. at 433–35.

[11] *E.g.,* Note, *Criminal Law—Entrapment—Predisposition of Defendant Crucial Factor in Entrapment Defense,* 59 CORNELL L. REV. 546, 557–62 (1974); Note, *The Viability of the Entrapment Defense in the Constitutional Context,* 59 IOWA L. REV. 655, 663–65 (1974); Note, *Elevation of Entrapment to a Constitutional Defense,* 7 U. MICH. J.L. REFORM 361, 364–69 (1974).

[12] We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.

Sorrells v. United States, 287 U.S. 435, 448 (1932). *See also* Russell v. United States, 411 U.S. 423, 433, 435 (1973); Sherman v. United States, 356 U.S. 369, 372 (1958).

[13] The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law.

Sorrells v. United States, 287 U.S. 435, 457 (1932) (Roberts, J., concurring). *Cf.* Sherman v. United States, 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring).

[14] *See* note 6 *supra.*

[15] 411 U.S. at 434–35.

tion of the basis for the entrapment defense in that case through comparison with the constitutional rationale for the exclusionary rule as applied to illegal searches and seizures and confessions. The analogy was "imperfect," the Court said, because the real basis for the exclusionary rule was the government's "failure to observe its own laws." [16] The agent's conduct in *Russell* did not violate any law, nor did it affront an independent constitutional right of the defendant.

The Court effectively left open the situation in which the undercover agents did engage in illegal conduct, such as the sale of contraband. Even if such conduct would not fall under the proscription of an individual constitutional right, and thus compel the court's criticism, the court would arguably have the discretion to condemn the unlawful police conduct on a judicial policy basis. This justification for the entrapment rule produces an objective test which focuses on the actions of the government regardless of the criminal inclinations of the defendant, just as the operation of the exclusionary rule does not depend on the guilt or innocence of the defendant. Rather it is a use of the rationale of the concurring opinions in *Sherman* and *Sorrell*: Such actions should not be permitted, not because the defendant's due process rights have been violated, but because the police, as those who must uphold law and order, should not be allowed to break the laws, in an attempt to catch alleged criminals.

Prior to *Russell*, the Fifth Circuit in *Bueno*,[17] arguably used judicial policy as a basis for entrapment at law[18] in defining its "conduit rule": that entrapment is established as a matter of law whenever the uncontradicted testimony of the defendant demonstrates that an informer furnished contraband to the defendant, regardless of his predisposition, and he then sold it to another government agent. This conduit theory, which covers the fact situations in which the defendant was merely the means of transmitting illegal substances from one hand of the government to the other, has also been affirmed by the Fifth Circuit subsequent to the *Russell* decision.[19]

[16] *Id.* at 430.

[17] 447 F.2d at 903.

[18] The decision of the court in *Bueno* does not mention that the finding of entrapment at law is constitutionally based. Commentators have agreed that the holding of *Bueno* is not founded in due process, but rather in judicial policy. *See, e.g.*, Note, *Elevation of Entrapment to a Constitutional Defense*, 7 U. MICH. J.L. REFORM 361, 372–73 (1974).

[19] United States v. Gomez-Rojas, 507 F.2d 1213, 1218 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975) (defendant's claim that the government informer was the source of his marijuana would, if proven, suffice as entrapment at law, even if the informer did not receive the marijuana from the government); United States v. Mosley, 496 F.2d 1012, 1016 (5th Cir.), *aff'd on rehearing*, 505 F.2d 1251 (5th Cir. 1974) (when contradictory testimony exists as to the source of the contraband sold by the defendant, the issue of entrapment should properly be submitted to the jury, even though the defendant was found to be predisposed; in short, defendant may be acquitted, even though disposed, when the undercover agent supplies him with the contraband); United States v. Oquendo, 490 F.2d 161, 163 (5th Cir. 1974) (once defendant has assumed his burden of going forth with evidence that the government was the source of his contraband, the government has the burden of showing beyond a reasonable doubt that the defendant did not obtain the contraband from the informer); United States v. Workopich, 479 F.2d 1142, 1144–45 (5th Cir. 1973) (government's conduct of soliciting defendant and supplying legal currency to enable him to purchase heroin was not entrapment at law because the currency supplied was legal, not contraband, and the defendant did not obtain the heroin from a government agent, and then sell it to another, *i.e*, there was no conduit).

A limit has been placed on the application of the conduit rule by United States v. Rodriguez, 474 F.2d 587, 589 (5th Cir. 1973), which held that when the prospective seller (defendant) received cocaine from his brother, who in turn received it from a government informer, entrapment at law was not established because the government source was one step removed.

The Fifth Circuit has also constrained the opportunity of the defendant to raise the constitutional defense of outrageous government conduct, which was based on *Russell*. United States v. Arias-Diaz, 497 F.2d 165, 169 (5th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). The defendants had a source of marijuana in Columbia and paid the undercover agent to fly there and pick it up. The defendants were arrested near the airport, after they had received the marijuana from the agent, and were charged with possession. No constitutionally offensive government involvement or entrapment at law was found.

In spite of these limitations, a three-judge panel of the Fifth Circuit has unanimously stated: "Thus the law of this Circuit is that a defendant, where entrapment is an issue, may be acquitted for lack of predisposition, or, even though disposed, where the undercover agent supplies him with the contraband." United States v. Mosley, *supra* at 1016. Although the court does not explicitly state that the contraband must then be sold to a government agent to complete the conduit, this can be

Until recently, the other circuits had followed *Russell* strictly, using the predisposition of the defendant as the basis for determining whether the defense of entrapment could be used.[20] Now, however, the Third Circuit has sanctioned the Fifth Circuit case law with the holding in *United States v. West*[21] that entrapment was proven under the *Bueno* conduit rule as well as under the *Russell* predisposition test.

West was a heroin pusher who, as the government admitted, had no history of previous involvement in narcotics distribution. The majority found two grounds for reversing the lower court's conviction of West. First, there was not adequate proof of West's predisposition to sell heroin. He had been gainfully employed and the prosecution conceded that he was a first-time offender. Moreover, the four transactions with government agents within a ten-day period were all part of a scheme proposed by the government agent, and thus the first sale could not be used to show a predisposition for the next three transactions.[22]

Second, the case was definitely of the *Bueno* genre: uncontradicted evidence showed that one government agent secured the heroin which the defendant later sold to another government agent.[23] The defendant's involvement appeared to be limited to accepting and carrying out one agent's proposal to sell the overcut or fake heroin. The court explicitly approved of the *Bueno* and *Mosley* decisions of the Fifth Circuit,[24] yet it did not mention entrapment at law or due process. Its justification for the conduit rule arguably is founded in notions of the social objectives of law enforcement, summarized by a holding that the conduct of the government was intolerable:

> But when the government's own agent has set the accused up in illicit activity by supplying him with narcotics and then introducing him to another government agent as a prospective buyer, the role of the government has passed the point of toleration. Moreover, such conduct . . . serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime. . . .
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> . . . .
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> [W]e view West's case as one of intolerable conduct by government agents, one supplying and the other buying the narcotics . . . .[25]

Although the adoption of the *Bueno* rule may be read as dictum in this case, it may be the harbinger of a significant trend in that it is the first non-Fifth Circuit opinion after *Russell* to accept the conduit theory.

The dissent in *West* argued that because of a procedural deficiency the court should not find entrapment as a matter of law.[26] Although the government did not rebut the defense testimony regarding the governmental source of the contraband, Judge Weis, citing *Masciale v. United States*,[27] would have allowed the trial court to judge the weight and credibility of the defendant's testimony in deciding

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inferred from the facts of that case and the cases which the court cited. *Id.* at 1014, 1016. Mosley alleged that a government agent had provided him with the heroin which he then sold to an undercover agent. His conviction was reversed because the trial court denied the request for a *Bueno*-type instruction, even though the jury found the defendant to be predisposed.

[20] *See, e.g.*, United States v. Smith, 508 F.2d 1157, 1159 (7th Cir., *cert. denied*, 421 U.S. 980 (1975) (Marshall & Stewart, JJ., dissenting); United States v. Quintana, 508 F.2d 867, 876–78 (7th Cir. 1975); United States v. Jett, 491 F.2d 1078, 1081 (1st Cir. 1974). The Tenth Circuit used the strict predisposition test even before the Supreme Court decided *Russell*. Martinez v. United States, 373 F.2d 810, 812 (10th Cir. 1967). Other courts strongly disagreed with the primacy of the predisposition test, also before *Russell*. United States v. Chisum, 312 F. Supp. 1307, 1311–12 (C.D. Cal. 1970); People v. Strong, 21 Ill. 2d 320, 323, 172 N.E.2d 765, 768 (1961).

[21] 511 F.2d 1083 (3d Cir. 1975). The Third Circuit law prior to *West* contained the general rule that entrapment occurs only when the criminal conduct was the product of the creative activity (inducement) of law enforcement officials upon an innocent person, *i.e.*, if the defendant is predisposed to commit the crime, he cannot use the entrapment defense. United States v. Silver, 457 F.2d 1217, 1219 (3d Cir. 1972).

[22] 511 F.2d at 1086.

[23] This case is unusual in that the uncontradicted evidence shows a confederation of two government agents, one an informer who, according to uncontradicted testimony, actually supplied the narcotics in question and the other an undercover officer who, as prearranged with the informer, bought this contraband from the accused third person whom the informer had persuaded to join with him in a selling venture.

Id. at 1085.

[24] *Id. See* notes 7 and 19 *supra*.

[25] 511 F.2d at 1085–86.

[26] *Id.* at 1088–89 (Weis, J., dissenting).

[27] 356 U.S. 386, 388 (1958), *aff'g* 236 F.2d 601 (2d Cir. 1956), *rehearing denied*, 357 U.S. 933 (1958).

whether the entrapment defense should be allowed. The majority attempted to distinguish *Masciale* on the basis that there was contradictory, albeit indirect, government testimony regarding inducement in that case. Yet a close reading of the language of the Court indicates otherwise.[28]

The real problem in interpreting *Masciale* is that it is difficult to ascertain whether the decision states a general rule of law, or merely indicates that the defendant's evidence in that case was deficient per se because it was inferential and sketchy.[29] Some courts have held that, following *Masciale,* the defense is not established as a matter of law when the only evidence of entrapment is the defendant's own testimony.[30] The Fifth Circuit subscribes to that general rule in most cases[31] but carves out

[28] Two agents were involved in *Masciale,* but on the same side of the transaction—as buyers, not sellers. The defendant had conceded that the jury could have found that he was predisposed when he met the second agent, on the strength of his boasting of knowledge of someone "high up in the narcotics traffic." 356 U.S. at 388. Yet the government did not contradict Masciale's testimony regarding the inducement of the first government agent, whom he met prior to his announcement of predisposition to the second agent. 236 F.2d at 602–03. The Supreme Court held:

> Petitioner argues that this undisputed testimony explained why he was willing to deal with [the second government agent] and so established entrapment as a matter of law. However, this testimony alone could not have this effect. While petitioner presented enough evidence for the jury to consider, they were entitled to disbelieve him in regard to [the first government agent-informer] and so find for the Government on the issue of guilt. Therefore, the trial court properly submitted the case to the jury.

356 U.S. at 388.

In fact, the First Circuit in United States v. Jett, 491 F.2d 1078, 1080 n.3 (1st Cir. 1974) had previously accused the Fifth Circuit of falling short in its analysis by failing to take notice of *Masciale* when it held in *Bueno* that the government had the burden of introducing evidence to directly contradict the defendant's testimony in a conduit situation. In *Jett* the court did find substantial evidence warranting a finding of predisposition, and thus did not reach the *Masciale* question, since the defendant's evidence in *Jett* was contradicted by the government.

The Fifth Circuit did review the procedural rule of *Masciale* in United States v. Workopich, 479 F.2d 1142 (5th Cir. 1973), and made the general statement:

> Thus, when the undisputed testimony of a defendant is the sole basis for an entrapment defense, entrapment is not established as a matter of law but rather is an issue for the jury to decide. Accord, United States v. Burgess, 5 Cir. 1970, 433 F.2d 987. *Cf.* United States v. Bueno, 5 Cir. 1971, 447 F.2d 903, where, when the government supplied contraband to the defendant, his uncontradicted testimony established entrapment as a matter of law.

Id. at 1146. Even though this quote does not explicitly mention the conduit situation, it must be understood that in *Bueno* the government-supplied contraband was then sold to a government agent. Therefore, this citation of *Bueno* seems to establish a different procedural rule (from *Masciale*) when the conduit theory is alleged. The procedural rule noted in *Bueno* could not be used in the *Workopich* case because the facts establishing the *Bueno* conduit situation were not shown.

In addition, the *Burgess* case cited in the quote also involved, like *Workopich,* a non-conduit fact situation, in which predisposition was the key issue. The untaxed liquor which the defendant sold to the undercover agent was not obtained from the government. The agent had pleaded with the defendant to sell him whiskey so that he could resell it to obtain money for his allegedly ill and hungry family. The court, in a per curiam decision, upheld the jury's decision to believe the government's evidence of no entrapment, without stating the nature of that convincing evidence. United States v. Burgess, 433 F.2d 987, 988 (5th Cir. 1970) (per curiam).

This somewhat ambiguous language in *Workopich* was clarified in United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975), in which the court affirmed the existence of the different procedural rule to be used with the conduit theory, without specifically mentioning *Masciale.* Although the evidence in the trial court was sufficient to go to the jury because the government contradicted the defendant's evidence on the source of the contraband, and the defendant's conviction was reversed because of an erroneous jury instruction, the court said in its analysis:

> [I]f the defendant establishes a prima facie case of a transaction of the *Bueno* variety, then the Government must prove beyond a reasonable doubt that the objective facts necessary to a *Bueno* defense did not occur. Once the Government comes forward with evidence that the defendant was not entrapped, then the case may go to the jury. United States v. Oquendo, *supra.*
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> In an ordinary entrapment case, the Government will seek to demonstrate the defendant's predisposition by pointing to the defendant's conduct and to his reputation for dealing in contraband. *See* United States v. Russell, *supra.* In a *Bueno*-type case, however, the Government's task is more difficult. It may not rely solely on the jury's decision to believe or not to believe the defendant's story.

Id. at 1218.

[29] United States v. Masciale, 236 F.2d 601, 603 (2d Cir. 1956), *aff'd,* 356 U.S. 386 (1958).

[30] *E.g.,* United States v. Johnson, 495 F.2d 242, 244 (10th Cir. 1974) (defendant claims that informer supplied him with contraband); United States v. Jett, 491 F.2d 1078, 1080 (1st Cir. 1974) (dictum).

[31] United States v. Burgess, 433 F.2d 987, 988 (5th Cir. 1970) (per curiam).

an exception when the government supplies contraband to the defendant who later sells it to a government agent. "In a *Bueno*-type case . . . [the government] may not rely solely on the jury's decision to believe or not to believe the defendant's story." [32]

Two other circuits have recently followed the predisposition test only. The Eighth Circuit expressly rejected the *Bueno* rule in *United States v. Hampton.*[33] In *United States v. Spivey*[34] the government's illegal conduct was found not to be violative of the due process test as outlined by Mr. Justice Rehnquist in *Russell.*

Hampton allegedly proposed a plan to sell a "pollutant"—a non-narcotic closely resembling heroin in appearance—to gullible acquaintances of a government informer. However, the informer then supplied heroin to Hampton, who sold the narcotics to undercover agents posing as friends of the informer. Hampton claimed that he mistakenly believed that the heroin was the alleged pollutant.[35]

The facts of this case seemed to compel the application of the *Bueno* rule: although the defendant was allegedly predisposed, he had testified that the government agent supplied him with the contraband. But the court said: "We believe that the Supreme Court's opinion in Russell forecloses us from considering any theory other than predisposition with respect to Hampton's entrapment defense." [36] The court did not clearly enunciate the basis for the entrapment doctrine which the defendant suggested as a defense, but the defendant, in his appeal, stated that his "government conduct theory" had its origins in the concurring opinions of *Sorrells* and *Sherman.*[37] The court's silence on the source of Hampton's defense is tantamount to agreement that the defense has judicial policy as at least one of its justifications. The *Hampton* opinion thus precludes the application of the *Bueno* rule in the Eighth Circuit, if the defense contends that the rule is based on judicial policy.

It would seem that the court's ambiguity could arguably allow the government conduct defense to be raised if due process notions were presented as its justification. But in light of the rationale of the cases cited by the majority as controlling, and the closing criticism of the dissenting judge,[38] a due process argument based on the conduit fact pattern is also foreclosed.

Judge Bright's majority opinion viewed the Supreme Court's remand of *United States v. McGrath* to the Court of Appeals for the Seventh Circuit,[39] and the subsequent affirmance of the conviction for failure to establish, in the record or briefs, either the defense of entrapment or of outrageous government conduct which affronted due process principles,[40] as undermining the validity of the *Bueno* holding.[41] The conviction in *McGrath* was not only for conspiracy to produce and pass counterfeit obligations, to which the entrapment defense was not applicable because the defendants initiated the conspiracy, but also for unlawful possession of the currency. Regarding the latter count, the court found that the government agents arranged for and supervised the printing of the bills, and then delivered them to the defendant.[42] Such involvement of the govern-

[32] United States v. Gomez-Rojas, 507 F.2d 1213, 1218 (5th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975). *See* note 28 *supra.*

[33] 507 F.2d 832, 834–36. (8th Cir. 1974), *cert. granted,* 420 U.S. 1003 (1975). Question presented: "Does Fifth Amendment's Due Process Clause bar defendant's conviction for selling contraband supplied by Government?" 43 U.S.L.W. 3562 (U.S. Apr. 15, 1975).

[34] 508 F.2d 146 (10th Cir.), *cert. denied,* 421 U.S. 949 (1975).

[35] The jury accepted the testimony of the government informer that Hampton knew that he was selling heroin. 507 F.2d at 836 n.4.

[36] *Id.* at 835. Judge Heaney strongly dissented on the grounds that this *Bueno* situation, in which "'. . . the government buy[s] heroin from itself, through an intermediary, the defendant, and then charg[es] him with the crime. . .'" is the type of outrageous conduct which Mr. Justice Rehnquist in *Russell* recognized would be violative of due process requirements. *Id.* at 837 (Heaney, J., dissenting), *quoting* United States v. Bueno, 447 F.2d 903, 905 (5th Cir. 1971).

[37] 507 F.2d at 834.

[38] In the future, it is difficult to see how any defendant in this Circuit can possibly raise the due process defense which the *Russell* Court sought to leave open. *Id.* at 837 (Heaney, J., dissenting).

[39] 412 U.S. 936 (1973), *vacating* 468 F.2d 1027 (7th Cir. 1972). The Court remanded for further consideration in light of United States v. Russell, 411 U.S. 423 (1973).

[40] 494 F.2d 562, 563 (7th Cir. 1974) (per curiam).

[41] 507 F.2d at 835–36.

[42] The court recognized the trial court's findings as follows:

ment agents in *McGrath* would seem to be even greater than that in *Bueno* or *Hampton* where the government was only the source of the contraband, not the mastermind for its manufacture. In light of the influential precedents of *Russell* and *McGrath,* the court would not allow an entrapment defense based on government conduct, either because of judicial policy or due process notions, but rather held the defendant's predisposition determinative in denying the defense and upholding his conviction.

The Tenth Circuit, which has previously indicated that absence of predisposition is the key requirement for allowing an entrapment defense,[43] demonstrated how difficult it is to establish that the government conduct was a denial of fundamental fairness guarantees of the due process clause. In *United States v. Spivey,*[44] the government informer violated both federal and state criminal statutes by possessing and giving the defendant marijuana in an attempt to obtain his trust and confidence. He was also generous with his home, food, and money.[45] However, the defendant, a "ready and willing seller of heroin," [46] had independent sources of heroin, and sold it on two separate occasions to government agents, out of the presence of the informer. The court definitely concluded that the illegality of the informer's conduct, without more, did not affront due process principles.[47] Therefore it did not allow the defendant to claim the *Russell*-originated constitutional defense of outrageous government conduct; yet it did not give any objective standards to test the availability of the due process arguments.

The more compelling aspect of this Tenth Circuit opinion is the statement that the government's conduct was not ". . . postured as connected in some way to the commission of the acts for which the defendant stands convicted." [48] The government conduct was allegedly limited to providing a home, food, marijuana, and money to the defendant, and introducing him to the government agent-purchasers. The defendant conducted the sales by himself, was not threatened or coerced by the agents, and did not act pursuant to a governmental design. As the Tenth Circuit concluded, illegal government conduct is not enough to constitute entrapment at law on constitutional grounds, when there is no nexus to the allegedly criminal activity of the defendant. But if such a connection could be shown, the court inferred that it would entertain the argument:

> [T]he more immediate the impact of the government's conduct upon the particular defendant, the more vigorously would be applied *Russell's* test for constitutional impropriety.[49]

Thus it may be possible for a defendant in the Tenth Circuit to successfully present a due process defense if it is within the context of the conduit fact pattern, where the impact of the government conduct is to provide him with the contraband, the sale of which will lead to his arrest.[50]

The effect of these opinions is an acknowledgment of the willingness of some circuits to

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The Government's proof demonstrated that the defendant, with the assistance of several other persons, embarked upon a scheme to print over one million dollars in counterfeit twenty dollar bills. At some point in the scheme, the Secret Service discovered the plan. Agents then infiltrated the defendant's conspiracy and effectively took direction of it. Prior to this point, the evidence shows that the defendant had purchased rag paper and ink of the type and color necessary to duplicate paper currency and had made inquiries about a printer. There is little dispute, however, that once the agents had infiltrated the ring, they exercised substantial control over its course. Not only did they arrange for and supervise the actual printing of the counterfeit bills, but they also determined how and when they would be delivered to the defendant.

468 F.2d at 1028.

[43] Martinez v. United States, 373 F.2d 810, 812 (10th Cir. 1967).

[44] 508 F.2d 146 (10th Cir.), *cert. denied,* 421 U.S. 949 (1975).

[45] *Id.* at 148.

[46] *Id.* at 151.

[47] Nevertheless, *Russell* did not establish—nor does it now require us to formulate—a fixed rule that would preclude, for due process reasons, the prosecution of the defendant here because the government's informer engaged in unlawful conduct.

Id. at 149. For *Russell's* acknowledgment of the possibility of due process violations in this context see note 6 *supra.*

[48] 508 F.2d at 149.

[49] *Id.* at 150.

[50] The *Spivey* court leaves this possibility open when it cites the *Bueno* and other Fifth Circuit "government-supplied contraband" cases in a footnote as an example of cases in which the govern-

use an objective test to determine the availability of the entrapment defense, by focusing on the law enforcement conduct, and justifying the defense in either judicial policy or due process notions. On the other hand, the majority of the circuits still require the use of the subjective test of the intent of the defendant—his predisposition—and see the *Russell* case as a bar to asserting entrapment or intolerable conduct in the *Bueno* situation where the defendant is predisposed to commit the crime. It remains for the Supreme Court to provide guidance by deciding whether the "intolerable" government conduct by reason of the conduit situation is enough to reverse the defendant's conviction, even though he probably would have committed the crime without the government's assistance in becoming his source of the contraband. In addition the Court has yet to provide standards for application of the outrageous government conduct/due process test outlined in *Russell*. Perhaps these will be provided when *Hampton* is decided by the Supreme Court on review.[51] In the absence of the latter standards, the Fifth Circuit seems to be content to continue to reaffirm that the conduit fact pattern affronts its judicial concepts of fairness and proper police action.

An expansion of this rationale into the other circuits, commencing with the *West* case in the Third Circuit, is desirable, and this rule, based on judicial policy, is the clearest path of action which has been charted, in the absence of constitutional due process standards, for courts who want to justify their finding of outrageous or intolerable government conduct in a conduit situation. Without any necessity for correlating a criticism of the conduct of the police to constitutional notions, the courts should be at liberty to make the determination that certain police conduct is not proper, regardless of the person to whom it is directed. Mr. Justice Frankfurter, in his concurring opinion in *Sherman*, convincingly summarized the import of this argument:

> Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.
>
> ....
>
> 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.[52]

Government Surveillance

In the post-Watergate era, public attention has focused as never before on the purported attempts of various government bodies to spy on private citizens. In several major cities, for example, reports of police intelligence gathering, directed at political enemies of parties in power, have filled the news media,[53] causing citizens concerned about the prying eye of "Big Brother" to ask if a solution to the problem of government surveillance can be found in the law.

In *White v. Davis*,[54] the California Supreme Court held that a state and local taxpayer had the requisite standing to seek an injunction against alleged illegal expenditures of public funds by a chief of police in connection with police undercover activities at the University of California at Los Angeles.[55] Observing that the campus is the "sacred ground of free discussion,"[56] the court also found that facts alleged by the plaintiff showed a prima facie violation of constitutional guarantees of free speech and assembly[57] and the right of privacy

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ment connection has been measured by ". . . the extent to which the government instigated, participated in, or was involved or enmeshed in, the criminal activity itself." *Id.* at 150 n.3 and accompanying text.

[51] *See* note 33 *supra*.

[52] Sherman v. United States, 356 U.S. 369, 380, 382–83 (1958) (Frankfurter, J., concurring).

[53] *See, e.g.*, Chicago Tribune, June 4, 1975, § 1, at 1, col. 4.

[54] 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

[55] *Id.* at 762–65, 533 P.2d at 225–27, 120 Cal. Rptr. at 97–99. This state and local taxpayer standing would apparently not allow suits against federal officers to prevent expenditure of federal funds. Such suits would require federal taxpayer standing to attack surveillance, which so far does not exist. For the most extensive grant of federal taxpayer standing to date see Flast v. Cohen, 392 U.S. 83 (1968).

[56] *Id.* at 770, 533 P.2d at 231, 120 Cal. Rptr. at 103.

[57] *Id.* at 765–73, 533 P.2d at 227–32, 120 Cal. Rptr. at 99–104. U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free-

set forth in a recently adopted provision of the California Constitution.[58] Since the Supreme Court of the United States in *Laird v. Tatum*[59] held that a citizen cannot, without specific injury, challenge in federal courts the legality of government investigative activity,[60] California may now, for the first time, be setting an example which other states will follow in providing an effective remedy for the general public against much undesired government snooping.

In *Laird,* plaintiffs, alleging the existence of covert United States Army intelligence-gathering operations directed at lawful civilian political activity, sought to enjoin the alleged spying because it had a "chilling effect," which discouraged them from exercising their first amendment rights.[61] A five-man majority for the Court held that a citizen must allege a more specific injury than mere surveillance to challenge such government activities.[62]

In *Bagley v. Los Angeles,*[63] a California federal court followed the *Laird* precedent in dismissing a complaint challenging the very police surveillance activities at issue in *White v. Davis.*[64] As in *White,* the plaintiff alleged that members of the Los Angeles police department, with the chief's authorization, were serving as secret informers and undercover agents at U.C.L.A. by registering as students, attending classes, and submitting reports of class discussions to the police department.[65]

With the federal courts effectively closed to suits by citizens challenging the mere existence of illegal surveillance, Hayden White, a professor at U.C.L.A., took his taxpayer's suit against the Los Angeles chief of police to the California state courts. On appeal from a dismissal of the complaint, the state supreme court applied section 526a of the California Code of Civil Procedure to grant standing,[66] noting that the same provision was used to confer standing in 1948 on a taxpayer challenging dragnet police blockades[67] and in 1957 on a taxpayer seeking a remedy for illegal electronic surveillance by police.[68] The court held that under section 526a no showing of special damage to the taxpayer is necessary when he challenges state or local government action, the primary purpose of the section being " 'to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.' " [69]

By holding that White had standing as a taxpayer to seek an injunction against the expenditure of public funds for illegal purposes by state or local officials, the California Supreme Court blazed a trail which courts in other states could easily follow to curb government snooping. Taxpayers' suits have been recognized as a common law right in some states.[70] Other American jurisdictions have statutes similar to section 526a of the Califor-

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dom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The provisions of the first amendment are applicable to the states by reason of the fourteenth amendment. National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449, 460–61 (1958); Near v. Minnesota, 283 U.S. 697, 707 (1931). CAL. CONST. art. 1, § 2 contains a similar provision for freedom of speech and assembly.

[58] 13 Cal. 3d at 773–76, 533 P.2d at 232–35, 120 Cal. Rptr. at 104–07. CAL. CONST. art. 1, § 1 reads:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

[59] 408 U.S. 1 (1972).

[60] *Id.* at 15.

[61] *Id.* at 2.

[62] *Id.* at 10.

[63] No. 71-166-JWC (S.D. Cal. 1971).

[64] 13 Ca. 3d at 763, 533 P.2d at 226, 120 Cal. Rptr. at 98.

[65] *Id.* at 761–62, 764, 533 P.2d at 225, 226, 120 Cal. Rptr. at 97, 98.

[66] *Id.* at 764, 533 P.2d at 227, 120 Cal. Rptr. at 99. Relevant portions of section 526a provide:

An action to obtain a judgment, restraining and preventing any illegal expenditure of . . . funds . . . of a county, town, city or city and county of the state, may be maintained against any officer thereof . . . by a citizen resident therein. . . .

CAL. CIV. PRO. CODE § 526a (West 1954).

[67] Wirin v. Horrall, 85 Cal. App. 2d 497, 193 P.2d 470 (1948).

[68] Wirin v. Parker, 48 Cal. 2d 890, 313 P.2d 844 (1957).

[69] 13 Cal. 3d at 764–65, 533 P.2d at 227, 120 Cal. Rptr. at 99, *quoting* Blair v. Pitchess, 5 Cal. 3d 258, 267–68, 486 P.2d 1242, 1246, 96 Cal. Rptr. 42, 48 (1971).

[70] *See, e.g.,* Appeal of Sears, Roebuck & Co., 123 Ind. App. 358, 109 N.E.2d 620 (1952); Everett v. County of Clinton, 282 S.W.2d 30 (Mo. 1955).

nia Code of Civil Procedure, specifically providing for taxpayers' suits.[71] Finally, the courts in several jurisdictions have liberally interpreted the language of state statutes so as to provide for such litigation.[72]

Although the laws of many states would support taxpayer actions such as White's the California Supreme Court in his case did extend the right of taxpayer suit to a situation in which it had rarely been exercised. Taxpayer actions have often been brought to prevent the levying of illegal taxes,[73] to prevent the payment of public funds to persons not authorized to receive them,[74] and to avoid illegal contracts entered into by state and local governments.[75] But seldom have they been brought to prevent unlawful official surveillance. Government spying has primarily been challenged by persons who have been specifically damaged by the spying activities.[76]

The *White* case is also unusual and important in that the surveillance involved in that case was challenged as violating constitutional rights which have seldom been asserted in court against government undercover activity, that is, freedom of speech and assembly and the right to privacy. As the court in *White* noted,[77] the most familiar limitations on police investigatory and surveillance activities are the search and seizure restrictions and warrant restrictions found in the fourth amendment to the United States Constitution and in many state constitutions.[78] The Supreme Court of the United States has rejected the contention that government surveillance in "domestic security" cases is immune from fourth amendment proscriptions,[79] and over the years many on-going police intelligence operations have been halted for violation of the rights protected by that amendment and by similar state provisions.[80] In many situations, however, citizens may be in a better position to claim that their freedom of speech or right to privacy has been violated than to rely on search and seizure and warrant requirements.

In holding that the allegations in White's complaint stated a prima facie infringement of the freedom of speech and assembly guaranteed by the constitutions of the United States and Calfornia,[81] the California Supreme Court distinguished the investigation of specific criminal activity by undercover government agents from the kind of surveillance of routine and continuous lawful activities alleged in the case at bar.[82] The court also cited United States Supreme Court cases indicating that to compel an individual to disclose his political ideas or affiliations to the government is to deter his exercise of first amendment rights,[83] and that police surveillance of university classrooms is particularly suspect from a constitutional standpoint.[84] The defendant's claim that the

[71] *See, e.g.,* ILL. REV. STAT. ch. 102, § 11 (1973); MASS. ANN. LAWS ch. 29, § 63 (1932); OHIO REV. CODE ch. 723, § 59 (1964); V.I. CODE ANN. tit. 5, § 80 (1957).

[72] *See, e.g.,* Hollis v. Piggott Junior Chamber of Commerce, Inc., 248 Ark. 725, 453 S.W.2d 410 (1970).

[73] *See, e.g.,* Knopf v. First Nat. Bank, 173 Ill. 331, 50 N.E. 660 (1898).

[74] *See* J.D.L. Corp. v. Bruckman, 171 Misc. 3, 11 N.Y.S.2d 741 (1939).

[75] *See, e.g.,* Henderson v. McCormick, 70 Ariz. 19, 215 P.2d 608 (1950).

[76] *See, e.g.,* People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973).

[77] 13 Cal. 3d at 766, 533 P.2d at 228, 120 Cal. Rptr. at 100.

[78] U.S. CONST. amend. IV provides as follows:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The fourth amendment applies directly to rights of the people against the federal government. The provisions of the fourth amendment are made applicable to the states by reason of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643, 654–55 (1961).

[79] United States v. United States Dist. Ct., 407 U.S. 297 (1972).

[80] *See, e.g.,* Wirin v. Parker, 48 Cal. 2d 890, 313 P.2d 844 (1957).

[81] The court admitted that comparable federal and state constitutional provisions for the freedoms of speech and assembly are not necessarily coextensive, but it did not explore potential variances in *White.* 13 Cal. 3d at 767, 533 P.2d at 228, 120 Cal. Rptr. at 100.

[82] 13 Cal. 3d at 765, 533 P.2d at 227, 120 Cal. Rptr. at 99.

[83] *Id.* at 768, 533 P.2d at 229, 120 Cal. Rptr. at 101. The cases cited included Talley v. California, 362 U.S. 60 (1960); and National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958). Both pointed out that secrecy can sometimes be essential to the organization of effective dissent. 362 U.S. at 64; 357 U.S. at 462.

[84] 13 Cal. 3d at 768–69, 533 P.2d at 229–30, 120

semi-public nature of a university classroom negates any claim of first amendment infringement was rejected by the court. Instead, the court reasoned that the risk a student takes in speaking in class that other students will record his statement and remember it in the future is qualitatively different from that posed by a police surveillance system involving the filing of reports in permanent police records.[85] As a result of the alleged infringement on the freedoms of speech and assembly, the court found that the defendant would have the heavy burden of showing that his actions bore a necessary relation to a compelling state interest.[86] This burden would be all the heavier, according to the court, because of alleged intrusion into the particularly sacrosanct environs of a university classroom and because White alleged that information gathered by the police through their operations at U.C.L.A. pertained to no "illegal activity or acts." [87]

By finding a prima facie infringement of the freedoms of speech and assembly guaranteed by the constitutions of the United States and California, the court in *White v. Davis*, as it had done in finding standing to sue, established a procedure courts in other states could easily follow in curbing government spying. Most, if not all, state constitutions contain provisions guaranteeing the freedom of speech and assembly. And, of course, the United States Constitution's provisions, including those for free speech and assembly, are applicable throughout the nation.

In finding that the facts alleged by White also constituted a prima facie violation of the California Constitution's right of privacy provision, the court held that the principal mischiefs at which the provision was aimed were:

> (1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose . . .; and (4) the lack of a reasonable check on the accuracy of existing records.[88]

The court also found that the constitutional provision, like most constitutional restraints, does not prohibit all government incursions on individual privacy, but creates a right of privacy enforceable by the individual citizen only when the government action cannot be justified by a compelling state interest.[89] As with regard to the alleged violations of the freedom of speech and assembly, the court found that the defendant would face a heavy burden at trial in establishing the legality of his actions.

By finding a prima facie violation of the California Constitution's right of privacy provision, the court in *White* also found a means of attacking government snooping that courts in other states could use. The great majority of American courts that have taken a position on the matter have held that there is a right of privacy at common law,[90] although in several states there are statutes limiting the right of privacy to a cause of action for the use of one's name or picture for

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Cal. Rptr, at 101–02: The cases cited included Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); and Sweezy v. New Hampshire, 354 U.S. 234 (1957). All mentioned, in one way or another, that the classroom is peculiarly the "marketplace of ideas" where the nation's future leaders must be trained through the robust exchange of views. 385 U.S. at 603; 364 U.S. at 487; 354 U.S. at 250.

[85] 13 Cal. 3d at 768 n.4, 533 P.2d at 229 n.4, 120 Cal. Rptr. at 101 n.4.

[86] *Id.* at 772, 533 P.2d at 232, 120 Cal. Rptr. at 104.

[87] *Id.* at 773, 533 P.2d at 232, 120 Cal. Rptr. at 104. Compare the court's treatment of the free speech issue in *White* with that of the court in Socialist Workers Party v. Attorney General, No. 74–2640 (2d Cir. Dec. 29, 1974), where a suit was unsuccessfully brought to enjoin the Director of the F.B.I. and his agents from conducting secret surveillance of a convention of the Young Socialist Alliance. There it was contended by the Socialist Workers Party that surveillance of the convention activities by the F.B.I. would have a "chilling effect" on free expression at the convention and that knowledge of probable F.B.I. surveillance would discourage attendance at the convention, as it had at previous ones held by the Y.S.A. The court refused to prohibit surveillance, however, on condition that the F.B.I. refrain from transmitting the names of persons attending the convention to the Civil Service Commission.

[88] 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

[89] *Id.*

[90] *See* Annot., 14 A.L.R. 2d 750 (1950); Annot., 168 A.L.R. 446 (1947); Annot., 138 A.L.R. 22 (1942). Intrusion upon a person's seclusion or solitude, or into his private affairs is generally recognized as an invasion of the common law right of privacy, and government snooping would certainly seem to fit under that description.

purposes of advertising or trade without one's consent.[91] There are even a few states, in addition to California, which provide a right of privacy in their constitutions,[92] and the United States Constitution has been said to provide a right of privacy which is binding on all of the states through the fourteenth amendment.[93]

In conclusion, the California Supreme Court has set a precedent in *White v. Davis* which may lead to an increasing number of taxpayer suits being filed in state courts across the country to enjoin, on grounds of infringement of the freedom of speech and assembly and/or the right to privacy, expenditures of state and local funds for government surveillance. A reversal of the United States Supreme Court decision in *Laird v. Tatum,* allowing taxpayer suits to be brought in federal courts, would further advance the cause of providing a legal solution to government spying on innocent private citizens. So would the granting of standing to federal taxpayers to challenge federal undercover activities. Whether *White* will set a trend leading to these developments, however, is difficult to say. At present, the only foreseeable result of *White,* which is nevertheless a significant one, is the establishment for the first time of an effective remedy for the general public against state and local government snooping.

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[91] *See* Annot., 14 A.L.R. 2d 750 (1950); Annot., 168 A.L.R. 446 (1947); Annot., 138 A.L.R. 22 (1942).

[92] For examples of other state constitutional provisions mentioning a right to privacy, see ARIZ. CONST. art. 2, § 8; HAWAII CONST. art. 1, § 5; ILL. CONST. art. 1, §§ 6, 12; WASH. CONST. art. 1, § 7. None of these constitutional provisions has yet been used to invalidate government snooping. Some have been said to have the same effect as the fourth amendment to the U.S. Constitution, and to confer no additional rights. *See, e.g.,* Cluff v. Farmers Insurance Exchange, 10 Ariz. App. 560, 460 P.2d 666 (1969).

[93] In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court suggested that a right of privacy exists in the penumbra emanating from the first amendment freedoms of speech and assembly, the third amendment prohibition against quartering soldiers in the home, the fourth amendment search and seizure provisions, the fifth amendment self-incrimination clause, and the ninth amendment reservation of unenumerated rights to the people. The court applied the right of privacy to the states through the fourteenth amendment.