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Jacobson v. United States: Do the Ends Justify the Means in Government Stings?

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Note

Jacobson v. United States: Do The Ends Justify the Means in Government Stings?

The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows. The patrols did not matter, however. Only the Thought Police mattered.¹

I. INTRODUCTION

During the last few decades, the United States government has been using increasingly elaborate undercover stings² to detect and punish criminals.³ Proponents of stings argue that they are often the only effective means of law enforcement.⁴ Some critics contend, however, that these operations infringe on individual rights.⁵

1. GEORGE ORWELL, 1984 4 (1947). Orwell's "Big Brother" recently reappeared in the comments of one writer who stated:

Big Brother has gone big time: He's posing as your friendly interior decorator, futures trader, salesman, investor, contractor, meat inspector, land developer, judge, and lawyer—not to mention the usual drug dealer, arms merchant, pornographer, and money launderer. It seems all the world's a stage for the federal government as it pursues scores of undercover sting operations in its battle against crime.

Saul M. Pilchen, *The Underside of Undercover Operations*, CONN. L. TRIB., July 22, 1991, at 18.

2. A sting is defined as: "[a]n undercover police operation in which police pose as criminals to trap law violators." BLACK'S LAW DICTIONARY 1414 (6th ed. 1990).

3. See generally LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME (Frank J. Remington ed., 1967) (discussing various types of crimes for which stings are considered essential, including prostitution, liquor sales, and narcotics sales).

4. See, e.g., Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations*, 36 EMORY L.J. 75, 78 (1987). "Undercover investigations have been recognized as an effective means—sometimes the only effective means—of detecting, investigating, successfully prosecuting, and thereby deterring such concealed offenses." *Id.*

5. See, e.g., Maura F.J. Whelan, Comment, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1197 (1985) (contending that the current focus on the

Others maintain that it is simply unethical for the government to create crime to catch criminals.⁶

The entrapment defense, which allows for acquittal if a defendant can show that the government coerced him into committing the crime, is an attempt to balance the needs of law enforcement officials with the rights of individual citizens.⁷ Though both state and federal courts allow the entrapment defense,⁸ the application

defendant, rather than on the police, results in a standard by which the citizen's morality is measured and tested by the government at the expense of that individual's rights).

6. See George E. Dix, *When Government Deception Goes Too Far*, TEX. LAW., Oct. 21, 1991, at 12 (characterizing stings as a violation of the Fourth Amendment and calling for a reasonable suspicion requirement of criminal activity before a person is targeted in a sting); Pilchen, *supra* note 1, at 18 (objecting to the amount of control prosecutors have over sting operations, because they may design a sting to result in a maximum sentence on conviction); Geoff Davidian, *Stings Raise Legal Hackles in Some Cases*, HOUS. CHRON., May 3, 1992, at C1 (discussing several sting operations and criticizing the government for using excessive influence to persuade people to commit crimes).

7. See *Sorrells v. United States*, 287 U.S. 435 (1932). Concurring in *Sorrells*, Justice Roberts defined entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." *Id.* at 454 (Roberts, J., concurring).

The Supreme Court's definition of entrapment, known as the "subjective approach," involves a two-part inquiry. 1 WAYNE R. LAFAYE AND JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 5.2(a), at 416 (1984) (citing *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932)). The first question is whether government agents induced the defendant to commit the crime. *Id.* The second question is whether, if the government did induce commission of the crime, the defendant was predisposed to commit the crime independent of government action. *Id.* This approach focuses primarily on the defendant's state of mind. See *id.* at 416-17.

The minority definition of entrapment is known as the "objective approach." PAUL MARCUS, THE ENTRAPMENT DEFENSE § 5.01, at 171 (1989) [hereinafter MARCUS]. This approach focuses on the outrageousness of the government conduct, rather than on the defendant's state of mind. *Id.* Those advocating this approach in the federal courts often argue that outrageous government conduct violates the Due Process Clause of the Fifth Amendment. See *id.* at 171-76. The Fifth Amendment's Due Process Clause provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

Proponents of the objective approach contend that it curbs abuses of government power. MARCUS, *supra*, at 171-76. The Supreme Court has never adopted the objective approach, but individual justices have embraced it in some concurring and dissenting opinions. In addition, the following state courts have adopted the objective approach: Alaska, Arkansas, California, Hawaii, Michigan, New Hampshire, North Dakota, Pennsylvania, Texas, Utah, Vermont, and West Virginia. *Id.* Other states, including Florida and New Jersey, have adopted hybrid tests, which combine features of both the objective and subjective tests. *Id.* at 172. Regardless of the approach, every state recognizes the defense in some form. See *id.* at 172-76; see also *infra* notes 37-69 and accompanying text (discussing the Supreme Court's analyses of these approaches).

8. See Michael A. DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243 (1966) (outlining the history of the entrapment defense and discussing the different ways in which the state and federal courts apply it).

of the defense to particular cases has been inconsistent and confusing.⁹ Neither the legislature nor the courts has established detailed guidelines for investigators who wish to avoid entrapping their targets.¹⁰

In spite of the problems and controversies inherent in all sting operations, the government continues to design and implement elaborate undercover investigations.¹¹ These stings are frequently used to investigate the producers, peddlers, and purchasers of child pornography.¹² Because it is shrouded in secrecy, the child pornography industry presents a special problem for any government investigation designed to dismantle it.¹³ As a result, sting operations targeting child pornography have become increasingly complex and clandestine.¹⁴ With the heightened complexity comes the increased likelihood that agents will unwittingly entrap their targets, thereby reducing (if not eliminating) the government's chance of obtaining convictions.¹⁵

Without clear judicial guidance on the entrapment defense, law enforcement officials will continue to conduct costly sting operations, while risking acquittals of guilty defendants. Perhaps more important, until the Supreme Court crafts explicit constitutional parameters for these investigations, citizens will continue to be unwitting targets of law enforcement's covert operations.

On April 6, 1992, the United States Supreme Court addressed the elements of the entrapment defense in *Jacobson v. United*

9. See Stephen E. Leidheiser, Comment, *Defense of Entrapment: The Confusion Continues*, 13 CUMB. L. REV. 373 (1982) (discussing the fine line between legitimate sting operations and impermissible police conduct designed to entrap certain individuals).

10. LAFAVE, *supra* note 7, § 5.1(b), at 413.

11. One well-known example was Abscam, which was conducted by the Federal Bureau of Investigation in the late 1970s. The operation took its name from the fictitious Abdul Enterprises, Ltd., which served as the front for the government's operation. Goldwasser, *supra* note 4, at 75 n.1. The operation began as an effort to recover stolen property and developed into an investigation of official corruption. *Id.*

Abscam resulted in the conviction of one United States Senator and six members of the House of Representatives. *Id.* at 75 n.2. The mayor of Camden, New Jersey, several members of the city council of Philadelphia, and an inspector for the United States Immigration and Naturalization Service were also convicted of charges related to official corruption. *Id.*

12. See Jim Spencer, *The Sting Master: Baiting the Trap for Pornographers*, CHI. TRIB., Nov. 24, 1987, at C1 (describing Operation Borderline, an elaborate child pornography sting run by the U.S. Customs Service, which operated under the cover of several fictitious organizations and resulted in a large number of arrests and convictions). For a detailed discussion of this sting and other child pornography stings, see *infra* notes 173-86 and accompanying text.

13. See generally Spencer, *supra* note 12.

14. See generally *id.*

15. See generally *id.*

States.¹⁶ In a five-to-four decision, the Court voted to reverse the conviction of a Nebraska farmer for knowing receipt of child pornography through the mail.¹⁷ The farmer, Keith Jacobson, was prosecuted as the result of an elaborate child pornography sting.¹⁸ The Court held that Jacobson had been entrapped as a matter of law because he was not predisposed to commit the crime independently of the government's inducement.¹⁹ For the first time, the Court expressly stated that a conviction cannot stand if the defendant alleges entrapment, and the government fails to prove that the defendant was predisposed to commit the crime before its agents initiated contact with him.²⁰

This Note examines the Court's ongoing struggle with the entrapment defense. First, the Note analyzes the evolution of the entrapment defense and of the Supreme Court's definition of it.²¹ Second, it discusses the factual background of the *Jacobson* case and the Supreme Court's reversal of Jacobson's conviction.²² This Note both criticizes the government agents who investigated Jacobson during the sting operation and faults the Supreme Court for failing to strongly condemn the government's behavior.²³ Next, it examines the traditional entrapment defense, as applied in *Jacobson*, and contends that the Court's analysis of the two elements—inducement and predisposition—is flawed.²⁴ The Note also explains that, because the "new" *Jacobson* standard already guided most sting operations, the case will have a limited impact on future stings.²⁵ Finally, this Note calls for the Court to provide a clear statement on the reasonableness of government conduct during sting operations, so that the applicability of the entrapment defense

16. 112 S. Ct. 1535 (1992).

17. *Id.* at 1537.

18. *Id.* at 1537-40.

19. *Id.* at 1543.

20. *Id.* at 1540-41. Prior to this decision, the Court had not discussed the point when a defendant's lack of criminal predisposition would support a finding of entrapment as a matter of law. However, some courts held that the defendant had to be predisposed before any contact by agents occurred. *See infra* notes 166-72 and accompanying text. Others maintained that the defendant had to be predisposed to commit the crime when the opportunity was first offered to him. *See infra* notes 46, 52-53 and accompanying text. Although there is some Supreme Court precedent tending to support the former view, Justice O'Connor vigorously argued the latter position in her dissent in *Jacobson*. *See infra* notes 110-15 and accompanying text.

21. *See infra* notes 27-69 and accompanying text.

22. *See infra* notes 70-121 and accompanying text.

23. *See infra* notes 122-46 and accompanying text.

24. For a full discussion of this test, *see infra* notes 147-72 and accompanying text.

25. *See infra* notes 174-91 and accompanying text.

will be more predictable in the future.²⁶

II. BACKGROUND

The entrapment defense, which is largely a product of the United States common law system, was first recognized approximately one hundred years ago.²⁷ Until that time, most courts had rejected the defense.²⁸ It was not until the late nineteenth century that certain state courts began to recognize entrapment as a viable defense.²⁹ Federal courts, however, were slow to follow the lead of the state courts.³⁰ In addition, the federal courts that did recognize the defense were divided on the issue of whether the key factor should be the government's conduct or the defendant's state of mind.³¹

The first federal case to reverse a conviction based on entrapment was *Woo Wai v. United States*,³² which was decided 37 years after *Saunders v. People*,³³ the first state court decision to recognize the defense.³⁴ In *Woo Wai*, the court held that government agents had entrapped the defendant by coercing him to smuggle aliens across the Mexican border into the United States.³⁵ The *Woo Wai*

26. See *infra* notes 192-95 and accompanying text.

27. DeFeo, *supra* note 8, at 244.

28. *Id.* Judge Bacon's language, as quoted in *Sorrells v. United States*, 57 F.2d 973, 976 (4th Cir. 1932), *rev'd*, 287 U.S. 435 (1932), poignantly illustrates the then-prevailing suspicion of the entrapment defense:

[Even if the inducement to crime be assumed to exist, the allegation of the defendant] would be but the repetition of the plea as ancient as the world and first interposed in Paradise: "The serpent beguiled me and I did eat." That defence [sic] was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say [C]hristian ethics, it never will.

Id. (quoting *Board of Comm'rs. v. Backus*, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864) (quoting *Genesis* 3:13)).

29. DeFeo, *supra* note 8, at 247-48 (noting that the first state court to recognize the defense was Michigan, in *Saunders v. People*, 38 Mich. 218 (1878), which held that a burglary conviction should be reversed because evidence of entrapment had been excluded).

30. See *id.* at 248-49.

31. See *infra* notes 38-69 and accompanying text.

32. 223 F. 412, 415-16 (9th Cir. 1915). The court relied on six state court decisions as support for the entrapment defense: *Love v. People*, 43 N.E. 710 (Ill. 1896); *People v. McCord*, 42 N.W. 1106 (Mich. 1889); *Saunders v. People*, 38 Mich. 218 (1878); *Commonwealth v. Wasson*, 42 Pa. Super. 38 (1910); *Commonwealth v. Bickings*, 12 Pa. D. 206 (1903); *O'Brian v. State*, 6 Tex. App. 665 (1879). *Id.* at 416.

33. 38 Mich. 218 (1878).

34. See DeFeo, *supra* note 8, at 248.

35. 223 F. at 414-15. The court objected to the lack of evidence that *Woo Wai* had

court recognized that earlier cases had upheld criminal convictions despite obvious government inducement, but it nevertheless reversed the defendant's conviction. The court concluded there was insufficient evidence to prove that the defendant would have committed the crime absent the persistent prompting of a government agent.³⁶

Thirteen years after the groundbreaking *Woo Wai* decision, the entrapment defense was endorsed by Justice Brandeis in his dissent in *Casey v. United States*.³⁷ In *Casey*, Brandeis accused the government of trying to create a crime, so that it could then punish the criminal that it had created.³⁸ His stern dissent stressed the outrageousness of the government's conduct, not the wrongfulness of the defendant's behavior.³⁹

Two months after *Casey* was decided, the Court handed down its decision in *Olmstead v. United States*.⁴⁰ In *Olmstead*, Justice Brandeis, again in dissent, contended that the government had gone to impermissible lengths to obtain evidence against certain criminal defendants.⁴¹ Brandeis chided the government for illegally tapping the defendants' phone lines in order to build a case against them.⁴² As he did in *Casey*, Justice Brandeis stressed the

ever engaged in any unlawful activity before being approached by government agents. *Id.* at 414.

36. *Id.*

37. 276 U.S. 413, 421-25 (1928) (Brandeis, J., dissenting).

38. *Id.* at 423 (Brandeis, J., dissenting). Government agents suspected that Casey, an attorney, was selling drugs to certain inmates that he visited. *Id.* at 422. The agents began their investigation after a jailer suggested to them that several inmates appeared to be under the influence of narcotics shortly after Casey visited them. *Id.* The agents arranged for two inmates to give Casey money for narcotics during his next visit. *Id.*

Commenting on the operation, Justice Brandeis wrote, "[t]he Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature." *Id.* at 423.

39. *Id.* at 423-25 (Brandeis, J., dissenting).

40. 277 U.S. 438 (1928).

41. *Id.* at 482-85 (Brandeis, J., dissenting).

42. *Id.* at 482 (Brandeis, J., dissenting). The defendants had been convicted of conspiring to violate the National Prohibition Act. *Id.* at 455. Federal agents had tapped their telephones to collect evidence against them. *Id.* at 456. Agents then listened to the defendants' conversations for nearly five months before arresting and indicting them. *Id.* at 471.

Concerned that the government was committing crimes to catch criminals, Brandeis wrote:

The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. . . .

....

. . . To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to

government's unethical conduct, and not that of the defendants.⁴³

Four years later, in *Sorrells v. United States*,⁴⁴ a majority of the Supreme Court embraced the entrapment defense for the first time. Though the *Sorrells* Court did not decide whether the defendant had been entrapped, it did conclude that the defendant should have been allowed to assert the defense at trial.⁴⁵ The Court distinguished a government investigation designed to *expose* criminal conduct from one that *creates* it.⁴⁶ However, unlike Justice Brandeis's dissents in *Casey*⁴⁷ and *Olmstead*,⁴⁸ the *Sorrells* Court emphasized not only the government's conduct, but also the defendant's state of mind.⁴⁹

Twenty-six years later, in *Sherman v. United States*,⁵⁰ the Supreme Court finally concluded that a defendant had been entrapped as a matter of law. The *Sherman* Court, following the lead of the *Sorrells* Court, considered the government's conduct, but based its decision primarily on the defendant's state of mind.⁵¹ The

secure the conviction of a private criminal—would bring terrible retribution.

Against that pernicious doctrine this Court should resolutely set its face.

Id. at 483, 485.

43. *Id.* (Brandeis, J., dissenting).

44. 287 U.S. 435 (1932).

45. *Id.* at 452. In *Sorrells*, the defendant was convicted of violating the National Prohibition Act. *Id.* at 438. An agent, who had once been a member of the military division in which Sorrells had served, repeatedly asked Sorrells to obtain liquor for him. Sorrells refused each request. *Id.* at 439. Finally, after a protracted appeal to Sorrells's sense of military camaraderie, Sorrells agreed to obtain some liquor, ultimately selling it to the agent. *Id.*

46. *Id.* at 442. The *Sorrells* Court noted that "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id.*

47. See *supra* note 37 and accompanying text.

48. See *supra* note 42 and accompanying text.

49. 287 U.S. at 441. The Court stated that absent government coercion, Sorrells may have lacked a criminal predisposition. *Id.* According to the Court, this factor, when coupled with the agent's repeated attempts to coerce him to commit a crime, might have constituted entrapment. *Id.* at 452.

In his concurring opinion, Justice Roberts condemned the government's conduct. *Id.* at 459 (Roberts, J., concurring). Though Justice Roberts agreed with the outcome of the case, he did not agree with the Court that the defendant's state of mind should be a factor. *Id.* at 458-59. In his opinion, as soon as the Court concluded that the government instigated a crime, its analysis should have been complete. *Id.* at 459.

50. 356 U.S. 369 (1958).

51. *Id.* at 372. This view of entrapment again prompted sharp disagreement. In a concurring opinion, Justice Frankfurter criticized the focus on the defendant's state of mind. *Id.* at 382 (Frankfurter, J., concurring). He characterized the entrapment defense as an expression of judicial outrage over extreme government behavior and argued that the Court should focus on the government's conduct, not on the defendant's state of mind. *Id.* Frankfurter maintained that the majority approach was difficult to apply and,

Sherman Court held that the defendant, an otherwise innocent man, had obtained illegal drugs only because a government agent had used unreasonable pressure to induce his conduct.⁵² The Court noted that the defendant was not predisposed to commit the crime when the agent first approached him.⁵³ Therefore, the *Sherman* Court concluded that the defendant had been entrapped as a matter of law.⁵⁴

In subsequent decisions, the Supreme Court continued to refine the parameters of the entrapment defense. For example, in *United States v. Russell*,⁵⁵ the Court expressly rejected a defense based on outrageous government conduct.⁵⁶ The Court held that there was no entrapment as a matter of law because the defendant admitted

as a result, had been ignored by many lower courts. *Id.* at 378-79. In his opinion, the focus on the defendant's state of mind made no sense, because if the defendant had committed the crime, his state of mind was necessarily a guilty one. *See id.* at 379. Moreover, Frankfurter maintained that a test which focused exclusively on the character and predisposition of the defendant, rather than on the conduct of the government, conflicted with the policy considerations behind the entrapment defense. *Id.* at 382.

52. *Id.* at 373. In *Sherman*, the defendant met the government agent while in a narcotics rehabilitation program. *Id.* at 371. The agent met Sherman several times, by accident, after they both had left the program. *Id.* The agent requested several times that Sherman buy the drugs for him, and each time Sherman refused. *Id.* Finally, after the agent appealed to Sherman's sympathy by describing his own suffering from his need to use drugs, Sherman obtained the drugs for him. *Id.*

The agent's conduct in *Sherman* provides one example of inducement: "One request was not enough, for [the government agent] tells us that additional ones were necessary to overcome, first, petitioner's refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation." *Id.* at 373.

53. *Id.* at 375. Sherman's criminal record included a nine-year-old conviction for drug sales and a five-year-old conviction for possession. *Id.* The Court held that the pair of prior convictions did not establish his predisposition to commit the crime that was then at issue. *Id.* In fact, his attorneys offered evidence to show that Sherman was actively trying to overcome a narcotics addiction when the agent approached him. *Id.* at 375-76.

54. *Id.* at 373. According to the *Sherman* Court, focusing on the defendant's state of mind is proper because "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal [when determining whether entrapment has been established]." *Id.* at 372.

55. 411 U.S. 423 (1973).

56. *Id.* at 425. The *Russell* Court reversed the decision of the lower court, which had concluded that "a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise." *Id.* at 424 (citing *Russell v. United States*, 459 F.2d 671, 673 (9th Cir. 1972)).

In *Russell*, the government agent went to Russell's home to learn the location of the makeshift laboratory where Russell was illegally producing methamphetamine. *Id.* at 425. The agent supplied Russell with a hard-to-find ingredient, which was needed for production of the drug. *Id.* at 426. Despite evidence of Russell's predisposition to commit the crime, the lower court reversed the conviction, concluding that the government, by providing the missing ingredient, had acted outrageously. *Id.* at 424.

having a predisposition to commit the crime.⁵⁷ The *Russell* Court concluded that because the defendant's criminal predisposition outweighed the government's questionable conduct, the defendant's entrapment argument had failed.⁵⁸

In *Hampton v. United States*,⁵⁹ the Supreme Court again rejected a defense based on outrageous government conduct, and focused instead on the defendant's predisposition. In *Hampton*, as in *Russell*, there was no apparent dispute regarding the defendant's predisposition to commit the crime.⁶⁰ A plurality of Justices in *Hampton* stated that it was beyond the Court's powers to focus on the appropriateness of government conduct.⁶¹ Although the Court flatly refused to focus on the government's conduct in its decision, this view was once again espoused in a concurring opinion.⁶² Moreover, dissenting, Justice Brennan argued that the conduct of the government in this case was, indeed, outrageous and that the conviction should be set aside on that basis.⁶³

57. *Id.* at 433, 436. Although the defendant admitted predisposition to commit the crime, he argued that the extreme degree of involvement by the government agent supported his assertion of entrapment. *Id.* at 427. The Court rejected this argument, noting that "[w]hile 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, . . . the instant case is distinctly not of that breed." *Id.* at 431-32 (citations omitted).

58. *Id.* at 435-36. Because Russell admitted his predisposition to commit the crime, no one disputed whether the government was justified in initially targeting him. *Id.* at 429. The main point of contention was whether the government's involvement was so extreme that it superseded all considerations of Russell's predisposition. *Id.* The Court, noting the specific facts of the case, maintained that Russell's predisposition was the primary issue. *Id.* at 431-32. Its discussion, however, left the door open for future cases in which the issue of outrageous government conduct would be critical. *Id.*

59. 425 U.S. 484 (1976) (plurality opinion).

60. *Id.* at 490.

61. The *Hampton* Court explained: "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Id.*

62. Concurring, Justice Powell did not believe that the government's conduct in *Hampton* was so outrageous that it precluded a conviction. He did, however, believe that government tactics could conceivably rise to this level. *Id.* at 492-93 (Powell, J., concurring). He maintained that *Russell* and the line of cases before it did not limit the scope of the entrapment defense to an analysis of the defendant's predisposition. *Id.*

Justice Powell was joined in his concurring opinion by Justice Blackmun. *Id.* at 491 (Powell, J., concurring). Three Justices—Justices Brennan, Stewart, and Marshall—dissented, unequivocally favoring a reversal based on outrageous government conduct. *Id.* at 495 (Brennan, J., dissenting). Thus, of the eight Justices voting, five actually favored a greater analysis of the government's conduct.

63. *Id.* at 496 (Brennan, J., dissenting). Justice Brennan argued that, in this case, an alternative to the traditional entrapment defense was available. He suggested that the jury should have been asked to consider whether the defendant would have obtained the

The Court added a new dimension to the entrapment defense by approving inconsistent defenses for entrapment cases, in *Mathews v. United States*.⁶⁴ In *Mathews*, the Court held that a defendant could plead in the alternative by denying one or more essential elements of a crime and raising the entrapment defense.⁶⁵ The Court did not discuss its entrapment definition in depth, but it did reiterate its emphasis on the defendant's predisposition.⁶⁶

As these cases illustrate, the key factor in the Supreme Court's entrapment decisions has been the defendant's state of mind.⁶⁷ Although many Justices and some state courts have focused on the government's conduct, the Court has consistently refused to focus on this aspect of a sting operation.⁶⁸ This focus on the defendant, rather than on the government, has caused considerable controversy.⁶⁹

III. DISCUSSION

Jacobson v. United States is the latest Supreme Court decision on entrapment, and it has rekindled the controversy over the entrapment defense. The elaborate government sting directed against Keith Jacobson raises new questions about outrageous government conduct. Government agents went to great lengths to implicate a single man for illegal receipt of child pornography. The concern over the propriety of the government's conduct is based, in large part, on the somewhat unusual facts of the case.

A. *Jacobson v. United States: The Facts and the Lower Courts' Opinions*

In February 1984, Keith Jacobson, a Nebraska farmer, ordered two magazines and a brochure from a California adult bookstore.⁷⁰

illegal contraband from somewhere else, had it not been supplied by the government. *Id.* at 496 n.1.

64. 485 U.S. 58 (1988). The Court defined the elements of a valid entrapment defense as "government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Id.* at 63.

65. *Id.* at 62. The Court did not specifically address the issue of whether the defendant had been entrapped. The issue before the Court was limited to the question of whether such a defense could be raised when the defendant denies one or more elements of the crime. Thus, the Court's comments relating to the definition of entrapment were primarily dicta. *Id.*

66. *Id.* at 63.

67. See, e.g., *Sherman*, 356 U.S. at 376-78; *Russell*, 411 U.S. at 435-36. For a detailed definition of this approach, see *supra* note 7.

68. See *supra* notes 7, 38-66 and accompanying text.

69. See *infra* notes 123-33 and accompanying text.

70. *Jacobson v. United States*, 112 S. Ct. 1535, 1537 (1992).

The magazines, "Bare Boys I" and "Bare Boys II," contained photographs of nude preteen and teenage boys.⁷¹ Jacobson ordered the magazines while it was still legal to purchase this material under both federal and Nebraska law.⁷² Three months later, Congress passed the Child Protection Act, which made it illegal to knowingly receive child pornography through the mail.⁷³

Shortly after the new law was passed, postal inspectors discovered Jacobson's name on the mailing list of the California bookstore that had mailed him the magazines.⁷⁴ In January of 1985, the government began investigating Jacobson as part of Operation Looking Glass.⁷⁵ A postal inspector sent him a letter from a fictitious organization called the "American Hedonist Society."⁷⁶ Jacobson enrolled in the organization and completed a sexual attitude questionnaire in which he indicated that he enjoyed preteen sex, but that he opposed pedophilia.⁷⁷

Jacobson was not contacted again until May 1986, when another postal employee found his name in a file. The Post Office then sent Jacobson a letter from "Midlands Data Research," another fictitious organization. After receiving this letter, Jacobson requested additional information.⁷⁸

Jacobson then heard from a third fictitious organization, the "Heartland Institute for a New Tomorrow" ("HINT").⁷⁹ HINT billed itself as a lobbying organization.⁸⁰ Jacobson responded once

71. *Id.*

72. *Id.* at 1538.

73. *Id.* 18 U.S.C. § 2252 (1988) provides in pertinent part:

(a) Any person who -

...
(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

74. *Jacobson*, 112 S. Ct. at 1538.

75. Brief for the United States at *11, *Jacobson v. United States*, 112 S. Ct. 1535 (1992) (No. 90-1124), available in LEXIS, GENFED library, Briefs file [hereinafter Brief for the United States].

76. *Jacobson*, 112 S. Ct. at 1538.

77. *Id.*

78. *Id.* In his response, Jacobson wrote: "Please feel free to send me more information, I am interested in teenage sexuality. Please keep my name confidential." *Id.*

79. *Id.*

80. *Id.* The letter said the organization's goals were "to repeal all statutes which

again, indicating that his interest in preteen homosexual material was "above average, but not high."⁸¹ Jacobson also indicated in his response that he believed freedom of the press was under attack.⁸² The "organization" then sent Jacobson a list of potential "pen pals," but he never initiated correspondence with them.⁸³ The government sent Jacobson this list as part of a tactic known as "mirroring," which enabled agents to acquire additional information on Jacobson's interests.⁸⁴

Although Jacobson never contacted any of these pen pals, a government agent, using the pseudonym "Carl Long," began writing to Jacobson anyway.⁸⁵ Jacobson responded to Long's letters on two separate occasions.⁸⁶

By March 1987, the Customs Service began investigating Jacobson as part of its own sting, called Operation Borderline.⁸⁷ Customs officials received Jacobson's name from the Postal Service.⁸⁸ The fictitious organization, "Produit Outaouais," sent Jacobson a brochure featuring photographs of young boys engaging in sexually explicit conduct. Jacobson ordered material from that organization, but for some unknown reason, the material was never delivered to him.⁸⁹

A short time later, the Postal Service wrote to Jacobson again. This time, however, it cloaked its correspondence under the cover of a new fictitious company—"Far Eastern Trading Company, Ltd."⁹⁰ The letter indicated that the organization had found a way to mail pornography "without [the] prying eyes of U.S. Customs seizing your mail."⁹¹ Jacobson wrote for more information, and the organization sent him a catalogue. Jacobson then ordered a magazine called "Boys Who Love Boys" and was arrested after

regulate sexual activities, except those laws which deal with violent behavior, such as rape" and "to lobby for the elimination of legal definitions of the 'age of consent.'" *Id.*

81. *Jacobson*, 112 S. Ct. at 1538.

82. *Id.*

83. *Id.* at 1539.

84. *Id.* The mirroring technique involves a government agent corresponding with the target of the sting. *Id.* The agent, who expresses interests similar to those of the target, hopes that the target will respond with further information about his own interests. *Id.*

85. *Id.*

86. *Jacobson*, 112 S. Ct. at 1539. In these letters, Jacobson did not mention child pornography although he indicated a predilection for homosexual material. *Id.*

87. *Id.* For a discussion of this and other child pornography sting operations, see *infra* notes 173-86 and accompanying text.

88. *Jacobson*, 112 S. Ct. at 1539.

89. *Id.*

90. *Id.*

91. *Id.*

receiving the publication.⁹² Jacobson was subsequently indicted for violating the Child Protection Act of 1984.⁹³

Jacobson pleaded entrapment at his trial, but the jury convicted him.⁹⁴ He then appealed his conviction to the Court of Appeals for the Eighth Circuit.⁹⁵ In a panel opinion, the court reversed his conviction, stating that the government must have a reasonable suspicion of criminal activity before it can target an individual for an undercover investigation.⁹⁶ After granting the government's petition for a rehearing, an *en banc* Court of Appeals for the Eighth Circuit reinstated Jacobson's conviction.⁹⁷ The Supreme Court granted certiorari on the question of whether Jacobson had been entrapped as a matter of law.⁹⁸ In a five-to-four decision, the Supreme Court reversed his conviction, concluding that Jacobson had been entrapped as a matter of law.⁹⁹

B. The Supreme Court's Majority Opinion

Writing for the majority, Justice White began by discussing the government's case against Jacobson.¹⁰⁰ The government, he noted, had demonstrated Jacobson's inclination to view pornographic material, but not his inclination to break the law in order to do so.¹⁰¹

92. *Id.* at 1540. The catalogue contained a graphic description of the magazine's contents, leaving no possible doubt that Jacobson knew he was ordering child pornography. *Id.*

93. *Jacobson*, 112 S. Ct. at 1540.

94. *Id.*

95. *United States v. Jacobson*, 893 F.2d 999 (8th Cir. 1990), *vacated*, 899 F.2d 1549 (8th Cir. 1990).

96. *Id.* at 1001. The panel reversed the conviction because the government had no "reasonable suspicion based on articulable facts" to justify its decision to target Jacobson. *Id.* at 1000.

97. *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990), *cert. granted in part*, 111 S. Ct. 1618 (1991). Judges Lay and Heaney, who voted to reverse Jacobson's conviction in the panel decision, strongly dissented. *Id.* Judge Lay described the government's conduct as "reprehensible." *Id.* at 469. Judge Heaney, describing the net results of a sting not rooted in reasonable suspicion, offered the following thoughts:

Had the Postal Service left Jacobson alone, he would have, on the basis of his past life, continued to be a law-abiding man, caring for his parents, farming his land, and minding his own business. Now he stands disgraced in his home and his community with no visible gain to the Postal Service in the important fight against the sexual exploitation of children.

Id. at 471 (Heaney, J., dissenting).

98. *Jacobson v. United States*, 111 S. Ct. 1618 (1991).

99. *Jacobson*, 112 S. Ct. at 1537.

100. *Id.* Justice White was joined by Justices Blackmun, Stevens, Souter, and Thomas. Justice O'Connor was joined in her dissent by Chief Justice Rehnquist and Justice Kennedy. Justice Scalia joined the dissent, except as to Part II.

101. *Id.* at 1541-42.

Justice White criticized the government's role in the sting, stating that the operation had induced criminal behavior in a party lacking an independent predisposition to break the law.¹⁰²

Justice White characterized the Court's decision as a restatement of established law and asserted that it would have no effect on most undercover operations.¹⁰³ Because the two elements of the entrapment defense—government inducement and lack of predisposition—were present in the case against Jacobson, reversal of his conviction was proper.¹⁰⁴ According to Justice White, the government had conceded the inducement element of the defense in this case¹⁰⁵ and had failed to show that Jacobson was predisposed to commit the crime before government agents approached him.¹⁰⁶

The government could have established predisposition, had it offered evidence that Jacobson was committing a crime *before* it began its investigation.¹⁰⁷ Furthermore, if the government had offered Jacobson the opportunity to order child pornography when it first began its investigation, and if Jacobson had readily accepted

102. *Id.* at 1542. Justice White accused the government of phrasing its correspondence in a way that would make Jacobson not only believe his actions were legal, but even admirable:

[T]he strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights.

Id.

103. *Id.* at 1540-41 n.2.

104. *Jacobson*, 112 S. Ct. at 1540-43.

105. *Id.* at 1540-41 n.2. However, the brief for the United States indicates that no such concession was made. Brief for the United States, *supra* note 75, at *27. The government argued that the nature of its operations—sending correspondence through the mail—could not be construed as inducement. *Id.* Jacobson could have, the government argued, simply thrown the correspondence away. *Id.*; see also *infra* note 151 (quoting government on inducement issue).

Justice O'Connor also argued in her dissent that the government did not induce Jacobson to commit the crime. *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting); see also *infra* note 152 and accompanying text (discussing Justice O'Connor's argument).

106. *Jacobson*, 112 S. Ct. at 1541.

107. *Id.* at 1543. The only prior evidence that the government had of any criminal activity on Jacobson's part was a conviction for driving under the influence of alcohol in 1958. *Jacobson*, 893 F.2d at 999-1000. Before beginning its investigation, the government had absolutely no evidence that Jacobson was illegally receiving child pornography through the mail. *Jacobson*, 112 S. Ct. at 1543.

Additionally, no evidence obtained during the investigation established that Jacobson was predisposed to order child pornography before being approached by government agents. *Id.* at 1543. When Jacobson was arrested, the only pornographic materials that the agents found were two magazines that Jacobson had legally ordered before the investigation, along with the magazine that the government had sold to Jacobson. *Id.* at 1540.

the offer, predisposition would have been established.¹⁰⁸ In this case, however, Justice White concluded that, because the government did not prove predisposition, Jacobson had been entrapped as a matter of law.¹⁰⁹

C. Justice O'Connor's Dissent

In a sharply worded dissent, Justice O'Connor accused the majority of requiring the government to have a reasonable suspicion of criminal activity before it could begin a criminal investigation.¹¹⁰ She contended that the Court's decision changed the entrapment doctrine and would result in unreasonable restrictions on government investigations.¹¹¹ According to Justice O'Connor, predisposition is typically established when the governments first *offers* the defendant a chance to commit a crime, not when the government first *contacts* the defendant.¹¹²

She noted that although it had sent Jacobson numerous letters and surveys, the government had offered him only two actual opportunities to order child pornography.¹¹³ On both occasions, Jacobson readily accepted.¹¹⁴ His eager acceptances, she argued, were sufficient for a reasonable jury to conclude that he was predisposed to commit the crime.¹¹⁵

108. *Jacobson*, 112 S. Ct. at 1541.

109. *Id.* at 1543.

110. *Id.* at 1545 (O'Connor, J., dissenting).

111. *Id.* (O'Connor, J., dissenting). Justice O'Connor illustrated her point by stressing specific long-term problems that would result from the decision:

[A]fter this case, every defendant will claim that something the Government agent did before soliciting the crime "created" a predisposition that was not there before. For example, a bribe taker will claim that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe later offered. . . . In short, the Court's opinion could be read to prohibit the Government from advertising the seductions of criminal activity as part of its sting operation, for fear of creating a predisposition in its suspects. That limitation would be especially likely to hamper sting operations such as this one, which mimic the advertising done by genuine purveyors of pornography. No doubt the Court would protest that its opinion does not stand for so broad a proposition, but the apparent lack of a principled basis for distinguishing these scenarios exposes a flaw in the more limited rule the Court today adopts.

Id.

112. *Jacobson*, 112 S. Ct. at 1544-45 (O'Connor, J., dissenting). This distinction is significant, because the majority conceded that Jacobson was predisposed to commit the crime when the government offered him the opportunity. *Id.* at 1542. Thus, under O'Connor's analysis, the entrapment defense fails.

113. *Id.* at 1544 (O'Connor, J., dissenting).

114. *Id.* (O'Connor, J., dissenting).

115. *Id.* (O'Connor, J., dissenting).

Justice O'Connor also minimized the importance of the prior correspondence that the government had sent to Jacobson, stating that Jacobson was free to ignore or discard the letters.¹¹⁶ She argued that preliminary correspondence is essential in any child pornography sting, because a "cold call" offer could scare an offender away, or inadvertently expose an innocent third party to the illegal material.¹¹⁷

Justice O'Connor also argued that Jacobson was predisposed to commit the crime when the government offered him the chance.¹¹⁸ She contended that the Court's opinion placed a new burden on the government in this type of sting case. In order to prevail, the government must now show that a defendant was predisposed to break the law "knowingly."¹¹⁹

Finally, Justice O'Connor argued that the applicability of the entrapment defense in this case was an issue of fact for the jury.¹²⁰ She concluded that a reasonable jury could have found against entrapment, and therefore, that Jacobson had not been entrapped as a matter of law.¹²¹

IV. ANALYSIS

As it worked its way through the court system, the *Jacobson* case generated a great deal of publicity—much of which expressed outrage at the government's conduct.¹²² In addition, many schol-

116. *Id.* at 1545 (O'Connor, J., dissenting).

117. *Jacobson*, 112 S. Ct. at 1544 (O'Connor, J., dissenting) (citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (upholding an individual's right to be free from offensive material at home); 39 U.S.C. § 3010 (1988) (regulating the mailing of sexually oriented advertising materials)).

118. *Id.* at 1543 (O'Connor, J., dissenting).

119. *Id.* at 1546 (O'Connor, J., dissenting). Justice O'Connor objected to the majority's assumption that Jacobson would not break the law. *Id.* The Court conceded that Jacobson was inclined to buy the magazines, but it did not agree with the government's contention that Jacobson would break the law to do so. *Id.* at 1541. Justice O'Connor stated that it was irrelevant whether Jacobson would have bought the magazines had he known it was illegal to do so. *Id.* at 1546 (O'Connor, J., dissenting). Because he had purchased similar magazines before (when it was legal to do so), she argued that predisposition was shown. *Id.* She contended that "[u]nder the Court's analysis . . . the Government must prove *more* to show predisposition than it need prove in order to convict." *Id.*

120. *Id.* at 1547 (O'Connor, J., dissenting).

121. *Id.* (O'Connor, J., dissenting).

122. See, e.g., Stephen Chapman, *The Court's Open Invitation to Government Snoops*, CHI. TRIB., Apr. 9, 1992, at C23 ("If the conduct of government agents who lured Keith Jacobson into breaking the law was bad enough to make the Rehnquist court queasy, you know it was awful."); Denis Horgan, *Court Swats Pesky Government After Painful Sting*, HARTFORD COURANT, Apr. 8, 1992, at A2 ("For a moment it seemed like some sort of a delayed April Fool's Day trick. The Supreme Court denies the government one of its

arly commentators criticized the government for baiting Keith Jacobson.¹²³ Though the Court's decision in *Jacobson* may limit the scope of future sting operations, it may not do enough to silence all of these critics.¹²⁴

If, as the Court suggests, the government must now be able to establish at trial that a particular individual was predisposed to commit a certain crime before being targeted, it will be less likely to prosecute defendants like Jacobson. Though this new requirement may not reduce the number of people that the government chooses to *target* in future stings, it will certainly limit the number of cases that are ultimately *prosecuted*.¹²⁵ The *Jacobson* decision is a step in the right direction, but the Court needs to place additional restrictions on outrageous government conduct.¹²⁶

A. Outrageous Government Conduct

Applying the *Jacobson* Court's reasoning, Keith Jacobson would not have prevailed with his entrapment argument, had the government been able to establish his predisposition to commit the crime.¹²⁷ Unfortunately, this approach leaves little room for evaluating the appropriateness of the government's conduct. The government bombarded Jacobson with correspondence for over two years, even though it had no prior basis for believing that he was

nasty little opportunities to put people in jail? This Supreme Court? But, lo and behold, there it is."); Dirk Johnson, *Postal Inspector's Porn Entrapment Plunged Farmer Into a Life of Shame*, HOUSTON CHRON., Apr. 19, 1992, at A1 (quoting Jacobson, "Doesn't the government realize that they can destroy a man's life?"); William Safire, *The Stingers Stung*, N.Y. TIMES, Apr. 13, 1992, at A19 ("You are paying more for stamps these days to cover the salaries of postal inspectors who spend bureaucrat-years—and hundreds of thousands of dollars—trying to induce innocent customers into committing a crime by buying porn.").

123. See, e.g., Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457, 469 (1990) [hereinafter Marcus, *The Due Process Defense*] (advocating a defense based on outrageous government behavior and specifically referring to *Jacobson* as an example of unacceptable government conduct); Teri L. Chambers, Note, *United States v. Jacobson: A Call for Reasonable Suspicion of Criminal Activity as a Threshold Limitation on Governmental Sting Operations*, 44 ARK. L. REV. 493, 508-10 (1991) (criticizing the government for targeting Jacobson in its investigation absent any reasonable suspicion of criminal activity); Cynthia Perez, Note, *United States v. Jacobson: Are Child Pornography Stings Creative Law Enforcement or Entrapment?*, 46 U. MIAMI L. REV. 235, 259 (1991) (discussing the competing interests of law enforcement and private citizens).

124. See Robert G. Morvillo, *Outrageous Government Conduct*, N.Y. L.J., June 2, 1992, at 3, 8. "Hopefully, the new standards to establish predisposition as laid out by the Court will limit the government's inclinations to create predispositions." *Id.*

125. See *id.*

126. See *infra* notes 127-46 and accompanying text.

127. See *Jacobson*, 112 S. Ct. at 1540-41.

interested in illegally receiving child pornography through the mail.¹²⁸ Had its luck been different, the government might have discovered independent evidence to demonstrate Jacobson's predisposition. According to the Court, this twist of fate would have rendered the government's conduct acceptable.¹²⁹

In these cases, it makes little sense for courts to focus almost exclusively on the defendant rather than on the government. The entrapment defense was originally created as a check on uncontrolled government investigations.¹³⁰ Under the current approach, the government has few apparent limitations on its conduct, as long as it can show that the defendant had a guilty state of mind.¹³¹

Because it held that the government had induced Jacobson to commit the crime, the *Jacobson* Court was somewhat critical of the government's conduct.¹³² The government's behavior was certainly obnoxious. It was unacceptable, however, not because of any undue pressure exerted on Jacobson,¹³³ but rather because of the strong public policy against the government's arbitrary sale of child pornography to its citizens.

1. Reasonable Suspicion of Criminal Activity

Although it argued that it had a reasonable basis for this investigation, the government actually violated its own investigative

128. See *supra* notes 70-92 and accompanying text (discussing in detail the elaborate operation that the government launched against Jacobson).

129. See Bennett L. Gershman, *Entrapment Revisited*, N.Y. L.J., Apr. 17, 1992, at 1. Gershman criticizes the traditional entrapment defense for focusing almost exclusively on the defendant's state of mind. *Id.* He contends that the defense allows any outrageous government conduct, as long as the government can prove the defendant was predisposed to commit the crime. *Id.* He argues that this reasoning produces a pernicious circularity of argument, which ultimately holds the defendant responsible for conduct caused by the government's outrageous tactics. *Id.*

130. See *supra* notes 27-39 and accompanying text.

131. Although the Supreme Court has never recognized a defense for a defendant shown to be predisposed, some of the circuits have recognized such a defense. After the *Hampton* plurality rejected this defense, the Court of Appeals for the Third Circuit expressly recognized it. *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978). The *Twigg* court stated that although the *Hampton* rule will bar application of the entrapment defense whenever it is demonstrated that a defendant had a predisposition to commit the crime, "fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was 'outrageous.'" *Id.* at 378-79.

Though the *Twigg* court concluded that the defendant was predisposed to commit the crime, the court nevertheless reversed his conviction. *Id.* at 382. A similar result was reached in *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971).

132. *Jacobson*, 112 S. Ct. at 1540 n.2.

133. See *infra* notes 150-55 and accompanying text (arguing that the government's conduct in *Jacobson* may not have constituted inducement under the entrapment definition).

guidelines when it targeted Jacobson.¹³⁴ Presumably, the government established these guidelines because it recognized that there must be some limits on government stings.¹³⁵

The *Jacobson* Court did not, as Justice O'Connor claimed, require that the government have a reasonable suspicion of criminal activity before beginning an investigation.¹³⁶ A reasonable suspicion requirement would mean that the government could not begin an investigation until it had reason to suspect that the target was already involved in a crime.¹³⁷ Instead, the Court held that the government must be able to establish at trial that the defendant was predisposed to commit the crime before the government contacted him.¹³⁸

Some commentators have called for a reasonable suspicion requirement for all government sting operations.¹³⁹ Even if courts

134. For example, guidelines of the United States Attorney General, the FBI, and the United States Postal Service require the government to have a reasonable suspicion of criminal activity before targeting an individual for investigation. See *Jacobson*, 916 F.2d at 472 (citing ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS 16 (Dec. 31, 1980), reprinted in LAW ENFORCEMENT UNDERCOVER ACTIVITIES: HEARING BEFORE THE SELECT COMM. TO STUDY LAW ENFORCEMENT UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPT OF JUSTICE, 97th Cong., 2d Sess. 86, 101 (1982) [hereinafter SENATE HEARINGS]); THE ATTORNEY GENERAL'S GUIDELINES ON CRIMINAL INVESTIGATIONS OF INDIVIDUALS AND ORGANIZATIONS (Dec. 2, 1980), reprinted in SENATE HEARINGS, *supra*, at 121.

135. The Court quoted William H. Webster, former director of the FBI, who explained the rationale behind undercover operations:

[O]ne of the basic standards for initiating an operation or for making a change in direction or a change in focus, which is one of the sore points we have observed in these various operations, currently appears in the Attorney General's Guidelines on Criminal Investigations, and that is that there must be facts or circumstances that reasonably indicate that a Federal criminal violation of the type to be investigated has occurred, is occurring, or is likely to occur. In other words, a reasonable cause provision.

Jacobson, 916 F.2d at 473 n.1 (citing SENATE HEARINGS, *supra* note 134, at 1041).

136. See *Jacobson*, 112 S. Ct. at 1544 (O'Connor, J., dissenting).

137. See, e.g., *Shrader v. State*, 706 P.2d 834, 836 (Nev. 1985) (holding that "when the police target a specific individual for an undercover operation, they must have a reasonable cause to believe that the individual is predisposed to commit the crime.").

138. *Jacobson*, 112 S. Ct. at 1540-42. For example, had the government made an immediate offer to Jacobson, and had he immediately accepted it, his conviction probably would have been upheld. *Id.* at 1541. Presumably, the conviction would have been upheld even if the government had no reason to suspect that Jacobson had an interest in child pornography, because Jacobson's ready acquiescence during the investigation would *in itself* have been sufficient to establish his predisposition. *Id.*

In addition, the Court implied that if the government, after searching Jacobson's home, had found child pornography purchased illegally from sources other than the government, this too would have been sufficient to establish Jacobson's predisposition. *Id.* at 1542.

139. See, e.g., Whelan, *supra* note 5, at 1197 (arguing that "police encouragement

are unwilling to impose this requirement on all stings,¹⁴⁰ reasonable suspicion of criminal activity should at least be required for child pornography stings, in which the rights of innocent third parties may be at stake.¹⁴¹

2. Reasonable Suspicion in Child Pornography Stings

Jacobson is distinguishable from other Supreme Court entrapment cases because the *Jacobson* stings involved child pornography.¹⁴² This factor made the government's conduct especially reprehensible, because *Jacobson*'s rights were not the only rights at stake. Child pornography cannot be produced unless children are abused, and pornographic material permanently records this abuse. Though claiming to protect children, the government actually perpetuates abuse when it sells child pornography.¹⁴³ Stings may be

tactics should be allowed only when law enforcement officials can demonstrate reasonable suspicion that the suspect is involved in ongoing criminal activity."').

140. The Supreme Court has never recognized a constitutional right to be free from investigation. *United States v. Trayer*, 898 F.2d 805, 808 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 113 (1990). In an ordinary sting, where only the rights of the target are at stake, the courts have not recognized a constitutionally mandated reasonable suspicion requirement. *Id.* In child pornography cases, however, the rights of innocent third parties are at stake, and a higher degree of care should be required before an investigation is begun.

It may be difficult to apply different standards to different types of cases, but it is possible. In his concurring opinion in *Hampton*, Justice Powell stated that the issue of outrageous government conduct should be evaluated on a case-by-case basis. *Hampton*, 425 U.S. at 494-95 n.6 (Powell, J., concurring).

141. In its panel decision, later vacated by the full court, the Court of Appeals for the Eighth Circuit criticized the government for beginning its investigation without a reasonable suspicion of criminal activity. *Jacobson*, 893 F.2d at 1001. Although the Supreme Court did not adopt the panel's position, the decision sent a message to law enforcement agencies to be more careful about whom they target and prosecute. See *Jacobson*, 112 S. Ct. at 1541-43. Solicitor General Kenneth W. Starr, who represented the government in this case, commented after the decision that "[t]his is a court that says there are limits to what the government can do. . . ." Ruth Marcus, *High Court Tightens Sting Rules: Child Pornography Conviction Voided on Entrapment Grounds*, WASH. POST, Apr. 7, 1992, at A1 [hereinafter Ruth Marcus].

142. Most of the Court's previous entrapment cases involved violations relating either to alcohol or drugs. See *Hampton*, 425 U.S. at 490 (narcotics); *Russell*, 411 U.S. at 424 (narcotics); *Sherman*, 356 U.S. at 371 (narcotics); *Sorrells*, 287 U.S. at 438 (violation of the National Prohibition Act). The exception is *Mathews*, which involved a charge of bribery. *Mathews*, 485 U.S. at 61. Because of the types of crimes at issue in those cases, no innocent third parties were injured by the investigations. The sale of child pornography, on the other hand, is an act that automatically injures the rights of innocent children. *New York v. Ferber*, 458 U.S. 747, 759-61 (1982) (explaining that the purchase of even one item of child pornography harms the children involved).

143. See *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). In *Osborne*, the Court upheld a conviction for possession of child pornography, citing the public policy against the production and purchase of child pornography and the state's compelling interest in protecting children. *Id.* The defendant in *Osborne* had challenged the constitutionality of an

essential in the important fight against child pornography, but the potential harm to innocent third parties warrants a strict standard to guide the government in its selection of targets.¹⁴⁴ At the very least, child pornography stings should be more limited in their scope than other types of stings.¹⁴⁵ The government should be prohibited from selling child pornography to its citizens when it has no basis for believing that its targets would otherwise purchase this material.¹⁴⁶

Ohio statute, which made it a crime to possess child pornography. *Id.* at 108. The Court stated that the possession of this material harmed children because it effectively preserved a record of abuse long after the initial exploitation occurred. *Id.* at 111. Because of the degree of harm involved, the Court expressly approved the portion of the statute encouraging those possessing child pornography to destroy it. *Id.*; see also *Ferber*, 458 U.S. at 761 (concluding that, because of the harm this material inflicts on children, states have greater leeway in regulating pornography).

144. Justice Powell noted, in his concurring opinion in *Hampton*, that crimes involving innocent third parties are distinguishable from the drug-related crimes the Court has generally considered in entrapment cases. *Hampton*, 425 U.S. at 493 (Powell, J., concurring). To support his contention, he recalled Judge Friendly's remarks in *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973):

[T]here is certainly a [constitutional] limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction.

Hampton, 425 U.S. at 493 n.4.

145. In *United States v. Chin*, 934 F.2d 393 (2d Cir. 1991), a defendant was convicted of illegally receiving child pornography through the mail, because the court found overwhelming evidence of his predisposition. The court, however, cautioned that limitations should be placed on these stings. The court distinguished child pornography stings from other types of sting operations and criticized the government for its role in the perpetration of the crime involved:

One factor distinguishes this case from the usual undercover operation and, in our opinion, raises very serious concerns with respect to the rights of third parties—namely, the rights of the children Congress sought to protect in enacting the prohibitions on child pornography. Our concern is that, in contrast to the usual sting operation, in which the Government sets up a phony drug transaction or another sort of dummy crime, the government agent in this case encouraged Chin to go out and commit a *real* crime, with *real* victims, just so Chin could later be arrested and prosecuted. In particular, [the agent] explicitly and repeatedly encouraged Chin to proceed with his trip to Amsterdam to obtain "Lolita materials," despite the fact that purchasing child pornography, by increasing the demand for such materials, serves to further the sexual exploitation of minors.

Id. at 399.

146. See generally Marcus, *The Due Process Defense*, *supra* note 123, at 460 (discussing criticisms of the due process defense and pointing out that even critics of the defense recognize that it may be valid under certain narrow circumstances).

Professor Marcus contends that some government behavior is so outrageous that the government should be absolutely barred from obtaining a conviction. *Id.* at 461. The key is whether the government's behavior is so egregious that it "shocks the conscience." *Id.*

B. *The Traditional Entrapment Defense*

The *Jacobson* Court decided this case by applying the traditional entrapment defense, rather than by evaluating the propriety of the government's conduct.¹⁴⁷ The traditional defense focuses on whether the government induced commission of the crime, and, if so, whether the defendant was predisposed to commit the crime.¹⁴⁸ The *Jacobson* Court minimized this first requirement, focusing its inquiry, instead, on the element of predisposition.¹⁴⁹ The inducement issue is important, and the Court should have given it more attention. Although the Court correctly concluded that Jacobson was not independently predisposed to commit the crime, the limited analysis employed in the case does little to restrict future government conduct.

1. The Court Did Not Properly Address the Inducement Issue.

The *Jacobson* Court largely ignored the inducement requirement, because, according to Justice White, the government had conceded this point in favor of Jacobson.¹⁵⁰ The government, however, briefed this issue for argument.¹⁵¹ Additionally, in her dissenting opinion, Justice O'Connor vigorously argued that the government had not induced Jacobson to commit the crime.¹⁵² Because the Court did not address this issue, there is no definitive

at 462 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)). He argues that the standard should apply regardless of the defendant's role in any given enterprise. *Id.*

147. See *Jacobson*, 112 S. Ct. at 1540-43.

148. See LAFAYE, *supra* note 7, § 5.2(a), at 415-16.

149. *Jacobson*, 112 S. Ct. at 1540-43. The Court properly concluded that Jacobson was not predisposed to commit the crime before being approached by government agents. *Id.*; see also *supra* notes 127-38 and accompanying text. The Court went a step further, however, and painted Jacobson in a light that may have been unwarranted. Justice White described him as "a 56-year-old veteran-turned-farmer who supported his elderly father in Nebraska" *Jacobson*, 112 S. Ct. at 1537. This description was unnecessarily flattering: Jacobson did order a magazine that he knew contained child pornography. *Id.* at 1540. The Court may have flattered Jacobson to help validate its focus on his character and lack of predisposition.

150. *Jacobson*, 112 S. Ct. at 1540-41 n.2.

151. Brief for the United States, *supra* note 75, at *40-41. "The evidence in this case does not show that overbearing government inducement caused an innocent person to break the law Petitioner concedes that he was neither 'coerced' nor 'force[d]' into committing the crime." *Id.*

152. *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting). Justice O'Connor's main contention was that no government agents had ever contacted Jacobson in person. *Id.* She agreed with the government's position that the agents simply sent him information through the mail, which he could have easily thrown away. *Id.* She argued that the government's behavior did not constitute inducement. *Id.*; see also *supra* note 105 and accompanying text (discussing argument presented by the government in its brief). On the other hand, Judge Heaney, in his dissent to the Eighth Circuit's *en banc* opinion,

benchmark for determining the point at which government conduct becomes inducement.

Some circuit courts have held that this type of sting operation does not constitute inducement.¹⁵³ These circuits have generally held that government conduct, similar to that in *Jacobson*, is not coercive enough to be considered inducement.¹⁵⁴ These courts traditionally have distinguished between conduct that merely offers the opportunity to commit the crime and that which actually creates the crime.¹⁵⁵

This distinction is important because a defendant raising the entrapment defense has the burden of proof on inducement.¹⁵⁶ It is only after the defendant comes forward on this point that the burden shifts to the government on the issue of predisposition.¹⁵⁷ If the defendant does not produce evidence of inducement, the burden never shifts, and predisposition becomes irrelevant.¹⁵⁸ There-

argued that the government's conduct was inducement. *Jacobson*, 916 F.2d at 476 (Heaney, J., dissenting).

153. See *United States v. Thoma*, 726 F.2d 1191, 1194-95, 1197-98 (7th Cir. 1984) (discussing child pornography sting similar to *Jacobson* and concluding that the government's conduct did not constitute inducement); *United States v. Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984) (discussing inducement in relation to Operation Abscam).

154. See generally *United States v. Mitchell*, 915 F.2d 521 (9th Cir. 1990) (arising from a government sting called Project Looking Glass, the defendant's conviction was affirmed); *United States v. Musslyn*, 865 F.2d 945 (8th Cir. 1989) (arising from a government sting called Operation Borderline, the defendant's conviction was affirmed); *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988) (arising from a government sting called Project Looking Glass, the defendant's conviction was affirmed).

155. See, e.g., *Sherman*, 356 U.S. at 369. In *Sherman*, inducement was obvious, because the agent had repeatedly tried to persuade Sherman to purchase narcotics, in spite of his obvious reluctance to do so. In *Jacobson*, however, inducement was not so clear, because government agents gave Jacobson only two opportunities to order the materials; each time he took the opportunity. To say that the mere length of an operation determines inducement would mean that inducement must be presumed in any long-term sting operation.

156. See *MARCUS*, *supra* note 7, § 6.02, at 212 (citing *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952), *aff'd*, 356 U.S. 369 (1958)).

157. *Id.*

158. *Id.* There is some dispute among the circuits as to who has the burden of proof on inducement. Some courts assign the burden of proof for *both* issues—lack of inducement and predisposition—to the government. See, e.g., *United States v. Fusko*, 869 F.2d 1048 (7th Cir. 1989); *United States v. El-Gawli*, 837 F.2d 142 (3d Cir. 1988). Under this approach, if the government fails to prove either of these points, the entrapment defense must succeed. See *MARCUS*, *supra* note 7, at § 6.02, at 212. Under this approach, the government's failure to prove Jacobson's predisposition would have sufficed to prove entrapment.

Most circuits, however, follow the traditional approach and split the burden of proof. *Id.* The Supreme Court has never expressly stated its approach, but it appears to have accepted the split burden. See, e.g., *Sherman*, 356 U.S. at 373-77 (stating that Sherman had been entrapped because the agent had induced his conduct *and* Sherman was not

fore, if Jacobson had not been induced to commit the crime, he could not have been entrapped as a matter of law.¹⁵⁹

2. Predisposition Defined: From *Sherman* to *Jacobson*

The *Jacobson* Court may have minimized the inducement issue because the traditional entrapment defense focuses more on the defendant's predisposition than on the government's conduct.¹⁶⁰ The *Jacobson* Court devoted most of its opinion to the defendant's state of mind, and it concluded that the government had to establish that the defendant was predisposed to commit the crime before government agents ever contacted him.¹⁶¹ In *Sherman*, the only other Supreme Court case to hold that a defendant was entrapped as a matter of law, the Court also defined predisposition by focusing on the defendant's state of mind before contact by government

predisposed to commit the crime). The Court's definition of entrapment has always referred to a defendant who is induced to commit the crime, and who is not otherwise predisposed to do so. *Id.* It does not appear, therefore, that the Court would accept only proof of inducement or proof of predisposition, on its own, as proof of entrapment. See *supra* notes 37-66 and accompanying text (outlining the Supreme Court's definition of entrapment on a case-by-case basis). The defendant must therefore establish inducement before predisposition can even become an issue.

159. See *United States v. Andrews*, 765 F.2d 1491 (11th Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986), where the court gave examples of conduct constituting inducement and described the defendant's burden of proof as follows:

[E]vidence that the government agent sought out or initiated contact with the defendant, or was the first to propose the illicit transaction, has been held to be insufficient to meet the defendant's burden. The defendant must demonstrate not merely inducement or suggestion on the part of the government but "an element of persuasion or mild coercion." The defendant may make such a showing by demonstrating that he had not favorably received the government plan and the government had had to "push it" on him or that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate.

Id. at 1499 (citations omitted).

Under the *Andrews* test, Jacobson may have failed to show inducement. For example, nothing in *Jacobson* indicates that he turned down government offers to commit a crime. At most, he failed to respond to a few of the letters sent to him, but none of those letters was an offer to commit a crime. *Jacobson*, 112 S. Ct. at 1537. The government only sent Jacobson two offers to order child pornography. *Id.* at 1539. He accepted both offers. *Id.*

160. See Paul Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53, 68 (1987).

161. *Jacobson*, 112 S. Ct. at 1540. The Court stated:

Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act *prior to first being approached by Government agents*.

Id. (citing *United States v. Whoie*, 925 F.2d 1481, 1483-84 (D.C. Cir. 1991) (emphasis added)).

agents.¹⁶² The *Jacobson* definition, therefore, is not new; it merely clarifies existing law.¹⁶³

One problem with the definition of "predisposition" involves the Court's interpretation of the word "approached," as it was used in *Sherman*. Justice O'Connor interpreted the word to mean the agent's first *offer to commit the crime*.¹⁶⁴ In *Sherman*, the agent had to make several offers to buy drugs before Sherman agreed.¹⁶⁵ According to Justice O'Connor's approach, Sherman was not predisposed, because he refused the first offer. Jacobson, on the other hand, accepted the government's first offer and, thus, was predisposed to commit the crime.

Because the *Sherman* Court linked predisposition to the time the agent first "approached" Sherman, however, another interpretation is plausible.¹⁶⁶ The *Sherman* Court, like the *Jacobson* Court,

162. *Sherman*, 356 U.S. at 375. In *Sherman*, the government tried to establish predisposition. The Court rejected its argument, finding no evidence of Sherman's involvement in the drug trade because a search of his home after the arrest revealed no narcotics. *Id.* His prior criminal convictions were insufficient to show predisposition "*at the time [the agent] approached him.*" *Id.* (emphasis added).

Similarly, in *Jacobson*, there was no independent evidence that Jacobson was involved with child pornography. *Jacobson*, 112 S. Ct. at 1543. A search of his home after his arrest revealed no illegally purchased materials, except those that the government had sold him. *Id.* at 1540. His only known criminal conduct had resulted in a drunk-driving conviction 30 years earlier. *Jacobson*, 893 F.2d at 1000. That type of evidence was insufficient to show predisposition in *Sherman*, and it was equally insufficient to show predisposition in *Jacobson*.

163. In fact, the standard jury instruction for entrapment closely tracks the *Jacobson* Court's definition of predisposition:

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, *before anything at all occurred respecting the alleged offense involved in this case*, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

1 EDWARD J. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 13.09 (3d ed. 1977) (emphasis added).

164. *Jacobson*, 112 S. Ct. at 1544 (O'Connor, J., dissenting). "This Court has held previously that a defendant's predisposition is to be assessed as of the time the Government agent first suggested the crime, not when the Government agent first became involved." *Id.* (citing *Sherman*, 356 U.S. at 372-76).

165. See *Sherman*, 356 U.S. at 373.

166. The *Jacobson* Court did not rely on *Sherman* for its definition of "approached." Instead, it cited *Whoie* for this proposition. *Jacobson*, 112 S. Ct. at 1540 (citing *Whoie*, 925 F.2d at 1483-84). Interestingly, Justice Thomas, who voted with the majority, wrote the *Whoie* opinion as an appellate judge.

It is not clear why the *Jacobson* Court did not cite *Sherman* for the proposition that a defendant must be predisposed before first being approached by a government agent. The word "approached" was used in both decisions. Possibly, the Court did not rely on the *Sherman* definition because several offers had been made and rejected in that case before

focused on the inadequate basis for suspicion, and on the lack of independent evidence that the defendant was engaged in criminal conduct, other than that induced by the government.¹⁶⁷ Thus, the *Sherman* Court may have intended the government to show predisposition prior to *any* contact with government agents.¹⁶⁸

The word "approached" can be defined to accommodate either interpretation.¹⁶⁹ Certainly, the latter approach is more sound. The policy behind the entrapment defense is to prevent convictions for crimes instigated by the government, when the defendant, acting on his own, would not have committed the crime.¹⁷⁰ If the government cannot establish that the defendant was predisposed to commit the crime before it initiated contact, there is an increased risk that the government will "create" the predisposition.¹⁷¹ The only way to be certain that the government did not create the predisposition is to require it to demonstrate that the defendant was predisposed before any contact with government agents occurred.¹⁷²

C. *The Jacobson Decision and Government Stings*

Jacobson was a government target in both Operation Looking Glass and Operation Borderline, two "reverse sting"¹⁷³ opera-

Sherman acquiesced. In contrast, Jacobson accepted both of the actual "offers" presented in this case.

167. *Sherman*, 356 U.S. at 375.

168. In fact, after *Sherman*, some lower courts concluded that predisposition must exist before any contact with government agents occurs. See, e.g., *United States v. Kaminski*, 703 F.2d 1004, 1008 (7th Cir. 1983) (quoting *United States v. Jannotti*, 501 F. Supp. 1182, 1191 (E.D. Pa. 1980) (holding that predisposition must be shown "before initial exposure to government agents") *rev'd on other grounds*, 673 F.2d 578 (3rd Cir. 1982), *and cert. denied*, 457 U.S. 1106).

169. For example, *Webster's Dictionary* provides definitions that would support either interpretation. "Approach" is defined as "to draw closer to: near." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 98 (1988). An alternative definition is "to make advances to esp. in order to create a desired result." *Id.* The first definition supports the proposition that any contact would qualify as "approaching." The second definition, on the other hand, supports the proposition that "approaching" involves taking some assertive action to achieve a desired end.

170. See *Sorrells*, 287 U.S. at 442; see also *supra* notes 27-69 and accompanying text (detailing the development of the entrapment defense and the policies underlying it).

171. See *supra* notes 134-41 and accompanying text.

172. In fact, during oral argument in *Jacobson*, the government conceded that the defendant had to be predisposed to commit the crime before the investigation got underway. *Jacobson*, 112 S. Ct. at 1540-41 n.2.

173. A "reverse sting" is defined as the government's sale of contraband to a buyer, whom it later prosecutes for the purchase. MICHAEL CALLAHAN, U. S. DEP'T OF JUSTICE, ENTRAPMENT AND THE FEDERAL COURTS 56 (1984).

tions.¹⁷⁴ Overall, these stings resulted in a large number of arrests and convictions for knowing receipt of child pornography through the mail.¹⁷⁵ Additionally, several child molesters were also arrested and convicted.¹⁷⁶ The stings have also resulted in three suicides.¹⁷⁷

The *Jacobson* stings differed from other child pornography investigations because the government, in targeting Keith Jacobson, did not adhere to its own standards.¹⁷⁸ When properly designed, stings provide an effective mechanism for detecting and punishing crimes that might otherwise remain undiscovered.¹⁷⁹ Few would dispute that the battle against child pornography is worth fighting, but the government must strike a careful balance between law enforcement interests and individual rights.

These child pornography stings were designed to identify and prosecute individuals who received this material through the mail.¹⁸⁰ Because a large amount of child pornography is produced overseas and imported into the United States, the stings targeted

174. Brief for the United States, *supra* note 75, at *11. The government stated that the purpose of these operations was "to reduce the traffic in child pornography by identifying and prosecuting individuals on the demand side of the market—i.e., the mail-order consumers of such material." *Id.*

175. The United States government prosecuted 161 people as a result of its child pornography sting operations. See Daniel L. Mihalko, *Far from a Clear-Cut Decision*, WASH. POST, May 4, 1992, at A22; see also Glenn Kessler, *Child-Porn Case Thrown Out*, NEWSDAY, Apr. 7, 1992, at 6 (discussing general effects of these stings); Bob Cohn, *A Fresh Assault on an Ugly Crime*, NEWSWEEK, Mar. 14, 1988, at 64 (detailing Operation Borderline, one of the stings in which Jacobson was a target).

176. Investigators found 35 cases in which children were being sexually exploited. See Mihalko, *supra* note 175, at A22; see also Cohn, *supra* note 175, at 64. For example, in Ohio, agents arrested a man after he ordered a photo set from Operation Borderline's Produit Outaouais. Cohn, *supra* note 175, at 64. Agents discovered the man's two young children locked in a filthy room. *Id.* They also discovered an obscene photograph of the man's daughter, which, he told inspectors, he thought would be "fun to take." *Id.* One search in Illinois uncovered over 1,000 child-porn magazines. *Id.* The agents needed a truck to remove them all. *Id.*

177. See Spencer, *supra* note 12, at C1 (quoting Jack O'Malley, Operation Borderline's director, "[child pornography] is the scarlet letter of the 1980's [sic].").

178. See *supra* notes 134-35 and accompanying text.

179. A recent article emphasized the value of sting operations in detecting and deterring crime:

If they play their roles well, undercover agents can achieve results in a sting not possible in cases where the primary government witness is a criminal who wishes to save his skin. A sting avoids the prosecution's problem of explaining the sordid past of a main government witness. Instead, a government agent is unmasked and takes the stand to accuse the sting's target of complicity in a crime.

Sarah N. Welling, *Supreme Court Raises Government Burden in Stings*, 3 MONEY LAUNDERING ALERT, May, 1992, at 2.

180. See generally *United States v. Goodwin*, 854 F.2d 33, 34 (4th Cir. 1988) (hold-

purchasers, rather than producers.¹⁸¹ One of the government's goals was to close the foreign distribution lines.¹⁸² The government intended to target only individuals who it believed were already committing crimes.¹⁸³ In many cases, that is exactly what happened.

For example, in *United States v. Thoma*,¹⁸⁴ a similar sting operation resulted in a conviction that is still valid under *Jacobson*. The court found that Thoma was predisposed to commit the crime before being approached by government agents, and that therefore he had not been entrapped.¹⁸⁵ The same can be said for a large number of the cases resulting from these stings. In many of these cases, the government had information linking the defendant to child pornography; in others, the subsequent investigation uncovered evidence of related wrongdoing.¹⁸⁶ Either set of circum-

ing that sting operations used to catch and prosecute those who receive child pornography through the mail are not contrary to fundamental fairness).

181. *Id.*

182. See Cohn, *supra* note 175, at 64. Approximately 95 percent of the child pornography in this country is imported from overseas, which is why the government targets purchasers, rather than producers, in these investigations. *Id.* Because pornographers generally operate under a veil of secrecy, government agents find it difficult to identify individual targets. *Id.*

Operation Borderline was one of the stings directed at Jacobson and was run by the United States Customs Service. *Id.* Though agents continually seized materials at international airports, there had been a drastic decline in the amount of this material intercepted. *Id.* This led law enforcement officials to conclude that the material was being imported through other channels. *Id.* Infiltration of this import network provided the justification for this sting. *Id.*

183. See Spencer, *supra* note 12, at C1. Director of Illinois State Police, Jeremy Margolis, stated that "[t]he projects may be tricky, but they're never designed to trap people who would have otherwise not been involved in these things. They're always designed to lure serious criminals." *Id.*

184. 726 F.2d 1191 (7th Cir. 1984).

185. In *Thoma*, the defendant was targeted for the sting after agents received information that he was purchasing and selling child pornography through the mail. *Id.* at 1196. After his arrest, a search of his home revealed a large stash of pornographic materials exceeding that which the government had sent him. *Id.* at 1196-97. Thus, the prior information and the evidence found afterwards indicated that the defendant had a predisposition to commit the crime before being approached by government agents. Therefore, under the *Jacobson* definition of entrapment, Thoma's conviction would stand.

186. See, e.g., *United States v. Musslyn*, 865 F.2d 945, 946-47 (8th Cir. 1989); *United States v. Rubio*, 834 F.2d 442, 445 (5th Cir. 1987); *United States v. Esch*, 832 F.2d 531, 534 (10th Cir. 1987).

In *Rubio*, 834 F.2d at 451, the defendant was targeted after Customs Agents seized child pornography being delivered to a post office box that he rented. The sting lasted approximately one and one-half years. *Id.* Though the court described the government's conduct as "offensive," it nevertheless concluded that the seized magazines were sufficient evidence of Rubio's predisposition. *Id.*

In *Esch*, 832 F.2d at 533-34, the government did not originally target two of the three defendants, the Esches, in the sting. The original target, however, told government

stances would fulfill *Jacobson's* predisposition requirement.

Thus, before it launched its long-term stings, the government should have determined whether Jacobson was involved in any illegal activity.¹⁸⁷ A reasonable suspicion of criminal activity is frequently established before an investigation is commenced.¹⁸⁸ When there is no reasonable suspicion, a long-term sting will invariably waste time and money while infringing on the rights of presumably innocent citizens.¹⁸⁹ Because most sting operations are less involved than the *Jacobson* sting, predisposition is often easy to establish.¹⁹⁰ If the government offers its target a chance to commit the crime early in the investigation, an eager response will establish predisposition.¹⁹¹ The problem arises when, as in *Jacobson*, the of-

agents that the Esches were involved in child pornography. *Id.* at 534. After arresting them, agents discovered several pornographic photographs of the Esch's children. *Id.*

In *Musslyn*, 865 F.2d at 945, the Postal Service began corresponding with defendant in 1982. As in *Jacobson*, the Customs Service, as part of Operation Borderline, also contacted him. Correspondence continued until 1987, at which time Musslyn was arrested. *Id.* at 946. After his arrest, a search of his residence turned up a supply of pornographic material that had not been sent to him by the government. *Id.*

187. *Jacobson*, 893 F.2d at 1001. Judge Heaney, in the Eighth Circuit's panel decision, offered several reasons why Jacobson should not have been investigated in this case:

First, the government had received no information that Jacobson was purchasing illegal child pornography through the mails or that he was producing illegal child pornography. Second, Jacobson had never ordered or advertised for any illegal material. Third, the government did not inadvertently target Jacobson as a result of pre-existing investigations. Fourth, there were no independent articulable facts that gave rise to the suspicion that Jacobson had committed a crime or was likely to commit a crime.

Id. (citations omitted).

188. See *United States v. Kelly*, 707 F.2d 1460, 1461-68 (D.C. Cir. 1983) (Abscam), cert. denied, 464 U.S. 908 (1988); *United States v. Myers*, 692 F.2d 823, 829 (2d Cir. 1982) (Abscam), cert. denied, 461 U.S. 961 (1983); *United States v. Jannotti*, 673 F.2d 578, 609 (3d Cir. 1982) (en banc) (Abscam), cert. denied, 457 U.S. 1106 (1981).

Reasonable suspicion was not discussed as a requirement in any of these cases, but the respective records provide evidence that agents had a reasonable suspicion of criminal activity in each case before they began their investigations. Therefore, reasonable suspicion, when coupled with proof of commission of a crime, would probably pass muster under the *Jacobson* Court's definition of predisposition. See *supra* note 161.

189. If the government does not establish reasonable suspicion before conducting a long-term sting, it must rely on information it gathers during the sting. See *supra* note 162. As a result, when the government begins a sting without reasonable suspicion, it has no way of knowing whether it will obtain the needed evidence. If the government does not obtain this evidence, it wastes time and money because its chance of winning a conviction is drastically reduced.

190. Solicitor General Kenneth W. Starr stated that the decision would not adversely affect most stings, because the *Jacobson* operation was "unusual in its length and intensity." Ruth Marcus, *supra* note 141, at A1.

191. See, e.g., *United States v. Williams*, 705 F.2d 603, 613 (2d Cir. 1983) (Abscam) (holding that Williams's ready acceptance of an offer to commit a crime was sufficient evidence of his predisposition); see also *United States v. Jenrette*, 744 F.2d 817, 822 (D.C.

fer to commit the crime is not made until the investigation is well under way.

V. IMPACT

The *Jacobson* decision is not likely to have a great impact on future stings.¹⁹² Nevertheless, the Court still needs to set a reasonable limit on government conduct in stings. One alternative is to bar prosecution of any defendant netted in a child pornography sting unless that sting grew out of a reasonable suspicion of criminal activity. The Court's modified definition of "predisposition" may mean, however, that the government will be more careful about whom it targets and prosecutes.¹⁹³ If the government now has to prove that a defendant was predisposed to commit a crime before having had any contact with its agents, the government may target fewer people for long-term sting operations. Even if the number of targets remains the same, the government will be less likely to prosecute as many people.

Because the *Jacobson* decision is fairly fact-specific, it is likely to have a limited impact on future entrapment decisions. In short-term sting operations, defendants will generally accept or reject the bait immediately, thereby establishing the element of predisposition at the outset.¹⁹⁴ The government will still be able to establish predisposition in long-term sting operations if the target provides some basis for reasonable suspicion. Similarly, if it finds independent evidence of predisposition during its investigation, the government will have met its burden. It is only in a *Jacobson*-type sting, which drags on over a long period of time and produces no independent evidence of criminal activity, that the government will have problems establishing criminal predisposition.¹⁹⁵

Cir. 1984) (*Abseam*) (finding that the defendant's hesitancy to accept the offer was attributed to his desire to work out details, not to any reluctance to commit the crime and such conduct was equivalent to ready acceptance, demonstrating his predisposition to commit the crime).

192. See Marcus, *The Due Process Defense*, *supra* note 123, at 458. An attorney for the government stated that the Court "has not embarked on a new approach to a case that should in any way jeopardize law enforcement efforts including sting operations . . . [the Court agreed] that sting operations are an important and legitimate law enforcement technique." *Id.*

193. See Welling, *supra* note 179, at 2. Welling warns that the *Jacobson* decision will affect sting operations relating to money laundering: "There is little doubt the *Jacobson* case will receive wide circulation in the growing number of money laundering cases which arise from stings of bankers, merchants, politicians and others." *Id.*

194. See *supra* note 138 and accompanying text.

195. U.S. Solicitor General Kenneth Starr said the ruling served primarily as a reminder to prosecutors that their job is to prosecute, not to create crime. Nancy E. Ro-

VI. CONCLUSION

The Court reached a just decision when it reversed Jacobson's conviction. Unfortunately, its silence on the issue of appropriate government conduct may suggest to investigators that the ends will continue to justify the means in sting operations. As long as the government can demonstrate later that the defendant had a guilty state of mind, there is no apparent check on its activities. Until the Court establishes some reasonable limits, Big Brother will remain alive and well.

MAUREEN DUFFY

man, *High Court Rejects U.S. Child-porn Sting*, WASH. TIMES, Apr. 7, 1992, at A1. He said the decision reaffirmed the idea that there are limits on what the government can do. *Id.*

Although most Court watchers have predicted that *Jacobson's* impact will be minimal, others have expressed conflicting opinions. *Id.* One commentator predicted that the decision would trigger increased litigation against the government. *Id.* He also predicted that the decision would make it more difficult for the government to combat organized crime. *Id.*

