Entrapment and *Jacobson v. United States*¹: “Doesn’t the government realize that they can destroy a man’s life?”²

**INTRODUCTION**

It has been suggested that the first plea of entrapment³ was raised in Paradise by Eve⁴ when she asserted that “[t]he serpent beguiled me and I did eat.”⁵ Her defense “was overruled by the great Lawgiver . . . [and] this plea has never since availed to . . . give indemnity to the culprit, and it is safe to say that under any code of civilized . . . ethics, it never will.”⁶ By this definition, the Supreme Court’s code of civilized ethics lasted approximately sixty-eight years.⁷

“The hallmark of any society that claims to be civilized has to be . . . its ability to do justice: its ability to apply its rules with equal favor to the high and to the lowly.”⁸ For sixty years, the Supreme Court’s ability to administer justice has been closely scrutinized and heavily criticized for its formulation of the entrapment defense. The confusion surrounding the defense has become so great that one recent commentator suggested that entrapment was the product of the absence of a coherent framework of blame and choice in criminal law and not the product, as it properly should be, of logically reasoned analysis based on fundamental legal principles.⁹

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¹. 112 S. Ct. 1535 (1992).
³. “Entrapment is 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.” Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., concurring).
⁶. *Backus*, 29 How. Pr. at 42.
⁷. See supra note 4 and infra note 19.
⁹. Louis M. Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 113. “[E]ntrapment doctrine is one of a number of adaptive mechanisms which compensate for our failure to develop a coherent theory of blame and choice to regulate the imposition of criminal punishment. More fundamentally, the doctrine is a consequence of the inherent limits on the ability of government to distribute the social cost of deterring crime in an equitable fashion.” *Id.*
In spite of the confusion encompassing this defense, entrapment is commonly asserted in prosecutions that result from undercover investigations of such criminal activities as pornography, narcotics, and governmental corruption. The United States is the world’s most lucrative market for child pornography with an estimated annual market of two billion dollars. Hence, the government claims that undercover operations are necessary to rid our society of child pornography because “of all of the crimes known to our society, perhaps none is more revolting than sexual exploitation of children, particularly for the purpose of producing child pornography.” A fifty-six year old farmer from Nebraska, Keith Jacobson, was caught in such a sting operation and was subsequently convicted for the receipt of a magazine which contained pornographic photographs of children. In Jacobson v. United States, the Supreme Court reversed his conviction by ruling that Jacobson had been entrapped as a matter of law.

This note examines the Jacobson v. United States decision. Part II provides a brief overview of the development of the entrapment defense. Part III tenders the facts, presents the procedural history, analyzes the reasoning used in the Supreme Court’s decision, and demonstrates how the Court tailored its analysis to achieve its desired result. Part III also establishes, by analyzing the facts of Jacobson against the conventional framework of the due process defense, that although the Court’s decision was inconsistent with traditional entrapment doctrine, the decision may be reconcilable as an implicit

11. Id. at 46.
12. Brief for the United States at *53, Jacobson v. United States, 112 S. Ct. 1535 (1992) (No. 90-1124), available in LEXIS, Genfed Library, Supreme Court Briefs File (citing United States v. Moore, 916 F.2d 1131, 1139-40 (6th Cir. 1990)). Raymond Smith, who supervises child pornography investigations for the Postal Service, stated that sting operations are necessary because child pornography is “not something that you discuss with your next-door neighbor or the guy sitting next to you at the bar . . . [it] is a very private thing." Ruth Marcus, Fair Sting or Foul Trap?: Child Pornography Investigation Challenged, Wash. Post, Nov. 6, 1991, at A8.
16. Id. at 1543. Before action may be taken as a matter of law, the court must answer a question of law. A question of law is a “disputed legal contention[] which [is] . . . left for judge to decide.” Steven H. Gifis, Law Dictionary 388 (3d ed. 1991).
application of the due process defense. Part IV discusses the potential implications that *Jacobson* will have on the future of the entrapment defense and, finally, Part V concludes that the inconsistencies between precedent and the instant case are attributable to the special circumstances surrounding *Jacobson*.

II. Entrapment and the Supreme Court\(^\text{17}\)

In the 1890's, the United States Supreme Court alluded to the possibility of entrapment as a potential defense.\(^\text{18}\) However, the Court did not actually recognize entrapment as a viable defense until 1932 in *Sorrells v. United States*.\(^\text{19}\)

While posing as a tourist, a Prohibition\(^\text{20}\) agent visited the defendant's home.\(^\text{21}\) The two discovered that they were both ex-members of the same military unit.\(^\text{22}\) During the course of the visit, the agent asked the defendant if the defendant would get the agent some alcohol because they were former war buddies.\(^\text{23}\) After three requests by the agent, the defendant left his home and returned after a few minutes with a half gallon of liquor.\(^\text{24}\) The agent paid the defendant five dollars for the alcohol.\(^\text{25}\) Following an indictment for violating the National Prohibition Act,\(^\text{26}\) the defendant asserted that he was entrapped.\(^\text{27}\) The Supreme Court held entrapment to be a permissible defense.\(^\text{28}\) The Court's decision that entrapment was available as a defense reflected tensions which are still dividing the Court, the federal

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\(^{17}\) For a comprehensive review of the historical development of entrapment, see PAUL MARCUS, THE ENTRAPMENT DEFENSE (1989).

\(^{18}\) MARCUS, supra note 17, §1.05. These “Decoy Letter Cases” are discussed in United States v. Dion, 762 F.2d 674, 682-83 (8th Cir. 1985), rev’d in part, 476 U.S. 734 (1986).

\(^{19}\) 287 U.S. 435 (1932).

\(^{20}\) Prohibition is the “[i]nterdict of the liberty of making and of selling or giving away intoxicating liquors, for other than medicinal, scientific, or sacramental purposes.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1349 (27th ed. 1965). Prohibition existed nationally in the United States from the passing of the Eighteenth Amendment in 1919 until its repeal by the Twenty-first Amendment in 1933. U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

\(^{21}\) *Sorrells*, 287 U.S. at 439.

\(^{22}\) Id.

\(^{23}\) Id. at 440.

\(^{24}\) Id. at 439.

\(^{25}\) Id.

\(^{26}\) Id. at 438.

\(^{27}\) Id.

\(^{28}\) Id. at 452.
and state judiciaries, and the academic community over what is the appropriate method or theory to be used as the basis of this defense.

Sorrells established the theoretical underpinnings of the entrapment defense. The majority held that the trial court should focus on the predisposition and criminal design of the defendant. Because the judicial focus is on the accused, this has become known as the subjective theory of entrapment. The Court defined entrapment as "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." Also, the Court cautioned that defendants cannot complain of appropriate investigations into their conduct and predisposition. In most situations, the subjective theory requires the issue of entrapment to be decided by the jury. Justice Roberts, joined by Justices Brandeis and Stone, criticized the majority's approach for its emphasis on the prior reputation or former acts of the accused instead of focusing on the commission of the charged crime.

For twenty-five years, Sorrells stood alone as the Supreme Court's promulgation on entrapment. In 1958, the Supreme Court reaffirmed the subjective theory of entrapment in Sherman v. United States. However, Justice Frankfurter's concurring opinion developed an alternative known as the objective theory of entrapment. The judicial focus of the objective theory is "whether the police conduct revealed

29. Marcus, supra note 17, § 1.06.
30. Id.
33. In Sorrells v. United States . . . the Court took what might be called a 'subjective' approach to the defense of entrapment." Id.
34. Id. at 451-52. The defendant pleading entrapment "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition . . . . If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." Id.
35. "[T]he issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." Sherman v. United States, 356 U.S. 369, 377 (1958).
38. While Justice Frankfurter's concurring opinion was the first real pronouncement of the objective test, Justice Robert's scathing attack on the subjective test in his concurring opinion in Sorrells was the basis for this formulation of the objective test. See Marcus, supra note 17, § 3.01.
in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." Unlike the subjective theory, where the entrapment determination is a question of fact for the jury, the entrapment decision under the objective theory is a question of law for the judge.

The philosophical underpinning of the objective theory is that the entrapment defense is not meant to protect defendants who would have been "otherwise innocent." To the contrary, the supporters of the objective theory feel that entrapment's purpose is to protect the government from the illegal conduct of its officers, to perpetuate the purity of its judiciary system, and to deter future inappropriate government conduct.

The supporters of both the subjective theory and the objective theory agree that the entrapment defense is warranted on their collective belief that luring innocent people into criminal activity is an oppressive abuse of the government's discretion. Whereas the objective theory is preferred by the Model Penal Code, commentators,


42. Id. at 442-43 (Stewart, J., dissenting) (quoting Casey v. United States, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting)).

43. Id.


45. Carlson, supra note 44, at 1031.

46. Model Penal Code § 2:13. This section states:

   (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such an offense by either:

       (a) Making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

       (b) Employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

Id.

47. See, e.g., Richard C. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L.J. 1091 (1951); Joseph Goldstein, For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed
and some states; the subjective theory is favored by the federal judiciary, including a majority of the Supreme Court’s justices, and the vast majority of states.

Turning to the facts of Sherman, a government informant met the defendant at a doctor’s office where they were both being treated for an addiction to narcotics. After several accidental meetings, their conversation progressed to a discussion of their mutual experiences and problems overcoming their drug addictions. Finally, the informant asked the defendant if he could obtain some narcotics to soothe the informant’s suffering. Initially, the defendant ignored the request. After a number of appeals, the defendant consented and obtained drugs for the informant. The defendant was convicted of buying illegal narcotics. The defendant’s conviction was set aside as the Supreme Court held that the defendant had been entrapped as a matter of law. The Court, applying the subjective theory of entrapment, found that the government had played on the weaknesses of an innocent party and beguiled that innocent party into committing crimes which he otherwise would not have attempted.

In 1973, the Court revisited the entrapment defense in United States v. Russell. This case involved the government supplying the defendant with a difficult to obtain, essential ingredient in the manufacture of methamphetamine, more commonly known as speed. An undercover agent initiated contact with the defendant in an effort to locate a laboratory where it was believed that speed was being manufactured illegally. The agent offered to supply the defendant with the essential ingredient in return for fifty percent of the speed.

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48. Approximately twelve states have adopted the objective theory. Marcus, supra note 17, § 1.13.
50. Id.
51. Id.
52. Id.
53. Id.
55. Id. at 373.
56. Id. at 376.
58. Id. at 426.
59. Id. at 425.
60. Id. at 424.
61. Id. at 425.
produced. The agent’s offer was conditional on being shown a sample of the speed and the laboratory where the speed was being produced. After the agent completed two transactions in approximately one month with the defendant, including one in which he observed the defendant’s production of the speed, the agent executed a search warrant at the laboratory’s location and arrested the defendant. The defendant was convicted by a jury. The Ninth Circuit Court of Appeals reversed the defendant’s conviction on the basis that, as a matter of law, an intolerable degree of governmental participation in the criminal enterprise is an appropriate defense. While a majority of the Supreme Court expressly rejected this attempt by the Ninth Circuit to broaden the subjective theory of entrapment formulated in *Sorrells* and *Sherman*, the Court conceded that a situation in the future may present government conduct so offensive that due process principles would be an absolute bar to criminal prosecution of the ensnared individual. Though the Court found the government’s conduct in this case was not of a violative variety, it failed to elaborate on the type of governmental conduct which the Court would consider sufficiently offensive to preclude prosecution. The Sixth Circuit Court of Appeals in *United States v. Johnson* held that a court must weigh the following four factors: “(1) the need for the type of government conduct in relationship to the criminal activity; (2) the preexistence of a criminal enterprise; (3) the level of the direction or control of the criminal enterprise by the government; (4) the impact of the government activity to create the commission of the criminal activity.” Since *Russell*, there has only been one conviction overturned by a court under the due process defense.

63. Id.
64. Id. at 426.
65. Id. at 424.
66. Id. at 424 (citing Russell v. United States, 459 F.2d 671, 673 (9th Cir. 1972)).
68. Id. at 431-32. Most courts and commentators agree that *Russell* was the first case in which the Supreme Court recognized the defense of due process for extremely outrageous investigative conduct by the government. MARCUS, *supra* note 17, § 7.05.
69. Russell, 411 U.S. at 432.
70. See *infra* note 87 and accompanying text.
71. 855 F.2d 299 (6th Cir. 1988).
72. Id. at 305 (citing United States v. Robinson, 763 F.2d 778, 785 (6th Cir.)
Although the Supreme Court in *Russell* was adamant in its refusal to overrule the longstanding precedent of *Sorrells* and *Sherman*, the majority recognized that the entrapment defense is not of constitutional dimension and, therefore, Congress was empowered to adopt any substantive formulation of the defense it so desired. The Court expressed its holding as """"It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.""""76 The principal element in the entrapment defense is the predisposition of the defendant to commit the crime.77

Although the lower courts have struggled with formulating an appropriate test for determining the presence of predisposition, the Eighth Circuit Court of Appeals in *United States v. Dion*78 surveyed the various standards used by other circuits and assimilated the various mutations into a factor analysis. The factors to be potentially balanced in the resolution of predisposition include: (1) the ready response of the accused to the offered inducement; (2) the surrounding circumstances of the illegal conduct; (3) the accused's state of mind prior to the government's suggestion of the charged criminal act; (4) whether the accused was previously involved in an activity similar to the charged criminal act; (5) whether the accused had planned the criminal act before the government's inducement; (6) the accused's reputation; (7) the accused's conduct during the government's solicitation of the criminal act; (8) the accused's refusal to commit similar criminal acts on previous occasions; (9) the nature of the charged criminal act, and (10) the relative degree of governmental coercion to the accused's criminal background.79 Nonetheless, the *Russell* Court found no reason to review the jury's finding of predisposition because the defendant's concession in the Court of Appeals that the jury finding as to predisposition was supported by the evidence was fatal to his claim of entrapment.80

In *Hampton v. United States*,81 the defendant was convicted for the sale of heroin which he had procured from a government inform-
The defendant initially claimed that acquittal was appropriate if the jury believed that the drug was supplied by the government. On appeal, the defendant stepped away from his entrapment theory and asserted a violation of due process which, in fact, closely paralleled the objective theory of entrapment. It has been suggested that the due process defense "originated from the objective view of entrapment and effectively replaced it." A three justice plurality of the Court thought the defendant correctly recognized that the case did not qualify as one involving entrapment. The plurality also rejected the defendant's assertion that "the conduct of the law enforcement agents [was] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ."

The plurality maintained that a due process defense is available only when the challenged government activity violates some protected right of the defendant. Nevertheless, the plurality contended that

82. Id. at 485.
83. Id. at 488.
84. Id. at 488-89.
87. Id. (quoting United States v. Russell, 411 U.S. 423, 431-32 (1973)). The due process defense is similar to the objective test for entrapment because both focus on the government's conduct. However, the two differ in that entrapment is normally a question of fact for the jury, whereas the due process defense is decided by the judge as a matter of law. Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 Am. Crim. L. Rev. 457, 458-59 (1990). The Courts of Appeals are not completely convinced that recognition of a due process defense for government misconduct is appropriate in every context. Compare United States v. Bontkowski, 865 F.2d 129 (7th Cir. 1989) with United States v. Miller, 891 F.2d 1265 (7th Cir. 1989) (recognizing the Supreme Court's lack of disavowment on the availability of the due process defense). However, the federal circuits have almost unanimously recognized the validity of the due process defense. See United States v. Bradley, 820 F.2d 3, 7 (1st Cir. 1987); United States v. Mazzella, 768 F.2d 235, 237 (8th Cir. 1985); United States v. Dyman, 739 F.2d 794, 762, 768 (2d Cir. 1984); cert. denied, 469 U.S. 1193 (1985); United States v. Hunt, 749 F.2d 1078, 1087 (4th Cir. 1984); cert. denied, 472 U.S. 1018 (1985); United States v. Belzer, 743 F.2d 1213, 1217 (7th Cir. 1984); cert. denied, 469 U.S. 1110 (1985); United States v. Tobias, 662 F.2d 381, 387 (5th Cir. 1981); cert. denied, 457 U.S. 1108 (1982); United States v. Brown, 635 F.2d 1207, 1212 (6th Cir. 1981); United States v. Twigg, 588 F.2d 373, 379 (3d Cir. 1978); United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978); United States v. Spivey, 508 F.2d 146, 149 (10th Cir. 1975); cert. denied, 421 U.S. 949 (1975); United States v. Kelly 707 F.2d 1460, 1468 (D.C. Cir. 1983); cert. denied, 464 U.S. 908 (1983). But see United States v. Struyf, 701 F.2d 875, 877 n.6 (11th Cir. 1983).
the establishment of predisposition in the defendant not only fore-
closes the availability of the entrapment defense, but also forecloses
the availability of the due process defense.\textsuperscript{89} To the contrary, the two
concurring justices and the three dissenting justices agreed that proof
of a defendant's predisposition does not bar the due process defense;\textsuperscript{90}
where the government's conduct is "sufficiently offensive"\textsuperscript{91} or "egre-
gious."\textsuperscript{92} Whether predisposition bars the defense of due process or
not, the courts have been very reluctant to exculpate an accused based
on this due process defense.\textsuperscript{93}

The final pre-\textit{Jacobson} Supreme Court case involving an entrap-
ment issue was \textit{Mathews v. United States}.\textsuperscript{94} The defendant, an em-
ployee of the Small Business Administration who was responsible for
subcontracting government contracts to small businesses, had been
charged with accepting a bribe in exchange for an official act.\textsuperscript{95} A
private citizen, working undercover to assist the Federal Bureau of
Investigation, offered the defendant a personal loan in exchange for
additional subcontracting assignments from the Small Business Ad-
m\textit{[...]}
the entrapment issue to the jury. Again, the Court reaffirmed the subjective test for entrapment by claiming that it has consistently adhered to the view that a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct.

In summary, when a criminal defendant raises the defense of entrapment, the Court, in applying the subjective theory of entrapment, will differentiate "between the trap for the unwary innocent and the trap for the unwary criminal" with the principal focus on the defendant's predisposition to commit the crime. Predisposition has been defined as the defendant's inclination to engage in illegal activity for which the person has been charged. In laymen's terms, a person was predisposed in situations where the person was ready and willing to commit the crime. If the jury determines that the defendant had the propensity to engage in the illegal act, then the entrapment defense will fail. In a minority of states, the courts apply the objective theory of entrapment. This theory requires the court as a question of law to determine whether the police conduct involved in the particular case fell below standards for the proper use of the government's power. In contrast to the subjective theory of entrapment, the defendant's predisposition to commit the crime is not an issue in an application of the objective theory. The criminal defendant, in addition to the entrapment defense, may contend that the government's undercover operation was so outrageous as to violate the defendant's right of due process. This defense closely parallels the objective theory of entrapment except that the due process standard applied by the courts in examining the government's conduct is

101. Id.
102. Id. at 62-63. Inducement was not an issue in Jacobson. The government did not dispute that it induced Jacobson to commit the crime. Jacobson v. United States, 112 S. Ct. 1535, 1540-41 n.2 (1992).
105. BLACK'S LAW DICTIONARY 1177 (6th ed. 1990) (adopting the court's definition in United States v. Ortiz, 804 F.2d 1161, 1165 (10th Cir. 1986)).
106. Id.
107. MARCUS, supra note 17 and accompanying text.
109. Id.
so low that only one conviction has been overturned based on the due
process defense."  

In Jacobson, the Supreme Court returned to explore this hazy
morass of criminal law known as entrapment. Unfortunately, the
Court’s exploration and explanation of the entrapment defense further
obfuscated this already murky issue.

III. Jacobson v. United States

A. FACTS OF THE CASE

Jacobson was a fifty-six-year old farmer and school bus driver
from Nebraska. He lived with his elderly father who relied on
Jacobson for financial support. In February of 1984, Jacobson
ordered two magazines and a brochure from the Electric Moon adult
bookstore in California. The magazines were entitled Bare Boys I
and Bare Boys II. Although the magazines contained photographs
of nude preteen and teenage boys, the boys were not depicted as
engaging in any affirmative sexual activity. The brochure listed
stores in the United States and Europe that sold sexually explicit
materials. At the time Jacobson received these two magazines, it
was legal under both federal and Nebraska laws.

Within three months, Congress had passed the Child Protection
Act which illegalized the receipt of sexually explicit depictions of
children through the mail. Immediately after the Child Protection
Act became law, inspectors from the United States Postal Service

111. United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986).
113. Id. In addition, Jacobson was the treasurer of his church and remained in
that post throughout the entire prosecutorial process. Johnson, supra note 2. While
the majority used Jacobson’s military service and meritorious record as a school bus
driver in supporting its holding that Jacobson was an “unwary innocent,” it did not
make any mention of his church service. In a not surprising repercussion of his
indictment, Jacobson was dismissed from his job as a school bus driver. Id.
acres of the family farm to pay for the costs of his defense. Johnson, supra note 2.
117. Id.
118. Id.
120. Jacobson, 112 S. Ct. at 1538.
122. Id.
executed a search warrant for the premises of the Electric Moon. During this search, the government discovered Jacobson's name on Electric Moon's mailing list.

In January of 1985, the government sent a letter to Jacobson from the American Hedonist Society, a fictitious organization, which claimed that the Society's members had the right to seek pleasure without restrictions because these restrictions were based on outdated puritan morality. In addition to enrolling in the organization, Jacobson returned a sexual attitude questionnaire in which he indicated he enjoyed sexual materials on preteen sex but he also indicated that he was opposed to pedophilia.

For approximately sixteen months, Jacobson was left alone by the government. After a new "prohibited mail specialist" discovered Jacobson's name in a file, the government sent a letter to Jacobson from another fictitious organization, Midlands Data Research. The letter solicited a response from those individuals who "believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite [sic] ages." Jacobson responded that he was interested in teenage sexuality.

The government followed up Jacobson's response to the Midland Data Research letter with a mailing from another fictitious organization, the Heartland Institute for a New Tomorrow (HINT). HINT represented that its purpose was to protect and promote sexual freedom, including the freedom to make lifestyle choices. The letter went on to claim that HINT's position was that the legislative process should be used to rescind arbitrarily imposed legislation that restricts sexual freedom. In response to a second survey, Jacobson responded that he had an "above average" interest in "[p]reteen sex-homosexual." Furthermore, he wrote that HINT must be ever vigilant to

125. Id.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
132. Id.
133. Id.
134. Id.
135. Id.
fight any right wing fundamentalist who attempted to curtail sexual freedom.136

In its reply, HINT stated that it was lobbying for the elimination of any legal definitions of “the age of consent.”137 This reply also stated that HINT’s funding was to be derived from future catalog sales which would feature products that Jacobson would find appealing and provocative.138 Additionally, HINT supplied Jacobson with a phony list of pen pals which HINT represented as having been generated from group members with similar responses from the aforementioned survey.139

When Jacobson did not initiate any correspondence, the Postal Service’s inspector wrote to him using a pseudonym from the list of pen pals.140 The inspector’s letter was written so that its contents described the fictitious writer’s sexual interests in a manner that reflected Jacobson’s sexual interests.141 Jacobson responded that his interest was primarily in “male-male items.”142 In responding to a second letter from the inspector’s pseudonym, Jacobson stated that he liked photographs which featured good looking homosexual males in their teens and early twenties engaging in oral and anal sex.143 After his second response, Jacobson discontinued the correspondence.144

In March of 1987, approximately twenty-six months after the Postal Service’s initial mailing, Jacobson’s name was submitted to the Customs Service for inclusion in its child pornography sting, “Operation Borderline.”145 The Customs Service sent Jacobson a brochure from a fictitious Canadian company named “Produit Outaouais.”146 The brochure advertised photographs of “young boys in sex action fun.”147 Jacobson placed an order which was never delivered.148

136. Id.
137. Id.
138. Id. at 1538-39.
140. Id.
141. Id. This technique is known as “mirroring.” Id.
142. Id.
143. Id.
144. Id. In a post-decision interview, Jacobson stated that his failure to respond to his pen-pal’s third letter was attributable to the fact that he had broken his wrist in a tractor accident. Marcus, supra note 12.
146. Id.
147. Id. at 1544.
148. Id. at 1539.
The postal inspector subsequently sent Jacobson a letter from a fictitious organization named Far Eastern Trading Company Ltd.\textsuperscript{149} The letter stated that the company had devised a method of getting pornography delivered to Jacobson without the material being seized by the United States Customs Service.\textsuperscript{150} Jacobson was invited to send for more information and the company requested that Jacobson formally acknowledge that he was not involved in any undercover operation sponsored by the United States government which was calculated to entrap the Far Eastern Trading Company, its agents or its customers.\textsuperscript{151} After Jacobson responded, the government sent a catalog.\textsuperscript{152}

Jacobson ordered a magazine called Boys Who Love Boys\textsuperscript{153} which was advertised in the catalog as "11 year old and 14 year old boys get[ting] it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this."\textsuperscript{154} With his order, Jacobson included a note which stated "[w]ill order other items later. I want to be discreet in order to protect you and me."\textsuperscript{155}

After a controlled delivery of the magazine, Jacobson was arrested.\textsuperscript{156} While searching his home, the government found Bare Boys I, Bare Boys II, and Boys Who Love Boys.\textsuperscript{157} The government's search failed to locate any other materials that indicated Jacobson was interested in child pornography.\textsuperscript{158}

Jacobson was indicted on one count of receiving through the mail a visual depiction, the production of which involved the use of a minor engaging in sexually explicit conduct.\textsuperscript{159}

\textsuperscript{149} Id. \\
\textsuperscript{150} Id. \\
\textsuperscript{151} Id. \\
\textsuperscript{152} Id. \\
\textsuperscript{153} Jacobson v. United States, 112 S. Ct. 1535, 1544 (1992). \\
\textsuperscript{154} Id. \\
\textsuperscript{155} Id. \\
\textsuperscript{156} Id. at 1540. \\
\textsuperscript{157} Id. \\
\textsuperscript{158} Id. \\
\textsuperscript{159} United States v. Jacobson, 893 F.2d 999, 1000 (8th Cir. 1990). He was charged with violating 18 U.S.C. § 2252(a)(2) (1984) which stated that "[a]ny person who knowingly receives ... any visual depiction that has been ... mailed ... if, the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct; shall be punished ... ." According to Daniel L. Mihalko, Manager of Congressional and Public Affairs for the Postal Service, a total of 161 people were convicted. Postal
B. PROCEDURAL HISTORY

At trial, Jacobson explained that he had been shocked and surprised when he had discovered that Bare Boys I and Bare Boys II contained pictures of very young, unclothed boys. Nevertheless, Jacobson contended that he had not drawn any sexual connations from the photographs because most of the boys had been featured in rural or outdoor settings. Furthermore, he had not been offended because he believed that the magazine was targeted to appeal to individuals who aspired to the nudist lifestyle.

A jury of nine women and three men returned a verdict of guilty. Jacobson was sentenced to two years of probation and 250 hours of community service.

A three judge panel from the Eighth Circuit Court of Appeals reversed the conviction. While the majority conceded that Jacobson exhibited a predisposition to receive sexually explicit photographs of children through the mail, the court held that Jacobson had been entrapped as a matter of law. Based on public policy concerns,

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Inspections—How Far Is Too Far? (CNN television broadcast, Apr. 2, 1992), available in LEXIS, Nexis Library, Script File, at *13-14. Also, thirty-five instances of child molestation were discovered. Daniel L. Mihalko, Far From a Clear-Cut Decision, WASH. POST, May 4, 1992, at A22. Unfortunately, at least four men committed suicide after the shame of being charged with the receipt of child pornography had become unbearable. Johnson, supra note 2. The Ninth Circuit Court of Appeals recently struck 18 U.S.C. § 2252 as unconstitutional. United States v. X-citement Video, Inc., No. 89-50556, 1992 WL 367097, at *6-7 (9th Cir. Dec. 16, 1992). The court held that the statute facially violated the First Amendment of the Constitution because it did not require that the accused know that at least one of the sexual performers was under the age of eighteen. Id.

161. Id. at 1538.
162. Id. The government contended that the magazine could not have seriously been mistaken for a nudist type publication because “the focus of the camera [was] squarely on the boy’s genitals.” Mihalko, supra note 159. However, Jacobson’s attorney asserted that the boys were engaged in skinny-dipping at a river in Texas. Postal Inspections—How Far Is Too Far?, supra note 159, at *16.
163. United States v. Jacobson, 893 F.2d at 1000. Jacobson’s attorney, in a post-decision interview, attributed the jury’s conviction of Jacobson to the fact that all of the nine women on the jury had children and, consequently, a verdict of “not guilty” in a case involving child pornography was extremely unlikely. Postal Inspections—How Far Is Too Far?, supra note 159, at *12.
164. United States v. Jacobson, 893 F.2d at 1000.
165. Id. at 1002.
166. Id.
167. Id.
168. Id. Although the court recognized that undercover operations are indispen-
the court contended that a reasonable suspicion of illegal activity was required by government agents before targeting an individual in an undercover investigation.\textsuperscript{169}

Upon granting of petition for rehearing en banc, the Eighth Circuit joined with the other courts of appeals which had not found a requirement in the Constitution which mandated that the government have a reasonable suspicion of wrongdoing before focusing on an individual in a sting operation.\textsuperscript{170} In viewing the evidence in the light most favorable to the government in deciding whether there was a jury question on entrapment, the court concluded that the govern-

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  \item \textsuperscript{168} \textit{Id.} Although the court recognized that undercover operations are indispensable to meet the goals of effective law enforcement, the court held that potential harms which include "the creation of crime, the entrapment of innocent persons, the destruction of the reputations of innocent persons, extensive fishing expeditions among innocent citizens, the creation of an air of distrust amongst colleagues and acquaintances and the subjecting of government agents to tremendous tons, dangers and stresses" require such limitations as a reasonable suspicion requirement to prevent the potential harms from occurring. \textit{Id.} at 1002 n.2.
  \item \textsuperscript{169} \textit{Id.} at 1002. Apparently, the government's brief cited numerous cases in support of their position that the Electric Moon purchase was sufficient evidence of predisposition to justify the undercover operation because the majority undertook the painstaking process of distinguishing all of the cases reaching the appellate level cited by the government. \textit{Id.} at 1001. Further, the majority discussed the Congressional hearings that reviewed the ABSCAM sting operation. They noted that reasonable suspicion appeared in the record of each ABSCAM case. \textit{Id.} at 1001 n.1. The cases cited by the court which specifically dealt with the reasonable suspicion requirement were: United States v. Kelly, 707 F.2d 1460, 1471 (D.C. Cir. 1983); United States v. Jannotti, 673 F.2d 578, 609 (3d Cir. 1982); and United States v. Myers, 635 F.2d 932, 941 (2d Cir. 1980). \textit{Id.} at 1001-02 n.1.
\end{itemize}
ment had only detected the crime and had not manufactured it. The court held that the government presented ample evidence that the postal inspectors only provided Jacobson with opportunities to purchase child pornography and renewed their efforts from time to time as Jacobson responded to their solicitations. Indeed, the panel's opinion recognized Jacobson's response to a survey mailed to him by the postal inspectors "indicated a predisposition to receive through the mails sexually explicit materials . . . [and] justified the decision to offer Jacobson the opportunity to purchase illegal materials through the mail." While the en banc majority held that Jacobson was not entrapped as a matter of law, the two judges who had constituted the majority in the panel's opinion filed two separate but equally strong dissenting opinions.

The United States Supreme Court certified for review the question of "whether [Jacobson] was entrapped as a matter of law . . ." In a five-four decision, the Court delivered an affirmative response.

172. Id.

173. The basis of Chief Judge Lay's dissent was the reprehensibility of the government's conduct. Id. at 470-71 (Lay, J., dissenting). Senior Circuit Judge Heaney based his dissent on the government's failure to have reasonable suspicion of Jacobson's conduct before targeting him in the sting operation. Id. at 471-76 (Heaney, J., dissenting). In essence, Judge Heaney reiterated the panel's opinion which he had authored.


175. This case was the first 5-4 split of the term which had seen the Court hand down fifty-two decisions prior to Jacobson. In a bit of a surprise, newly-appointed Justice Thomas broke ranks from Justice Scalia for only the second time of the term and joined the majority in throwing out the conviction. Linda Greenhouse, Justices, in Entrapment Case, Cast a Rare Vote Against Prosecutors, N.Y. Times, Apr. 7, 1992, at A1.

176. Jacobson v. United States, 112 S. Ct. 1535, 1543 (1992). While judicial headcounting is not dispositive of the proper resolution for a case, the final tally in this case is very interesting. The dissenting judge on the Eighth Circuit Court of Appeals' panel opinion stated that there was ample evidence that Jacobson was predisposed to commit the criminal act. After sitting en banc, the remaining seven judges of the Eight Circuit Court of Appeals concurred that the government had met five to four its burden of proving Jacobson's predisposition. The Supreme Court voted
C. THE SUPREME COURT'S DECISION

The Court began by recognizing the malignant nature of child pornography.\(^{177}\) Citing Sorrells v. United States,\(^{178}\) the majority stated that there was no disputing the fact that the government may use undercover agents to enforce the law\(^{179}\) However, 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.\(^{180}\)

Dissenting, Justice O'Connor viewed this part of the holding as changing the entrapment doctrine.\(^{181}\) According to Justice O'Connor, the defendant's predisposition had been traditionally evaluated as of the time the crime was suggested and not at the time of the government's initial involvement.\(^{182}\) Justice O'Connor's argument is not consistent with past entrapment cases such as Sorrells because entrapment occurs "when the criminal design originates with the officials of the [g]overnment, 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."\(^{183}\) From this description of entrapment, a court must examine whether the criminal seed

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\(^{177}\) Id. at 1540.
\(^{178}\) 287 U.S. 435 (1932).
\(^{179}\) Jacobson, 112 S. Ct. at 1540 (quoting Sorrells, 287 U.S. at 441) ("It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.").
\(^{180}\) Jacobson, 112 S. Ct. at 1540 (citing United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C. Cir. 1991)).
\(^{181}\) Id. at 1544 (citing Sherman v. United States, 356 U.S. 369, 372-76 (1958)). But see Sorrells v. United States, 287 U.S. 435, 451 (1932) (stating "the controlling question [is] whether the defendant is ... [an] otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." (emphasis added)). A product is the result of some operation of human labor or skill. Webster's New Twentieth Century Dictionary of the English Language Unabridged 1347 (27th ed. 1965). Clearly, preinducement conduct of government agents is part of the production process.
\(^{182}\) Id. at 1544 (citing Sherman v. United States, 356 U.S. 369, 372-76 (1958)).
was planted in the accused’s mind by the government and it logically follows, therefore, that the prosecution must prove beyond reasonable doubt that the accused’s mental desire to commit the crime was in place prior to the initial contact by the government’s agents.

The Court proceeded to establish some parameters for proving Jacobson’s predisposition.\(^\text{184}\) If the government agents had simply offered Jacobson an opportunity to order child pornography through the mail, his entrapment defense probably would not have warranted a jury instruction\(^\text{185}\) because Jacobson’s predisposition would have been demonstrated by his ready commission of the criminal act\(^\text{186}\). However, the majority held that the evidence in the instant case was not adequate to prove that Jacobson’s predisposition was independent of the government’s actions.\(^\text{187}\)

The prosecution’s evidence was categorized into two areas.\(^\text{188}\) First, the Court addressed the evidence developed prior to the government’s sting operation.\(^\text{189}\) This evidence consisted of Jacobson’s purchase, by mail, of the Bare Boys I and Bare Boys II magazines.\(^\text{190}\) At the time, the purchase of the magazines was a legal transaction.\(^\text{191}\) The Court did not consider the evidence that Jacobson engaged in conduct which was legal at the time of his participation to be sufficient to demonstrate that he was predisposed to act in the same manner after Congress had criminalized the activity.\(^\text{192}\) This statement was based on the Court’s belief that people obey the law even when they do not like the law.\(^\text{193}\) Nonetheless, the Court found that while Jacobson’s legal purchase of Bare Boys I and Bare Boys II may have suggested a predisposition to view sexually-oriented photographs, the transaction had very little probative value for establishing Jacobson’s predisposition to engage in the charged criminal activity.\(^\text{194}\) The purchase merely indicated that Jacobson was generally inclined to act within a broad range of conduct which encompassed lawful and unlawful behavior.\(^\text{195}\)

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\(^{185}\) Id.
\(^{186}\) Id. (citing United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952)).
\(^{187}\) Jacobson, 112 S. Ct. at 1541.
\(^{188}\) Id.
\(^{189}\) Id.
\(^{190}\) Id.
\(^{191}\) Id.
\(^{192}\) Id. at 1542.
\(^{193}\) Id.
\(^{194}\) Id. at 1541.
\(^{195}\) Id. During oral arguments, Jacobson’s counsel admitted that if a person
The second category of the prosecution's evidence was gathered during the government's undercover investigation. The Court found Jacobson's responses to the government's mailings indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex. Nonetheless, the Court concluded that these responses hardly supported an inference that Jacobson would commit the crime of receiving child pornography through the mail. Justice O'Connor attacked this part of the holding for redefining predisposition. In her view, the Court added a new requirement dictating that the prosecution prove the defendant was predisposed to knowingly break the law. Further, she contended that this requirement demanded the government to prove more to show predisposition than it needed to prove for conviction. Justice O'Connor felt that the Court ignored the judgment of Congress by imposing this specific intent requirement. She was also concerned that the Court substituted its judgment in place of the jury's judgment. In her opinion, this substitution was improper because one of the functions of the jury is to prevent arbitrary law enforcement by acting as the community's conscience.

The Court found a "strong arguable inference" that the government pressured Jacobson to order the illegal magazine "as part of a fight against censorship and the infringement of individual rights."
In her dissent, Justice O'Connor's intense scrutiny of the record did not unearth any evidence indicating that the government had exerted any substantial pressure on Jacobson.\footnote{Id. at 1545 (O'Connor, J., dissenting).}

In supporting its inference that the government had pressured Jacobson into ordering an unlawful magazine, the majority initially noted that the fictitious organization of HINT’s mailing described the group’s function as protecting and promoting sexual freedom.\footnote{Id.} The Court also observed that the mailing stated that HINT intended to achieve its goals by lobbying legislatures and by promoting dialogue between concerned individuals.\footnote{Id.} The mailing informed Jacobson that HINT's lobbying efforts would be financed through catalog sales.\footnote{Id.} The majority felt HINT's mailing “waved the banner of individual rights and disparaged the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials . . . .”\footnote{Jacobson v. United States, 112 S. Ct. 1535, 1542 (1992).} While admitting that the HINT mailing suggested that lobbying efforts would be funded from catalog sales, Justice O'Connor cited the record from trial which stated that the catalogs, which had not contained any references to HINT, were sent from the fictitious organizations of Produit Outaouais and Far Eastern Trading Company.\footnote{Id. at 1546 (O'Connor, J., dissenting).} In addition, she found it probative that the catalogs did not suggest that their proceeds would be used for political purposes.\footnote{Id.} Justice O'Connor also pointed out that the government’s sting operation had not claimed to be organizing a civil disobedience movement which would have protested the pornography laws by breaking them.\footnote{Id.} This fact was used by Justice O'Connor to counter the majority’s assertion that the government had exerted substantial political pressure on Jacobson.

In addition to its commentary on the government’s urging of Jacobson to take action in order to protect his individual rights, the Court noted that two of the government’s solicitations “raised the spectre of censorship.”\footnote{Id. at 1546 (O'Connor, J., dissenting).} From the Customs Service’s mailing, the majority observed that Produit Outaouais’ reported that its business which had previously been legal and commonplace had been forced into becoming an underground, secretive service.\footnote{Id.} Attention was also
drawn to the solicitation's representation that Produit Outaouais took extreme precautions to insure discreet delivery which had become necessary because of the global effort to eradicate child pornography.\textsuperscript{218} The majority further noted that the Postal Service's catalog described the global concern about child pornography as "hysterical nonsense,"\textsuperscript{219} decried "international censorship,"\textsuperscript{220} and assured Jacobson that his order could not be opened for inspection without judicial authorization.\textsuperscript{221}

These observations led the Court to conclude that:

[t]he evidence that [Jacobson] was ready and willing to commit the offense came only after the government had devoted [two and one-half] years to convincing him that he had or should have the right to engage in the very behavior proscribed by law. Rational jurors could not say beyond a reasonable doubt that [Jacobson] possessed the requisite predisposition prior to the government's investigation and that it existed independent of the government's many and varied approaches to [Jacobson].\textsuperscript{222}

Justice O'Connor disagreed with the majority's limited interpretation of the evidence.\textsuperscript{223} She argued that the government's suggestions of illegality could be inferred as simply warning potential buyers of their risk in ordering materials that featured sexually-explicit photographs of minors.\textsuperscript{224} With his order for Boys Who Love Boys, Jacobson included a note which stated "[w]ill order other items later. I want to be discreet in order to protect you and me."\textsuperscript{225} This note indicated Jacobson's intent to order additional items at a later date and, more importantly, his note suggested that Jacobson knew that he was involving himself in an unlawful activity.\textsuperscript{226} Because she found the evidence susceptible to more than one interpretation, Justice O'Connor stated that it was the jury's obligation to make the appropriate interpretation.\textsuperscript{227} Therefore, she thought the jury's finding that

\begin{itemize}
  \item \textsuperscript{218} Id.
  \item \textsuperscript{219} Id.
  \item \textsuperscript{220} Id.
  \item \textsuperscript{221} Id.
  \item \textsuperscript{222} Id. at 1543.
  \item \textsuperscript{223} Id. at 1546 (O'Connor, J., dissenting).
  \item \textsuperscript{224} Id.
  \item \textsuperscript{225} Jacobson v. United States, 112 S. Ct. 1535, 1546 (1992) (O'Connor, J., dissenting).
  \item \textsuperscript{226} Id.
  \item \textsuperscript{227} Id.
\end{itemize}
Jacobson was predisposed should have been upheld. Justice O'Connor concluded that the Court erred in failing to construe the evidence in the light most favorable to the government, and that the Court erred in failing to draw all reasonable inferences in the government's favor.

D. ANALYSIS

The Court sought to find entrapment as a matter of law and tailored its analysis accordingly. The only prior case in which the Supreme Court held that the defendant had been entrapped as a matter of law was Sherman v. United States. The subjective theory of entrapment affirmed in Sherman defines entrapment as "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." The supporters of the subjective theory contend that by focusing on the defendant's culpability, the subjective theory "attempts to distinguish between persons who are blameworthy and persons who are not ... [and] that should be the goal of our law of crimes." One of the principal criticisms of the subjective theory is that an examination of a defendant's predisposition allows for the introduction of highly prejudicial evidence of the "defendant's bad reputation or past criminal activities" which, in turn, may inflame the jury to convict the defendant because of the person's past reputation or conduct. In the American system of jurisprudence, the only appropriate basis for a conviction is the prosecution proving guilt beyond a reasonable doubt for the charged crime as opposed to convincing the jury that they should vote for conviction because the defendant is a "bad" person.

By focusing on the government's conduct, the objective theory avoids this risk that a defendant would be convicted for simply being a "bad" person. Further, the proponents insist that this theory is necessary because "certain police conduct ... is not to be tolerated

228. Id.
229. Id.
231. Id. at 372.
234. Id.
by an advanced society.’’235 Of course, the objective theory also has its detractors. One of the principal criticisms is that the objective theory’s focus on the government’s conduct allows culpable parties to escape criminal liability for their actions.236

The subjective theory is the correct approach for the administration of the entrapment defense. While there is a danger of a jury’s conviction resulting from its belief that the defendant is a “bad” person and needs to be punished regardless of whether the prosecution met its burden of proof beyond a reasonable doubt for the charged crime, this danger is mitigated by the availability of the due process defense. Because the subjective theory has this important restraint, this theory may, to a large extent, also satisfy the concerns held by the proponents of the objective theory. Thus, the Supreme Court has been applying the correct theory of entrapment.

Based on Jacobson’s ready compliance to the government’s solicitation of the criminal act and his prior purchase of child pornography which indicated that Jacobson was predisposed to receiving child pornography through the mail, a proper application of the subjective theory of entrapment should have resulted in an affirmation of the jury’s conviction. Although his entrapment defense should have been denied, the Supreme Court’s reversal of Jacobson’s conviction is reconcilable as an implicit application of the due process defense.237

The first key distinction between Sherman and Jacobson was the reluctance of the defendant in Sherman to participate in the illegal conduct.238 In Sherman, the government informant had to make numerous requests to overcome the defendant’s initial refusal, then the defendant’s evasiveness, and, finally, the defendant’s hesitancy.239 The informant’s persistence was necessary to achieve the defendant’s capitulation to the informant’s request for the performance of the charged criminal activity.240 As Justice O’Connor pointed out in her dissent, Jacobson “was offered only two opportunities to buy child pornography through the mail. Both times, he ordered. Both times,

236. Marcus, supra note 17, § 1.12.
237. There was no due process argument articulated in Jacobson’s brief filed with the Supreme Court. Brief for the Petitioner, Jacobson v. United States, 112 S. Ct. 1535 (1992) (No. 90-1124), available in LEXIS, Genfed Library, Supreme Courts Briefs File.
238. Sherman, 356 U.S. at 373.
239. Id.
240. Id.
he asked for opportunities to buy more." Although the Court conceded that "the ready commission of the criminal act amply demonstrated the defendant's predisposition," the majority ignored its own statement by overturning the jury conviction.

The Court contended that while Jacobson would not have even warranted a jury instruction on entrapment if the government had simply offered Jacobson an opportunity to order child pornography, twenty-six months of mailings and communications from the government had negated any opportunity for the prosecution to prove Jacobson's predisposition merely on the basis of his instant acquiescence to the government's inducement. Unfortunately, the majority ignored the realities of the child pornography market. Previously successful law enforcement measures necessitated the development of a very secretive, underground network from which child pornographers continue to operate. Naturally, these clandestine traffickers are extremely suspicious of newcomers and, consequently, are virtually airtight against penetration by traditional investigations. Because consumers of child pornography risk criminal charges and social stigmatization if apprehended, they are also extremely cautious of new purveyors of child pornography. Thus, whether attempting to investigate distributors or consumers of child pornography, the government has a very difficult time penetrating this market for investigatory purposes.

The second key distinction between Sherman and Jacobson was the form of the government's contact with the defendant. In Sherman, the government informant had befriended the defendant before asking him to commit the criminal act of obtaining narcotics. Thus, based on the face-to-face communications with the government informant, the defendant finally acquiesced to these requests. In contrast, Jacobson was firmly ensconced in the privacy of his own home during his contact with the government. While the defendant in Sherman would have had to turn down the request for a favor from a friend in a face-to-face conversation, Jacobson only had to place the government's mailings in a garbage receptacle to avoid the criminal activity or, alternatively, could have avoided the government's sting operation

242. Id. at 1541.
243. Gene L. Malpas, Protect Children from Buyers of Pornography, WASH. TIMES, Dec. 5, 1991, at G2 (Mr. Malpas is affiliated with the National Law Center for Children and Families.).
244. Id.
by not responding to its solicitations. Indeed, one of the supervising postal inspectors stated that if Jacobson "had discarded this material, threw it away, did not answer, did not respond to us, [the Postal Service] would have folded up our tent and moved on to somebody else."[246]

By ignoring the precedent of Sherman, the majority in Jacobson demonstrated its ability to analyze the evidence in such a manner as to support its holding. As Justice O'Connor clearly stated, the matter was settled when the Court conceded that Jacobson's responses to the various solicitations prior to the criminal act were indicative of Jacobson's predisposition to view photographs of preteen sex.[247] The Court's concession on this predisposition issue mandated an affirmation of Jacobson's conviction.[248]

In addition, an application of the factor analysis initially promulgated in United States v. Dion[249] supports a finding that Jacobson was predisposed to commit the criminal act of receiving child pornography through the mails. First, the majority conceded that Jacobson had readily responded to the government's solicitation of the criminal act. [250] This is the most heavily-weighted factor in the analysis.[251] Second, while the mailings and communications indicated that the solicited act was illegal, the sheer number of governmental commu-

248. Id.
249. 762 F.2d 674, 687-88 (8th Cir. 1985).
   The lower courts have looked to a variety of factors in determining predisposition including: (1) whether the defendant readily responded to the inducement offered; (2) the circumstances surrounding the illegal conduct; (3) "the state of mind of a defendant before government agents make may any suggestion that he shall commit a crime;" (4) whether the defendant was engaged in an existing course of conduct similar to the crime for which he is charged; (5) whether the defendant had already formed the "design" to commit the crime for which he is charged; (6) the defendant's reputation; (7) the conduct of the defendant during the negotiations with the undercover agent; (8) whether the defendant has refused to commit similar acts on other occasions; (9) the nature of the crime charged; and (10) "[t]he degree of coercion present in the instigation law officers have contributed to the transaction" relative to the "defendant's criminal background."
   Id. (citations omitted).
251. United States v. Thoma, 726 F.2d 1191, 1197 (7th Cir. 1984), cert. denied, 467 U.S. 1228 (1984) (citing United States v. Kaminski, 703 F.2d 1004, 1008 (7th Cir. 1983)).
communications sent over the extended period of this case suggests overzealous law enforcement that may or may not have implanted Jacobson’s motivation to order the child pornography. Therefore, this factor does not favor Jacobson or the government in this case. Third, Jacobson’s state of mind prior to the government’s inducement of the criminal act evidenced by the number of his replies to the government’s mailings support the conclusion that he was very interested in pornographic materials which featured children. Fourth, although Jacobson ordered Bare Boys I and Bare Boys II when it was still legal to do so, the mail-ordering of these magazines was an activity nearly identical to the charged criminal act of receiving child pornography through the mail. Fifth, there are no facts which suggest that Jacobson planned the criminal act prior to the government’s inducement. Sixth, because Jacobson was a decorated veteran, treasurer of his church, and a school bus driver with an impeccable record of conduct, his reputation suggested an “unwary innocent” in whom the government had implanted the will to commit the criminal act. Seventh, by continually responding to the government’s mailings, Jacobson’s conduct during the government’s inducement of the criminal act signifies that he was predisposed to ordering child pornography through the mail. Eighth, because Jacobson had never been previously targeted, this factor is not applicable to this case. Ninth, although Jacobson had specifically indicated his opposition to pedophilia, the nature of the criminal act for which he was charged is not one in which a person would commonly become involved in as a result of curiosity, on the contrary, “[c]hild pornography exists primarily for the consumption of pedophiles.” Tenth, while the majority stated that the government exerted substantial pressure on Jacobson, its conclusion is hard to reconcile with the fact that Jacobson was in the privacy of his home where he was free to ignore the mailings by disposing of them or by not even bothering to open these mailings. However, for the sake of objectivity, the majority’s conclusion that the government’s coercion was much too extreme

252. See supra note 195 and accompanying text.
254. Johnson, supra note 2.
256. Malpas, supra note 243 (quoting Ken Lanning who is a behavioral scientist for the Federal Bureau of Investigations). Pedophiles use child pornography for gratifying their own sexual desires, reducing the inhibitions of their victims, instructing their victims on proper sexual performance, blackmailing their victims, and bartering, trading or selling for other materials. Id.
for Jacobson's background will be accepted. This balancing test results in five elements favoring a finding of predisposition, three elements favoring an absence of predisposition, one element which is evenly balanced between the two positions and one element which is not applicable to this case. Most importantly, the key element of Jacobson's ready response to the inducement supports the jury's finding that he was predisposed. Therefore, Jacobson's conviction should have been affirmed under the subjective theory of entrapment. Nonetheless, under the due process defense which serves as a limitation on the subjective theory of entrapment to ameliorate any potential injustices, Jacobson's conviction should have been reversed.

The majority chose to ignore the two critical distinctions between this case and Sherman, which were Jacobson's eagerness to participate in the solicited illegal conduct as opposed to Sherman's reluctance to accept the government's solicitations and Jacobson's solicitation by mail from faceless entities as opposed to Sherman's face-to-face pressure from a friend. Instead, the Court chose to concentrate on its contention that the government exerted substantial pressure on Jacobson to obtain and read pornographic material as part of a fight against censorship and the infringement of individual rights. The majority held that the "processes of detection and enforcement should [not] be abused by the instigation by government officials . . . to lure [citizens to commit an act] . . . and to punish them." However, by focusing on the government's conduct in regards to its exertion of pressure on Jacobson, the Court either implicitly applied an objective test of entrapment or tacitly determined that Jacobson's right to due process had been violated. Admittedly, the majority framed its opinion in language that appears to be consistent with the subjective theory's focus on the defendant's predisposition. Nevertheless, the subjective test rejects the "strict analysis" of the manner of the government's intrusion in favor of an examination of the defendant's reaction to the criminal opportunity. Yet, the majority continuously alluded to the nature of the government's solicitation of Jacobson. Therefore, in what may have been an effort to give the appearance of remaining committed to the precedent that established the subjective theory as the appropriate theory of entrapment in the federal courts, the Court manipulated and phrased its analysis in terms that specifi-

258. Id. at 1543 (quoting Sorrells v. United States, 287 U.S. 435, 448 (1932)).
259. See supra notes 38-44.
260. Marcus, supra note 17, § 2.01.
cally parallel the typical language used in entrapment analysis under the subjective test.

The Court’s reasoning is much more palatable if viewed as an aberrational application of either the objective theory of entrapment or the due process defense. Because the due process defense has a higher threshold of tolerance for governmental conduct, a successful due process defense means an entrapment defense under the objective theory would also be successful. Therefore, an analysis of this case under the due process defense, using the factor analysis framework from *United States v. Johnson*,262 is a proper starting point to determine if the Court’s holding would have been more appropriate under either of these two theories.

First, was there a need for the type of government conduct in relationship to the criminal activity?263 As previously discussed, the clandestine child pornography market is extremely distrustful of newcomers and, thus, typical investigations have been unsuccessful in infiltrating this area of crime.264 Consequently, undercover operations such as the one involved in *Jacobson* are necessary for the apprehension of child pornographers who are involved in this highly secretive market. On the other hand, mailing two sexual attitude surveys, seven letters gauging his voracity for child pornography, and two sex catalogs over a period of twenty-six months to a man who had made one purchase of similar materials at a time when such material was legal appears to be an example of overzealous law enforcement. Even accepting the argument that persons involved in child pornography are highly suspicious of newcomers, there is no reason why the government waited in excess of twenty-six months before soliciting the criminal act. Jacobson’s response to the first government mailing indicated that he enjoyed materials featuring preteen sex.265 The Postal Service should have immediately offered Jacobson an opportunity to purchase the pornographic materials. Instead, the government chose to continue communications with Jacobson for an additional twenty-

262. 855 F.2d 299 (6th Cir. 1988).
These factors are: (1) the need for the type of government conduct in relationship to the criminal activity; (2) the preexistence of a criminal enterprise; (3) the level of the direction or control of the criminal enterprise by the government; (4) the impact of the government activity to create the commission of the criminal activity.

*Id.* at 305.
six months before offering him an opportunity to commit the criminal act of receiving child pornography through the mail. While this type of government action may be essential in any effort to eliminate any vestiges of child pornography, the actual execution of the sting operation involved in *Jacobson* was unsavory and offensive.

Second, was there a criminal enterprise in preexistence? Clearly, Jacobson had not been involved in any preexisting criminal enterprise which would ameliorate the unsavoriness of the government's conduct in this case.

Third, what was the level of direction or control of the criminal enterprise by the government? The government controlled every aspect of the criminal enterprise in this case. The government created and disseminated the propaganda used by the fictitious organizations in an attempt to convince Jacobson that his sexual freedom and his freedom of choice had been restricted by arbitrarily imposed legislative sanctions. Additionally, any contact that Jacobson had with the child pornography market between his receipt of *Bare Boys I* and *Bare Boys II* in February of 1984 and his arrest by Postal Service inspectors in September of 1987 was, in truth, contact with the government. Thus, the government had total control over the criminal enterprise involved in this case.

Fourth, what was the impact of the government activity to create the commission of the criminal activity? The government had a tremendous impact on the commission of this crime. "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 [sic], farming his land and minding his own business." Instead, the government invested considerable time and money in encouraging Jacobson to stand up for his rights by satisfying his questionable appetite for pornographic materials which featured children engaging in sexual acts. From the surrounding circumstances of this case, it appears highly unlikely that Jacobson would have ever ordered any other child pornography after his dissatisfaction with his legal purchases of *Bare Boys I* and *Bare Boys II* without the government dangling such materials in front of him.

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266. *Johnson*, 855 F.2d at 305.
267. *Id*.
An analysis of the four factors from *United States v. Johnson*\(^{271}\) indicates that the government’s conduct may have been sufficiently offensive or egregious to shock the conscience of the Court. The combination of a sympathetic criminal defendant, outrageous investigative overkill by the government, and a scintilla of evidence of his predisposition outside of the government’s investigation may have served to exculpate Jacobson as a victim of circumstances. Balancing the fact that child pornography is such a heinous crime with the fact that it is so difficult to investigate, the Supreme Court may have desired to avoid establishing parameters of acceptable government conduct when operating undercover operations to apprehend child pornographers. By claiming to have focused on Jacobson’s lack of predisposition, the Court effectively protected Jacobson’s due process rights without impairing the government’s efforts to exterminate the child pornography market in the United States.

Consistency with the subjective theory of entrapment as previously promulgated demanded that Jacobson’s conviction be upheld and his entrapment defense denied. The Supreme Court abandoned the consistency of stare decisis in its reasoning by manipulating an “analysis” to reach its desired result. Nonetheless, while disregarding the importance of consistency with its past decisions on entrapment, the Court made the correct determination. In short, Jacobson never should have been prosecuted. He was only guilty of falling victim to “one of the most outrageous examples of government behavior”\(^{272}\) which resulted in Jacobson losing his job as a school bus driver, selling forty acres of the family farm to pay for his defense, and publicizing his previously undisclosed homosexuality. Jacobson summed up his ordeal by asking “[d]oesn’t the government realize that they can destroy a man’s life?”\(^{273}\)

### IV. PRactical Implications

While *Jacobson* specifically involved an undercover investigation into the child pornography market, its holding may impact a number of other areas of law enforcement efforts by the government. The government commonly uses undercover investigations to apprehend individuals who are illegally involved in narcotics, gambling, prostitution, and firearms.\(^{274}\) Therefore, *Jacobson* may seriously hamper

\(^{271}\) 855 F.2d 299 (6th Cir. 1988).

\(^{272}\) Marcus, *supra* note 12 (quoting Paul Marcus who is a Professor at the University of Arizona College of Law).

\(^{273}\) Johnson, *supra* note 2.

\(^{274}\) Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1093 (1951).
the government's undercover investigations of these activities.

In her dissent, Justice O'Connor predicted a number of undesirable consequences would result from this decision. First, she stated that the holding could be read as requiring the government to have sufficient evidence of a defendant's predisposition before it ever seeks to contact him.275 Essentially, an implicit endorsement of the reasonable suspicion principle articulated in the Eighth Circuit's panel opinion would narrow the government's power to initiate undercover operations. The application of this standard to investigations of child pornography would be devastating. In order for photos, films, or videos of child pornography to be created, a child must be sexually exploited. Furthermore, the psychological effects of child pornography to its young victims is more damaging than prostitution or sexual abuse because the victim must proceed through life with the haunting knowledge that the photo, film, or video has been widely distributed in this clandestine market.276 A reasonable suspicion requirement would effectively restrict the government's ability to intervene to protect children at risk. Instead, governmental intervention would have to occur after children have already been sexually molested. However, it is very doubtful that the Court would accept such an implication because the majority specifically rejected the dissent's attack and, more importantly, the Court has previously stated that preventing sexual exploitation of children is a legitimate governmental objective of "surpassing importance."277

If the reasonable suspicion standard was applied in other circumstances, it would improperly allow the federal judiciary to make unauthorized vetoes over law enforcement techniques which do not rise to the level of violating due process but that the judiciary finds disagreeable. Also, the reasonable suspicion requirement is inconsistent with Hampton. The Court wrote that due process comes into issue when the government's conduct violated "some protected right of the defendant."278 There is no constitutional right to be free of investigation.279 Therefore, there is no foundation in the Constitution for the reasonable suspicion requirement.

Second, Justice O'Connor felt that the holding of the Court would require the government to prove more to show predisposition

than it needs to prove for conviction.280 By her reading, the majority requires the government to prove that a defendant accused under 18 U.S.C. § 2252(a) of receiving child pornography through the mail knowingly violated the statute. Requiring the government to prove a defendant’s specific intent to break the law would have a chilling effect on convictions. In such a troubling area as child pornography, this potential implication is unacceptable. The Court specifically rejected this concern.281 Instead, the majority simply held that proof of prior legal conduct and certain personal inclinations was not sufficient to demonstrate that Jacobson had been predisposed to commit the crime absent the government's actions. Therefore, it is highly unlikely that this concern of the dissent will come to fruition.

By rejecting Justice O'Connor's concern about requiring proof of the defendant's specific intent to engage in the unlawful activity, the majority opened the courtroom doors to "protracted expert psychiatric testimony addressing natural criminal propensities" of the defendant.282 If a defendant, ensnared in an undercover operation which required an extended period of time for proper execution, had no prior criminal record and an outstanding reputation for being a honorable, law-abiding citizen, the defense will argue that the defendant had never harbored a criminal thought until the government implanted the criminal seed by making such an attractive inducement as to be irresistible. For example, an undercover operation is targeted at a specific individual for whom the government possesses a reasonable suspicion of wrongdoing. Instead of soliciting the criminal act from the targeted individual, an undercover agent mistakenly solicits another person who, coincidentally, bears a striking resemblance to the targeted individual. This individual commits the solicited criminal act because, as defense counsel will argue at trial, the government's solicitation of the criminal act was irresistible. To bolster the defense, expert psychiatric testimony will be elicited to support the contention that the accused had been victimized by the government's psychological warfare. Of course, the prosecution will counter with its own experts. This psychiatric jousting will lengthen trials which will further backup the already overcrowded docket of the federal courts. If the dueling ends in a draw, the majority's decision would suggest that an acquittal should be ordered by the court in this hypothetical scenario.

281. Id. at 1542 n.3.
After a number of such acquittals have been publicized, the result will be to "exacerbate public cynicism of the law."283 Jacobson can easily be read as requiring the government to avoid giving undercover operations any appearances other than of corruption and unlawfulness.284 In other words, the government should not appeal to a person's lawful instincts in attempting to induce unlawful behavior.

Jacobson can also be read to bar a conviction resulting from the government's relentless pursuit of a person who did not evince any criminal inclination at the initial contact.285 If an individual does not clearly indicate a criminal intent at the time of the person's first contact with the government's undercover investigation, the individual should be removed from the government's list of targets. By removing the non-inclined from the target list early in the investigatory process, undercover operations will be able to concentrate their efforts on those individuals that are most likely to be ensnared. Thus, smaller target lists translate into less costs to the taxpayers for each operation. Also, by concentrating its efforts, the government will increase its conviction rate and, most importantly, the convictions will be of the habitual offenders who persist in their efforts to make our streets unsafe.

The majority's specific denials of any of the implications forthcoming by Justice O'Connor's dissent, combined with the decision's inconsistency with precedent, suggests that this case may be limited to its facts.286 In the Justice Department's official reaction, Assistant Attorney General Robert S. Mueller III stated "[t]he Supreme Court decision is generally limited to the facts of the Jacobson case . . . the decision will not affect the government's sting operations . . . ."287 However, if the lower federal courts do not seek to limit Jacobson to

283. Id.
286. One court distinguished its case on the basis that Jacobson involved a sting operation in which the government made the initial contact. United States v. Payne, 962 F.2d 1228, 1232 n.2 (6th Cir. 1992). Another court distinguished its case on the basis that Jacobson involved a defendant who did not readily accept the government's solicitation of the criminal act until the government had spent more than two years pressuring the defendant to accept such a solicitation. United States v. Hart, 963 F.2d 1278, 1283 (9th Cir. 1992).
its facts, its holding could have substantial and far-reaching implications on investigatory techniques employed by the government.

CONCLUSION

In *Jacobson v. United States*, the Supreme Court reviewed the issue of entrapment for only the sixth time in its history. Additionally, *Jacobson* was only the second time the Court found that a defendant had been entrapped as a matter of law.

The decision is troubling in two respects. First, the analysis used in *Sherman v. United States*, the only other case in which the Court found entrapment as a matter of law, would suggest an outcome opposite to the Court’s final disposition of this case. Second, by manipulating its analysis to focus on the government’s conduct, the majority implicitly applied an objective test of entrapment which the Court has vehemently rejected throughout its entrapment decisions or, alternatively, the Court tacitly determined that Jacobson’s due process rights had been violated which is a concept the Court has also consistently spurned in its past decisions.

This decision will impact criminal investigations and prosecutions in a number of ways. Since the Court emphasized the offensiveness of the sting operation’s appearance of legality, undercover operations will have to carefully avoid purporting to be anything but illegal and corrupt. Additionally, by requiring proof of a defendant’s predisposition independent of evidence gathered during the government’s sting operation, the Court has narrowed the government’s ability to initiate undercover operations by, for all practical purposes, requiring the government to possess reasonable suspicion that the defendant was engaging in the illegal behavior before the defendant was actually targeted in the sting operation.

Although the defense of entrapment has been recognized by the Supreme Court for over sixty years, the doctrinal principles are still being shaped. Thus, entrapment is an area that will probably receive increasing attention in the future from the Court until entrapment’s doctrinal principles are established more definitively.

Hopefully, the future cases reviewed by the Supreme Court will be done in a manner consistent with the precedent of *Sherman* and not resemble the manipulated analysis of *Jacobson*. Without more distinctive direction from the Court, the lower federal courts will continue to struggle with constructing a discernible pattern of prece-

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dent to create uniformity in the very inconsistent doctrinal confines of entrapment.

Since Jacobson is inconsistent with the reasoning of Sherman, either the Court should overrule one of these cases or the Court should attempt to reconcile the two holdings. From the special circumstances in Jacobson, the Supreme Court should seek to reaffirm Sherman by limiting Jacobson to its facts.

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