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United States v. Jacobson: Are Child Pornography Stings, Creative Law Enforcement or Entrapment?

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CASENOTE

United States v. Jacobson: Are Child Pornography Stings Creative Law Enforcement or Entrapment?

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I. INTRODUCTION

The production, distribution, and use of sexually explicit materials involving minors¹ has become a multi-million dollar industry.²

1. This Note uses the terms "child pornography" and "sexually explicit material involving minors" interchangeably. 18 U.S.C. § 2252 (a)(1)(A) (1988) defines these terms as a "visual depiction involv[ing] the use of a minor engaging in sexually explicit conduct." Section 2256(2) states:

- (2) "sexually explicit conduct" means actual or simulated-
 - (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (B) bestiality;
 - (C) masturbation;
 - (D) sadistic or masochistic abuse; or
 - (E) lascivious exhibition of the genitals or pubic area of any person.

See also HOWARD A. DAVIDSON & GREGORY A. LOKEN, CHILD PORNOGRAPHY AND PROSTITUTION: BACKGROUND AND LEGAL ANALYSIS 1 (1987) ("In simple terms, child pornography is the permanent record of the sexual exploitation and abuse of a child.")

2. See ANN W. BURGESS, CHILD PORNOGRAPHY AND SEX RINGS 8 (1984). Quantifying the amount of sexually explicit material in circulation or the number of children used in producing these materials is difficult, if not impossible, because of the clandestine nature of their production and distribution. *Id.*; see also DAVIDSON & LOKEN, *supra* note 1, at 1 ("In 1977 there were at least 260 different monthly magazines published in the United States, with such names as *Torrid Tots*, *Night Boys*, *Lolita*, *Boys Who Love Boys*, and *Children Love*."). A

Although contradictory data exist on whether viewing "pornographic"³ material causes sexual aggression,⁴ pedophiles⁵ generally collect child pornography.⁶ Regardless of whether viewing sexually explicit material leads to sexual offenses against minors, producing these materials victimizes children.⁷ In addition to the physical, psychological, and emotional harm caused to those depicted, some pedophiles use these "permanent records" of abuse as part of a scheme to lure other children.⁸

The use of children to create pornography has stirred feelings of indignation and concern nationwide and has led to a vehement assault on the problem through innovative law enforcement techniques.⁹

1986 Senate Report concluded that child pornography enterprises grossed several million dollars per year. *Id.*; see also Child Protection Act of 1984, Pub. L. No. 98-292, § 2, 98 Stat. 204 (codified at 18 U.S.C. § 2251-2254 (1988)).

3. Pornography has not been legally defined. See *Miller v. California*, 413 U.S. 15, 22 (1973) ("[N]o majority of the Court has at any time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power.").

4. See U.S. COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27 (1970) ("In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults."). But see *Effect of Pornography on Women and Children: Hearings Before the Subcomm. on Juvenile Justice of the Senate Judiciary Comm.*, 98th Cong., 2d Sess. 17 (1984) [hereinafter *Effect of Pornography*]; see also ATTORNEY GEN.'S COMM'N ON PORNOGRAPHY: FINAL REPORT 938 (1986) [hereinafter ATTORNEY GEN.'S REPORT].

5. A pedophile is a person who prefers children as sexual partners over adults. See KENNETH LANNING, *Situational and Preferential Sex Offenders*, in SEXUAL EXPLOITATION OF THE CHILD 30 (Thomas M. Frost & Magnus J. Seng eds., 1986). Lanning distinguishes between the situational pedophile, who uses a child for sexual gratification simply because the child happens to be available, and the preferential pedophile who prefers children even though he has adult options. *Id.* at 28. See also ATTORNEY GEN.'S REPORT, *supra* note 4, at 609.

6. See DANIEL S. CAMPAGNA & DONALD L. POFFENBERGER, THE SEXUAL TRAFFICKING IN CHILDREN: AN INVESTIGATION OF THE CHILD SEX TRADE 30 (1987); see also *Effect of Pornography*, *supra* note 4, at 35.

7. In *New York v. Ferber*, Justice White wrote:

[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children [T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.

458 U.S. 747, 758-59 (1982) (emphasis added); see also Child Protection Act of 1984, *supra* note 2 ("Thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials."); *Effect of Pornography*, *supra* note 4, at 39 ("The only way you can produce child pornography is to sexually molest a child.").

8. Pedophiles use child and adult pornography to lower a victim's inhibitions by presenting the desired activity as the norm. See ATTORNEY GEN.'S REPORT, *supra* note 4, at 411; see also *Effect of Pornography*, *supra* note 4, at 32-33.

9. See *infra* notes 85-139 and accompanying text.

Because both the production¹⁰ and distribution of sexually explicit materials involving minors are difficult to detect and prevent through conventional means,¹¹ law enforcement officials have resorted to undercover operations to apprehend purchasers of child pornography.¹² Recently, the government has focused its efforts on enforcing federal laws prohibiting the sale and receipt of sexually explicit materials involving minors through the mail.¹³ In these operations, the government's focus has been on purchasers, rather than on producers.¹⁴

To identify purchasers, the government has set up mock organizations which target certain "predisposed"¹⁵ individuals and solicit orders for child pornography. While these elaborate and deceptive undercover operations have resulted in numerous convictions,¹⁶ they raise serious concerns about entrapment and protection of individual due process rights.

This Note explores the legal ramifications of undercover child pornography "sting" operations by analyzing the recent decision of the Court of Appeals for the Eighth Circuit in *United States v. Jacobson*.¹⁷ The Postal Inspection Service targeted Keith Jacobson as a potential customer of child pornography when police searched the Electric Moon, a reputed California "pornography bookstore," and discovered his name on a mailing list.¹⁸ Jacobson's name appeared on the mailing list because he had previously ordered two magazines from the Electric Moon featuring nude adolescent boys and a brochure listing stores in the United States and Europe that carried

10. See *Effect of Pornography*, *supra* note 4, at 32; see also ATTORNEY GEN.'S REPORT, *supra* note 4, at 406 ("[A] large amount of child pornography is "homemade" for private use or barter with other pedophiles, making the amount of child pornography actually produced difficult to determine.").

11. See GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 74 (1988).

12. See ATTORNEY GEN.'S REPORT, *supra* note 4, at 413.

13. See *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990), *cert. granted in part*, 111 S. Ct. 1618 (1991); *United States v. Mitchell*, 915 F.2d 521 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1686 (1991); *United States v. Musslyn*, 865 F.2d 945 (8th Cir. 1989); *United States v. Thoma*, 726 F.2d 1191 (7th Cir. 1984), *cert. denied*, 467 U.S. 1228 (1984). See also Bob Cohn, *A Fresh Assault on an Ugly Crime*, NEWSWEEK, Mar. 14, 1988, at 64.

14. See JOHN RUBERTI, *Child Pornography and Pornographers*, in SEXUAL EXPLOITATION OF THE CHILD, *supra* note 5, at 12; see also Mike Brown, *Government Sting Worked; Critics Charge Entrapment*, LOUISVILLE, KY. COURIER-J., Oct. 19, 1987, at 7; Ken Myers, *'Sting' Nets 15 Child-Pornography Recipients*, NAT'L L.J., Sept. 8, 1986, at 28; Susan Kuczka, *Government Details Child-Porn Crackdown*, L.A. DAILY J., Aug. 31, 1984, at 3.

15. See *infra* notes 168-90 and accompanying text.

16. See *infra* notes 85-167 and accompanying text.

17. 916 F.2d 467 (8th Cir. 1990), *cert. granted in part*, 111 S. Ct. 1618 (1991).

18. *Id.* at 468.

sexually explicit materials.¹⁹ None of the materials were illegal.²⁰

Posing as hedonist organizations advocating sexual freedom,²¹ the Postal Inspection Service sent Jacobson a sexual attitude questionnaire and a membership application, which he completed and mailed in with his membership fee.²² Although Postal Inspection Service regulations for undercover operations require that an individual's name appear on at least two independent sources²³ before the individual is sent a sexual attitude survey, Jacobson's name had been found on only one source, the Electric Moon's mailing list.²⁴ Nevertheless, Jacobson was the target of five undercover sting operations.²⁵

Jacobson's responses to the sexual attitude questionnaire revealed his "preference for preteen sex."²⁶ The Postal Service then mailed him another survey (to which he responded "positively"²⁷), and a list of "pen pals" who shared his sexual interests.²⁸ Jacobson began corresponding with one of these pen pals, an undercover postal inspector.²⁹ Over a period of twenty-seven months, Jacobson received "two sexual attitude surveys, seven letters measuring his appetite for child pornography, and two sex catalogues."³⁰ The fictitious organizations assured him the mailings were completely legal.³¹ He responded on eight occasions and finally requested *Boys Who Love Boys* from a Postal Service catalogue and a set of sexually explicit photographs of young boys from a Customs Service brochure.³² After a controlled delivery of the magazine,³³ the Postal Service searched

19. *Id.*

20. *Id.* at 471 (Lay, C.J., dissenting).

21. *Id.*

22. *Id.* at 468.

23. *Id.* at 473 (Heaney, J., dissenting). The sources were to include:

mailing lists seized by postal inspectors in separate child pornography investigations; incoming child pornography seized by the United States Customs Service; programs conducted by the FBI; investigations of mail order dealers of child pornography conducted by metropolitan police departments and state police agencies; or Postal Inspection Service regional testing programs.

Id. (citations omitted).

24. *Id.* at 472.

25. *Id.* at 471.

26. *Id.* at 468.

27. Jacobson's response to the survey was: "Please feel free to send me more information. I am interested in teenage sexuality." *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 476 (Heaney, J., dissenting).

32. *Id.* at 468.

33. During a controlled delivery, after a suspect picks up the "contraband" from his post office box, postal inspectors follow him and search his home pursuant to a previously issued warrant. *See, e.g., United States v. Mitchell*, 915 F.2d 521, 523-24 (9th Cir. 1990).

Jacobson's home, where they found the illicit magazine and arrested him for receiving it through the mail in violation of federal law.³⁴

At trial, Jacobson raised two defenses. First, he argued that he had been entrapped as a matter of law, but the court found sufficient evidence of predisposition to submit the issue to the jury.³⁵ Second, he asserted that the government's conduct was outrageous, thus violating his due process rights.³⁶ The jury rejected his defenses and found him guilty of knowingly receiving through the mail sexually explicit material depicting a minor.³⁷ He appealed his conviction to the Eighth Circuit. A panel of the Eighth Circuit heard the initial appeal and reversed the trial court, holding that the government must have a reasonable suspicion of wrongdoing before targeting an individual.³⁸ The Eighth Circuit then heard the case en banc and affirmed the trial court, holding that the government's actions did not constitute entrapment or outrageous governmental conduct, despite the government's lack of a reasonable suspicion to target Jacobson as a predisposed consumer.³⁹

This Note argues that governmental sting operations used to target and arrest purchasers of child pornography must be subject to stricter procedures to preserve individual rights. Current entrapment and due process analyses do not properly scrutinize the government's conduct in undercover child pornography operations. Courts should require governmental agents to have at least a reasonable suspicion before they target an individual in a child pornography sting operation.

Part II presents the entrapment and due process defenses, and shows how federal courts have applied both. By allowing the government to bar either defense by proving the defendant's predisposition,

34. *Jacobson*, 916 F.2d at 468. Jacobson never received the photographs. *Id.*

35. *Id.* at 470.

36. *Id.* at 469.

37. 18 U.S.C. § 2252 (a)(2) (1988) states:

(a) Any person who—

(2) knowingly receives or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce 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;

.....

Id. at 468.

38. *United States v. Jacobson*, 893 F.2d 999, 1001 (8th Cir. 1990), *vacated*, 899 F.2d 1549 (8th Cir. 1990).

39. *Jacobson*, 916 F.2d at 467 (8th Cir. 1990), *cert. granted in part*, 111 S. Ct. 1618 (1990).

courts have effectively merged the two defenses, leaving a "predisposed" defendant without a legal defense. Part III analyzes *United States v. Jacobson*,⁴⁰ illustrating the Eighth Circuit's rejection of the due process and entrapment defenses. Part IV criticizes the Eighth Circuit's willingness to allow the government to prove a defendant's predisposition to purchase child pornography through the mail by simply showing that the defendant did so at the government's behest because it erodes the prosecution's standard of proof. Part V concludes that the government must conduct child pornography sting operations within specific guidelines. The egregious nature of child pornography should not change the balance between law enforcement and individual rights.

II. PERSPECTIVE

A. *The Entrapment Defense*

Entrapment is the "conception and planning of an offense by [a law enforcement] 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."⁴¹ The United States Supreme Court first recognized the defense of entrapment in *Sorrells v. United States*.⁴² The government indicted Sorrells for possessing and selling whiskey to a prohibition agent in violation of the National Prohibition Act.⁴³ In accepting Sorrells' entrapment defense on public policy grounds, the Court stated: "When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor."⁴⁴

Justice Roberts' concurrence in *Sorrells* marked the beginning of an alternative analysis in entrapment cases. Roberts believed the Court's inquiry should focus on the government's conduct, while the majority believed it should focus on the defendant's predisposition to commit the charged offense.⁴⁵ Commentators refer to Roberts' view as the "objective theory" of entrapment and to the majority's

40. *Id.*

41. *Sorrells v. United States*, 287 U.S. 435, 454 (1932) (Roberts, J., concurring).

42. *Id.* at 443.

43. *Id.* at 438. Sorrells refused to sell the agent whiskey two times. After exchanging war stories for a while, he finally acquiesced. *Id.*

44. *Id.* at 445 (quoting *Newman v. United States*, 299 F. 128, 131 (4th Cir. 1924)).

45. See *United States v. Russell*, 411 U.S. 423, 429 (1973) (discussing Justice Roberts' concurrence in *Sorrells v. United States*, 287 U.S. 435, 453 (1932)).

approach as the "subjective theory."⁴⁶ These analytical approaches reflect different conceptions about the underlying purpose served by the entrapment defense. The subjective theory, which continues to be the majority view in the Supreme Court, precludes a finding of entrapment once the government establishes the defendant's predisposition to commit the charged offense. Conversely, the objective view allows a finding of entrapment—despite the defendant's predisposition—if the government's conduct in procuring the arrest exceeds tolerable limits.⁴⁷ Subsequent decisions reveal the tension created by these differing approaches to entrapment analysis.

The Court implicitly reaffirmed *Sorrells*⁴⁸ in *Sherman v. United States*.⁴⁹ In *Sherman*, the defendant met a government informant at a doctor's office where both were undergoing drug addiction therapy.⁵⁰ After several casual meetings, the informant requested that Sherman supply him with narcotics because he was not responding to treatment.⁵¹ Although the defendant refused these requests several times, he eventually sold drugs to the informant and was prosecuted for the offense.⁵²

The Court reversed Sherman's conviction and rejected the government's argument that the defendant was predisposed to commit the offense. It approached the case using the subjective theory, focusing on the defendant's predisposition, rather than the government's conduct. First, it noted that the police failed to find any narcotics while searching the defendant's apartment.⁵³ Thus, the government lacked evidence of Sherman's drug use independent of those incidents involving the informant. Second, the government introduced no evidence that the defendant was in the narcotics trade or that he had made a profit from the drug sales to the government informant.⁵⁴ Finally, the Court held that the defendant's prior convictions for the sale and possession of narcotics were not probative of a willingness to sell narcotics at the time of the incident in question.⁵⁵ The Court,

46. See Edward G. Mascolo, *Due Process, Fundamental Fairness, and Conduct that Shocks the Conscience: The Right Not to Be Enticed or Induced to Crime By Government and Its Agents*, 7 W. NEW ENG. L. REV. 1, 4 (1984).

47. The objective approach set out in Justice Roberts' concurrence seems to be a precursor to the due process defense the Supreme Court later recognized in *Russell*.

48. See *United States v. Russell*, 411 U.S. 423, 433-35 (1973) (discussing *Sherman's* impact on *Sorrells*).

49. 356 U.S. 369 (1958).

50. *Id.* at 371.

51. *Id.*

52. *Id.*

53. *Id.* at 375.

54. *Id.*

55. *Id.*

however, did not ignore the objective theory altogether. It described the government's conduct as "evil" because it enticed someone avoiding drugs not only to sell, but also to use them.⁵⁶

In his concurring opinion, Justice Frankfurter argued that the court should exercise its supervisory jurisdiction when police conduct "falls below standards, to which common feelings respond, for the proper use of governmental power."⁵⁷ Justice Frankfurter contended that the defendant's predisposition was irrelevant because the underlying reason for the entrapment defense was to prevent the police from ensnaring individuals into criminal activity regardless of their past history.⁵⁸ Justice Frankfurter's concurrence in *Sherman* parallels Justice Roberts' concurrence in *Sorrells*, and both have served as harbingers for the idea that certain law enforcement techniques violate deeply rooted expectations about appropriate government conduct.⁵⁹ Although the Court rejected the objective theory of entrapment in *Sherman*, it later recognized the theory's underlying purpose in the due process defense.

B. *The Due Process Defense*

The Supreme Court first recognized the due process defense, in dicta, in *United States v. Russell*.⁶⁰ Russell was indicted for manufacturing, selling, and delivering methamphetamine in violation of federal law after a government agent supplied him with an essential, but otherwise available, ingredient.⁶¹ Although the Supreme Court reversed the Ninth Circuit and rejected Russell's entrapment defense, it acknowledged that a violation of due process would be a valid defense in certain situations: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed."⁶²

The Court justified its rejection of the due process defense in *Russell* by stating that infiltrating drug rings was often "the only prac-

56. *Id.* at 376.

57. *Id.* at 382 (Frankfurter, J., concurring).

58. *Id.* at 382-83.

59. See Mascolo, *supra* note 44, at 17-18.

60. 411 U.S. 423 (1973); see also Jill Burtram, Note, *The Failure of the Due Process Defense in United States v. Gamble*, 63 DENV. U.L. REV. 327, 3039 (1986) (tracing the development of the due process defense).

61. *Russell*, 411 U.S. at 424.

62. *Id.* at 431-32 (citation omitted).

licable means of detection.”⁶³ The Court concluded that the government’s limited participation did not violate the Due Process Clause.⁶⁴ The Court, however, failed to define the level of governmental participation in a crime or the type of governmental conduct that would violate the defendant’s due process rights.⁶⁵

When confronted with the opportunity to delineate the contours of the due process defense, the Court severely restricted it. In *Hampton v. United States*,⁶⁶ a plurality of the Court in effect collapsed the due process and entrapment defenses into one by allowing proof of the defendant’s predisposition to preclude both defenses. *Hampton* involved a “full-circle” sale: government agents supplied the narcotics and resold them to government agents, with the defendant acting solely as a middleman.⁶⁷ Rather than focusing on the government’s conduct, the plurality concluded that Hampton’s predisposition barred both his entrapment and due process defenses.⁶⁸ In response to Hampton’s entrapment defense, the Court stated that “[t]he remedy of the criminal defendant with respect to the acts of Government agents . . . lies solely in the defense of entrapment.”⁶⁹ However, the Court found that Hampton’s predisposition effectively precluded his entrapment defense.⁷⁰

Justice Rehnquist’s plurality opinion⁷¹ in *Hampton* limited the due process defense to situations where the government’s activity violates one of the defendant’s protected rights.⁷² However, no existing right ensures complete freedom from governmental deception or investigation. Thus, Rehnquist’s body of “protected rights” may in effect be a very small, if not an empty, set of rights.⁷³ The Court reasoned that if the police engage in illegal activity which does not violate the defendant’s “protected rights,” the remedy lies in prose-

63. *Id.* at 432.

64. *Id.*

65. *Id.*; see also Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 185 (1976) (“The *Russell* opinion did not describe the types of instigation which might be prohibited by due process.”).

66. 425 U.S. 484 (1976).

67. *Id.* at 485-86.

68. *Id.* at 489-90.

69. *Id.* at 490.

70. *Id.*

71. Chief Justice Burger and Justice White joined in Justice Rehnquist’s opinion. Justices Powell and Blackmun concurred in the result. Justices Brennan, Stewart, and Marshall dissented, and Justice Stevens took no part in the decision. *Id.* at 484.

72. *Id.* at 490.

73. See Mascolo, *supra* note 46, at 34 (arguing that the position of the *Hampton* plurality is unrealistic because “it is difficult to conceive of police conduct that would directly infringe upon a *separate* protected right of one predisposed to the commission of the very offense of which he is charged.”).

cutting the police, not in barring the defendant's conviction.⁷⁴ Therefore, according to the plurality, a predisposed defendant can raise neither an entrapment nor a due process defense.⁷⁵

The concurring opinion⁷⁶ questioned the plurality's adoption of a per se rule prohibiting a predisposed defendant from raising a due process defense, regardless of the outrageousness of the government's conduct.⁷⁷ According to the concurrence, *Russell* did not foreclose the possibility that circumstances might arise where the Court could rely on due process principles or its supervisory power to bar conviction of a predisposed defendant.⁷⁸

The *Hampton* dissent argued that even under the subjective approach to the entrapment defense, the Court should reverse Hampton's conviction.⁷⁹ It distinguished *Russell* from *Hampton* on two grounds. First, in *Russell*, the government had not actually supplied the contraband itself, but only a legal ingredient necessary to produce the illegal drug.⁸⁰ Second, the defendant in *Russell* was engaged in an ongoing enterprise, which continued beyond the government agent's participation.⁸¹ The dissent thus believed that the government was not actually promoting a law enforcement interest in *Hampton* because its method did not discover ongoing drug traffic.⁸² Rather, the government created the defendant's criminal behavior by deliberately enticing him to commit a crime and then convicting him for the offense.⁸³ According to the dissent, "that the accused is 'predisposed' cannot possibly justify the action of government officials in purposefully creating the crime."⁸⁴

74. Compare *Hampton v. United States*, 425 U.S. 484, 490 (1976) (remedy for illegal police activity is prosecution of the police, not freeing the defendant) with *Weeks v. United States*, 232 U.S. 383, 393-96 (1914) and *Mapp v. Ohio*, 367 U.S. 643, 657-60 (1961) (exclusionary rule is the only effective deterrent to governmental violations of protected rights).

75. The current Supreme Court has not spoken on the availability of the due process defense to a predisposed defendant.

76. 425 U.S. at 491 (Powell & Blackmun, JJ., concurring).

77. *Id.* at 492.

78. *Id.* at 493-95. "Disposition of those claims [in *Russell* and earlier entrapment cases] did not require the Court to consider whether overinvolvement of Government agents in contraband offenses could ever reach such proportions as to bar conviction of a predisposed defendant as a matter of due process." *Id.* at 493.

79. *Id.* at 496 (Brennan, Stewart, & Marshall, JJ., dissenting).

80. *Id.* at 497-98.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* Brennan proposed that an alternative inquiry in entrapment analysis might be whether the defendant would have obtained the contraband from a source other than the government. The jury charge in entrapment cases would include this question. Once the

C. Federal Court Decisions on Child Pornography Stings

The clandestine and pervasive nature of the child pornography industry as well as the devastating effects on the children exploited⁸⁵ may require the use of undercover operations to apprehend purchasers. The government often uses reverse stings involving the sale of child pornography.⁸⁶ Because the government not only supplies, but also markets the contraband, these operations raise classic entrapment issues. Yet, the very nature of the commodity being sold and the highly emotional issues it raises make objective evaluation of the government's conduct difficult.

Perhaps to further a political agenda, federal courts have consistently sided with the government in cases challenging the validity of child pornography sting operations.⁸⁷ In fact, no child pornography sting operation has ever been challenged successfully in a federal court.⁸⁸ While it is true that the clandestine nature of the child pornography industry may require increased governmental efforts to apprehend offenders, current cases have allowed the government too much latitude in child pornography stings.

In *United States v. Thoma*,⁸⁹ for example, the government indicted the defendant for mailing a videotape consisting of children engaged in sexually explicit conduct to undercover postal service agents.⁹⁰ Calling themselves the "Crusaders for Sexual Freedom" ("CSF"),⁹¹ postal investigators targeted Thoma after receiving information that he was "purchasing pedophilia through the mail and might be involved in producing pedophilia."⁹² Concluding that this information provided the government a good faith basis to investigate Thoma, it solicited information from him.⁹³ Thoma initially refused

accused offered evidence that the government supplied the contraband, the prosecution would bear the burden of proving beyond a reasonable doubt either (1) that the government was not the supplier or (2) that the defendant would have obtained the contraband elsewhere. *Id.*

85. See *supra* notes 1-8 and accompanying text.

86. See *infra* notes 89-167 and accompanying text.

87. See *infra* notes 89-167 and accompanying text.

88. See Appellee's Brief at 10, *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990) (No. 88-2097NE), *cert. granted in part*, 111 S. Ct. 1618 (1991) ("[E]very occasion in which a Court of Appeals has been called upon to assess the conduct of government agents involved in undercover operations that were virtually identical to the operation utilized in the present case, those courts have held that the operations did not constitute outrageous government conduct.").

89. 726 F.2d 1191 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984).

90. *Id.* at 1193.

91. *Id.* at 1194.

92. *Id.* The defendant also had a prior arrest on child pornography charges. *Id.* at 1195.

93. "[B]ased upon the information [Postal Inspector] Ruberti received about defendant's activities the Government had a good faith basis for investigating defendant." *Id.* at 1198.

to respond to the government's solicitations,⁹⁴ but he later responded to more than thirty advertisements in the CSF newsletter and sold videos by mail to several postal inspectors.⁹⁵

Thoma raised the defenses of entrapment and of outrageous government conduct—the due process defense—at trial and on appeal.⁹⁶ The court found that Thoma was predisposed and rejected his entrapment argument.⁹⁷ In its analysis, the court applied the following factors to determine predisposition:

- (1) the character or reputation of the defendant;
- (2) whether the suggestion of criminal activity was originally made by the Government;
- (3) whether the defendant was engaged in criminal activity for a profit;
- (4) whether the defendant evidenced reluctance to commit the offense, overcome by Government persuasion;
- (5) the nature of the inducement or persuasion offered by the Government.⁹⁸

The court viewed the defendant's reluctance to commit the offense as the most important factor.⁹⁹

The court also rejected Thoma's alternative argument that the outrageousness of the government's conduct in using the CSF cover violated his due process rights.¹⁰⁰ In doing so, the court contrasted Thoma's situation, in which the government merely purchased contraband from a willing seller, with a case in which the government actively supplied or produced contraband.¹⁰¹ Because Thoma mailed the illicit videos to the undercover investigators and the government did not supply him with any of the obscene materials, the court concluded that the government's inducement did not amount to misconduct. Thus, it distinguished sting operations from reverse sting operations,¹⁰² finding the latter entailed more egregious governmental conduct.

Contra United States v. Jacobson, 916 F.2d 467, 474 (1990) (Heaney, J., dissenting) (dismissing as dicta the *Thoma* court's statement that a good-faith basis prior to investigation is not a constitutional prerequisite), *cert. granted in part*, 111 S. Ct. 1618 (1991).

94. *Thoma*, 726 F.2d at 1194. A postal investigator sent Thoma a sexual attitude survey, which he tore up. Police found the torn pieces in Thoma's garbage while conducting a "trash cover" of his residence. Thoma also failed to respond to a pamphlet containing "questions from fictitious members, responses from the editorial staff, and ninety advertisements that covered a wide variety of sexual tastes." *Id.* Postal Inspector John Ruberti authored all the material that Thoma received. *Id.*

95. *Id.* at 1195.

96. *Id.* at 1193, 1196-97.

97. *Id.* at 1197.

98. *Id.* (citing United States v. Kaminski, 703 F.2d 1004, 1008 (7th Cir. 1983)).

99. *Id.*

100. *Id.* at 1199.

101. *Id.*

102. A sting operation involves the government's purchase of contraband from a seller

Mirroring the *Hampton* plurality, the *Thoma* court effectively collapsed the due process and entrapment defenses by making predisposition the litmus test for both defenses. It stated, "When a defendant is predisposed to commit the offense due process cannot be violated by Government inducement; to hold otherwise would be to allow a predisposed defendant to raise the functional equivalent of an entrapment defense."¹⁰³ Consequently, a predisposed defendant can raise neither an entrapment nor a due process defense against the government's conduct in a reverse child pornography sting.

In *United States v. Johnson*,¹⁰⁴ the Court of Appeals for the Sixth Circuit rejected the defendant's entrapment and due process defenses and upheld his conviction for sending and receiving child pornography through the mail.¹⁰⁵ Johnson, a confessed pedophile,¹⁰⁶ had mailed and received orders for child pornography for ten years.¹⁰⁷ Postal inspectors began investigating Johnson when he responded to a mock advertisement the government had placed in *Screw Magazine*.¹⁰⁸

The court rejected Johnson's entrapment defense, concluding that the prosecution had ample evidence to prove Johnson's predisposition beyond a reasonable doubt.¹⁰⁹ Because Johnson took the initiative in soliciting pornographic material from the government, the court did not believe the government had "seduced [Johnson] to criminal activity."¹¹⁰ In fact, the court concluded that "Johnson's predisposition to enlarge his collection at any cost developed long before his correspondence with postal inspectors."¹¹¹

Johnson's due process defense also failed. The court listed four

whom it later prosecutes for the offense. A reverse sting operation involves the government's sale of contraband to a buyer whom it later prosecutes for the offense.

103. *Thoma*, 726 F.2d at 1199.

104. 855 F.2d 299 (6th Cir. 1988).

105. *Id.* at 304-05.

106. *Id.* at 300.

107. *Id.* at 303-04. Although the United States Customs Bureau confiscated one of his overseas orders, Johnson remained undeterred. *Id.* at 304. Johnson's collection of pedophilic materials included "100 magazines, 58 books and booklets, 13 reels of film, and numerous drawings. The collection also included advertising brochures that contained sexually explicit photographs of children." *Id.* at 300.

108. *Id.* at 304. Johnson's letter responding to the ad stated:

I am interested in family fun and *young* girls. I will buy 8mm films, magazines and photo sets, (Hard core only). I am over the age of 21, and I am not affiliated with or acting for any censorship or law enforcement agency. All material is intended for my personal use.

Id. at 300.

109. *Id.* at 303.

110. *Id.* at 304.

111. *Id.*

factors for determining whether police activity impinged on due process protections: "(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; [and] (4) the impact of the governmental activity to create the commission of the criminal activity."¹¹²

Applying these factors, the court concluded that the government's conduct was not so outrageous as to violate the defendant's due process rights.¹¹³ First, the court found that the clandestine nature of the child pornography industry justified the government's solicitations through magazine ads.¹¹⁴ Second, the evidence suggested that Johnson had collected child pornography long before the government solicited his order.¹¹⁵ Third, the court believed that the postal inspectors exercised no control over Johnson's alleged criminal activity nor did the postal inspectors' tactics "disproportionately increase" the transmission of child pornography through the mail.¹¹⁶ Finally, the court relied on Johnson's initiative in responding to the advertisement.¹¹⁷ Although the Sixth Circuit's application does not explicitly collapse the due process defense into the entrapment defense, the second factor it considered in rejecting Johnson's due process defense—Johnson's previous involvement with child pornography—incorporates predisposition into the due process analysis.

The Eighth Circuit first addressed the issue of the use of reverse sting operations in child pornography investigations in *United States v. Musslyn*,¹¹⁸ a case in which the defendant asserted only a due process defense. In 1982, the government "identified [Musslyn] as a person who had an interest in child pornography" and targeted him for investigation. The Postal Inspection Service sent Musslyn a CSF membership application. He completed the application revealing his interest in sexually explicit material involving preteen children.¹¹⁹ After requesting CSF's current issue, Musslyn corresponded with a postal inspector and finally met her at a bar in Kansas City, where he reiterated his interest in child pornography.¹²⁰ In 1985, the "American Hedonist Society," another postal undercover operation, targeted

112. *Id.* at 305 (citing *United States v. Robinson*, 763 F.2d 778, 785 (6th Cir. 1985)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 865 F.2d 945 (8th Cir. 1989).

119. *Id.* at 946.

120. *Id.*

Musslyn.¹²¹ He remitted their membership application as well.¹²² And in 1987, "Operation Borderline" sent Musslyn a brochure offering sexually explicit photographs of children because of his history of correspondence with the Postal Inspection Service and a 1986 conviction for child sexual abuse.¹²³ Musslyn eventually ordered four packets of sexually explicit photographs of minors.¹²⁴

At trial and on appeal, Musslyn contended that the government's involvement in this reverse sting operation was "so overreaching and outrageous as to bar prosecution as a matter of due process of law."¹²⁵ Nonetheless, the court rejected this defense on the very same ground that would have precluded an entrapment defense: predisposition. "The outrageous government conduct defense is not available to Musslyn because he was clearly predisposed to order child pornography and the government agents involved only acted in concert with Musslyn's illegal request."¹²⁶ The court further emphasized—as the *Johnson* court had—that the nature of the child pornography industry justified the government's undercover tactics.

Thus, applying the Supreme Court's reasoning in *Hampton v. United States*,¹²⁷ the Eighth Circuit effectively reduced the government's requisite showing for a conviction. In order to defeat both the entrapment and outrageous government conduct defenses, the government need only prove predisposition. Therefore, at least in child pornography cases, the Eighth Circuit has made the government's nature and burden of proof for both the defenses of entrapment and outrageous government conduct the same.

The latest decision of the Court of Appeals for the Ninth Circuit upholding child pornography stings parallels the Eighth Circuit's reasoning in *Musslyn*. In *United States v. Mitchell*,¹²⁸ postal inspectors found the defendant's name on a confiscated mailing list of a company¹²⁹ from which he had previously purchased a sexually explicit

121. *Id.*

122. *Id.*

123. *Id.* In 1986, Musslyn pled guilty to charges of child sexual abuse. *Id.*

124. *Id.*

125. *Id.* at 946.

126. *Id.*

127. 425 U.S. 484 (1976).

128. 915 F.2d 521 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1686 (1991). *Mitchell* was decided on October 1, 1990; *Jacobson* was decided on October 15, 1990. See *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990), *cert. granted in part*, 111 S. Ct. 1618 (1991).

129. *Mitchell*'s name appeared on Catherine Stubblefield Wilson's mailing list. Wilson allegedly controlled 80% of the child pornography market in the United States. Her mailing list, which consisted of thousands of names, was circulated to postal inspectors throughout the United States and became a source for potential "targets." *Id.* at 525 n.5.

magazine depicting minors.¹³⁰ Using this information, they sent him a four page application for membership in "Love Land," an organization purportedly espousing the "right to seek pleasure without the restrictions . . . [of] an outdated puritan morality."¹³¹ "Love Land" assured Mitchell that it could provide pornographic material to him "without [the] prying eyes of United States Customs seizing [his] mail."¹³² The defendant then requested more information, and postal inspectors sent him a catalog offering a variety of explicit materials.¹³³ When Mitchell picked up his order for *Torrid Tots*, postal inspectors followed him, searched his home and arrested him.¹³⁴

Before trial, Mitchell moved to dismiss his indictment on the grounds that the government's outrageous conduct violated his due process rights.¹³⁵ The district court denied the motion, finding Mitchell predisposed to commit the offense and the government's conduct not outrageous.¹³⁶ After entering a conditional guilty plea, Mitchell appealed.¹³⁷ The Ninth Circuit affirmed, reasoning that Mitchell's purchase was voluntary and had not involved governmental "prodding."¹³⁸ The court did acknowledge a high level of governmental

130. Mitchell ordered *Skoleborn School Children*, an illegal Swedish child pornography magazine, from Wilson. *Id.* at 525.

131. *Id.* at 522-23. The application surveyed applicants' views on a number of sexual and non-sexual activities. *Id.* The court described the application as follows:

The application had ten parts. Several of the parts required applicants to express their attitudes toward a broad spectrum of sexual and non-sexual activities. Part "D" required applicants to indicate whether they were in favor of, undecided about, or opposed to, activities alphabetically ranging from "animal training" to "water sports." Part "E" required applicants to indicate the degree of enjoyment (on a 4-point scale, with 1 being the highest) they received from fifteen types of sexually oriented materials including those presenting "pin-ups," "swingers" clubs, heterosexual activity, and homosexual activity. Part "F" asked applicants to reveal their attitudes (on a 3-point scale) about sexually explicit materials, sexual freedom in all activities, and sexual freedom for all consenting persons without any age restrictions. Part "G" asked applicants to indicate whether they enjoyed hobbies such as painting, music, and photography. Part "H" asked applicants to indicate their age at the time of their first sexual experience and to indicate what they considered to be the best age for a first sexual experience. Finally, the application said, in all capital letters, "I understand that the information which I have produced shall be held in strict confidence by the society and that all information received by me from the society shall be held in strict confidence by me."

Id. at 523.

132. *Id.* at 523.

133. *Id.*

134. *Id.* at 523-24.

135. *Id.* at 522.

136. *Id.*

137. *Id.*

138. *Id.* at 526. The court distinguished *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), which held that the pressure government agents applied to "prod" the defendants into

involvement in the operation, but the dispositive factor was whether the defendant had purchased the contraband "willingly and without pressure."¹³⁹

III. *UNITED STATES V. JACOBSON*: THE EIGHTH CIRCUIT REDEFINES PREDISPOSITION AND REJECTS THE DEFENDANT'S ENTRAPMENT AND DUE PROCESS DEFENSES

In *United States v. Jacobson*,¹⁴⁰ the Court of Appeals for the Eighth Circuit held that the Postal Service's use of mock organizations to target an individual and solicit mail orders for child pornography did not violate due process, despite the government's lack of a reasonable suspicion that the individual was receiving child pornography through the mail.¹⁴¹ The court dismissed the requirement of reasonable suspicion, stating that the "Constitution does not require reasonable suspicion of wrongdoing before the government can begin an undercover investigation."¹⁴²

Jacobson appealed his conviction on two grounds.¹⁴³ First, he argued the government entrapped him as a matter of law because the postal inspectors devised the criminal plan, "implanted the disposition to purchase child pornography into Jacobson's otherwise innocent mind,"¹⁴⁴ and because Jacobson ordered the illegal magazine at their insistence.¹⁴⁵ Viewing the evidence most favorably to the government, the court refused to dismiss the action on the basis of entrapment as a matter of law. It reasoned that "this is not a case in which the government was a manufacturer rather than a detector of

illicit activity could only be construed as a "veiled threat" where the government acted as a criminal "syndicate" in the defendants' eyes. *Id.*

139. *Id.*

140. 916 F.2d 467 (8th Cir. 1990), *cert. granted in part*, 111 S. Ct. 1618 (1991).

141. *Id.* at 469.

142. *Id.*

143. Jacobson raised two defenses at trial: entrapment and outrageous government conduct. On appeal, he argued that the government should not have targeted him as a potential consumer because they lacked a reasonable suspicion that he was predisposed to criminal activity. *Id.* at 468. The court disposed of this contention, stating that "Jacobson has no constitutional right to be free of investigation." *Id.* at 469.

Jacobson also drew an unsuccessful analogy between child pornography undercover operations and investigatory detentions (which require that police have a reasonable suspicion of criminal activity). The court believed this analogy was constitutionally unwarranted. Although "*Terry stops*" do implicate the individual's Fourth Amendment right to be free from unreasonable seizures, the court found no corresponding constitutionally protected right to be free from undercover investigation. *Id.* at 469.

144. *Id.* at 468-70.

145. *Id.* at 470.

crime."¹⁴⁶

The Eighth Circuit believed that the lower court had properly submitted Jacobson's case to the jury because entrapment as a matter of law exists only when uncontradicted evidence establishes the defendant's lack of predisposition.¹⁴⁷ Despite the fact that Jacobson had no record of violating child obscenity laws,¹⁴⁸ the court concluded that the prosecution had presented "ample evidence" that the government had merely afforded Jacobson opportunities to purchase child pornography and had renewed its offers when Jacobson responded.¹⁴⁹ However, the court conceded that the government had measured Jacobson's predisposition by his response to the sexual attitude questionnaire it had sent him and not by any other outside source.¹⁵⁰ Contrary to federal regulations requiring a target's name to appear on two outside sources, in *Jacobson* the defendant's initial responses validated subsequent targeting.

The court also rejected Jacobson's second contention that the Postal Service's investigatory techniques were sufficiently outrageous governmental conduct to violate his due process rights.¹⁵¹ Although the court recognized that due process principles might bar the government from obtaining a conviction when it used "outrageous" investigatory conduct, it required that the level of outrageousness be "'quite high.'"¹⁵² In this instance, the court concluded that the government's conduct did not reach that level of outrageousness.¹⁵³

Following the majority in *Hampton*,¹⁵⁴ the court's due process analysis focused on the *defendant's* conduct in deciding whether the *government's* conduct was permissible.¹⁵⁵ The court found that the postal inspectors did not exert "extraordinary pressure on Jacob-

146. *Id.* The record in this case is unclear as to whether the postal inspectors produced the child pornography they advertised. *Cf.* *United States v. Mitchell*, 915 F.2d 521, 524 (9th Cir. 1990) (government prepared all of the materials, including the child pornography, used in a number of undercover operations), *cert. denied*, 111 S. Ct. 1686 (1991).

147. *Jacobson*, 916 F.2d at 470.

148. *Id.* at 471 (Lay and Heaney, JJ., dissenting).

149. *Id.*

150. *Id.* The previous panel opinion concluded that Jacobson's responses to the sexual attitude survey "indicated a predisposition to receive through the mails sexually explicit materials depicting children." *United States v. Jacobson*, 893 F.2d 999, 1000 (8th Cir. 1990).

151. *Jacobson*, 916 F.2d at 469.

152. *Id.* (quoting *Gunderson v. Schlueter*, 904 F.2d 407, 410 (8th Cir. 1990)).

153. *Id.* at 470. "We simply cannot characterize the government's conduct in Jacobson's case as outrageous." *Id.*

154. *See supra* notes 66-78 and accompanying text.

155. *Jacobson*, 916 F.2d at 470. *But see* *United States v. Twigg*, 588 F.2d 373, 382 (3d Cir. 1978) (Adams, J., dissenting) (arguing that the due process defense is not just another name for the objective theory of entrapment, which focuses on the government's conduct instead of the defendant's predisposition to commit a crime).

son.”¹⁵⁶ Unlike potentially coercive face-to-face contacts,¹⁵⁷ the court suggested that Jacobson simply could have thrown the mailings away if he had no interest.¹⁵⁸ Because he responded to the mailings instead, the court equated Jacobson’s expressed interest in preteen sexuality with a willingness to purchase pornographic material through the mail.¹⁵⁹ In the court’s view, Jacobson’s case was indistinguishable from *United States v. Musslyn*,¹⁶⁰ where a similar undercover child pornography operation withstood constitutional scrutiny.

However, the Eighth Circuit’s reliance on *Musslyn* is problematic for two reasons. First, the government arguably had a reasonable suspicion that Musslyn would purchase child pornography based on prior incidents. No such prior incidents existed in *Jacobson*. Second, the court in *Musslyn* refused to recognize a due process defense separate from a valid entrapment defense. Instead, it allowed the same factor that barred an entrapment defense—predisposition—to bar a due process defense. Once the court concluded that Jacobson’s entrapment defense was barred because of predisposition, it did not have to reach his due process argument.

The majority’s opinion in *Jacobson* elicited two dissenting opinions.¹⁶¹ Chief Judge Lay believed that the government had entrapped Jacobson as a matter of law. He found no evidence in Jacobson’s record indicating a predisposition to purchase child pornography through the mail and argued that the case was improperly submitted to the jury.¹⁶²

Judge Heaney accepted Jacobson’s “reasonable suspicion” argument and his claim of outrageous governmental conduct.¹⁶³ The judge asserted that targeting Jacobson “violated federal law enforcement guidelines requiring an investigative agency to have a reasonable suspicion before investigating an individual that the prospective target is engaging, has engaged, or is likely to engage in illegal activities of a

156. *Jacobson*, 916 F.2d at 470.

157. *Id.* But see *United States v. Musslyn*, 865 F.2d 945 (8th Cir. 1989) (affirming the defendant’s conviction where the government’s conduct included face-to-face contact).

158. *Jacobson*, 916 F.2d at 470.

159. *Id.*

160. 865 F.2d at 945.

161. *Jacobson*, 916 F.2d at 470-71 (Lay and Heaney, J.J., dissenting).

162. Jacobson’s criminal record included only a 1958 conviction for driving under the influence. In addition, Jacobson’s purchases from the Electric Moon, the pornography bookstore where the Postal Service found Jacobson’s name, were lawful, and thus arguably irrelevant for purposes of establishing predisposition. *Jacobson*, 916 F.2d at 471. Judge Heaney believed Jacobson was not predisposed to receiving child pornography through the mail. *Id.* at 472 (Heaney, J., dissenting).

163. *Id.* at 472, 476 (Heaney, J., dissenting).

similar type."¹⁶⁴ But for the government's failure to follow its own investigative guidelines, Jacobson would have continued to be a law-abiding citizen "minding his own business."¹⁶⁵ The Postal Service's continuous solicitations to Jacobson for nearly two and a half years appalled Judge Heaney.¹⁶⁶ He believed the government's outrageous deception and temptation required a reversal of Jacobson's conviction.¹⁶⁷

IV. ANALYSIS

A. *Validity of Jacobson's Entrapment Defense*

1. THE SUBJECTIVE THEORY

The subjective theory of entrapment, adopted by the United States Supreme Court in *Sorrells v. United States*,¹⁶⁸ evaluates the defendant's predisposition to commit the charged offense.¹⁶⁹ Under this theory, once the prosecution establishes predisposition, the government's conduct—no matter how reprehensible—is not entrapment. In *Jacobson*, the Eighth Circuit found that the defendant was predisposed to receive child pornography through the mail, despite his lack of a criminal record for violating child obscenity laws through the mail or prior specific instances of such conduct.¹⁷⁰ Although the police found Jacobson's name on a customer list of the Electric Moon, a reputed "pornography bookstore,"¹⁷¹ Jacobson's lawful purchases hardly established a predisposition to purchase illegal pornography through the mail.¹⁷² These purchases, at most,

164. *Id.* at 471. The government targeted Jacobson even though his name appeared on only one mailing list and his purchase from this store was completely legal. *Id.* at 473. *But see* *United States v. Thoma*, 726 F.2d 1191, 1199 n.3 (7th Cir. 1984) ("[W]hether the investigators violated their own self-imposed standards or procedures is irrelevant to the determination whether defendant's rights were violated as these standards do not grant [the] defendant any rights."), *cert. denied*, 467 U.S. 1228 (1984).

165. *Jacobson*, 916 F.2d at 471 (Heaney, J., dissenting).

166. *Id.*

167. *Id.* at 476. In his dissent, Judge Heaney wrote:

Jacobson's conviction thus was the culmination of the Postal Service's two and one-half year campaign to induce this heretofore law-abiding farmer to violate the obscenity laws. . . .

In its pursuit of Jacobson, I believe the Postal Service's direct and continuous involvement in the creation and maintenance of opportunities for criminal activity rises to that demonstrable level of outrageousness which violates due process.

Id. (citations omitted).

168. 287 U.S. 435 (1932).

169. *See supra* notes 45-59 and accompanying text.

170. *Jacobson*, 916 F.2d at 471 (Lay, C.J., dissenting).

171. *Id.* at 468.

172. *Id.* at 472 (Heaney, J., dissenting).

might have been relevant to establish an inclination to purchase legal, sexually oriented material. Thus, the court defined the defendant's predisposition based solely on the incident before it—an incident instigated by the government.

In other child pornography sting cases where the court has found predisposition, the defendant previously had violated child pornography laws or had a reputation for purchasing child pornography prior to the incident in question.¹⁷³ Although these prior violations did not always result in convictions,¹⁷⁴ they formed a basis for reasonable suspicion and arguably justified targeting these individuals as potential child pornography purchasers. Keith Jacobson had no prior convictions, reputation evidence or prior incidents from which to infer predisposition.¹⁷⁵ Thus, the court allowed the government to establish predisposition by showing that Jacobson "took the bait" that the government offered. Defining predisposition by reference to the incident in question ensures that a defendant will never be able to raise a valid entrapment defense.¹⁷⁶

Although the undercover operation in *Jacobson* supposedly tested the defendant's predisposition through progressive solicitation, these solicitations also generated responses from thousands of individuals who were not "predisposed," that is, individuals whose responses merited no further governmental targeting.¹⁷⁷ Thus, the government cannot infer predisposition merely from an individual's response to a

173. See, e.g., *United States v. Mitchell*, 915 F.2d 521 (9th Cir. 1990); *United States v. Musslyn*, 865 F.2d 945 (8th Cir. 1989); *United States v. Johnson*, 855 F.2d 299 (6th Cir. 1988).

174. See, e.g., *Mitchell*, 915 F.2d 521; *United States v. Thoma*, 726 F.2d 1191, cert. denied, 467 U.S. 1228 (1984).

175. *United States v. Jacobson*, 916 F.2d 467, 470-71 (8th Cir. 1990), cert. granted in part, 111 S. Ct. 1618 (1991).

176. "Predisposition has been defined as 'the defendant's state of mind before his initial exposure to government agents.'" *United States v. Johnson*, 855 F.2d 299, 303 (6th Cir. 1988) (quoting *United States v. McLernon*, 746 F.2d 1098, 1112 (6th Cir. 1984)); see also *United States v. Marren*, 890 F.2d 924 (7th Cir. 1989); *United States v. Williams*, 705 F.2d 603 (2d Cir. 1983); *United States v. Fields*, 689 F.2d 122 (7th Cir. 1982). BLACK'S LAW DICTIONARY 1177 (6th ed. 1990) defines predisposition as follows: "For purposes of entrapment defense, [predisposition] may be defined as defendant's inclination to engage in illegal activity for which he has been charged, i.e., that he is ready and willing to commit the crime. It focuses on defendant's state of mind before government agents suggest that he commit the crime." *Id.*

Defining predisposition on the basis of the incident being prosecuted precludes a defendant from raising a valid due process defense. See *supra* notes 65-75 and accompanying text. In cases where a defendant enters an inconsistent plea (i.e., he pleads not guilty and raises entrapment), the prosecution will have to prove all of the substantive elements of the charge. The prosecution's burden with respect to the entrapment defense in these cases will still be relatively easier, however, because the court has accepted that responses to the government's questionnaires establish predisposition.

177. *Mitchell*, 915 F.2d at 526 n.8.

sexual attitude survey. Rather, the test of predisposition must hinge on the individual's conduct *prior* to any contact with the government.

Contrary to prior federal court decisions,¹⁷⁸ *Jacobson* does not require the prosecution to establish predisposition by reference to prior convictions, previous conduct, or reputation evidence since the very incident being prosecuted will suffice. In effect, *Jacobson* changes the substantive law, reducing the proof required for a conviction. Although the prosecution still must establish predisposition "beyond a reasonable doubt," in effect the court has tipped the scale in favor of conviction by redefining predisposition to include the incident at issue. By making it easier for the government to establish predisposition beyond a reasonable doubt, the court has undermined the protections embodied in that burden of proof. Because of the relative ease of establishing predisposition *after* the defendant has purchased the illegal material, the government should at least be required to have a reasonable suspicion before it can even target an individual for an undercover operation of this kind.¹⁷⁹

2. THE OBJECTIVE THEORY

Since *Sorrells v. United States*,¹⁸⁰ courts have generally rejected the objective theory of entrapment, deferring instead to undercover law enforcement practices.¹⁸¹ Nevertheless, the objective theory remains popular among commentators and state courts.¹⁸² This approach—which shifts the focus from the defendant's predisposition to the government's conduct—preserves individual autonomy and forces the government to remain accountable for its conduct.¹⁸³ The objective approach to the entrapment defense is also crucial because

178. See *Marren*, 890 F.2d 924; *United States v. Ortiz*, 804 F.2d 1161 (10th Cir. 1986); *Fields*, 689 F.2d 122 (defining predisposition as the defendant's inclination to commit the offense *prior* to his contact with the government).

179. Requiring the government to possess a reasonable suspicion of a suspect's predisposition to purchase child pornography through the mail *before* targeting the individual through reference to prior convictions for this offense, specific instances of conduct, or reputation follows the nature of proof the prosecution would offer at trial. Under the Federal Rules of Evidence, in cases where character is properly in issue, *i.e.*, cases where predisposition is an issue, the prosecution may prove its case through such references. FED. R. EVID. 404, 405.

180. 287 U.S. 435 (1932).

181. See *supra* notes 42-167 and accompanying text.

182. See, *e.g.*, MODEL PENAL CODE § 2.13 (Official Draft 1962) (endorsing the objective theory of entrapment).

183. Although the objective theory of entrapment and the due process defense are similar because both focus on the level of governmental conduct, they do have some differences. See Mascolo, *supra* note 46, at 25-28 (listing the differences between entrapment and the due process defense.).

*Hampton v. United States*¹⁸⁴ casts doubt on the viability of the due process defense.¹⁸⁵

Justice Brandeis' famous dissent in *Olmstead v. United States*¹⁸⁶ articulates a Supreme Court policy barring the use of evidence which the government procures with "unclean hands."¹⁸⁷ This policy is based on the belief that, as the "omnipresent teacher," the government should act equitably. In *Jacobson*, the defendant argued that the government had committed four separate felonies in procuring Jacobson's one illegal order.¹⁸⁸ Among other tactics, it had employed highly deceptive correspondence, assuring Jacobson that the "Far Eastern Trading Company had found a lawful means of transmitting sexually explicit material through the mail."¹⁸⁹ Using deceptive techniques to ensnare an "unwary criminal"¹⁹⁰ is quite different from using such techniques against someone whose past criminal record consists of a single drunk driving conviction thirty years earlier.¹⁹¹ It defies the belief that government should act equitably and raises serious questions about what limitations, if any, are placed on the government's zeal.

Two other factors highlight the unfairness of the government's conduct in *Jacobson*. First, in attempting to target the greatest number of individuals with its reverse sting operation, the Postal Service ignored its own guidelines. The guidelines for sting operations require an individual's name to appear on two independent sources before the Postal Service can solicit the individual for illegal activity;¹⁹² Jacobson's name had appeared only on the Electric Moon's

184. 425 U.S. 484 (1976). See *supra* notes 66-84 and accompanying text.

185. The objective theory could be used in conjunction with the subjective theory, allowing courts both to consider the defendant's predisposition as well as evaluate the extent and nature of governmental involvement in the undercover operation. Cf. *Katz v. United States*, 389 U.S. 347 (1967) (adopting a two pronged test with a subjective component, which focuses on the individual's expectation of privacy, and an objective component, which focuses on society's willingness to accept that expectation as reasonable).

186. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

187. *Id.* at 483; see also Mascolo, *supra* note 46, at 13.

188. Appellant's Brief at 18, *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990) (No. 88-2097NE), *cert. granted in part*, 111 S. Ct. 1618 (1991).

189. *Id.*

190. *Sherman v. United States*, 356 U.S. 369, 372 (1958); see also, e.g., *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984); *United States v. Williams*, 705 F.2d 603 (2d Cir. 1983); *United States v. Myers*, 635 F.2d 932 (2d Cir. 1980), *cert. denied*, 449 U.S. 956 (1980).

191. *Jacobson*, 916 F.2d at 472 (Heaney, J., dissenting).

192. *Id.* at 473. According to Raymond J. Mack, a postal inspector and a witness at Jacobson's trial, the Postal Inspection Service was to target only those individuals whose names appeared independently on at least two lists from the following sources: "mailing lists seized by postal inspectors in separate child pornography investigations; incoming child pornography seized by the United States Customs Service; programs conducted by the FBI;

mailing list. Had the government followed its own solicitation procedures, Jacobson would never have been a target. Requiring the government to stay within its self-delineated boundaries is reasonable, given the court's refusal to recognize an individual's right to be free from undercover investigations.¹⁹³

Second, the questionnaires sent to potential targets—purportedly designed to test an individual's predisposition to receive child pornography through the mail—deceived thousands of individuals into disclosing extremely personal information about their sexual attitudes by asking a wide range of questions unrelated to child pornography.¹⁹⁴ The counterargument is that assumption of risk principles preclude any invasion of privacy claims by individuals who respond to these surveys. Yet these deceptive, sweeping questions raise issues about the voluntariness of an individual's response, thus casting doubt on the assumption of risk defense. Furthermore, using scarce resources to conduct random sampling for potential targets amounts to hit-or-miss law enforcement.

B. *Validity of Jacobson's Due Process Defense*

Federal courts have accepted a due process challenge to undercover government operations only three times, none of them involving child pornography stings.¹⁹⁵ In fact, the Supreme Court's recent plurality decision in *Hampton* suggests that due process is no longer a viable defense to governmental conduct in drug sting operations.¹⁹⁶ The Eighth Circuit, in effect, extended *Hampton* to child pornography stings in *Jacobson*, perhaps signalling a trend toward eliminating the due process defense altogether.

Courts claim to allow due process as a defense to governmental conduct that "shocks the conscience"¹⁹⁷ or is otherwise "outrageous." In *Jacobson*, the government employed its undercover operation in

investigations of mail order dealers of child pornography conducted by metropolitan police departments and state police agencies; or Postal Inspection Service regional testing programs." *Id.* Calvin M. Comfort, a prohibited mailing specialist with the Postal Inspection Service, testified at trial that the Electric Moon's mailing list was the Postal Inspection Service's only source of Jacobson's name. *Id.*

193. *Jacobson*, 916 F.2d at 469.

194. *United States v. Mitchell*, 915 F.2d 521, 526 n.8 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1686 (1991).

195. *United States v. Bogart*, 783 F.2d 1428 (9th Cir. 1986) (selling cocaine); *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978) (manufacturing LSD); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (bootlegging).

196. *Hampton v. United States*, 425 U.S. 484, 490 (1976) ("The remedy of the [predisposed] criminal defendant with respect to the acts of Government agents . . . lies solely in the defense of entrapment.").

197. *See Rochin v. California*, 342 U.S. 165, 172 (1952).

violation of its own regulations and without reasonable suspicion that Jacobson had committed a crime. Furthermore, it enticed Jacobson to succumb to purchasing child pornography through the mail, assuring him that it was legal. Then, after providing child pornography to Jacobson, the government prosecuted him for purchasing it. The Eighth Circuit found that this governmental conduct was not outrageous enough to allow a due process defense. Its criteria for determining outrageousness are inadequate.

United States v. Johnson suggests appropriate factors to determine if the police conduct intruded on constitutional due process protections.¹⁹⁸ One key factor in *Johnson* was the "preexistence of a criminal enterprise."¹⁹⁹ *Jacobson* did not consider this factor, perhaps because Jacobson's "criminal enterprise" consisted of purchasing only one illegal magazine and a set of photographs—the items that the government sold to him. Another factor in *Johnson* was the government's direction and control over the criminal enterprise. If the court had applied this factor in *Jacobson*, it would have discovered that the government advertised, manufactured, and supplied the child pornography at issue. Also, unlike Johnson, who responded to an advertisement in an illegal magazine, Jacobson placed an order only after postal inspectors sent him ten ostensibly legal mailings.

Another facet of due process is fairness to the defendant. In *Sherman v. United States*,²⁰⁰ Justice Frankfurter observed that "[h]uman nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."²⁰¹ The *Sherman* court acknowledged that an individual undergoing drug addiction therapy would have difficulty rejecting encouragement to sell drugs.²⁰² In *Jacobson*, once the defendant expressed an interest in preteen sexuality, the government solicited his orders for material depicting sexually explicit conduct by minors while assuring him that such conduct was completely legal.²⁰³ In fairness to defendants, courts must consider the nature of the inducement when determining whether the government's conduct exceeds permissible bounds.

The government's offers of child pornography in reverse sting operations assume that the world is made up of two kinds of people:

198. See *supra* notes 104-12 and accompanying text.

199. *United States v. Johnson*, 855 F.2d 299, 305 (6th Cir. 1988).

200. 356 U.S. 369 (1958).

201. *Id.* at 384.

202. See *supra* note 56 and accompanying text.

203. See *supra* notes 25, 30-31 and accompanying text.

the predisposed and the non-predisposed.²⁰⁴ Only predisposed individuals—those who have actually purchased these materials in the past—will respond to the government's solicitations. Offering these materials to those who are not predisposed poses no threat because the upright will reject these offers. Therefore, the government targets individuals without acknowledging that criminality often depends on situational factors,²⁰⁵ such as the purported confidentiality of the transaction and the defendant's misplaced reliance on representations of the legality of the undertaking. Courts should consider that persistent government enticements may be too great to overcome. This determination should be made even if the "unwary innocent" is a pedophile.

According to both dissenters in *Jacobson*, the government's sting created the criminal activity.²⁰⁶ But for the government's targeting of Jacobson and repeated soliciting of his orders for nearly two and a half years, he would have continued "minding his own business."²⁰⁷ The record contained no evidence that he had ever violated any child obscenity or abuse laws or even solicited child pornography in the past.²⁰⁸

V. CONCLUSION

The government's concern for protecting children from the exploitation inherent in producing child pornography is unquestionably important.²⁰⁹ Nonetheless, long-standing principles of protection of individual freedom must temper "overzealous" law enforcement.²¹⁰ Using reverse stings against individuals such as Jacobson, whose prior conduct prompted no reasonable suspicion, raises serious doubts about the limits of governmental conduct. *Jacobson* suggests that the government has no restrictions when it comes to child pornography. The government's conduct certainly "falls below standards, to which common feelings respond, for the proper use of governmental power."²¹¹ Recent decisions suggest that committing the crime of

204. See Gary T. Marx, *Who Really Gets Stung?: Some Issues Raised by the New Police Undercover Work*, 28 CRIME & DELINQ. 165, 172 (1982).

205. *Id.*

206. *United States v. Jacobson*, 916 F.2d 467, 470-71 (8th Cir. 1990) (Lay and Heaney, JJ., dissenting), *cert. granted in part*, 111 S. Ct. 1618 (1991).

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

208. *Id.* at 472.

209. Some may argue that attacking the problem at the production stage is the most effective way of eradicating it. Yet given that most child pornography is produced outside the United States, this can be only part of the solution.

210. See, e.g., *Sherman v. United States*, 356 U.S. 369, 381 (1958).

211. *Id.* at 382 (Frankfurter, J., concurring).

purchasing child pornography establishes a predisposition.²¹² Because predisposition is dispositive of an individual's defenses of entrapment and due process, the government should have a reasonable suspicion of an individual's predisposition to make such purchases, by reference to prior convictions or reputation, before targeting him.²¹³

The scarcity of law enforcement resources also militates against using these operations indiscriminately. Postal inspectors spent nearly two and a half years to secure the conviction of one individual prosecuted for requesting a sexually explicit magazine that never would have entered United States mails had the government not put it there.²¹⁴ These law enforcement resources would have been better spent in soliciting orders from those who had demonstrated predisposition prior to the investigation.²¹⁵ If the government's role is one of deterrence, its efforts should concentrate on preventing crime, not creating it.

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212. See *supra* notes 173, 178 and accompanying text.

213. Cf. Robert A. Brooks, III, Comment, *Undercover Searches—Should Assumption of Risk Principles be Used to Render Undercover Searches Inherently Reasonable?*, 65 U. DET. L. REV. 113, 124 (1987) (arguing in favor of adopting a rule limiting undercover searches to situations in which a suspect expresses to the police officer a willingness to engage in criminal activity).

214. *United States v. Jacobson*, 916 F.2d 467, 476 (8th Cir. 1990) (Lay and Heaney, JJ., dissenting), *cert. granted in part*, 111 S. Ct. 1618 (1991). When investigators searched Jacobson's apartment, the only illegal magazine they found was the one he had purchased from the postal inspectors. *Id.* at 472.

215. *United States v. Mitchell*, 915 F.2d 521 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1686 (1991); *United States v. Musslyn*, 865 F.2d 945 (8th Cir. 1989); *United States v. Johnson*, 855 F.2d 299 (6th Cir. 1988).